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the very last resort of construction to make any such assumption. The great usefulness of the illustrations, which have, although not part of the sections, been expressly furnished by the Legislature as helpful in the working and application of the statute, should not be thus impaired." Moreover a comparison of the language used in sections 10A, 11 and 12, which all occur in the 3rd Chapter of the Act, yields the same result. For, whereas the words used in section 10A are "any suit or proceeding to which an agriculturist is a party", those used in sections 11 and 12 are "suit of the description mentioned in section 3." That this variation of language is not attributable to a desire of improving the style or of avoiding repeated use of the same words, becomes obvious on a mere reading of sections 11 and 12 themselves. In my opinion, therefore, section 10A has a wider operation than what is contended for on behalf of the appellants; and this construction best harmonizes with the object which the Legislature had in view in passing the enactment.

Appeal dismissed : case remanded.

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APPELLATE CIVIL.

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

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January 17.

HANMANT TIMAJI DESAI AND OTHERS (ORIGINAL DEFENDANTS),
APPELLANTS v. RAGHAVENDRARAO GURURAO DESAI (ORIGINAL
PLAINTIFF), RESPONDENT*.

*Decree—Mortgage decree—Execution—Payment in instalments—Failure to
pay instalments—Payment, appropriation of.*

A decree passed on a mortgage, dated 1904, made the decretal amount payable in annual instalments, and provided that on failure to pay two instalments, the whole decree could be executed by sale of the mortgaged property

*First Appeal No. 157 of 1921.

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any time after six months from the date of default in payment of the second instalment. The first instalment which fell due in August 1916, was paid in time. On failure to pay the second instalment in July 1917, the decree-holder applied to recover the amount of the instalment from the persons of the defendants or from other property of theirs. During the pendency of this application, the instalments for 1918, 1919 and 1920 were paid up and appropriated towards those instalments. The executing Court ordered execution to proceed against the other property of the defendants. On defendants' appeal :—

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Held, reversing the order, that the personal remedy on the money claim against the mortgagors (defendants) having been barred, the only way in which the mortgagee could recover his money was by sale of the mortgaged property.

Held, further, that it was the duty of the Court, when instalments were paid, to appropriate them to the earliest instalment unpaid, and that the debtor could not allow such earlier instalment to remain unpaid, unless at the time he made the payment the instalment had been already barred by limitation.

FIRST appeal from the decision of J. H. Betigeri, First Class Subordinate Judge at Dharwar.

Execution proceedings.

The defendants mortgaged their land to the plaintiff in 1904.

The plaintiff sued on the mortgage and obtained a decree in 1915 for Rs. 14,000. The amount was made payable in annual instalments of Rs. 1,300 each, and the last instalment was of Rs. 1,000. It was provided that if there was default in the payment of two instalments, the decree-holder was to wait for six months from the date of the second instalment, and he was then at liberty to recover the amount of all instalments then due by sale of the mortgaged property.

Under the decree the first instalment became due in 1916 ; it was paid in time.

In 1917, the second instalment became due. It was not paid. The plaintiff applied to the Court to recover the amount of the instalment by sale of a

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portion of the mortgaged property. The Darkhast was dismissed on the ground that it was premature (44 Bom. 981).

In April 1920, the defendants obtained a money-decree for Rs. 2,040 against one Shrinivas Murhar.

The plaintiff applied in July 1920 to recover the amount of the second instalment by attachment of the decree for Rs. 2,040. The defendants contended that the decree was already satisfied.

The executing Court was of opinion that the plaintiff was entitled to recover the amount claimed either from the persons of the defendants or from any other property of theirs excepting the mortgaged property. It therefore ordered the parties to lead evidence on the question whether the decree of 1920 was satisfied.

In the meanwhile, three more instalments which had become due were paid in. They were applied towards the instalments of 1918, 1919 and 1920.

The defendants appealed to the High Court.

