

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

JIVARATHNAM MUDALIAR (SECOND DEFENDANT-SECOND
RESPONDENT), APPELLANT,

1907
September
13, 26.

v.

SRINIVASA MUDALIAR (TRANSFEREE PLAINTIFF-
PETITIONER), RESPONDENT.*

Civil Procedure Code, Act XIV of 1882, ss. 232, 233—Transfer of property Act, Act IV of 1882, s. 99—Transferee decree-holder cannot bring to sale property which the decree-holder could not bring to sale under s. 99 of the Transfer of Property Act.

A transferee decree-holder is only entitled, under section 232 of the Code of Civil Procedure, to execute the decree in the same manner and subject to the same conditions as if the application were made by the original decree-holder, and, under section 233, he holds the decree subject to any equities which the judgment-debtor might have enforced against the original decree-holder. A transferee decree-holder cannot in execution bring to sale property, which the original decree-holder is prohibited from bringing to sale by section 99 of the Transfer of Property Act.

Chhagan Guman v. Lakshman Dagdu, (9 Bom. L. Rep., 728), approved and followed.

Chundra Nath Dey v. Burroda Shoondury Ghose, (I. L. R., 22 Cal., 813), approved.

Bank Bal v. Manni Lal, (I. L. R., 27 All., 450), dissented from.

THE facts are fully stated in the judgment.

C. Balarama Rau for appellant.

P. Doraisami Ayyangar for respondent.

JUDGMENT.—In this case the plaintiff obtained a money decree in the Small Cause Court and transferred it to the respondent, who obtained leave to execute it under section 232 of the Civil Procedure Code. The decree was then transferred to the City Civil Court and the respondent sought to execute it by the attachment and sale of property belonging to the judgment-debtor, which was mortgaged to the original decree-holder. The judgment-debtor objected that, under the provision of section 99 of the Transfer of Property Act, the respondent was not entitled to

* Civil Miscellaneous Appeal No. 41 of 1907, presented against the order of M. R. Ry. C. V. Kumarasamy Sastriar, City Civil Judge of Madras, in Execution Petition Register No. 368 of 1906 in suit No. 6613 of 1905 on the file of the Small Cause Court of Madras.

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bring the mortgaged property to sale, but the Judge of the City Civil Court overruled the objection on the authority of *Banh Bal v. Manni Lal*(1), and ordered the attachment and sale of the mortgaged property. From this order the judgment-debtor appeals. Section 99 of the Transfer of Property Act provides that, where a mortgagee, in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches, the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section 67. The disability imposed by this section is a disability imposed on the mortgagee, and, if a mortgagee were to obtain a transfer of a money-decree to himself, he would clearly be debarred by the terms of the section from executing it against the mortgaged property. It might similarly be argued that, when a mortgagee obtains a money-decree and transfers it, the transfers does not come within the section which is only aimed at a sale of the mortgaged property by the mortgagee otherwise than by means of a suit under section 67. The rights of a transferee decree-holder are, however, regulated by sections 232 and 233 of the Civil Procedure Code, and his right to sell in the present case must be determined by the provisions of these sections. Under section 232 of the Civil Procedure Code he is only entitled to execute the decree in the same manner and subject to the same conditions as if the application were made by the original decree-holder, and section 233 provides that he is to hold the decree subject to the equities, if any, which the judgment-debtor might have enforced against the original decree-holder. In our opinion the transferee is prohibited from selling the mortgaged property in execution of the decree transferred to him by the first if not also by the second of these sections. By virtue of section 99 of the Transfer of Property Act the original decree-holder could only execute the decree subject to the condition of not bringing the mortgaged property to sale otherwise than by instituting a suit under section 67 of the Transfer of Property Act. In our opinion the transferee decree-holder took the decree subject to this condition, and the fact that it is not open to him to institute a suit under section 67 as he is not the mortgagee, does not relieve him from the condition of not bringing it to sale otherwise. This is the view

taken by the Bombay High Court in *Ohagan Guman v. Lakshman Dagdu*(1), with which we agree. In *Ohundra Nath Dey v. Byroda Shoondury Ghose*(2), it appears to have been taken for granted that a transferee decree-holder could not sell property which the original decree-holder was debarred from selling under section 99 of the Transfer of Property Act. With regard to *Banh Bal v. Manni Lal*(3), the learned Judges do not advert to the language of section 232 of the Civil Procedure Code and we are unable to agree with the conclusion at which they have arrived. There is, however, nothing in section 99 of the Transfer of Property Act to prohibit the attachment of the mortgaged property, and, in allowing the appeal, our decision is without prejudice to the earlier order of the 21st December 1906 directing the attachment of the mortgaged property. The respondent will pay costs in this and the lower Court.

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APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Miller.

RAGHAVAN, MINOR BY GUARDIAN SANKARA SASTRIAL
AND ANOTHER (DEFENDANTS—PETITIONERS), APPELLANTS,
v.
ALAMELU AMMAL AND ANOTHER (PLAINTIFFS—RESPON-
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Contract Act—Act IX of 1872, ss. 69, 70—Money paid for income-tax by the person assessed and on whom demand is made cannot under these sections be recovered from a person who is alleged to be the party really liable to pay.

When the income-tax authorities assess a person in respect of certain income alleged to be derived by him and recover the tax so assessed from him, such person cannot, under section 69 or section 70 of the Contract Act, recover the amount so paid from another person on the ground that such other was in actual receipt of the income. Section 69 cannot apply, as the latter person, not being assessed was not legally bound to pay the tax, and section 70 cannot apply as the person paying the tax did so on his own account and not on behalf of another.

(1) 9 Bom. L. Rep., 728.

(2) 1. L. R., 22 Calc., 813.

(3) 1. L. R., 27 All., 450.

* Appeal No. 23 of 1907, presented under section 15 of the Letters Patent against the judgment of Mr. Justice Boddam in Civil Revision Petition No. 486 of 1906, presented to the High Court to revise the decree of the Subordinate Judge's Court, Kumbakonam, in Small Cause Suit No. 132 of 1906.