

APPELLATE CIVIL.

Before Mr. Justice Fawcett.

GANESH EKNATH KAULGI AND ANOTHER (ORIGINAL PLAINTIFFS),
APPELLANTS v. BHAUSAHEB BHAVANRAO DESHMUKH (ORIGINAL
DEFENDANT), RESPONDENT².

1921.

August 2.

Bombay Hereditary Offices Act (Bombay Act III of 1874), section 5—Decree on mortgage—Decree against Vatandar—Provision in the decree to pay the mortgage amount by instalment—Deficiency in instalment to be made good by mortgagor—Death of Vatandar mortgagor—Decree-holder cannot execute the decree against Vatandar's heirs by sale of other property.

A decree on a mortgage against a Vatandar-mortgagor provided that the mortgage debt was to be satisfied by payment of an annual sum out of the profits of the mortgaged lands; and in case of deficit, the mortgagor was personally liable to make good the deficiency. After the death of the mortgagor, the decree-holder applied against the mortgagor's heirs to recover the full amount of the decree by attachment and sale of other property in the hands of the heirs of the mortgagor:—

Held, that the mortgage having been in its inception void against the heirs of the Vatandar, any arrangement, or even any decree, based on the mortgagee's rights under such mortgage, was also void against the heirs of the Vatandar.

FIRST appeal from the decree passed by N. G. Chapekar, First Class Subordinate Judge at Sholapur.

Execution proceedings.

The defendant's father Bhavanrao executed two mortgages on his Vatan property in 1868 and 1876, in favour of plaintiffs. Bhavanrao applied in 1881 to a Conciliator under the Dekkhan Agriculturists' Relief Act for the settlement of his claims under the mortgages or for a certificate. The proceeding ended in an agreement under which some of the properties included in the mortgages were omitted and others were given in possession of the mortgagee as security for the mortgage-debt. The properties having been in

² First Appeal No. 167 of 1921.

1921.

GANESH
EKNATHBHAUSAHEB
BHAVANRAO.

possession of tenants, the mortgagee was entitled to receive the rent of Rs. 125 every year until the amount due was paid off. If there was shortage in rent in any year the mortgagee was authorised to recover the deficiency from the mortgagor.

After the death of Bhavanrao, the defendant obtained a declaration from the Court that the mortgages effected by Bhavanrao were inoperative after his death under the Bombay Hereditary Offices Act.

In 1919, the plaintiff filed an application to execute the decree based on the Kabulayat of 1881 by attachment and sale of the properties.

The Subordinate Judge rejected the application for the following reasons :—

I am asked to execute the decree passed upon the conciliation agreement. Exhibit 3 is the Kabulayat of decree under execution. Now the decree provides for the method of the satisfaction of the decretal amount. Evidently this discharge of the decretal debt must work itself out in the way ordered by the decree ; and the decree directs that the mortgage of Rs. 5,000 and odd will be defrayed automatically out of the profits of the lands to be received by the mortgagee. The decretal amount carried no interest. In the place of the prescribed mode of satisfaction I am now asked to substitute another mode which, it seems to me, the law does not permit me to do. I am an executing Court and cannot afford to travel even an inch beyond the decree.

The plaintiffs appealed to the High Court.

The appeal was placed for admission before Fawcett, J.

D. A. Tuljapurkar, for the appellant.

FAWCETT, J.:—The Subordinate Judge has held that the application in effect asks him to vary the prescribed mode of satisfaction under the decree on the award and that as an executing Court he cannot do so. It seems to me that he is justified in that view ; for the award decree clearly contemplates satisfaction

by payment of an annual sum out of the profits of certain mortgaged lands, whereas the Court is now asked to recover the full amount due by attachment and sale of other property in the hands of the mortgagor or his legal representatives.

The appellant's pleader relies on the provision in the decree that, if the payment should fall short of Rs. 125 in any particular year, then the mortgagor should make good the amount from his other private resources. It is open to question whether that particular provision is a valid one, in view of the decisions in *Hargovandas v. Mohanbhai*⁽¹⁾ and *Damodar v. Vyanku*⁽²⁾ to the effect that no money decree against a mortgagor can come into existence until the stage provided for by section 90 of the Transfer of Property Act (now Order XXXIV, Rule 6, Civil Procedure Code) has been reached. That stage has certainly not been reached in the present case. But even assuming that this particular provision could be authority for the application now under consideration, it seems to me that this will not avail the applicant. The real objection to the Darkhast is the fact that under the ruling in *Padapa v. Swamirao*⁽³⁾ the mortgage was in its inception void against the heir of the Vatandar. That being so, any arrangement, or even any decree, based on the mortgagee's rights under such mortgage must also be void against the heir of the Vatandar. Such an arrangement or decree cannot be put on any higher footing than the transaction of mortgage on which it is based. No doubt it is possible that the applicant may have certain rights to recover what the opponent's father has failed to pay under the decree, e.g., in consequence of the liability of a Hindu son to pay the debts of his father. But that is an entirely

1921.

GANESH
EKNATH
v.
BHAUSAHEB
BHAVANRAO.

(1) (1900) 2 Bom. L. R. 225. (2) (1906) 31 Bom. 244.

(3) (1900) 24 Bom. 556.

1921.

GANESH
EKNATH
v.
BHAUSAHEB
BHAVANRAO.

distinct cause of action, and the Subordinate Judge has rightly held that any such claim can only be made in a properly framed suit. It is obviously not a case that can be dealt with under section 47, Civil Procedure Code, for the claim will not be one relating to the execution, discharge or satisfaction, of the decree but will arise from a right different from applicant's rights under the decree. The appeal is, therefore, summarily dismissed.

Appeal dismissed.

R. R.

APPELLATE CIVIL.

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

1921.

August 9.

KUSHABA RAMJI THOKE AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS v. BUDHAJI SAKHARAM THORAT AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS^o.

Civil Procedure Code (Act V of 1908), sections 11, 47, Order XXXIV, Rules 7 and 8—Mortgage—First decree for redemption of mortgage—Provision in the decree that if the mortgage was not redeemed the mortgagor was debarred from all rights to redeem—Mortgage not redeemed—Second suit for redemption does not lie.

In 1897, the plaintiffs obtained a redemption decree which provided that if the mortgagors failed to pay the mortgage money within the time provided by the decree, they should be finally debarred from all rights to redeem. The mortgage was not redeemed. The plaintiffs sued again in 1917 to redeem the mortgage :—

Held, that the second suit for redemption did not lie.

Ramji v. Pandharinath⁽¹⁾, explained.

PER MACLEOD, C. J. :—"There is a certain amount of inconsistency between Rules 7 and 8 of Order XXXIV of the Civil Procedure Code."

"A preliminary decree" in a redemption suit, "ought not to direct more than this, that if the plaintiff makes a default then the mortgagee should have a

^o Appeal from Order No. 65 of 1920.

⁽¹⁾ (1918) 21 Bom. L. R. 56.