

APPELLATE CIVIL

Before Mr. Justice Dixit.

NANALAL BHOGILAL CHOKSHI AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 2), APPELLANTS *v.* AMBALAL SOMNATH (ORIGINAL DEFENDANT NO. 3), RESPONDENT.*

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Jan. 24

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1—Suit on mortgage by a prior mortgagee—Subsequent mortgagee added as defendant—Consent decree—Amounts due on mortgages exceeding pecuniary jurisdiction of the Court—Jurisdiction of Court to pass decree not lost—Decree in favour of subsequent mortgagee relates to suit—Decree executable—Execution proceedings.

In a mortgage suit by a prior mortgagee in which a subsequent mortgagee in respect of the same property is added as a defendant, the jurisdiction of the trial Court to pass a consent decree is not lost even if the amounts claimed on the prior and subsequent mortgages taken together exceed the pecuniary jurisdiction of the Court.

Ganpatrao v. Shamrao,⁽¹⁾ *Shailendrakumar Palit v. Haricharan Sadhukhan,*⁽²⁾ referred to.

Under the law, to such a suit the subsequent mortgagee is a necessary party, and the investigation of the claim in respect of mortgages in his favour can form the subject matter of the decree. In the event of the mortgagor failing to pay the amount decreed in his favour, the decree becomes executable.

Bajirao v. Sakharam,⁽³⁾ referred to.

Second Appeal against the decision of M. D. Manek, Joint Judge at Ahmedabad, reversing the decree passed by T. J. Patel, Joint Civil Judge (Junior Division) at Ahmedabad.

Execution proceedings.

The facts material for the purposes of this report are fully stated in the judgment.

B. G. Thakor, for the appellant.

D. V. Patel, for the respondent.

DIXIT J. This is a second appeal in execution which raises an interesting question of jurisdiction.

The decree sought to be executed was passed on October 5, 1945. It was a decree by consent. The suit in which the decree was passed was suit No. 496 of 1942 filed by one Raval

* Second Appeal No. 307 of 1950.

⁽¹⁾ [1941] Nag. 194.

⁽²⁾ (1930) 58 Cal. 329.

⁽³⁾ (1930) 33 Bom. L. R. 463.

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Goculeshwar Maganlal in the Court of the Joint Civil Judge, Junior Division, Ahmedabad. The suit was to enforce a mortgage executed in his favour on May 6, 1932, by two defendants, who are father and son, and who are appellants in the present appeal. In the suit was also another party as defendant No. 3, who is the respondent to the present appeal. Defendants Nos. 1 and 2 effected three mortgages, subsequent to the first mortgage, in favour of defendant No. 3 and those three mortgages are dated December 16, 1932, November 27, 1933, and May 17, 1938. The mortgage in favour of the plaintiff was one in order to secure a sum of Rs. 1,200 and the mortgages in favour of defendant No. 3 were respectively to secure Rs. 1,300, Rs. 1,500 and Rs. 4,000. The mortgage in favour of the plaintiff was one with possession.

In the suit in question the plaintiff and the defendants came to an agreement or compromise and the agreement was embodied in a decree. There are several parts of the decree which are set out in the appellate judgment. Nothing turns upon the terms of the decree, so that it is not necessary to refer to those terms in any detail in this place.

Briefly stated, the decree, so far as it is relevant to the present appeal, is to the effect that defendants Nos. 1 and 2 were to pay defendant No. 3 a sum of Rs. 7,000 in respect of his mortgage claims in the manner provided in the decree.

In the year 1948 defendant No. 3 filed darkhast No. 394 to execute the decree when he was met with the objection that the decree was not executable. This plea found favour with the executing Court and in the result that Court disposed of the darkhast with costs on the decree-holder. From the order made by the executing Court defendant No. 3 preferred an appeal in the District Court, Ahmedabad, and the learned Joint Judge allowed the appeal of defendant No. 3, reversed the order of the executing Court and directed that Court to proceed with the execution application in accordance with law. From the appellate decree defendants Nos. 1 and 2 have come up in second appeal.

