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namely, Rs. 2,000 per annum. We do not think that we should interfere with the decision of the lower Court upon that point which was come to after careful consideration of all the evidence, for we are not satisfied that the lower Court was wrong.

As the learned pleaders for the parties do not wish the mortgage account to be re-opened, or to be taken again, we remand the case simply in order that the promissory note account may be taken separate from the mortgage account. The plaintiff will be entitled to take back his mortgaged property on the footing of the mortgages having been discharged, and the suits on promissory notes will be dealt with by the lower Court in accordance with the result of the promissory note account upon the basis indicated in this judgment.

The defendant must pay half the costs in the lower Court and have his costs of this appeal. One set of costs to be set off against the other. The rest of the costs of the suit on remand to be dealt with by the lower Court.

Decree set aside and suit remanded.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

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August 13.

UMABAI BHRATAR SHANKAR GODBOLE (ORIGINAL PLAINTIFF), APPELLANT, *v.* AMRITRAO ANANT AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Decree—Execution—Garnishee order—Revenue payable on estate ordered to be paid into Court—Revenue in future can be ordered to be paid—Civil Procedure Code (Act V of 1908), Order XXI, Rule 52—Darkhast kept alive as long as the decree remains unsatisfied—Practice and procedure.

Under a consent decree the sum found due was made payable in instalments; and the plaintiff was to be put in possession of the defendants' lands and also

* First Appeal No. 209 of 1912.

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to receive the defendants' share of the revenues of three Inam villages. In the execution proceedings under the decree in 1894, a consent order was taken whereby defendant No. 1 was constituted the plaintiff's tenant of the lands and the revenues of the villages were to be paid to the plaintiff through the Court. The Court then passed an order to the effect that the revenues of the villages should be paid by the village officers into Court. The payments so made were made over to the plaintiff till 1892, when the Court struck off the application for execution on the ground that the Court was *functus officio* for all purposes of execution as soon as it had put the plaintiff in possession of the lands in 1895 and issued one garnishee order of the same year. The plaintiff having appealed :—

Held, that the order passed upon the darkhast of 1894 continued alive and effective up to 1912, and would remain in force till the plaintiff's debt was satisfied.

PER CURIAM :—Property attached yielding a revenue or producing interest or dividends is within the meaning and contemplation of all garnishee orders issued under Order XXI, Rule 52 of the Civil Procedure Code (Act V of 1908) ; and that such interest or dividend becoming due, and therefore in the future, is expressly provided for in that rule, and it would follow upon the same principle that if an estate yielding a revenue were properly attachable under the same Rule, then revenue *in futuro* would be for all the purposes of such attachment on the same footing as interest or dividend.

FIRST appeal from the decision of G. N. Kelkar, First Class Subordinate Judge at Belgaum.

Proceedings in execution.

On the 10th February 1887, a consent decree was passed in terms of an award, whereby the plaintiff was to be paid the sum of Rs. 41,690 in thirteen annual instalments of Rs. 3,100 each and the last instalment of Rs. 1,390 was to be paid in the fourteenth year. The plaintiff was to be put in possession of defendants' lands and to receive the revenue of the three Inam villages belonging to the defendants. The possession of the plaintiff was to continue till the satisfaction of the whole debt by the usufruct of the property.

In 1894, the plaintiff applied to execute the decree. During its pendency, the parties arrived at an agreement on the 16th September 1895 under which the defendant

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No. 1 was made a tenant of the plaintiff in respect of the lands. The terms of the agreement merged into an order passed by the Court. The plaintiff was put in actual possession of the lands and the Court directed the village officers to pay the revenues of the three Inam villages into Court. The revenues were accordingly paid and the plaintiff used to receive the same till 1912.

In 1912, the Court took up the application for execution, and struck it off on the following grounds :—

The Court has no power to carry out any of the conditions embodied in the agreement of 1895. They are matters entirely in the hands of the plaintiff and the defendants. Any dispute that may arise may be settled in a separate suit. Since 1894 the vasul of the three villages varying from Rs. 10 to Rs. 583 is sent from year to year to this Court by the village officers (Exhibit 169). It is paid to the plaintiff and darkhast is kept pending. This shows that the Court cannot execute the decree beyond the recovery of vasul through the village officers and there is no prospect of the decree being ever satisfied out of the vasul received from the three villages.

