

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

1912.
January 3.

NARHAR RAGHUNATH NAPHAD AND ANOTHER (ORIGINAL PLAINTIFFS),
APPELLANTS, v. KRISHNAJI GOVIND NADGAVANDI AND OTHERS (ORIGINAL
DEFENDANTS), RESPONDENTS.*

*Civil Procedure Code (Act V of 1908), section 48—Decree—Execution—
Limitation—Decree ripe for execution.*

On the 14th December 1892, the plaintiffs obtained a decree against the defendants. It directed (1) that the plaintiffs should be put in possession of certain land mortgaged to them by the defendants, and that the former should enjoy the profits of the land for 20 years, in satisfaction of the amount due on the mortgage; (2) that the defendants should pay to the plaintiffs a certain amount of money annually in the nature of cash allowance; (3) that if in any year the defendants failed to make the payment, the plaintiffs were entitled to bring to sale the mortgaged land and get the money debt satisfied out of the sale-proceeds; and (4) that if there should be "any deficit or any just and legal obstruction of whatever nature" to the mortgaged property being sold, the plaintiffs were entitled to recover the deficiency in respect of the cash allowance from the defendants "personally and from their other property". The defendants made default in the payment of the cash allowance in 1893 with the result that the plaintiffs brought the mortgaged property to sale under an order of the Court in execution. A part of the land was sold, but as the proceeds of the sale were not sufficient to satisfy the full amount of the debt, he was about to bring to sale the rest of the mortgaged property in 1908, when the Collector intervened and had the impending sale stopped on the ground that it was *vatan* property. On the 19th December 1910, the plaintiffs filed the present *darkhast* to recover the balance by enforcing the personal remedy against the defendants. The lower Court rejected the application on the ground that it was barred under the provisions of section 48 of the Civil Procedure Code of 1908.

Held, that the application was not barred under section 48 of the Civil Procedure Code of 1908, for the twelve years' period ran only from the date when the decree became in all its parts ripe for execution. The decree became for the first time capable of execution in 1908 in respect of the personal remedy given to the plaintiffs in the fourth part; until then, in respect of that part and that remedy, the decree was merely ancillary and provisional. The decree-holder could not till that point of time make any application for execution which it was in the power of the Court to grant, because till then there was no decree ripe for execution, so far as the personal remedy was concerned.

Per Curiam.—The execution and application contemplated by section 48 of the Civil Procedure Code of 1908, relate to a decree which is executable at that date in respect of the application made and execution sought, and the "order for

* First Appeal No. 126 of 1911.

execution" contemplated by the provisions of the section refers to an order which the Court could have made and enforced in obedience to the terms of the decree.

1912.

APPEAL from the decision of V. N. Rahurkar, First Class Subordinate Judge of Satara.

NARHAR
RAGHUNATH
v.
KRISHNAJI
GOVIND.

Proceedings in execution.

The decree under execution was obtained by the plaintiffs against the defendants on the 14th December 1892. It provided *inter alia* as follows:—

The plaintiff do recover from all the defendants Nos. 1, 2 and 3 the amount claimed, *viz.* Rs. 6,800, further interest and costs during a period of 20 (namely twenty) years from this day's date as follows:—The plaintiff shall recover the revenue of all the mortgaged property which is referred to in the plaint and which has been in his possession and of the property which the defendants have further mortgaged by Exhibit 25 being the pursis statement, *i. e.*, the revenue which is recoverable now and which may be recoverable in future on cultivation agreement and the revenue settlement and shall pay all the Government dues, *viz.*, Government Judi, etc., and out of what may remain he shall deduct Rs. 25 for administration of each year and shall apply the whole of the remaining income towards the payment of the interest on the amount of claim. As to what will remain after payment of interest, the same shall be received towards the payment of the principal sum in the following manner:—Account of interest shall be made in the case of Rs. 4,000 (*viz.* four thousand) at the rate of 8 annas per mensem per centum and in the case of Rs. 2,800 at the rate of 10 annas per mensem per centum from year to year and the amount of income as stated above shall be received towards the payment of the whole of that interest. The account of interest shall be made as from the month of Kartik every year up to the end of Ashwin of next year. The first year shall commence from the first of Kartik Shud in the Shak year 1814 and end with the 30th of Ashwin in the Shak year 1815. In this manner the plaintiff shall recover the profits of the mortgaged property for 20 twenty years, that is to say up to the end of the month of Ashwin of the Shak year 1834; on the expiration of the fixed time the defendants shall forthwith pay to the plaintiff the amount which may be found due to the plaintiff on the accounts being made. As regard the expenses which may be incurred in connection with the realization of the income, the plaintiff shall recover the same together with interest at the above rate of 10 annas from the income every year. The defendants shall after the period of twenty years on the payment of the whole amount get back the mortgaged property from the plaintiff. Should any amount remain unpaid by the tenants the plaintiff shall not be responsible for the same. Until the satisfaction of this debt the defendants shall not cause any obstruction to the mortgaged property and if any other obstruction shall be caused, the defendants shall get them removed. As to the cash allowance which is receivable from the Government in the name of the defendants, the defendants shall every year receive the same at the proper time for the plaintiff and pay the same to the plaintiff in time. In default of any of the abovementioned

1912.

