

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1911.

February 7.

BAI GANGA, WIDOW OF SADARAM PRANJIVAN (ORIGINAL DEFENDANT), APPELLANT, *v.* RAJARAM ATMARAM (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), Order XXXIV, Rule 14—Transfer of Property Act (IV of 1882), section 99—Repeal—Decree on mortgage—Execution sale—Proceeds insufficient to satisfy decree—Attachment of mortgagor's other property comprised in redemption decree for the recovery of the balance—Property attached to be sold.

H and G mortgaged their property *A* to R, who also held in mortgage from the same mortgagors their other property *B*. R obtained a decree on the mortgage of property *A* for the recovery of the mortgage-debt by sale of that property and the balance, if any, to be paid by the mortgagors. Subsequently the mortgagor G, H having died in the meanwhile, got a redemption decree against R with respect to property *B*. In execution of R's decree, property *A* was sold but the sale-proceeds were not sufficient to satisfy the decretal debt. R, thereupon, sought to recover the balance by execution against property *B* and the said property was attached. After attachment a question having arisen as to whether R could recover the balance of his decree by sale of property *B* in execution without instituting a suit for the sale of that property,

Held, that the Civil Procedure Code (Act V of 1908) in so far as it repealed section 99 of the Transfer of Property Act (IV of 1882) and substituted in its place Order XXXIV, Rule 14, merely effected a change of procedure in the manner in which mortgaged property has to be realized in execution of money decrees and, therefore, the statutory rule in force for the purpose of the execution of the unsatisfied portion of the decree on mortgage was the rule contained in Order XXXIV of the Civil Procedure Code (Act V of 1908). R was, therefore, entitled to an order that the attached property *B* be sold in execution of his decree with respect to property *A*.

SECOND Appeal from the decision of M. B. Tyabji, District Judge of Broach, reversing his own decree in Appeal No. 52 of 1909 and modifying the order passed by B. N. Shah, Subordinate Judge of Ankleshvar, in an execution proceeding, Darkhast No. 859 of 1909.

One Harishankar Sadaram and his mother Bai Ganga mortgaged their land *A* to Rajaram Atmaram for Rs. 999 under a

* Second Appeal No. 553 of 1910.

mortgage-deed, dated the 3rd November 1893. The said mortgagors also passed another mortgage-deed to the same mortgagee on the 8th June 1894 mortgaging their land *B* for Rs. 599. The mortgagee Rajaram Atmaram brought a suit, No. 509 of 1896, on the mortgage of property *A*. The decree in the suit was passed on the 5th June 1897. It directed the defendants to pay to the plaintiff, on the 5th December 1897, Rs. 1,264, costs and interest Rs. 164-10-4, and also provided for a personal remedy. The mortgaged property *A* was sold in execution of the decree and Rs. 960 were realized by the sale, and to secure the balance the mortgagee made several applications and got some properties of the mortgagors sold.

In the year 1905 one of the mortgagors, Bai Ganga, the other mortgagor Harishankar having died in the meanwhile, filed a suit, No. 330 of 1905, against the mortgagee for the redemption of the property *B* and obtained in appeal an instalment decree, dated the 8th January 1908, directing that the plaintiff should pay to the defendant the mortgage-debt by annual instalments of Rs. 75 each.

In August 1908 the mortgagee presented a Darkhast No. 859, for the execution of the decree of 1897, and sought to recover the balance due to him under that decree by the sale of property *B*, which was the subject of the decree for redemption. The opponent-defendant resisted the darkhast on the ground that the property was not attachable under section 99 of the Transfer of Property Act.

The Subordinate Judge found that the opponent-defendant's equity of redemption was attachable under section 99 of the Transfer of Property Act. He, therefore, ordered execution to proceed.

The opponent preferred an appeal, No. 52 of 1909, to the District Judge, who, on the 25th November 1909, reversed the said order and dismissed the application for execution on the ground that it was in contravention of section 99 of the Transfer of Property Act which "provides that when a mortgagee attaches property mortgaged to him in execution of a decree for the satisfaction of any claim, he shall not bring such property to sale

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otherwise than by instituting a suit under section 67 of the Act."

After the above order was passed the plaintiff-applicant applied for its review and the District Judge reversed his order and directed that the property, against which execution was sought, be attached on the following grounds:—

The application for attachment and sale was heard before the present Civil Procedure Code came into force, but the order on it was passed after the Code became law. Order XXXIV, Rule 14, of the Code provides that when a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise by instituting a suit, etc.