I see no reason to allow this darkhast to continue. It must be thrown out, and the parties must be left to enforce the usufructuary mortgage. The parties may do this by a separate suit or in any other way as they may be advised.

The plaintiff appealed to the High Court.

D. A. Khare, for the appellant :—The lower Court erred in striking off the *darkhast* of its own motion. The order made in 1895 was meant to have operation till the whole decree was satisfied. The Court cannot of its own motion re-open the darkhast and vacate the order once passed. See *Krishnaji* v. *Gurunath*[1] and *Manilal* v. *Maganlal*[2].

S. R. Bakhale, for the respondents :—The lower Court appears to have acted under section 151 of the Civil Procedure Code. The decree was already on the files of the Court for execution for upwards of 12 years ; and a great many years must still elapse before the decree could be fully satisfied. The lower Court was perfectly

(1) S. A. No. 90 of 1906 (Un. Rep.). (2) S. A. No. 96 of 1905 (Un. Rep.)

justified in holding that the decree merely created a mortgage and the duty of the Court came to end as soon as the plaintiff was put into possession.

The future share of revenues of the defendants was an unascertained amount; and not being in existence at the date of the order could not be attached. See *Tulaji* v. *Balabhai*[1]. Under Order XXI, Rule 52, the property to be attached seems to be movable property and not immovable property. The Court can only attach the revenues that have accrued due and are in the hands of the village officers. It cannot attach the dues for future years. The general prohibitory order was therefore wrong in its very inception and the Court had authority to vacate it under section 151 of the Civil Procedure Code.

Khare, in reply:—The case of *Tulaji* v. *Balabhai*[1] does not apply. It was a case of political pension, which could not be said to be in existence until it was actually paid in. In the present case, the revenues of immovable property are attached, which stand on an altogether different footing.

BEAMAN, J.:—The plaintiff and the defendant submitted their original differences to arbitration in the year 1887. Upon the award a consent-decree was taken creating what appears to have been a usufructuary mortgage in the plaintiff's favour. The scheme of that award was clearly to pay off the sum of Rs. 41,000, said to be due by the defendant to the plaintiff, in fourteen years, by instalments of Rs. 3,100 a year, and in the fourteenth year an instalment covering the balance. The plaintiff was to be put in possession of the defendants' lands and also to receive the defendants' share of the revenues of three Inam villages. It is in respect of this latter part of the decree that the point arose with which alone we are now concerned.

[1] (1896) 22 Bom. 39.

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In 1894 the plaintiff put in a darkhast for the execution of this decree, and it appears that in the proceedings taken upon that darkhast the plaintiff and defendant entered into a further agreement, the main purpose of which was to constitute the defendant the plaintiff's tenant of the lands. There were many other minor details and provisions in case of default on the defendants' part, and loss occasioned thereby to the plaintiff. But those are immaterial. This agreement appears to reaffirm and be intended to carry out the scheme of the consent-decree of 1887. Again, the share of the revenues of the villages belonging to the defendant is to be paid through the Court to the plaintiff, and this agreement would appear to have been recorded as a modification or amplification of the original consent-decree, for the enforcement of which the Court would undertake responsibility. We may well doubt whether the Court was well-advised in accepting any modification of this kind upon those or any other terms. What appears to us to have been a more proper course would have been to record this, if at all, as a new agreement, and to record it, not as a decree of the Court, but as such agreement, in substitution of the first consent-decree. Even as to that, I mean the first consent-decree, we may again doubt whether the Court was well-advised in taking upon itself virtually the execution of a mortgage contract between these parties in the form of a consent-decree, without any of the preliminaries of a mortgage suit having been gone through. But notwithstanding the doubts we feel upon both these points the fact remains that the Court appears to have accepted this darkhast of 1894 at the close of the year 1895, and thereon to have issued a prohibitory order providing that the share of the revenues of the three Inam villages belonging to the defendant should be paid by the village officials to the Court's order to hold in satisfaction of

