

HEATON, J.:—I concur. Whether the decision in *Sadashiv bin Mahadu v. Narayan Vithal*⁽¹⁾, is correct or not (and I think it may need reconsideration), yet the case as presented by the plaintiff here is certainly not one which can be summarily dismissed on the ground that the suit will not lie. Whatever the true facts may be, the plaintiff is seeking to recover possession from two persons defendant No. 1 and defendant No. 2, and the relief he asks for against defendant No. 2 he could not obtain by proceedings in execution. Therefore he is driven to bring a suit, and as my Lord the Chief Justice has pointed out, it would really be a legal absurdity to compel him for one matter which ought to be disposed of as one case, to take separate proceedings; first, proceedings in execution against defendant No. 1; and then a suit against defendant No. 2. However involved our law of procedure may be, I feel quite certain that it was never intended to produce results of that kind.

Decree reversed.

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⁽¹⁾ (1911) 35 Bom. 452.

APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Hayward.

SHANMANT TIMAJI DESAI (ORIGINAL DEFENDANT No. 1), APPELLANT *
RAGHAVENDRA GURURAO DESAI AND OTHERS (ORIGINAL PLAINTIFF
AND DEFENDANTS NOS. 2 AND 3), RESPONDENTS *.

1920.

February 12.

Civil Procedure Code (Act V of 1908), Order XXXIV, Rule 14—Instalment decree—Failure to pay one instalment—Darkhast to recover amount of the instalment by sale of a portion of the property mortgaged—Premature darkhast.

A decree passed on a mortgage was made payable in instalments and provided that if any two instalments remained unpaid till six months after the date of the second instalment, the whole amount of the decree then remaining

* First Appeal No. 6 of 1919.

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due became payable at once. The first instalment was paid up, but the second instalment which fell due on the 1st August 1917 was not paid. The decreeholder applied in July 1918 to recover the amount of the second instalment by sale of a part of the mortgaged property :—

Held, that the application was premature, in view of the precise terms of the decree itself and of the principles underlying Order XXXIV, Rule 14, of the Civil Procedure Code, which showed that where a mortgagee had obtained a decree for payment of money in satisfaction of a claim arising under the mortgage, he would not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage.

FIRST appeal from the decision of H. V. Chinmulgund, First Class Subordinate Judge at Dharwar.

Execution proceedings.

The plaintiff obtained a decree on his mortgage on the 8th October 1915 against the defendants which provided as follows :—

“Defendants do pay to plaintiff Rs. 14,000 by eleven instalments. The first ten instalments are to be annual instalments of Rs. 1,300 each, and the last instalment is to be of Rs. 1,000. Defendants do pay to plaintiffs the said instalments on the 1st August every year. The first instalment should be paid on 1st August 1916.

In case of default by defendants to pay any two instalments out of the said instalments, the said instalments should be paid within six months of the date of default of the second instalment, and in case of default to pay the said instalments within six months accordingly, plaintiff do recover the whole of the amount, viz., amount of the said two instalments and the subsequent instalments remaining unpaid on that day, together with the cost, by the sale of the property mentioned in the simple mortgage deed.

The first instalment was paid in time. There was default in the payment of the second instalment which fell due on the 1st August 1917. The plaintiff applied in July 1918 to recover the amount of the second instalment by sale of a portion of the mortgaged property. In the meanwhile, the third instalment was paid in.

The Subordinate Judge granted the application and ordered execution to proceed.

The defendant No. 1 appealed to the High Court.

N. V. Gokhale, for the appellant.

R. A. Jahagirdar, for respondent No. 1.

SHAH, J. :—This appeal arises out of an application made by the decree-holder to execute the decree passed on an award. Originally in 1904 a simple mortgage bond was passed by defendant No. 1 in favour of the plaintiff and his brother for Rs. 6,500. The disputes between the parties as to this bond were referred to an arbitrator and an award was made. Subsequently on the application of the plaintiff which was registered as a suit a decree was passed in terms of the award. Under that decree the defendants were to pay Rs. 14,000 in eleven instalments. The first ten instalments were to be annual instalments of Rs. 1,300 each, and the last instalment was to be of Rs. 1,000. The first instalment was to be paid on the 1st of August 1916, and the other instalments were to be paid on the 1st of August every following year. The decree further provided that “in case of default by defendants to pay any two instalments out of the said instalments, the said instalments should be paid within six months from the date of default of the second instalment ; and in case of default to pay the said instalments within six months accordingly plaintiff do recover the whole of the amount, viz., the amount of the said two instalments and the subsequent instalments remaining unpaid on that day, together with costs, by sale of the property mentioned in the simple mortgage bond.” The defendants paid the first instalment on the 1st of August 1916, and the present darkhast was filed in July 1918 to recover the second instalment payable on the 1st of August 1917 with interest by sale of a part of the mortgaged property. The part of the mortgaged property was specified in the darkhast, and it was stated in the darkhast that the instalment payable on the 1st of August 1918 had been already paid to the decree-holder.