N. V. Gokhale, for the appellants.

A. G. Desai, for the respondent.

MACLEOD, C. J. :—The plaintiff obtained a decree on an award on the 8th October 1915, whereby it was directed that the defendants should pay to the plaintiff Rs. 14,000 by eleven instalments; that the first ten instalments were to be paid by annual instalments of Rs. 1,300 each, and the last instalment was to be one of Rs. 1,000; that the defendants should pay the instalment every year on 1st August to the plaintiff; that the first instalment was to be paid on 1st August 1916; that if the defendants failed to pay any two instalments out of the said instalments, the said two instalments should be paid within six months from the date of

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default to pay the second instalment ; and that in case of failure to pay the said two instalments within six months accordingly, the plaintiff should recover the whole amount of the said two instalments and the future instalments that remained unpaid on that day, and costs, by sale of the property mentioned in the deed of mortgage without possession.

The date of the mortgage on which the decree was passed was 8th September 1904. It is quite clear that any personal remedy against the mortgagor would be barred by limitation. The first instalment was paid on the 1st August 1916, but the second one not having been paid, the plaintiff applied in July 1918 for execution of the decree by selling a portion of the mortgaged property to realize the amount of the second instalment. The defendant contended that the property could not be sold unless two instalments were in arrears, and the matter came up to the High Court on appeal from the decision of the Subordinate Judge allowing execution to proceed: *Hanmant Timaji v. Raghavendra Gururao*⁽¹⁾. It was held that the application for execution was premature. But from the judgment of Mr. Justice Shah it might be inferred that the Court was of opinion that a suit might have been filed to recover Rs. 1,300, the instalment due, and in that suit a decree might be obtained for sale of the mortgaged property or sufficient to satisfy the payment of the instalment in arrear. With due respect we doubt very much if that was a correct reading of Order XXXIV, Rule 14, Civil Procedure Code.

But at present we are concerned with a later Darkhast taken out by the plaintiff by which he sought to recover the instalment which fell due on the 1st August 1917 by attaching other property of the

⁽¹⁾ (1920) 44 Bom. 981.

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defendant, namely, the decree which he had obtained against one Shrinivas Murhar in the Court of Haveri. The Judge said "the most important question which I have to decide is, therefore, whether plaintiff can proceed now against the persons of the defendants, or their property other than that mortgaged to him in Exhibit 4", and he found that the plaintiff was entitled to recover the amount claimed either from the persons of the defendants or from any property of theirs excepting the mortgaged property in Exhibit 4.

It was eventually found that the decree which was attached had been fully satisfied. Therefore in the ordinary course the Darkhast would fall to the ground. But the point decided against the defendants was that in the case of any one instalment remaining unpaid after the due date, the plaintiff could execute against the persons of the defendants or against any property belonging to them, other than the mortgaged property. That is an important question, and it appears to us that it was wrongly decided by the Court below.

It seems clear that where the decree only gives the mortgagee a remedy against the mortgaged property, the personal remedy on the money claim against the mortgagor being barred, the only way in which the mortgagee can recover his money is by sale of the mortgaged property. The decree directs that execution should only issue against the mortgaged property in the event of two instalments being in arrears for six months, and it may be that if one instalment remains in arrear, and the plaintiff may be running the risk of losing that instalment, he would be entitled to file a suit for the payment of that instalment, which could be recovered by sale of the mortgaged property; and it seems if the decree is construed strictly that would be the only way in which he could recover the

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last instalment, the others having been duly paid, since it could not be said that two instalments were in arrears as that was the sole condition under the decree on which the sale could be directed.

However it is not necessary to decide that point at present. But it seems that although four instalments had been paid under the decree, the last three instalments had been credited to the instalments for 1918, 1919 and 1920, leaving the instalment for 1917 still unpaid. The result might be that recovery of that instalment, if the remaining instalments were paid according to due dates, would become barred entirely, and we do not think that that was the intention of the Court when the decree was drawn up. It would be the duty of the Court, when instalments are paid, to appropriate them to the earliest instalment unpaid. The debtor cannot allow such earlier instalment to remain unpaid, unless at the time he makes the payment the instalment was already barred by limitation. It seems to us, therefore, that this decree should be considered as if instalments up to 1919 had been paid, and the instalment for 1920 remained due. Any instalment paid hereafter will be appropriated according to date, so that as soon as two consecutive instalments are in arrears, then the plaintiff will be entitled to execute by sale of the mortgaged property. The appeal would be allowed and the Darkhast will be amended according to this judgment so as to show that the instalment for 1920 is in arrear, and not for 1917. The fresh Darkhast now filed should also be amended according to this judgment. The appellant to get costs of the appeal.

Appeal allowed.

R. R.