APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Beaman.

1906. *December* 12.

DAMODAR SAKARCHAND (ORIGINAL DEFENDANT), APPELLANT, *v.* VYANKU GANGARAM, MINOR, BY HIS MOTHER RANGUBAI (ORIGINAL PLAINTIFF), RESPONDENT.*

Transfer of Property Act (IV of 1882), section 90—Civil Procedure Code (Act XIV of 1882), section 235 (g)—Decree on mortgage—Direction for sale and recovery of deficit personally—Reservation of liberty to apply for personal decree—Personal decree contingent on the ascertainment of balance—Attachment—Suit for declaration of ownership and removal of attachment.

A decree on a mortgage directed that on default of payment of the mortgage-money within six months the property should be sold, and, if the sale-proceeds were insufficient to pay the amount due on the mortgage, the balance was to be recovered from the defendant-mortgagor personally.

Held, that the decree was passed in disregard of the provisions of section 90 of the Transfer of Property Act (IV of 1882) in so far as it directed personal payment by the mortgagor. The words of the section show that this direction should have been in a supplemental decree to be passed when the net proceeds of the sale should be found to be insufficient. The original decree should merely have reserved to the plaintiff liberty to apply for a decree under section 90.

A minor son of the mortgagor having brought a suit for a declaration of his ownership of an undivided half of a house and removal of an attachment which was levied under the personal clause of the aforesaid decree, before the birth of the minor,

Held, that the plaintiff was entitled to a direction that the house to the extent of the plaintiff's interest therein be released from attachment.

Held, further, that the personal decree was contingent on the ascertainment of the balance and only became operative and capable of execution when the balance was ascertained. Until then the amount of the debt, for which alone the personal decree was passed, could not be stated as required by section 235 (*g*) of the Civil Procedure Code (Act XIV of 1882). The balance of the debt being unascertained, the minor was entitled to establish any circumstance which affected the validity of the attachment against his interest in the property.

* Second Appeal No. 21 of 1906.

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SECOND appeal from the decision of J. J. Heaton, District Judge of Násik, reversing the decree passed by B. R. Mehendale, Joint Subordinate Judge.

In the year 1895 one Gangaram Dadoba mortgaged certain property to his creditor Damodar Sakarchand Gujarathi, who on the 8th March 1902 obtained a decree on the mortgage. The decree allowed six months' time for the payment of the mortgage-debt and directed that if the debt was not paid within the said period the mortgaged property should be sold, and, if the sale produced insufficient amount, the balance should be recovered from Gangaram personally. On the 7th November 1902 Damodar, the mortgagee decree-holder, applied for the sale of the mortgaged property, and in June 1903 it was sold for Rs. 575. While the proceedings of the sale were going on and before the property was actually sold, the decree-holder applied for the attachment of a house not comprised in the mortgage, alleging that the sale-proceeds would prove insufficient to satisfy the decretal amount and that the judgment-debtor Gangaram might dispose of the property to his (decree-holder's) detriment. The house was accordingly attached on the 19th June 1903.

On the 2nd July 1903 the judgment-debtor applied to have the sale of the mortgaged property set aside, and it was set aside by an order passed on the 4th August following. On the 17th August he applied to have the attachment on the house raised, but the Court directed that the attachment should be maintained and ordered that the property should not be sold until the proceeds were found to be insufficient.

In September 1904 the plaintiff Vyanku was born, his father being the judgment-debtor Gangaram Dadoba.

On the 28th November 1904 the mortgaged property was sold for Rs. 456. Subsequently on the 5th January 1905, the decree-holder having applied for the sale of the house which was already attached, the minor Vyanku applied to have the attachment removed from his half share in the house, but his application was rejected on the 11th March 1905. He, thereupon, brought the present suit for the declaration of ownership of a moiety of the house and the removal of attachment from it, alleging that the

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house did not belong to the judgment-debtor Gangaram alone, that the plaintiff had a half share in it, that the attachment of the house was premature and that the cause of action accrued to the plaintiff on the 11th March 1905 when his application for the removal of the attachment was rejected.

The defendant answered *inter alia* that at the date of the attachment the plaintiff had no interest in the house nor had he any at the time of the suit, and that, even assuming that he had an interest in the house, the defendant was entitled to attach it and to bring the whole of it to sale including plaintiff's interest therein in execution against the defendant's judgment-debtor.

The Subordinate Judge found that the plaintiff had no interest in the house. He, therefore, dismissed the suit.

On appeal by the plaintiff the Judge observed :—

It is said that this attachment was without authority and is void. The contention seems to me to be perfectly correct. It must be granted that a Court has no authority, no jurisdiction, to attach property, except so far as power is conferred by the Code of Civil Procedure. In this case the attachment was made after judgment and decree, and was made to ensure satisfaction of the conditional personal decree, which had been made, but would not become operative unless and until the sale of the mortgaged property had taken place and had failed to discharge the debt in full. That is to say, there was no operative decree which justified the attachment. The application, therefore, did not lie and the attachment cannot be justified under Chapter 19 of the Code, for there was no personal decree which could be enforced.

