the plaintiffs can sue the mortgagee for all those rights which the mortgagee will still be entitled to claim against the mortgagor, and they are entitled to remain in possession as long as the mortgagee, who is their mortgagor, can claim his mortgage rights against the Talukdar. The appeal, therefore, must be allowed, and in addition to the decree for Rs. 100 for damages, there must be a decree in favour of the plaintiffs to recover possession of the plaint property, with costs throughout. There must be an inquiry as to mesne profits from the date of suit until possession is restored or three years from to-day.

SHAH, J. :—I agree.

Appeal allowed.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

GUMANJI DHIRAJI MARWADI (ORIGINAL PLAINTIFF), APPELLANT *v.* VISHVANATH PARBHU HINGMIRE (ORIGINAL DEFENDANT No. 1) RESPONDENT*.

1921. *July* 15.

Decree—Execution—Decree varied in appeal—Interest of defendant not party to appeal affected—Executing Court not to go behind the decree—Practice and procedure.

In a mortgage decree defendant No. 2 was impleaded because the debt was said to have been incurred for his benefit by the father of defendant No. 1, and his property No. 3 among other properties of the family was primarily made liable for the decretal amount. Defendant No. 2 appealed from the decree making plaintiff the only respondent and the appellate Court set aside the order of the lower Court against defendant No. 2 and against property No. 3. In execution of the decree, defendant No. 1 contended that as he was not a party to the appeal, the order of the appellate Court could not bind him and he was, therefore, entitled to insist upon the plaintiff first recovering his debt from the sale proceeds of property No. 3.

* Second Appeal No. 744 of 1920.

1921.

GUMANJI DHIRAJI *v.* VISHVANATH PARBHU.

Held, overruling the contention, that as defendant No. 1 took no steps to get the order or the appellate Court set aside, the only decree that could be executed was the decree which directed that properties other than property No. 3 should be sold in default of payment of decretal amount.

It is not for the executing Court to enter into the merits or demerits of a decree; its only functions are to carry out the directions of the Court.

SECOND Appeal against the decision of N. S. Lokur, Assistant Judge of Satara reversing the decree by P. C. Divanji, Subordinate Judge at Tasgaon.

Proceedings in execution.

One Parbhu Hingmire mortgaged four properties to one Gumanji Marwadi for Rs. 275 on the 15th September 1903.

In 1914 Gumanji filed a Suit No. 340 of 1914 against Parbhu's son, Vishwanath (defendant No. 1), and three others to recover Rs. 539-8-0 due under the mortgage. Mahadu Hingmire (defendant No. 2) was joined because the mortgage debt was said to have been incurred for his benefit by Parbhu and his property, property No. 3, was sought to be made liable. A decree was passed in favour of Gumanji which provided that defendants Nos. 3 to 5 should pay the amount claimed with costs of the suit to the plaintiff within six months; and that, if they failed to do so, then the amount should be recovered by the sale of property No. 3 belonging to Mahadu, defendant No. 2; and that, in case the amount realized by the sale of the said property be found insufficient, then the plaintiff was at liberty to seek relief under section 15B, clause (2) of the Dekkhan Agriculturists' Relief Act for the purpose of bringing the other properties to sale for the satisfaction of the deficit.

The defendant No. 2 appealed against the decree making plaintiff Gumanji the only respondent and the appellate Court amended the decree by setting aside

the order awarding the plaintiff's claim against defendant No. 2 and against property No. 3.

The plaintiff thereafter applied for execution of the decree.

Defendant No. 1 Vishwanth contended that, as he was not a party to the appeal, the decree of the appellate Court could not bind him, and he was, therefore, entitled to insist upon the plaintiff first receiving payment of his debts from the sale proceeds of property No. 3.

The Subordinate Judge directed that execution should proceed and that the Darkhast should be sent to the Collector for sale of the property.

On appeal the Assistant Judge was of opinion that, so far as defendant No. 1 was concerned, it was only the decree of the first Court which could be executed against him, and as he was not a party to the appeal he was not bound by any amendment made in the decree by the Court of appeal behind his back: *Dev Gopal* v. *Vasudeo*, 12 Bom. 371; and *Gajraj* v. *Swaminath*, 39 All. 13 at pages 21 and 22. He, therefore, varied the order by directing that the property No. 3 should be valued and that value should be deducted from the decretal amount and that execution should proceed against other properties only to the extent of the balance: *Shrimati Giri Bala Debia* v. *Shrimati Rani Mina Kumari*, 5 C. W. N. 497.

The plaintiff appealed to the High Court.

P. B Shingne, for the appellant:—In this case the order of the first Court was the proper order. The lower appellate Court was wrong in excepting property No. 3 from the original decree. If the decree is to be executed in accordance with the order under appeal, the case may lead to extraordinary results. If the construction thus placed by the lower appellate Court

1921.

GUMANJI DHIRAJI v. VISHVANATH PARBHU.

were to be accepted, it may be that the appellant may lose the fruit of his decree. The respondent had, if at all, a grievance against the appellate Court, which decided the appeal against the original decree, and by its decision, affected the interest of the respondent though he was not a party to that appeal. It was open to the respondent to move the High Court in a proper proceeding taken for that purpose and get the decision reversed or to move the appellate Court in review. That was not, however, done. If so, the decree must be executed as it goes and in execution the respondent cannot question the decree.