The necessity for filing a suit is now confined to the cases in which a mortgagee seeks to bring mortgaged property to sale, after obtaining a decree for payment of money in satisfaction of a claim arising from the mortgage; under the Transfer of Property Act the mortgagee was obliged to sue, if he attached property mortgaged to him, in satisfaction of any claim, whether based on a mortgage or not.

The law to be applied, is the law that was in force when the application for execution was presented (I. L. R. 4 Bom. 163). Section 99 of the Transfer of Property Act therefore is applicable, and sale of the property is not permissible, without a suit being brought. This section does not, however, prohibit attachment of the property and it is contended for the applicant, that the attachment on the property should have been allowed to remain undisturbed. Section 99 of the Act contemplates attachment. The decision of the High Court of Bombay (I. L. R. 32 Bom. 207) is in favour of the applicant's contention and the circumstances of the case are such that the property may be allowed to remain under attachment.

Section 67 of the Transfer of Property Act is not in the applicant's way because a decree for redemption of the land which is the subject of these proceedings, has been made. I hold therefore that attachment of the property is valid, but it cannot be sold in these proceedings.

The opponent preferred a second appeal and the applicant filed cross-objections.

B. F. Dastur, for the appellant (defendant):—

The darkhast should have been dismissed as no order for sale could be made under section 99 of the Transfer of Property Act. The application for execution did not contain a prayer for the attachment of the property. The District Judge held that the

prayer for attachment could be implied as there was a prayer for sale. We submit that the Court could not go beyond the terms of the application.

G. N. Thakore, for the respondent (plaintiff) :—

Though our application for execution did not contain a specific prayer for attachment, still as it was an application for the sale of the property, the property could not be sold without attaching it. The attachment was a step preliminary to the sale.

Order XXXIV, Rule 14 of the Code of 1908, applies to the present case and not section 99 of the Transfer of Property Act. That section was repealed by the Code and it related to the manner of executing decrees by sale of mortgaged property. It was entirely a rule of procedure. Laws relating to procedure are always retrospective and apply to pending suits. We are, therefore, entitled to have an order for sale of the attached property under Order XXXIV, Rule 14 of the Code.

SCOTT, C. J. :—In the year 1897 a decree was obtained upon a mortgage under which the mortgaged property was sold and the sale-proceeds proved insufficient to satisfy the judgment-debt, the balance of Rs. 581 remaining payable according to the terms of the decree by the mortgagors. The mortgagee was also the holder of another mortgage executed by the same mortgagors upon other property. One of the mortgagors after the decree had been passed died, and his mother who was the surviving mortgagor, instituted a redemption suit to redeem the other mortgage which had not been the subject of the decree and which for the sake of convenience we will speak of as the mortgage of property *B*. She obtained a decree for redemption and an order for payment of the mortgage-debt by instalments, the mortgagee being entitled to a charge on the property *B* until his claim was satisfied.

In August 1908 before twelve years had elapsed from the passing of the decree of 1897, the mortgagee applied for execution against property *B* in respect of the unpaid balance of Rs. 581 payable under the decree.

The execution was resisted and the application came on for argument before the Subordinate Judge on the 3rd February

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1909. He held that an attachment was permissible even though section 99 of the Transfer of Property Act applied.

From his decision there was an appeal to the District Judge, Mr. Tyabji, who on the 25th November held that the application for execution was in contravention of the provisions of section 99 of the Transfer of Property Act, and accordingly the darkhast was dismissed. Then in April 1910, for reasons which are not apparent to us, he revoked his decision given five months previously on a point of law and came to the conclusion that, although section 99 of the Transfer of Property Act still applied to the case notwithstanding the provisions of the Code of Civil Procedure, Order XXXIV, Rule 14, the attachment was nevertheless permissible. He, therefore, reversed his decree dismissing the darkhast and directed the property against which execution was sought by the decree-holder to be attached.

Both sides have appealed to this Court, the respondent by way of cross-objection.

The appellant says the learned Judge was wrong in permitting the attachment. The respondent says that the learned Judge should have gone further and permitted a sale.

We are of opinion that the Civil Procedure Code now in force in so far as it repealed section 99 of the Transfer of Property Act and substituted in its place Order XXXIV, Rule 14, merely effected a change of procedure in the manner in which mortgaged property has to be realized in execution of money decrees, and, therefore, the statutory rule in force, for the purpose of the execution of the unsatisfied portion of the decree of 1897, is the rule contained in Order XXXIV of the present Procedure Code. For this reason we think that the respondent is entitled to an order on the darkhast that the property attached be sold, and we amend the decree of the District Judge by directing that the property be sold.

The appellant must pay the costs throughout.

Decree amended.

G. B. R.