NARHAR
RAGHUNATH
v.
KRISHNAJI
GOVIND.

conditions the plaintiff shall, at that very time (of default) without listening to the excuse of the unexpired period, recover the amount of his claim which may be found due on account being made, together with costs of the suit by the sale of the whole of the mortgaged property. Should there be any deficit or any just and legal obstruction of whatever nature be caused to the mortgaged property being sold, the same shall be recovered from the defendants personally and from their other property.

The defendants made default in the payment of the allowance to the plaintiffs in 1893. The plaintiffs thereupon applied to execute the decree by sale of the property. A portion of the property was sold; but as the sale-proceeds were not sufficient to discharge the decree in full, the plaintiffs applied to have the remainder of the property sold. The Collector intervened in 1908; and the property was not sold as it was *vatan* property.

On the 19th December 1910, the plaintiffs filed the present *darkhast* praying to recover the balance of the decretal amount by enforcing the personal remedy against the defendants.

The Subordinate Judge held that the *darkhast* was barred by the provisions of section 48 of the Civil Procedure Code of 1908, as the period of twelve years commenced to run from the defendants' default in payment in 1893.

The plaintiffs appealed.

Goyaji, with *K. H. Kelkar*, for the appellants.

Shortt, with *M. V. Bhat*, for the respondents.

CHANDAVARKAR, J.:—In holding the execution of the decree in the *darkhast* before us barred under section 48 of the Code of Civil Procedure, the lower Court has overlooked the important consideration that the decree contemplated by the section should have been in all its parts ripe for execution on the date from which the twelve years' period of limitation is computed.

The decree in the present case was passed on the 14th of December 1892 and the present *darkhast* was presented on the 19th of December 1910. The decree consisted of four parts. In the first place, it directed that its holder should be put in possession of certain land, mortgaged to him by the judgment-debtors, and that the former should enjoy the profits of the land

for twenty years, in satisfaction of the amount due on the mortgage. The second part ordered the judgment-debtors to pay to the decree-holders a certain amount of money annually in the nature of cash allowance. The third part directed that if in any year the judgment-debtors should fail to make the payment, the decree-holders should bring to sale the mortgaged land and get the money debt satisfied out of the sale-proceeds. Lastly—and this is the part of the decree with which we are now concerned for the purposes of the twelve years' limitation under section 48—the decree provided that if there should be “any deficit or any just and legal obstruction of whatever nature” to the mortgaged property being sold, the decree-holders should recover the deficiency or whatever might be due in respect of the cash allowance from the judgment-debtors “personally and from their other property”.

The judgment-debtors made default in the payment of the cash allowance in 1893 with the result that the decree-holders, in compliance with the terms of the third part of the decree, brought the mortgaged property to sale under an order of the Court in execution. A part of the land was sold; but as the proceeds of the sale were not sufficient to satisfy the full amount of the debt, they were about to bring to sale the rest of the mortgaged property when the Collector intervened and had the impending sale stopped on the ground that it was *vatan* property.

It was at this point—in the year 1908—that the decree became for the first time capable of execution in respect of the personal remedy given to the decree-holders in the fourth and last part. Until then, in respect of that part and that remedy, the decree was merely ancillary and provisional. The decree-holders could not till that point of time make any application for execution which it was in the power of the Court to grant, because till then there was no decree ripe for execution, so far as the personal remedy was concerned.

When section 48 of the Code provides that “where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the

1912.

NARHAR
RAGHUNATH
v.
KRISHNAJI
GOVIND.

1912.

NARHAR
RAGHUNATH
v.
KRISHNAJI
GOVIND.

same decree shall be made upon any fresh application presented after the expiration of twelve years from the date of the decree sought to be executed", the execution and application contemplated relate to a decree which is executable at that date in respect of the application made and execution sought, and the "order for the execution" contemplated by the provisions of the section refers to an order which the Court could have made and enforced in obedience to the terms of the decree. This construction is supported by the ruling of the Allahabad High Court in *Muhammad Suleman Khan v. Muhammad Yar Khan*⁽¹⁾ on the interpretation of Article 179 of the Limitation Act of 1877. The first paragraph of that article provided for the execution of a decree three years' limitation "from the date of the decree". It was held that the paragraph "must necessarily apply only where there is a decree or order which can at its date be executed".

In the present case the decree-holders were not in a position to make any application for the execution of the decree against the judgment-debtors personally until there had been an arrest of the enforcement of the remedy given to them by the third part of the decree. Nor was the Court competent to grant the personal remedy until that arrest. When that contingency happened, the personal decree, which had been till then provisional and ancillary, became effective, and the application to enforce the personal remedy took the place of, as having been ancillary to, the previous proceedings in execution under the third part of the decree, rendered abortive by the Collector's order under the Vatan Act: *Rahim Ali Khan v. Phul Chand*⁽²⁾.

On these grounds the decree appealed from must be reversed and the *darkhast* remitted to the Court below to be disposed of on the merits according to law. The respondents must pay to the appellants the costs of this appeal. Other costs of the *darkhast* to abide the result.

Decree reversed.

R. R.

(1) (1894) 17 All. 39.

(2) (1896) 18 All. 482.