

I, therefore, decide that plaintiff is not entitled to claim a share of the property in suit.

Attorneys for the plaintiff:—*Messrs. Jehangir, Gulabhai and Billimoria.*

Attorneys for the defendant:—*Messrs. Bicknell, Mervanji and Romer.*

B. N. L.

1908.

SHIVAJIRAO

v.
VASANTRAO.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

SIR JEHANGIR COWASJI JEHANGIR (PLAINTIFF) v. THE HOPE MILLS, LIMITED (DEFENDANTS).*

1908.

September 19,

Decree—Execution—Civil Procedure Code (Act XIV of 1882), sec. 244—Transfer of Property Act (IV of 1882), sec. 93.

An application for redemption or foreclosure of a decree *nisi* is not an application in execution under the Civil Procedure Code, but must be made in Court under the Transfer of Property Act; and until a decree *nisi* is made absolute there is no decree capable of execution.

Where a decree *nisi* contemplated an account being taken, but was silent as to how that account was to be taken, and the Court has declined to modify the decree by inserting such a direction, it would be out of the question to compel a party in execution-proceedings to do that which he is not directed to do by the decree.

Ajudhia Pershad v. Baldeo Singh(1) and *Nandram v. Babaji*(2), followed.

PROCEEDINGS IN CHAMBERS.

The plaintiff, a mortgagee in possession of the property belonging to the defendants, instituted this suit to recover the money due to him under his mortgage and prayed that in default of payment the right to redeem might be foreclosed or the mortgaged premises sold. After the mortgage the plaintiff had entered into an agreement with the defendants under which they could work the Mills.

* Suit No. 490 of 1903.

(1) (1894) 21 Cal. 818.

(2) (1897) 22 Bom. 771.

1908.

SIR
 JEHANGIR
 COWASJI
 c.
 THE HOPE
 MILLS,
 LIMITED.

On 26th January 1904 the plaintiff obtained a decree which was defective because *inter alia* there was no reference to the Commissioner and no direction whatever for taking accounts although the decree contemplated an account.

On 9th August 1904 the plaintiff applied for a decree for foreclosure or sale which was refused on the ground that the exact amount due to him was not ascertained.

On the 19th October 1907 the defendants' agents obtained a rule *nisi* calling upon the plaintiff to show cause why he should not pass his accounts as first mortgagee in possession of the defendants' property before the Commissioner for taking accounts.

The rule came on for argument before Davar, J., on 21st November 1907 who made it absolute⁽¹⁾ ordering the plaintiff to pass his accounts before the Commissioner. On appeal this order was set aside⁽²⁾ by the Appeal Court on 3rd March 1908.

On the 15th August 1908 the defendants issued a notice to the plaintiff on the following terms :—

"Take notice that you are hereby required under section 244 of the Code of Civil Procedure to appear in person or by Advocate or Attorney of this Court before the sitting Judge in Chambers on the 29th day of August 1908 at 11-15 in the forenoon, to show cause why you should not render an account of moneys due and payable to you under the decree *nisi* passed herein on the 26th day of January 1904 less the value of the stock and stores in hand or the sale-proceeds thereof and any sum that may be found on account to be in your hands as first mortgagee in possession after deducting from such value or sale-proceeds all such charges, expenses and emoluments that you may be entitled to with respect to the mortgaged premises and the working thereof and execute a reconveyance of the mortgaged premises in Schedule A to the said decree *nisi* specified in favour of the 1st defendant Company on making payment of the said amount or such further or other order should not be made or directions given as to this Honourable Court may seem proper under section 244 of the Civil Procedure Code and if need be but not otherwise why issues should not be tried as to the first defendant Company's right thereto and heard along with Suit No. 650 of 1908."

The notice came on for argument on 5th September 1908.

Kirkpatrick with *Setalvad* for defendants.

(1) See 9 Bom. L. R. 1330.

(2) See *ante* p. 216.

