

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Beaman.

1907.

April 12.

CHHAGAN GUMAN GUJARATHI (ORIGINAL PLAINTIFF'S ASSIGNEE),
APPELLANT, v. LAKSHMAN valad DAGDU (ORIGINAL DEFENDANT), RES-
PONDENT.*

Transfer of Property Act (IV of 1882), section 99—Money decree obtained by mortgagee against mortgagor—Transfer of the decree—Assignee bound by the provisions of section 99.

The transferee of a money decree obtained by a mortgagee against his mortgagor is bound by the restriction imposed upon the mortgagee by section 99 of the Transfer of Property Act (IV of 1882). He can attach the mortgaged property, but he is not entitled to bring it to sale otherwise than by instituting a suit under section 67 of the Act.

SECOND appeal from the decision of J. J. Heaton, District Judge of Násik, reversing the order passed by the Subordinate Judge of Sinnar.

Proceedings in execution.

Laxuman Dagdu, the respondent, mortgaged certain property to a creditor. The creditor obtained a money decree and transferred it to the appellant.

The appellant applied for execution of the money decree by attachment and sale of the mortgaged property.

The Subordinate Judge held that section 99 of the Transfer of Property Act (IV of 1882) applied and struck off the application for execution.

This order was on appeal reversed by the District Judge on the following grounds :—

“Section 99 does not bar an attachment, and to dismiss a Darkhást because the sale cannot be held until further proceedings are taken is to go beyond the scope of section 99 of the Act. It is ordered that the Darkhást be restored to the file in so far as it is a Darkhást for the attachment of the property, and that it be dealt with as such according to law.”

The assignee appealed to the High Court.

V. V. Ranade, for the appellant.

No one appeared for the respondent.

* Second Appeal No. 298 of 1905.

CHANDAVARKAR, J.—The question of law in this second appeal is, whether the transferee of a money decree, obtained by a mortgagee against his mortgagor, is bound by the restriction imposed upon the mortgagee by section 99 of the Transfer of Property Act—*viz.*, that he shall not be entitled to bring the mortgaged property to sale in execution of the decree otherwise than by instituting a suit—under section 67.

It does not appear from the judgment of the lower appellate Court whether the assignment of the money decree by the mortgagee in favour of the present appellant was oral or in writing. But that is immaterial for the determination of the question above stated. If the assignment was oral, under the ruling of this Court in *Parvata v. Digambar*⁽¹⁾ the appellant has no *locus standi* at all for the execution of the money decree, whether by attaching the mortgaged property and bringing it to sale or otherwise. If, on the other hand, the assignment was in writing, according to section 232 of the Code of Civil Procedure the transferee is not, as of right, entitled to execute the decree, but it is in the discretion of the Court to allow execution or not. See *Javermal Hirachand v. Umaji Hayabati*⁽²⁾ and *Parvata v. Digambar*⁽³⁾. And such discretion must be exercised reasonably: *Krishna Mohini Dossee v. Kedarnath Chuckerbutty*⁽⁴⁾. Section 232 of the Code of Civil Procedure provides that if the Court thinks fit, “the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder”, *i.e.*, by the transferor. The mortgagee, who obtained the money decree, held it subject to the condition or obligation, prescribed by section 99 of the Transfer of Property Act, that, if he seeks execution of it against the mortgaged property, he can only attach it, but he cannot bring it to sale except by instituting a suit under section 67. It is true that the present appellant, being a transferee of the money decree only and not of the mortgage, cannot himself institute such a suit. There is no hardship involved in that, because, in the first place, the appellant must be regarded as having obtained

(1) (1890) 15 Bom. 307.

(2) (1884) 9 Bom. 179.

(3) (1890) 15 Bom. 307.

(4) (1888) 15 Cal. 446.

1907.

CHHAGAN
v.
LAKSHMAN.

the assignment with knowledge of the obligation imposed on his assignor by the law, and secondly, he might have stipulated with his assignor while taking the assignment that he should institute such suit for him. A mortgagee is prohibited by law from bringing the mortgaged property to sale in execution of his money decree against his mortgagor, and "whatever is prohibited by law to be done directly, cannot legally be effected by an indirect and circuitous contrivance." (Per Tindal, C. J., in *Booth v. Bank of England*⁽¹⁾). It is, therefore, a question whether the act of a mortgagee, who, having obtained a money decree, parts with it in favour of another to enable the latter to do in execution what the law prohibits his doing himself, would not amount to fraud, of which it has been said that it is "infinite in variety" (per Lord Macnaghten in *Reddaway v. Bankham*⁽²⁾) and whether it is not "merely a device for carrying into effect that which the legislature has said shall not be done." Further, section 238 of the Code of Civil Procedure provides that "every transferee of a decree shall hold the same subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder." Under these circumstances we think the decision of the lower appellate Court is right.

The decree is confirmed.

Decree confirmed.

R. R.

(1) (1840) 7 Cl. & F. 509 at p. 540.

(2) [1896] A. C. 199 at p. 221.