V. D. Limaye, for the respondent :—The decree so far as it affects the interest of the respondent, was wrong and could not have been passed behind the back of the respondent. Therefore he is not bound by the decree of the appellate Court. Hence the order passed by the appellate Court is proper. As the respondent was not a party to the appeal, he had no reason to apply to get it set aside.

MACLEOD, C. J. :—One Parbhu mortgaged four properties to Gumanji Dhiraji for Rs. 275 on the 15th September 1903. Gumanji filed a Suit No. 340 of 1914 against Parbhu's son and four others to recover Rs. 539-8-0 due under the mortgage and obtained a decree which provided that the defendants Nos. 3 to 5, who apparently made themselves personally responsible for the debt, should pay the amount claimed with costs of the suit, to the plaintiff within six months ; that, if they failed to do so, then the amount should be recovered by sale of the property No. 3 ; and that, in case the amount realized by the sale of the said property should be found insufficient, then the plaintiff was at liberty to seek relief under section 15B, clause (2) of the Dekkhan Agriculturists' Relief Act for bringing the other properties to

sale for the satisfaction of the deficit amount. The 2nd defendant was impleaded because the debt was said to have been incurred for his benefit by the father of defendant No. 1, and his property No. 3 was primarily made liable for the decretal amount.

We have not got the decision of the Subordinate Judge who tried that suit before us, and so we are unable to say why property No. 3 belonging to defendant No. 2 was primarily made liable for the decretal amount, and not equally together with other properties which Parbhu had mortgaged. The 2nd defendant appealed from the decree, making the plaintiff the only respondent, and the appellate Court amended the decree by setting aside the order of the lower Court against defendant No. 2 and against property No. 3. The reason for that decision was that no part of the mortgage debt had been raised for the benefit of the 2nd defendant; therefore the mortgage was not binding on property No. 3.

Naturally that decision would affect the interest of the 1st defendant, and it is certainly remarkable that the appellate Judge should not have noticed that, and should not have insisted upon having defendant No. 1 added a party respondent. However, the fact remains that without hearing the 1st defendant the appellate Court varied the decree of the trial Court in a way which affected the interests of the 1st defendant. The plaintiff sought execution of the decree, when the 1st defendant contended that as he was not a party to the appeal it could not bind him, and he was, therefore, entitled to insist upon the plaintiff first recovering his debt from the sale proceeds of property No. 3. The Subordinate Judge, however, directed execution should proceed and that the Darkhast should be sent to the Collector for sale of the property.

1921.

GUMANJI DHIRAJI *v.* VISHVANATH PARBHU.

In appeal to the Assistant Judge that order was varied. The effect of the order passed was that property No. 3 should be valued and that value should be deducted from the decretal amount and that execution should proceed against the other properties only to the extent of the balance. That certainly would tend to most extraordinary results. If the value of property No. 3 was more than the decretal amount, the result would be that the plaintiff would lose the whole of his money. The learned Judge seems to rely upon the decision in *Gajraj Mati Tiwarin* v. *Swami Nath Rai*[1]. But the facts there were entirely different. The appellant before that Court had a decree in the trial Court passed against her *ex parte*. Her sons who were defendants with her appealed, but they did not make their mother a party to the appeal. The mother, twelve years after the decree of the High Court, filed an application in the Court of the Subordinate Judge alleging that she had no knowledge of the suit and praying that the *ex parte* decree should be set aside. The Subordinate Judge held that as the decree had been confirmed by the High Court, that Court only had power to entertain the application and consequently rejected it. The High Court decided that the proper Court to which the application should be made was the Court which passed the decree and not the Court which modified that decree or dealt with it in appeal. That was the only point, so far as I can see, which was decided in that case, and it is no authority whatever for the decision of the learned Assistant Judge in this case. Applying the decision in that case, the 1st defendant had a grievance against the appellate Court which decided an appeal which was against his interest without hearing him, and he should then have applied to that Court to set aside the order and deal

(1) (1916) 39 All. 13.

1921.

GUMANJI DHIRAJI *v.* VISHVANATH PARBHU.

with the appeal afresh after hearing his contentions. As the 1st defendant did not apply to the appellate Court, then it is quite clear that the Court executing the decree could not entertain any application to alter the terms of the decree. We have more than once decided that it is not for the execution Court to enter into the merits or demerits of the decree. Its only functions are to carry out the directions of the Court. Therefore as the 1st defendant had taken no steps to get the appellate order set aside, the only decree that could be executed was the decree which is now before us which directs that the properties other than property No. 3 should be sold in default of payment of the decretal amount. The appeal, therefore, must be allowed and the order of the Subordinate Judge restored with costs throughout.

SHAH, J. :—I agree.

Decree reversed.

J. G. R.

ORIGINAL CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

GOVINDLAL BANSILAL, APPELLANT *v.* BANSILAL MOTILAL AND OTHERS, RESPONDENTS*.

1921.

August 5.

Letters Patent, 1865, clause 12—Suit for partition—Part of property, outside British India—Leave of Court—High Court—Jurisdiction—Practice—Procedure.

In a suit filed in the High Court at Bombay for partition of immoveable properties situated in British India, part whereof was within the local limits of the Court, defendant No. 1 contended in his written statement that the plaintiff should be compelled to bring into hotchpot all the properties in his possession in the Hyderabad State, or in the alternative that the partition should be so effected as to allot to the plaintiff's share properties of sufficient value out of those lying at Hyderabad. During the pendency of the

* O. C. J. Appeal No. 51 of 1921 : Suit No. 688 of 1917.