Robertson, Advocate-General, with *Coyaji* for plaintiff :—Our first preliminary objection is that no notice has been given to us as provided by section 248 of the Civil Procedure Code.

PER CURIAM.—This point was not taken on the last occasion when the plaintiff applied for a week's adjournment and being a purely technical objection may be taken to have been waived.

Robertson :—Our second preliminary objection is that the decree in this case cannot be executed under section 244 of the Civil Procedure Code as it is a decree *nisi*.

Our third preliminary objection is that the defendants cannot apply for execution of this decree. No relief has been granted him against anyone. If he claims any relief he must apply to the Court under the Transfer of Property Act.

Kirkpatrick :—In reply to the second objection the plaintiff would remain in possession till the year 1916 and then the defendant could not redeem him.

As to the second objection we say the decree directs the plaintiff to reconvey the property and that is precisely what we ask for here.

We ask to be allowed to raise issues in this matter now.

Robertson :—This application has been misconceived. We refer to *Ajudhia Pershad v. Baldeo Singh*⁽¹⁾, *Nandram v. Babaji*⁽²⁾, *Akikunnissa Bilee v. Roop Lal Das*⁽³⁾, *Tara Pado Ghose v. Kamini Dassi*⁽⁴⁾, and sections 88, 89 and 91 of the Transfer of Property Act.

Kirkpatrick :—We submit our procedure in this case is the only one we could adopt. Execution only means enforcement of a decree; the Code defines a decree in section 2. This would include a decree *nisi*. Section 235 of the Code speaks of decrees generally. Cf. sections 260, 261 of the Code and Rule 75 of the High Court Rules. We refer to *Karim Mahomed Jamal v. Rajooma*⁽⁵⁾. We have now served the plaintiff with notice under section 248 of the Code.

(1) (1894) 21 Cal. 818.

(3) (1887) 25 Cal. 132.

(2) (1897) 22 Bom. 771.

(4) (1901) 23 Cal. 644.

(5) (1887) 12 Bom. 174.

1903.

SIR
JHANGIR
COWASJI
v.
THE HOPE
MILLS,
LIMITED.

Robertson :—It is now suggested for the first time that this matter may be treated as a motion in Court under the Transfer of Property Act. This cannot be done.

[MACLEOD, J. :—Mr. Kirkpatrick you might move under section 76 of the Transfer of Property Act.]

Kirkpatrick :—We desire such accounts taken as would enable us to proceed with the decree.

Robertson :—We submit that to allow the defendants that relief would be to reverse the decision of the Appeal Court and this Court cannot in these proceedings rectify the decree of the Appeal Court. The case of *Karim Mahomed Jamal v. Rajooma*⁽¹⁾ might have been cited to the Appeal Court but it has no relevancy here.

MACLEOD, J. :—This is an application by the first defendant Company for the execution of a decree *nisi*, dated the 26th January 1904, passed in this suit which was brought by the plaintiff as first mortgagee of the defendant Company. Under that decree it was ordered that upon the defendants or any of them paying into Court on behalf of the plaintiff, etc.

There was no provision made in the decree for the way in which the account contemplated should be taken. On the 3rd December 1907 an order⁽²⁾ was made by Mr. Justice Davar on a rule taken out by the defendant Company that the plaintiff should pass his accounts as first mortgagee in possession and having regard to all the directions in the decree before the Commissioner and the Commissioner was directed to take such accounts. This order was not to be enforced for two months and if the plaintiff within that time filed a suit to establish an agreement made by him with the defendant Company on the 3rd October 1905 the order was to be suspended until that suit was determined. This order was reversed by the Appeal Court⁽³⁾ on the 3rd March 1908. The defendant Company now say that they are anxious to redeem the plaintiff-mortgagee but they cannot ascertain what amount should be paid into Court to

(1) (1887) 12 Bom. 174.

(2) (1907) 9 Bom. L. R. 385.

