

necessary. The point has not been argued; and I express no opinion about it.

I, therefore, agree that the appeal should be dismissed with costs.

Decree confirmed.

J. G. B.

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APPELLATE CIVIL.

Before Mr. Justice Shah; on difference between Mr. Justice Heaton and Mr. Justice Pratt.

AMBALAL BAPUBHAI GUJARATHI AND ANOTHER (ORIGINAL PLAINTIFFS, DECREE-HOLDERS), APPELLANTS v. NARAYAN TATYABA BHOSALE (ORIGINAL DEFENDANT, JUDGMENT-DEBTOR), RESPONDENT.*

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Civil Procedure Code (Act V of 1908), Order XXXIV, Rule 14—Charge on immoveable property created by a money-decree—Execution proceedings of the decree—Charged property can be sold in execution—No separate suit for bringing the property to sale necessary.

A decree for money directed the defendant to pay a sum of money to the plaintiffs, and further declared a first charge and a lien on certain immoveable property of the defendant. In execution of the decree the plaintiffs applied to sell the property charged;

Held, by Shah J., agreeing with Heaton, J. (Pratt J. dissenting), that the plaintiffs had the right to bring the property charged to sale in execution proceedings; and that no separate suit for the sale of the property was necessary.

FIRST appeal from the decision of R. T. Kirtane, First Class Subordinate Judge at Poona.

Execution proceedings.

The decree under execution was obtained by consent on the Original Side of the Bombay High Court. It provided as follows:—

“This Court by and with such consent doth order that the defendant do pay to the plaintiffs the sum of Rs. 35,789-6-11 for debt and interest... and this Court with the like consent doth declare that the plaintiffs have a

* First Appeal No. 194 of 1917.

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first charge and a lien (on certain immoveable property described) to secure repayment of the amount of this decree and interest thereon.....any of the parties hereto is at liberty to apply to this Court as there may be occasion."

The plaintiffs had the decree transferred to the Court of the First Class Subordinate Judge at Poona for execution; and applied there for sale of the property charged in execution proceedings. The learned Judge was of opinion that the plaintiffs were not competent to sell the property in execution proceedings, but that they were bound to bring a fresh suit for bringing the property to sale.

The plaintiffs appealed to the High Court.

The appeal was heard by Heaton and Pratt JJ., on the 17th December 1918, but their Lordships having differed in opinion, delivered the following judgments.

HEATON, J. :—My learned brother and I are agreed that if under the decree the "security property" (as it may be called) can be sold in execution then the appeal must succeed and sale in execution should be allowed. If it cannot be sold in execution under this decree then the order of the lower Court is correct and the appeal must be dismissed.

My opinion is that sale of the "security property" can lawfully take place in execution proceedings under this decree and that no further suit is necessary. The case to my mind presents itself in this way: we have first to determine the intention of the parties to this consent decree. The intention to my mind is plain, to this extent, that on failure of the debtor to pay the debt the "security" is to be sold. Is it to be sold in execution proceedings or only after a further suit? On this particular point the decree is silent. However, here also I do not myself feel doubt as to the intention of the parties: I believe they contemplated the simple,

cheap and speedy device of a sale in execution and not the complicated, expensive and dilatory procedure of a second suit to be followed later by execution proceedings. The decree is a consent decree, not a decree drawn up by or under the superintendence of the Court, and so I should take the word "declare" to have its ordinary meaning and implication rather than the technical meaning which in certain cases the law has impressed on the word. To a non-legal mind the word "declare" in this decree makes it clear that the property is security for the debt and can be sold for the debt; it does not, to the non-legal mind, import anything as to the processes by which the sale is to be made, except possibly that they would be the ordinary legal processes.

I cannot myself see that it is necessary to give to the word "declare" in this case the very technical import which it must have if we are to refuse to sell the "security property" until a further suit has been brought.

The decree, which was made in a Bombay High Court suit, is, as I read it, analogous to a mortgage with a power of sale which allows of a sale without any suit. That I believe to be the idea underlying this decree, a very familiar idea in Bombay.

As we differ on the matter we state the point of law to be submitted to a third Judge under section 98, Civil Procedure Code, as follows: what is the correct construction of the decree? Does it give the decree-holder the right to bring the property charged to sale in execution proceedings?

