

## APPELLATE CIVIL.

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*Before Mukherjea and Latifur Rahman JJ.*

PURNA CHANDRA BHOWMIK

*v.*

BARNA KUMARI DEBI.\*

1939

May 11, 19.

**Execution**—*Mortgage of decree to be passed—Mortgagee, if can execute—Specific Relief Act (I of 1877), s. 42.*

The defendant executed a mortgage bond in favour of the plaintiff assigning by way of security the decree that would be passed in a suit instituted by him against a third party for recovery of money due on unpaid bills for work done. That suit resulted in a decree in favour of the defendant. The plaintiff then instituted a suit for a declaration that as assignee of the decree passed in favour of the defendant, he was entitled to realise the decretal amount amicably or by execution.

*Held* : (i) that the plaintiff was not an assignee of a mere right to sue, and the transfer being of a claim to a debt was valid in law ;

(ii) though the transfer was in the form of a mortgage the plaintiff was entitled to execute the decree.

*Abu Mahomed v. S. C. Chunder* (1) ; *Jewan Ram v. Ratan Chand Kissen Chand* (2) and *Khetra Mohan Das v. Biswa Nath Bera* (3) distinguished.

*Holroyd v. Marshall* (4) ; *Collyer v. Isaacs* (5) and *Palaniappa v. Lakshmanan* (6) relied on.

APPEAL FROM THE APPELLATE DECREE preferred by defendant No. 2.

The facts of the case and the arguments in the appeal appear fully in the judgment.

*Surajit Chandra Lahiri* and *Amares Chandra Roy* for the appellants.

*Narendra Krishna Dam* for the respondent.

*Cur. adv. vult.*

\*Appeal from Appellate Decree, No. 344 of 1938, against the decree of K. K. Hajara, District Judge of Murshidabad, dated Dec. 10, 1937, reversing the decree of Satya Gopal Mukherji, first Munsif of Berhampore, dated July 20, 1937.

(1) (1909) I. L. R. 36 Cal. 345.

(2) (1921) 26 C. W. N. 285.

(3) (1924) I. L. R. 51 Cal. 972.

(4) (1861) 10 H. L. C. 191 ; 11 E.R. 999.

(5) (1881) 19 Ch. D. 342.

(6) (1893) I. L. R. 16 Mad. 429.

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MUKHERJEA J. This appeal is on behalf of defendant No. 2 and it arises out of a suit commenced by the plaintiff for a declaration that, as an assignee of a decree passed in Money Suit No. 252 of 1928, he was entitled to realise the decretal amount amicably or by execution of the decree. The facts lie within a narrow compass and are for the most part undisputed.

The defendant No. 1 filed a suit, being Money Suit No. 258 of 1928 in the Court of the Subordinate Judge of Berhampore against the London Mission Society and another person, for recovery of a sum of Rs. 7,997-0-5 pies only. The defendant No. 1 borrowed money at different dates from the plaintiff aggregating to Rs. 1,500, to carry on this litigation and on August 23, 1932, he executed a mortgage-bond in favour of the plaintiff, assigning, by way of security, the decree that would be passed in the money suit instituted by him. The stipulation was that the plaintiff would be entitled to realise out of the decretal amount the sum of Rs. 1,500 due to him together with interest at the rate mentioned in the document. On March 8, 1934, a decree was passed in favour of defendant No. 1 in the money suit for a sum of Rs. 2,566-10-0 only. On appeal to this Court preferred by the defendants it was further reduced to Rs. 1,743-2-0. The judgment of this Court is dated December 22, 1936. The plaintiff now wants a declaration that, on the strength of the mortgage-bond mentioned aforesaid, she is entitled to have her dues realised out of the amount payable under the decree mentioned aforesaid. As the defendant No. 2 purported to be a subsequent transferee of the same decree under a conveyance executed on April 20, 1934, he was made a party to the suit as it was necessary to have the declaration in his presence.

The defendant No. 1 did not contest the suit. It was contested by the defendant No. 2 alone. His contention in substance was that the plaintiff was a

mere *benâmdâr* of the defendant No. 1 and there was no consideration for the alleged mortgage-bond. It was further pleaded that the plaintiff acquired no rights under the decree passed in Money Suit No. 258 of 1928 which was sold to defendant No. 2 for money due to the latter by defendant No. 1 who was stated to be a partner in the former's business.

