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—
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way. It was the transferor who makes the lease; he wrote nothing, he made the lease if there was in fact a lease by agreeing orally with the defendant to allow him to hold on certain conditions. There is, so far as we can see, nothing to prevent the giving in evidence of Exhibit A in proof of the conditions. There is nothing in the evidence Act to prevent the proof of an oral agreement by documentary evidence.

We allow the appeal and, reversing the decree, remand the suit to the District Munsif for disposal according to law. Costs will abide the event.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

1909.
January 26.
February 17.

ABBAKKI (PETITIONER-PLAINTIFF), APPELLANT,

v.

KRISHNAYA (RESPONDENT-SECOND DEFENDANT), RESPONDENT.*

Transfer of Property Act, IV of 1882, ss. 88, 89, 90—Personal liability of mortgagor, if adjudicated in suit, not to be treated as a nullity.

Section 90 of the Transfer of Property Act read with sections 88 and 89 show that the proper procedure to follow in mortgage suits is to postpone the consideration of personal liability for the amount decreed until the need for it arises when the sale-proceeds of the mortgaged property prove insufficient to pay the decree amount.

It does not necessarily follow however that where, with the consent of the parties, the Court had decided the question in the course of the suit, such decision is to be considered a nullity.

The reopening of the question under section 90 will be barred by *res judicata*.

CIVIL miscellaneous appeal against the order of H. O. D. Harding, Esq., District Judge of South Canara, in execution Petition No 87 of 1907 (Original Suit No. 19 of 1904) on the file of the Subordinate Judge's Court of South Canara.

The plaintiff in a mortgage suit brought against the second defendant and others obtained a decree in the following terms:—

“This Court doth order and decree that the first or second defendant do pay to the plaintiff or into Court on or before 3rd November 1904 (i) Rs. 7,255-6-8 for the principal and interest

* Civil Miscellaneous Appeal No. 114 of 1908.

claimed, and (ii) Rs. 676-2-0 for his (plaintiff's) costs of the suit together with interest at 6 per cent. per annum on item No. 1 from the date of plaint (6th June 1904) and on the second item from this date (3rd August 1904) up to the date of payment. It is further ordered and decreed that if the net sale-proceeds realized as above be found insufficient, plaintiff do recover the balance from the first defendant personally."

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The mortgaged property was sold and the sale-proceeds having proved insufficient, the plaintiff applied under section 90 of the Transfer of Property Act to make the second defendant personally liable for the deficit.

The lower Court made the following order :—

"The decree was against the property and first defendant personally and not against second defendant personally. There was a finding on this point in second defendant's favour. This was never appealed against and is final. Plaintiff cannot bring second defendant in again under section 90. This petition fails and is dismissed with costs. Rs. 7 to be paid by petitioner to respondent."

Plaintiff appealed. The sixth ground of appeal was as follows :—

The Court had no jurisdiction to determine in the suit itself questions properly arising under section 90, Transfer of Property Act, and therefore any judgment in the suit on such questions is not binding on the parties.

B. Sitarama Rao for appellant.

G. Annaji Rao for respondent.

JUDGMENT—We think the order of the District Judge is right, and that the decisions in *Musaheb Zaman Khan v. Inayat-ul-lah*(1) and *Chandi Charan Roy Chowdhry v. Ambika Charan Dutt*(2) do not support the proposition which the appellant must establish if he wishes to succeed. Those cases do not lay down that, where the question of the personal liability of a mortgagor or his assignee was originally put directly in issue at the trial of the action and expressly adjudicated upon and negatived, and the decree which is in accordance with such adjudication is allowed to stand as final, even in such a case the decree-holder finding the sale-proceeds of the mortgaged property to be insufficient to satisfy his dues can apply under section 90, Transfer of Property Act, for an order for

(1) (1892) I.L.R., 14 All., 515.

(2) (1904) I.L.R., 31 Calc., 792.

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the sale of the property of the person whose personal liability for the debt he sought to establish in the suit but failed. We think the re-opening of the question would be clearly barred under the above circumstances by the principle of *res judicata*, and the learned Judges who decided *Musaheb Zaman Khan v. Inayat-ul-bih*(1) seem to recognise this as they do not question the soundness of the decision in *Batak Nath v. Pitambar Das*(2). The learned vakil who appeared for the appellant was driven in order to maintain his ground, to contend that in a suit to enforce a mortgage the Court is not competent to decide in the first instance the question of the personal liability of the defendant, although the parties themselves might have asked for such a decision and that it acquires jurisdiction to deal with that question only after the security has been sold and its sale-proceeds are found to be insufficient. It is enough to say that there is nothing in reason or in the code to warrant such a contention. No doubt section 90 read with sections 88 and 89 shows that the proper procedure to follow in mortgage suits is to postpone the consideration of the right of the plaintiff to sell the properties of the defendant until the need for it has actually arisen, and that is all that is pointed out in *Musaheb Zaman Khan v. Inayat-ul-lah*(1), *Batak Nath v. Pitambar Das*(2), *Maliaperumal v. Nachiappa*(3) and *Chandi Charan Roy Chowdhry v. Ambika Charan Dutt*(4). But that is not sufficient for the appellant's purpose, and we are not prepared to go further and to say that the decision in the first instance on the question of the personal liability of the second defendant is to be regarded as of no effect in law. As regards the construction of the decree we have no doubt; reading it in the light of the judgment and the pleadings, that it clearly negatived the right of the appellant to hold the second defendant personally liable for the debt to any extent whatever.

The appeal fails and is dismissed with costs.

(1) (1892) I.L.R., 14 All., 515.

(2) (1891) I.L.R., 13 All., 360

(3) (1895) 5 M.L.J., 294.

(4) (1904) I.L.R., 31 Calc., 792.