Upon this appeal Mr. B. G. Thakor for the appellants has taken up two points. In the first place, he contends that the consent decree passed on October 5, 1945, is one without jurisdiction, so that the executing Court cannot proceed to execute the decree. It is next contended that the relief which has been claimed by the respondent in the present darkhast did not

relate to the suit, that it was extraneous to the suit and that the respondent's remedy, if any, was to file a separate suit and not to proceed by way of an execution application. Each of the two points, if correct, is sufficient to disentitle the respondent to the relief claimed by him. But I am not satisfied that either of the two contentions is well-founded.

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Now, the principles as regards the powers of an executing Court are well settled. An executing Court cannot question the validity, legality or correctness of a decree. Its duty is to execute the decree except where it is shown that the Court passing a decree had no inherent jurisdiction to pass it. Bearing in mind these principles it is now necessary to turn to the circumstances in which the consent decree was passed. The suit filed by the original plaintiff was a suit to enforce a mortgage. To the suit he had joined not only the original mortgagors but also a subsequent mortgagee who is the present respondent. Under the provisions of O. XXXIV, r. 1, of the Code of Civil Procedure, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. It cannot, therefore, be urged that defendant No. 3 should not have been joined as a party to the suit. The suit which the plaintiff filed was a suit to enforce the mortgage in his favour. The mortgage was executed in order to secure a sum of Rs. 1,200 and the plaintiff as the first mortgagee sought by his plaint to recover a sum of Rs. 1,899. This was the valuation which the plaintiff put in the plaint and it is not in dispute that this was the correct valuation, having regard to s. 7 (*ix*) of the Court-fees Act. It is apparent, therefore, that the suit was properly instituted in the Court, in which it was instituted and Mr. Thakor for the appellants has not disputed that in such a suit the Court which made the decree would have jurisdiction to pass an appropriate decree. But he contends that inasmuch as the three mortgages in favour of the third defendant exceeded an amount of Rs. 5,000 which is the upward limit of the pecuniary jurisdiction of the Court which made the decree, the Court which passed the decree had no jurisdiction to pass it in favour of the third defendant because the amount awarded to the respondent was a sum of Rs. 7,000 and the amount due upon the three mortgages in favour of the respondent exceeded a sum of Rs. 5,000. A reference to rule 4 of Order XXXIV shows that a plaintiff suing upon a mortgage is entitled to apply for a final decree directing that the mortgaged property

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or a sufficient part thereof be sold, and the proceeds of the sale be paid into Court and applied in payment of his debt as indicated in that rule. The rule provides that after the plaintiff is so paid, the balance, if any, is to be paid to the defendant or other persons entitled to receive the same. In the face of this provision it is, I think, not open to the appellants to contend that the question of the mortgages in favour of the third defendant could not be gone into in the suit. A subsequent mortgagee is a necessary party under Order XXXIV, rule 1 and a subsequent mortgagee is interested in the amount realised at the sale of the property after a preliminary decree is passed. Now, the property which was the subject of mortgage in the plaintiff's favour was again the subject-matter of three mortgages in favour of the third defendant and I fail to see how it is possible to join a puisne mortgagee as a necessary party to the suit without mentioning his claims in the suit. You do not join a party as a necessary party to the suit unless he has some interest in the subject-matter of the suit. It is true that in this instance the amounts secured by the three mortgages aggregated to a sum exceeding Rs. 5,000 and it is this circumstance which has enabled the appellants to put forward the contention that the Court which passed the consent decree had no jurisdiction to make it. Now, this is a consent decree; but that surely will not avail the decree-holder if it is shown that the Court had no jurisdiction to pass it because consent of a party cannot confer jurisdiction upon a Court where no such jurisdiction exists in that Court.

The question to be decided, therefore, is whether the appellants are right in their contention that the original Court had no jurisdiction to pass this decree. For the reasons given above, it seems to me that the trial Court had jurisdiction to pass the decree for the reason that defendant No. 3 was a necessary party to the suit and that the three mortgages in his favour related to the same property. Question then is whether the circumstance of the three mortgages aggregating to a sum exceeding Rs. 5,000 would deprive the Court of its jurisdiction to pass the decree. It seems to me that this circumstance has nothing to do with that question. The question of jurisdiction has to be decided by reference to the allegations made in the plaint. Mr. Thakor for the appellants has conceded that the plaintiff had a right to file the suit in the Court in which it was filed and that the claim which the plaintiff put forward in the suit was a claim in respect of which the trial Court could grant a decree. Apart from authority, therefore, this

contention must be rejected. At the most, it was an irregular exercise of jurisdiction. However, fortunately for the respondent, there is a direct authority in his favour. That is the decision of the Nagpur High Court reported in *Ganpatrao v. Shamrao*.⁽¹⁾ It is enough to quote the head-note in that case which is as follows :—