PRATT, J.:—The appellants seek execution of a decree of this Court of the 27th January 1914. The decree was made in an account suit and the first part directs payment by the defendant-respondent to the

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plaintiffs of a certain sum of money. The second part of the decree is as follows: "The Court with the like consent doth declare that the plaintiffs have a first charge and a lien on the land, hereditaments and premises situate at, &c."

The appellants prayed for execution by sale of the property charged in the decree.

The lower Court rightly held that the second part of the decree was declaratory merely. There can be no doubt that this is so. The decree as to the charge is expressed to be declaratory and there is no order directing the sale of the property charged.

Mr. Coyaji contends, however, that plaintiffs have the right to sell the property charged in fulfilment of their personal remedy under the first part of the decree. The lower Court has denied this, following the cases of *Aubhoyessury Dabee v. Gouri Sunkur Panday* ⁽¹⁾; *Matangini Dasse v. Chooneymoney Dasse* ⁽²⁾; *Hem Ban v. Bilari Gir* ⁽³⁾. As to this it is contended that these cases were decided under section 99 of the Transfer of Property Act but that Order XXXIV, Rule 14 is more restrictive. It is true that while section 99 prevented the mortgagee selling the mortgaged property under a judgment unconnected with the mortgage debt Order XXXIV, Rule 14, limits the restriction to a judgment for the mortgage debt. But the case is within this limited restriction. The decree creates the charge as well as the debt and the decree-holder may not, therefore, sell the property charged in satisfaction of the debt which is charged upon it. I do not think the fact that the decree was in a money suit and not on a mortgage makes any difference for the original claim is now merged in the decree. Irrespective of section 99 of the Transfer of Property Act and

⁽¹⁾ (1895) 22 Cal. 859.

⁽²⁾ (1895) 22 Cal. 903.

⁽³⁾ (1905) 28 All. 58.

Order XXXIV, Rule 14, the sale of a bare equity of redemption under a judgment on the covenant was never allowed : *Khijarajmal v. Daim*⁽¹⁾.

I should, therefore, confirm the decree of the lower appellate Court and dismiss this appeal with costs.

Owing to the above difference in opinion the case was heard by Shah J., under the provisions of section 98 of the Civil Procedure Code, on the 27th January 1919.

Coyajee with S. R. Bakhle, for the appellant :—The decree in question is a consent decree ; it was passed on an adjustment of accounts. We say the decree is capable of execution ; it is not a mere declaratory decree. It expressly directs the defendant to pay the amount specified. It also declares that the decretal amount is a charge on certain property, that is, it is recoverable by attachment and sale of it. The decree empowers us to recover the money from the defendant in the first instance. If the decree were to stop here, we could execute it and bring the property to sale : see Order XXI, Rules 11 (i), (ii) and 30. If so, does the fact that the decree proceeds further and declares a charge on certain property prevent that property from being liable to the ordinary remedy of sale ?

Order XXXIV, Rule 14 cannot apply here, because the present is not the case of a mortgagee who has obtained decree on his mortgage : there is no mortgage prior to the decree, which creates a charge for the first time.

There are some difficulties in following the judgment of Pratt J. He says the sale of the bare equity of redemption under a judgment on the covenant was never allowed but there was no covenant on which the

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judgment was founded. It is difficult to see how *Khiarajmal v. Daim*⁽¹⁾ applies. The cases of *Aubhoyessury Dabee v. Gouri Sunkur Panday*⁽²⁾; *Matangini Dasse v. Chooneymoney Dasse*⁽³⁾ and *Hem Ban v. Bihari Gir*⁽⁴⁾ are relied on, but they are all cases based on section 99 of the Transfer of Property Act, 1882.

[SHAH J.—refers to *Mahadeo Narayan Kulkarni v. Girjabai Sadashiv Kulkarni*⁽⁵⁾.]

The analogy of the maintenance decrees is useful; see *Mansa Debi v. Jivan Lal*⁽⁶⁾; *Vishnu Shambhog v. Manjamma*⁽⁷⁾; *Ashutosh Bannerjee v. Lukhimoni Debya*⁽⁸⁾.