(3) See *ante* p. 216; 10 Bom. L. R. 438.

enable them to get a reconveyance of the mortgaged property. They are ready to pay into Court any ascertained sum. A mortgagor in such a position demands the sympathy of a Court of Equity. Unfortunately for the defendant Company the Court of Appeal has decided that the omission in the decree to provide how the account should be taken was intentional and that the decree left it open to the parties to have the account taken and settled privately by some person of their nomination. Further it appeared to the Appeal Court that an account had been taken by a person appointed jointly by the parties with the result that a certain sum had been found due by the defendant Company to the plaintiff.

Under these circumstances I am asked by the defendant Company in execution proceedings to make an order calling upon the plaintiff to render an account of moneys due and payable to him under the decree *nisi* passed herein, and to execute a reconveyance of the mortgaged premises in the said decree in favour of the defendant Company on making payment of the said amount. The question at once arises whether there is a decree which can be executed. It has been held that an application for redemption or foreclosure of a decree *nisi* is not an application in execution under the Civil Procedure Code, but must be made in Court under the Transfer of Property Act; and that until a decree *nisi* is made absolute there is no decree capable of execution: *Ajudhia Pershad v. Baldeo Singh*⁽¹⁾ referred to in *Nandram v. Babaji*⁽²⁾. But it is argued that a decree directing accounts to be taken is a decree under section 2 of the Civil Procedure Code and can therefore be executed. The answer to that is that this decree *nisi* does not direct accounts to be taken. While it contemplated an account being taken it was silent on the question how that account was to be taken, and the Court has declined to modify the decree by inserting such a direction. I am asked now in execution-proceedings to order the plaintiff to do something which he is not directed to do by the decree. That would be out of the question under any circumstances. There is nothing whatever in the decree *nisi* which is capable

1908.

SIR
JRHANGIE
COWASJI
v.
THE HOPE
MILLS,
LIMITED.

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1908.

SIR
JEUANGIR
CQWASJI
v.
THE HOPE
MILLS,
LIMITED.

of execution and the application must be dismissed with costs.
Counsel certified.

Application dismissed.

Attorneys for plaintiff:—*Messrs. Bhaishanker, Kanga and Girdharlal.*

Attorneys for defendant:—*Messrs. Mulla and Mulla.*

W. L. W.

APPELLATE CIVIL.

Before Chief Justice Scott and Mr. Justice Batchelor.

1908.

November 11.

MADHUSUDAN PARVAT STYLING HIMSELF SHANKARACHARYA OF DHOLKA (ORIGINAL DEFENDANT), APPELLANT, v. SHRI SHANKARACHARYA SWAMI OF SHARADA MATH (ORIGINAL PLAINTIFF); RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), section 11—Shankaracharya of Sharada Math, plaintiff—Shankaracharya of Dholka, defendant—Dispute as to precedence or privilege between purely religious functionaries—Jurisdiction of Civil Courts.

The plaintiff, Shankaracharya of the Sharada Math at Dwarka in Gujarath, sued the defendant, Shankaracharya of the Jyotir Math at Dholka in the same province for (1) a declaration that the defendant was not entitled to the style, title and dignities of a Shankaracharya and that he was not entitled to call for or receive any offerings from the people in Gujarath in his assumed capacity of a Shankaracharya of the Jyotir Math or a branch of that Math; (2) for an account of the money received by the defendant as a Shankaracharya in Gujarath with a decree for payment to the plaintiff of the sum found to have been so received by the defendant; and (3) for an injunction restraining the defendant from styling himself a Shankaracharya in Gujarath and from claiming and receiving offerings in Gujarath as Shankaracharya of the Jyotir Math or a branch of that Math.

The lower Court made a declaration that the defendant was not entitled to call himself a Shankaracharya of the Jyotir Math or of a branch of it at Dholka and an injunction against the defendant so styling himself and claiming or receiving offerings. The claim for an account and recovery of offerings received by the defendant was not allowed as the offerings might or might not have been made to the plaintiff.

On appeal by the defendant,

* First Appeal No. 45 of 1907.