the decree, and was to be paid by the Court to the plaintiff. Such an order at that time, assuming that the defendants' share of the revenues of these Inam villages was an estate, would certainly have been within the express terms of Civil Circular 87 of the Order book of the year 1889; nor do we think that it would in any way conflict with the principle of the decision in *Tulaji* v. *Balabhai*[1] for regarding the estate as that which produces the revenue, and as something attachable in itself, it would fulfil the requirements which we understand to underlie the principle of Farran Chief Justice's judgment, namely that what is attached must be something in existence, and not merely in the future. It is perfectly clear that property attached yielding a revenue or producing interest or dividends is within the meaning and contemplation of all garnishee orders under Order XXI, Rule 52, and that such interest or dividend becoming due, and therefore in the future, is expressly provided for in that rule, and it would follow upon the same principle that if an estate yielding a revenue were properly attachable under the same rule, then revenue *in futuro* would be for all the purposes of such attachment on the same footing as interest or dividend. The only doubt we feel in thus applying the rule to the principle of *Tulaji* v. *Balabhai*[2], is whether Order XXI, Rule 52 was really intended to contemplate the attachment of immovable property. We think it unnecessary to dwell further upon this point, because it is clear in the events that have happened that the order of 1895 making the defendants' share of the Inam revenues of these three villages payable into Court for the benefit of the plaintiff was never appealed against and continued in force up to the date of the present proceedings.

In the year 1904 it would appear that the darkhast of 1894 upon which the order of 1895 was passed came

[1] (1896) 22 Bom. 39. [2] (1896) 22 Bom. 39.

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under criticism, probably on account of its apparent staleness. The learned Subordinate Judge at that time, Mr. Wagh, held that the order of 1895 was still in force, the darkhast of 1894 was alive and must be continued. On that footing it would appear that the defendants' share of the revenues of these Inam villages has been paid into Court, and that the Court has paid it to the plaintiff under this darkhast of 1894.

In 1912 the learned Subordinate Judge appears to have called upon the parties, and to have taken up the matter of this darkhast again. The pleaders who represent the parties here cannot inform us whether the defendant really took any part in these proceedings. The plaintiff certainly did, and the learned Judge appears to have come to the conclusion that the Court was already *functus officio* for all purposes of execution as soon as it had put the plaintiff in possession of the lands under the agreement of 1895, and issued one garnishee order of the same year. The learned Judge, therefore, came to the conclusion that the darkhast of 1894 was no longer in existence, and must be struck out. We think that in taking that view the learned Judge was wrong. From what has been already stated it is clear that however doubtful the steps may have been through which the order of 1895 was reached, that was an order upon the darkhast of 1894, and continued alive and effective up to 1912. We think that unless it could be shown that the plaintiff's debt was satisfied, for this appears to be the only condition imposed upon the continuity of the order in 1895, that order would still have to be in force. We certainly feel great sympathy with the learned Judge who evidently conceived himself to have been acting within the scope and principle of section 151, but we think that his proper course here would have been to issue notice to the parties concerned, if he thought it essential in the interests of justice to do so,

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to show cause why the order of 1895 should not now be discharged on the ground of full and complete satisfaction of the plaintiff's debts. As matters stand no such satisfaction appears to have been pleaded before the learned Judge, and ordinarily it would be for the defendant, whose money was thus being appropriated, to take the first step and raise the first objection, if he really believed that his debt to the plaintiff was satisfied.

With these observations we think that the order complained of must be reversed, and that the darkhast of 1894 must still be considered to be alive and operative until it shall be brought to an end in the manner we have suggested, should the investigation thus set on foot prove that there is no need to continue further this garnishee order. In the circumstances we think that each party should bear his own costs of this appeal.

Order reversed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, on reference from Mr. Justice Beaman and Mr. Justice Hayward.

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August 19.

BASANGAVDA BIN NAGANGAVDA (ORIGINAL DEFENDANT 1), APPELLANT, *v.* BASANGAVDA BIN DODANGAVDA AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS 2 TO 4 AND 6), RESPONDENTS.*

Hindu Law—Mitakshara, Ch. II, sec. 5, pl. 4 and 5—Mayukha, Ch. VIII, pl. 18—Compact series of heirs—Brother's widow—Sapinda—*Uncle's sons—Brother's widow nearer heir.*

The widow of a brother of the deceased is, as a *sapinda*, a nearer heir of the deceased than his paternal uncle's sons.

SECOND appeal against the decision of D. S. Sapre, First Class Subordinate Judge of Bijapur with appellate

* Second Appeal No. 525 of 1913.