Patwardhan, with *B. K. Mehendale*, for the respondent:—By consent the parties here obtained a decree for money. Had the decree been a simple money decree the plaintiff could have executed it by attaching and selling any property of the defendant. But the plaintiff does not obtain a simple money decree: he fortifies his position by obtaining a charge on certain specified property. Thus so far as specified property is concerned the decree becomes a mortgage decree and can only be executed as such: although it is open to the decree-holder to proceed against any other property of the defendant in execution of the money-decree in the ordinary way: see *Aubhoyessury Dabee v. Gouri Sunkur Panday*⁽⁹⁾; *Hem Ban v. Bihari Gir*⁽¹⁰⁾ and *Gobinda Chandra Pal v. Kailas Chandra Pal*⁽¹¹⁾.

(1) (1904) 32 Cal. 296.

(2) (1895) 22 Cal. 859 at p. 863.

(3) (1895) 22 Cal. 903 at p. 906.

(4) (1905) 28 All. 58 at p. 59.

(5) (1918) S. A. No. 795 of 1917, decided by Shah J. on 28th. August 1918 (Un. Rep.).

(6) (1886) 9 All. 33.

(7) (1884) 9 Bom. 108.

(8) (1891) 19 Cal. 139.

(9) (1895) 22 Cal. 859.

(10) (1905) 28 All. 58.

(11) (1917) 45 Cal. 530.

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The scheme of the Transfer of Property Act is that where property is made the subject of a charge, the party must always be given a reasonable opportunity of finding the money.

I contend that Order XXXIV, Rule 14, does not apply here, but that section 67 of the Transfer of Property Act applies in virtue of Order XXXIV, Rule 15, of the Civil Procedure Code.

Coyajee, in reply :—The effect of the amendment in the Transfer of Property Act by the Civil Procedure Code for 1908 is that the amended section 100 of the Transfer of Property Act becomes a complement of Order XXXIV, Rule 15. If you want to ascertain what are the restrictions on the rights of the mortgagee, you have to go to Rule 15.

C. A. V.

SHAH, J. :—In consequence of the difference of opinion between the learned Judges who heard this appeal, the following question has been referred to me under section 98 of the Code of Civil Procedure :—

“What is the correct construction of the decree? Does it give the decree-holder the right to bring the property charged to sale in execution proceedings?”

The decree in question was passed by consent on the Original Side of this Court in a suit in which the plaintiffs claimed to recover a certain sum of money from the defendant on an adjustment. The material terms of the decree are these :—

“This Court by and with such consent doth order that the defendant do pay to the plaintiffs the sum of Rs. 35,789-6-11 for debt and interest and the costs of this suit when taxed and noted in the margin hereof and further simple interest at the rate of 6 per cent. per annum upon the amount of the said judgment from the date hereof until payment and this Court with the like consent doth declare that the plaintiffs have a first charge and a lien on

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certain immoveable property described) to secure repayment of the amount of this decree and interest thereon...Any of the parties hereto is at liberty to apply to this Court as there may be occasion."

The learned First Class Subordinate Judge of Poona to whose Court the decree was transferred for execution held that the property could not be sold in execution in the absence of a direction in the decree as to the enforcement of the charge. This view was contested in the appeal by the plaintiffs and it is on this question that there has been a difference of opinion. On a consideration of the terms of the decree I am of opinion that the decree-holder has the right to bring the property charged to sale in execution proceedings.

The decree contains a distinct direction that the defendant should pay the sum to the plaintiffs. This gives the plaintiffs the right to attach and sell the property of the judgment-debtor under the Code of Civil Procedure; and in the exercise of this right he can seek to realise the decretal amount or the balance thereof by the sale of the property in question. The declaration in the decree as to the charge on the property in favour of the decree-holder in order to secure repayment of the amount of the decree has the effect of protecting them against any transfer of the property by the judgment-debtor and not of reducing or modifying the right which the plaintiffs have got in virtue of the direction that the defendant should pay the amount. The fact that liberty is reserved to the parties to apply as occasion may arise does not, in my opinion, indicate any other meaning.