“A mortgage suit in which a subsequent mortgagee who is added as a defendant wants his right to be investigated and decided, has to be valued for the purpose of jurisdiction *ad valorem* on the amount due on the plaintiff's prior mortgage, and jurisdiction of the trial Court is not lost if the amounts claimed on the prior and subsequent mortgages taken together exceed the pecuniary jurisdiction of the Court.

No Court-fees are payable on the claim under the subsequent mortgage.”

This case, in turn, relies upon the Calcutta case reported in *Shailendrakumar Palit v. Haricharan Sadhukhan*.⁽²⁾ It seems to me that both on the statutory provisions and on authority the contention urged in support of the appeal must, therefore, be rejected.

Mr. Thakor, however, argues that even if the Court had jurisdiction to pass the decree, the decree is not executable. The contention is based upon the assumption that the claim of the third defendant does not relate to the suit, the contention being that the proper remedy of the third defendant was to file a suit and not to proceed by way of execution. It seems to me that this contention must likewise fail. The expression “so far as it relates to the suit” has been judicially considered by Mr. Justice Madgavkar in the case of *Bajirao v. Sakhararam*⁽³⁾ and it is there observed that it is a very wide expression and may include something which was extraneous to the suit and which was never in question in the suit itself. In the present case the facts are stronger. The property mortgaged is the same. The suit was by a prior mortgagee to enforce his mortgage. Under the law to such a suit a subsequent mortgagee is a necessary party and in this suit the Court was concerned with the investigation of the claim both of the plaintiff as well as of the third defendant. I fail to see, therefore, how it can be said that the claim of the third defendant did not relate to the suit. If it relates to the suit, it can then well form the subject-matter of the consent decree and when the consent decree provided that in the event of defendants

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⁽¹⁾ [1941] Nag. 194.

⁽²⁾ (1930) 58 Cal. 829.

⁽³⁾ (1930) 33 Bom. L. R. 463.

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Nos. 1 and 2 not paying the amount as directed by the decree the third defendant was entitled to recover the amount by sale of the property, it seems to me that it is not possible to successfully contend that this part of the decree was, therefore, not executable. In my opinion, therefore, this contention must equally fail.

As the two contentions urged in support of the appeal fail, the appellate decision will have to be affirmed. The result is that this appeal fails and the same will be dismissed with costs.

Decree confirmed.

J. G. R.

APPELLATE CRIMINAL

Before Mr. Justice Rajadhyaksha and Mr. Justice Vyas.

STATE v. RAMNIKLAL N. JOSHI (ORIGINAL ACCUSED).*

1951
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Essential Supplies (Temporary Powers) Act (XXIV of 1946) s. 7—Essential Articles Restricted Acquisition and Possession Order, 1943, clause (2) sub-cl. (2) and clause 3A (1)—‘Normal quantity’, meaning of—Normal quantity prescribed for each individual essential article is not to be exceeded—Lumping together of various essential articles is not contemplated by the order—Order of discharge of accused—Filing of revision—Application by the State—Limitation—Six months from the date of decision complained against—Rules of the High Court, Appellate Side, Rule 73.

The object of the Essential Articles Restricted Acquisition and Possession Order, 1943, is to put a restraint on the acquisition and possession of essential articles so as to ensure fair and equal distribution of those articles amongst the public.

For calculating the normal quantity which a house-holder is deemed to require, one has to aggregate the quantities reckoned on the basis laid down in the Notification, i. e. in the light of the limit fixed for each essential article. The total quantity of any particular essential article in the possession of a person is not to exceed the limit fixed in the Notification issued under the proviso to clause (2) sub-clause (2).

For the determination of the ‘normal quantity’ the lumping together of the various essential articles is not contemplated by the order.

For filing a criminal revision application by the State the period of limitation is six months from the date of the decision complained against.

* Criminal Revision Application No. 1372 of 1950.