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The defendants objected to the sale of a part of the mortgaged property.

The First Class Subordinate Judge, who dealt with this darkhast, allowed execution to proceed on the footing that the defendants were personally liable to pay the sum of Rs. 1,300 and that it was open to the decree-holder to realize that amount by the sale of the property mentioned in the darkhast not as part of the mortgaged property, but as property belonging to the judgment-debtors.

From this order the present appeal is preferred to this Court, and it is urged on behalf of the appellant that the darkhast is premature.

I desire to make it clear at the outset that in this darkhast we are concerned only with the prayer of the decree-holder to realize the amount of the instalment by the sale of a part of the mortgaged property. We are not concerned with the question as to whether, apart from any right to bring to sale a part of the mortgaged property, the decree-holder can recover the amount personally from the defendants or by the sale of any property of the judgment-debtors other than the mortgaged property. The question does not arise in this darkhast, and I express no opinion as to the remedy which the decree-holder may have as regards the sum in question against the defendants personally or the other property of the defendants.

It seems to me clear that on the facts stated above and on the terms of the decree the present darkhast to bring to sale a part of the mortgaged property is premature. The instalment of Rs. 1,300 forms part of the mortgage amount; and the terms of Rule 14 of Order XXXIV show 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. The suit in which the plaintiff has obtained the decree now sought to be executed may be treated as a suit for sale in enforcement of the mortgage within the meaning of this rule. But it is clear that the decree-holder is not entitled to bring the mortgaged property to sale otherwise than by instituting such a suit. Treating the suit out of which these proceedings have arisen as a suit for sale in enforcement of the mortgage, it seems to me that the decree-holder is clearly bound by the terms of the decree. Under the terms of the decree the plaintiff can recover the whole amount which may have remained unpaid after default in the payment of any two instalments by the sale of the property mentioned in the mortgage bond. At the date of this darkhast this contingency had not arisen, because admittedly there was a default in the payment of one instalment only at the time. The whole amount had not become due, and the right to bring the property to sale under the decree had not accrued to the decree-holder. Under these circumstances it seems to me that the present darkhast is premature, treating it strictly as a darkhast for enforcing the decree by the sale of a part of the mortgaged property. In my opinion the lower Court was wrong in allowing the property to be sold otherwise than under the terms of the decree.

I would, therefore, allow this appeal and dismiss the darkhast without prejudice to the right of the decree-holder to claim this amount in any subsequent darkhast which he may be advised to file.

Having regard to all the circumstances we direct that each party should bear his own costs throughout.

HAYWARD, J. :—I agree. It is an anomalous decree and it is quite possible that the second instalment of

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Rs. 1,300 will be recoverable at once personally against the judgment-debtor notwithstanding the provisions of Rules 4 and 6 of Order XXXIV of the First Schedule to the Civil Procedure Code. But it seems to me quite clear that the amount is not recoverable now by the sale of any part of the mortgaged property both in view of the precise terms of the decree and of the principles underlying Rule 14 of Order XXXIV of the First Schedule of the Civil Procedure Code.

Appeal allowed.

R. R.

APPELLATE CIVIL.

*Before Mr. Justice Heaton; on difference between Mr. Justice Shah and
Mr. Justice Crump.*

1920.

January 27.

HARGOVIND FULCHAND DOSHI (ORIGINAL PLAINTIFF), APPELLANT v.
BAI HIRBAI (ORIGINAL DEFENDANT), RESPONDENT*.

*Bombay Court of Wards Acts (Bombay Act I of 1905), sections 31,
32, §(c) †—Gujarat Talukdars' Act (Bombay Act VI of 1888).*

* First Appeal No. 241 of 1918.

† The sections run as follows:—

31. No suit relating to the person or property of any Government ward shall be brought in any civil Court until the expiration of two months after notice in writing, stating the name and place of abode of the intending plaintiff, the cause of action and the relief claimed, has been delivered to, or left at the office of, the Court of Wards; and the plaint shall contain a statement that such notice has been so delivered or left:

Provided that notice under this section shall not be required in the case of any suit, the period of limitation for which will expire within three months from the date of a notification issued under section 13, sub-section (1).

32. Subject to the provisions of the second paragraph of section 440 of the Code of Civil Procedure, in every suit brought by or against a Government ward, the manager of the Government ward's property, or, where there is no manager, the Court of Wards, having the superintendence of the Government ward's property, shall be named as the next friend or guardian for the suit, as the case may be.