It is not uncommon in the Mofussil in this Presidency to insert such declarations as to charges particular in decrees awarding future maintenance to Hindu widows; and no instance has been cited at the bar in which the person holding a decree for the payment of future maintenance has been forced to a separate suit in

order to secure the sale of the property charged for the realisation of the decretal amount. I see no reason to think that in a decree passed on the Original Side of this Court the insertion of such a declaration would be intended or ought to have the effect of forcing the plaintiffs to a separate suit or of curtailing their right to bring the property to sale in virtue of the direction to the defendant to pay the amount. It may be that in the present case, if necessary, under the clause reserving liberty to the parties to apply, an express provision directing the sale of the property charged may be added to the decree by an application to the Court which passed the decree. On a construction of the decree, however, I do not think that any such provision is necessary.

It is urged on behalf of the defendant that under Rules 14 and 15 of Order XXXIV a separate suit for the sale of the property, as in the case of a mortgage, under Section 67 of the Transfer of Property Act is necessary. Under Rule 15 the provisions contained in Order XXXIV as to sale of mortgaged property would apply to property subject to a charge within the meaning of section 100 of the Transfer of Property Act so far as may be. Treating the charge under the decree as equivalent to a mortgage for the purpose of this argument, the question is whether Rule 14 would apply to the present case. The rule provides that "where 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 than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, Rule 2." The words "where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the

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mortgage" mean that the decree should relate to the payment of money in satisfaction of a claim arising under the mortgage, i.e., a mortgage independent of the decree. It can have no application where the charge or the mortgage is created by the decree and where the direction as to payment of money is in no sense in respect of a claim arising under the charge or the mortgage. In the present case there was no charge or mortgage prior to the decree, and the claim in the suit did not arise under any charge but was an ordinary money claim. The payment of money in respect of the claim is secured by creating a charge: but the obligation to pay exists apart from the charge and is enforceable. Thus Rule 14 does not apply; and no separate suit for the sale of the property is necessary as provided by that rule.

Mr. Patwardhan for the defendant has relied upon *Aubhoyessury Dabee v. Gouri Sunkur Panday*⁽¹⁾; *Hem Ban v. Bihari Gir*⁽²⁾ and *Gobinda Chandra Pal v. Kailas Chandra Pal*⁽³⁾. I do not think, however, that these decisions can help him. The decision in *Aubhoyessury Dabee's case*⁽¹⁾ is based upon the terms of section 99 of the Transfer of Property Act, which is now replaced by Rule 14 of Order XXXIV. The terms of section 99 differ materially from those of Rule 14. I am not now concerned with the question whether a separate suit would be necessary to bring the property charged to sale in the present case, if section 99 of the Transfer of Property Act were still in force: in that event the said decision would no doubt be an authority in favour of the defendant's contention. But it cannot be treated as an authority in support of the view that Rule 14 is applicable to the present case. The second case is distinguishable on the double ground that there

(1) (1895) 22 Cal. 859.

(2) (1905) 28 All. 58.

(3) (1917) 45 Cal. 530.

was a prior security in that case and that the decision turned upon the provisions of section 99. In the last case also there was a mortgage prior to the decree. It is significant that in that case the argument as to Rule 14 is met by the fact that the decree-holder was a chargeholder at the date of the decree. In the present case the fact is otherwise.

I, therefore, agree with my brother Heaton in holding that the property charged can be sold in execution.

The result is that the order of the lower Court is set aside and the lower Court is directed to proceed with the Darkhast according to law. The defendant to pay the costs of this appeal: other costs to be costs in the Darkhast.

Order set aside.

R. R.

ORIGINAL CIVIL

Before Mr. Justice Marten.

SARABAI AMIBAI *v.* MAHOMED CASSUM HAJI JAN. MAHOMED.^o

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Will—Cutchi Memon—Mahomedan law—Document in the nature of instructions as to the disposition of property operating as a will under Mahomedan law—Probate—Probate and Administration Act (V of 1881), section 3.

August 22.

A widow of a Cutchi Memon applied for probate of a document in Gujerati as being the last will and testament of her deceased husband, the document according to the official translation being in the following terms:—"May it be known to Bhai Abdullahai as follows:—In the will which you will get made to-morrow and give me, be kind not to forget (to add) my 'Mukhatyari' as long as I am alive and after me my wife's 'Mukhatyari'. Whatever costs may be incurred I will pay you. Written by your servant Mahomed Hasam Haji". On the other side of the document were the words "Bhai Abdullahai". 'Mukhatyari' in the document meant absolute ownership of

^o O. C. J. Suit No. 10 of 1918.

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