The trial Court dismissed the plaintiff's suit, primarily on the finding that the mortgage-bond upon which the plaintiff rested his case was a *benâmi* document, which was not supported by any consideration.

On appeal, the judgment was reversed. The District Judge, who heard the appeal, held on evidence that the mortgage-bond was for consideration and that the plaintiff as an assignee of the decree was entitled to execute it. It is against this decision that the present Second Appeal has been preferred.

Mr. Lahiri, who appears for the appellant, has urged a number of points in support of his appeal. His first contention is that, as a decree for a definite sum of money was not in evidence at the date when the mortgage-bond was executed in favour of the plaintiff, she was an assignee only of a right to sue which is not alienable under the Transfer of Property Act. The plaintiff, therefore, has not acquired any rights under the decree and cannot claim to execute it. In support of this contention the learned advocate has relied upon certain decisions of this Court which are to be found in the cases of *Abu Mahomed v. S. C. Chunder* (1); *Jewan Ram v. Ratan Chand Kissen Chand* (2) and *Khetra Mohan Das v. Biswa Nath Bera* (3). I do not think that this contention is sound. It is true, as was laid down in all these decisions, that the right to sue for damages of an unascertained amount resulting from a breach of contract could not be transferred. What is

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assignable is the benefit of the contract before any breach occurred. As the breach discharges the contract nothing remains after that but the mere right to sue for damages which is not assignable in law. This principle, however, is of no assistance to the appellant in the present case. Here the plaintiff in the money suit did not sue for damages arising out of a breach of contract. He did certain building works for the defendants in the suit and some bills were unpaid. A suit was brought to recover the money due on these unpaid bills. In my opinion, what was transferred was the claim to a debt and as such would come within the definition of actionable claim as given in s. 3 of the Transfer of Property Act. The mere fact that the claim was reduced by the Court did not make, in my opinion, any difference. It cannot be disputed that an assignment of future or non-existing property is quite valid and the transfer becomes operative as soon as the property comes into existence: *Holroyd v. Marshall* (1); *Collyer v. Isaacs* (2); *Palaniappa v. Lakshmanan* (3). Here the mortgage must be deemed to have attached itself to the decree which was for a definite amount as soon as a decree was passed and I am unable to agree with the appellant that what was transferred was a mere right to sue.

The second argument that is put forward is that the plaintiff was at best a mortgagee in respect of the rights under the decree and unless she purchased the entire rights of the decree-holder she could not rank as an assignee of the decree and was not entitled to execute it as such. The assignment was undoubtedly by way of mortgage and not of the entire rights of the assignor. What the assignee was entitled to under the terms of the instrument was to realise the sum of Rs. 1,500 together with interest on the decretal amount and she was to pay the balance, if any, to the assignor. She was, therefore, an assignee

(1) (1861) 10 H. L. C. 191 ;  
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(2) (1881) 19 Ch. D. 342.

(3) (1893) I. L. R. 16 Mad. 429.

of the decree for the purpose of realising the amount due on the mortgage-bond and she was competent under the terms of the bond itself to institute proceedings for recovery of the amount. I think there is nothing wrong in the form of the relief that has been granted to her by the Court below.

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The third ground put forward by the appellant is that the suit which was one for a pure declaration was bad under s. 42 of the Specific Relief Act and the plaintiff ought to have prayed for consequential relief in the shape of a permanent injunction restraining the defendant No. 2 from executing the decree. This argument is manifestly untenable. All that the plaintiff could want possibly at the present stage was a declaration that she was an assignee of the decree and if she gets a declaration it would be open to her to apply for execution of the decree under O. XXI, r. 16, of the Code of Civil Procedure. No other consequential relief by way of injunction or otherwise could or should have been prayed for by the plaintiff in the present suit.

The last argument of the appellant is directed against the finding of the lower appellate Court that the mortgage-bond was not a *benāmi* transaction and was supported by consideration. This is a finding of fact even though there is no other evidence except that of the plaintiff's husband in support of it. In my opinion, the Court of appeal below has given reasons for this finding and the finding being based on evidence is unassailable in Second Appeal. It may be that the defendant No. 2 is himself duped by the defendant No. 1, but there is no reason why another innocent person should suffer.

In the result we dismiss the appeal, but, regard being had to the circumstances, we make no order as to costs.

LATIFUR RAHMAN J. I agree.

*Appeal dismissed.*