The Judge, therefore, reversed the decree of the Subordinate Judge and raised the attachment from the whole of the house.

The defendant preferred a second appeal.

G. S. Rao for the appellant (defendant) :—Assuming that the plaintiff had the right to have the attachment removed, it was wrong to remove it from the whole of the house. Our judgment-debtor was entitled at least to a half share in the house and the attachment on that share should stand. Even the plaintiff did not seek for the removal of the attachment from the entire house.

The amount due to us under the decree was Rs. 1,697, while the mortgaged property fetched only Rs. 575 at the first sale. There was a large balance left which we were entitled to recover from the judgment-debtor personally under the terms of the

decree. The decree gave us a right to proceed against property not comprised in the mortgage. We, therefore, submit that the attachment of the house was perfectly valid.

The plaintiff was born in September 1904, while the attachment on the house was levied in June 1903. The plaintiff had, therefore, no interest in the house at the time of the attachment so as to enable him to bring the present suit.

R. R. Desai for the respondent (plaintiff):—The decree on the mortgage was clearly wrong, it being contrary to the provisions of section 90 of the Transfer of Property Act. Further, the appellant was not entitled to proceed under the personal clause of the decree until the balance of the debt was ascertained. When the attachment was levied in June 1903 the balance was not ascertained, and it was not possible to do so. The sale was subsequently set aside by the Court at the instance of the judgment-debtor. The appellant had, therefore, no right to attach the house until the balance was ascertained. The attachment under the personal clause was therefore clearly bad.

Under the Hindu Law the plaintiff's interest came into existence immediately on his birth, and there were no circumstances in the present case which prevented such interest from coming into existence.

JENKINS, C. J.:—On the 8th of March 1902 a decree on a mortgage was passed in favour of the defendant Damodar Sakarchand. It was thereby directed in effect that on default in payment of the mortgage-money within six months the property should be sold, and that if the sale-proceeds were insufficient to pay the amount due on the mortgage the balance was to be recovered from the defendant Gangaram personally. On the 7th of November 1902 the plaintiff applied for a sale of the mortgaged property, and in June 1903 it was sold for Rs. 575. Subsequently, on the 17th of the same month, the decree-holder, purporting to proceed under the personal decree for the balance, applied for attachment of a house not comprised in the mortgage; on the following day the order for attachment was made, and on the 19th of June the house, to which this suit relates, was actually attached.

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On July 2nd the judgment-debtor, Gangaram, applied to have the sale of the mortgaged property set aside, and by an order passed on the 4th of August the sale was set aside.

On the 17th of August the judgment-debtor applied to have the attachment of the house raised. The Court directed the attachment to be maintained, but ordered that the property should not be sold until the proceeds were found to be insufficient.

In September 1904 the plaintiff Vyanku was born, his father being Gangaram the judgment-debtor.

On the 26th of November 1904 the mortgaged property was sold for Rs. 456.

On the 5th of January 1905 the decree-holder applied for the sale of the house, and thereupon the minor Vyanku applied to have the attachment removed from his ½ share in the house. His application was refused.

Then the minor commenced this suit by his next friend, his mother Rangubai, asking for a declaration of his ownership of an undivided half of the house, and for removal of the attachment from it. The first Court dismissed the suit with costs, but on appeal the attachment was set aside by the District Court. From this the present appeal is preferred. The order setting aside the attachment is unqualified, and so far as it purports to do more than remove the attachment from the plaintiff's moiety it is manifestly erroneous as being in excess of what is sought in the plaint. The judgment of the District Court proceeds on the assumption that the house was attached before any sale of the mortgaged property. But this overlooks the sale effected in June 1903, and if the removal of the attachment from the plaintiff's moiety is to be supported it must be on other grounds. Now, the decree was passed in disregard of the provisions of section 90 of the Transfer of Property Act in so far as it directs personal payment by Gangaram. It is clear from the words of the section that this direction should have been in a supplemental decree to be passed when the net proceeds should be found to be insufficient. The original decree should merely have reserved to the plaintiff liberty to apply for a decree under section 90.

But though the decree is erroneous, we must see how far in the circumstances it justified an attachment.

The personal decree was contingent on the ascertainment of the balance, and only became operative and capable of execution when that balance was ascertained. Until then the amount of the debt, for which alone the personal decree was passed, could not be stated as required by section 235 (*g*) of the Civil Procedure Code.

Then, was the balance ascertained when the attachment of the 17th of June was made? Undoubtedly not. There had been no adjustment of accounts, the whole of the purchase-money had not been paid into Court, and there was no kind of pronouncement by the Court as to what the balance was. Even the application for execution contained no statement of the debt for which the personal decree was passed, and that was because the amount of the debt had not been ascertained. Then, is it open to the minor plaintiff to rely on this objection? We think it is. He is (in our opinion) entitled to establish any circumstance which affects the validity of the attachment as against his interest in the property.

The result then is that the decree of the lower appellate Court must be varied by directing that the house to the extent of the plaintiff's interest therein be released from attachment. As the appellant has succeeded in part and failed in part, each party should bear his own costs.

Decree varied.

G. B. R.