

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Pakenham Walsh.

VENKATA REDDI (PETITIONER—FOURTH DEFENDANT),
APPELLANT,

1932,
August 5.

v.

T. V. DORASAMI PILLAI (RESPONDENT—PLAINTIFF),
RESPONDENT.*

Code of Civil Procedure (Act V of 1908), O. XXI, rr. 18 and 20—Mortgage decree and money decree—Set-off of one against the other—Permissibility—Conditions.

The mere fact that the decrees in which the set-off is sought are mortgage decrees, or one of the two decrees is a mortgage decree, does not by itself amount to an objection to the set-off claimed.

A mortgagee against whom a money decree has been obtained by his mortgagor can claim to set off that decree against a decree for sale obtained by him against his mortgagor on foot of his mortgage in a case in which, under the decree for sale, the mortgagor is liable for all the deficiency that may remain after the sale. The position will be different if, under the decree for sale, the mortgagor is not liable for the deficiency. In such a case it cannot be said that there is any decree for money against the mortgagor.

APPEAL against the order of the Court of the Subordinate Judge of Vellore, dated 26th September 1928, and made in Execution Application No. 512 of 1928 in Execution Petition No. 86 of 1928 in Original Suit No. 1 of 1926.

B. Somayya for appellant.

C. S. Venkatachariar for respondent.

Cur. adv. vult.

* Appeal against Order No. 353 of 1928.

JUDGMENT.

VENKATA
REDDI
v.
DORASAMI
PILLAI.

RAMESAM J.

RAMESAM J.—In this case the appellant before us is the fourth defendant in Original Suit No. 1 of 1926. The plaintiff obtained a decree in that suit for Rs. 4,214-0-4 towards *peshkash* and road cess. In Original Suit No. 25-A of 1918, which was a suit for redemption of a mortgage, the defendant obtained a final decree for Rs. 6,908-14-4. This final decree is a decree directing the sale of the mortgaged property and, if there is any deficiency, it should be paid by the plaintiff. In the connected Appeal No. 35 of 1931 we have held that that final decree should not have been amended by the Subordinate Judge of Chittoor and should remain as it was originally passed. The result is the mortgage decree is a decree for an amount which in the last resort may have to be paid personally by the plaintiff. In the petition against which this civil miscellaneous appeal arises, Execution Application No. 512 of 1928, the fourth defendant seeks to set off the money decree against him in Original Suit No. 1 of 1926 against the mortgage decree obtained by him and to stop all further proceedings for his arrest in Execution Petition No. 86 of 1928 in execution of Original Suit No. 1 of 1926. The question of law that arises before us is whether the two decrees can be so set off against each other. Order XXI, rule 20, Code of Civil Procedure, now enacts :

“The provisions contained in rules 18 and 19 shall apply to decrees for sale in enforcement of a mortgage or charge.”

This shows that the mere fact that the decrees in which the set-off is sought are mortgage decrees, or one of the two decrees is a mortgage decree, does not by itself amount to an objection to the set-off claimed. I do not mean to say that there may not be some other objection. Without any other objection the mere fact

that one of the decrees is a mortgage decree is not enough to refuse the set-off. This is the view of the Allahabad High Court in *Nagar Mal v. Ram Chand*(1) and this was always the view of the Madras High Court prior to the Code of Civil Procedure of 1908. But the decision in *Nagar Mal v. Ram Chand*(1) had to be considered and was distinguished in *Sheo Shankar v. Chummi Lal*(2). In that case the decree is a foreclosure decree which is of a nature giving simply an option to the mortgagor to redeem and, if he does not, his right to redeem is simply foreclosed. It is not a decree to which ordinarily Order XXI, rule 20, applies. Therefore that case is distinguishable. But I will observe that even in a decree for sale it may be that the property is worth much less than the amount of the decree and the mortgagor may find it convenient to allow the property to be sold, and in such a case if he is not liable for the deficiency it cannot be said that there is any decree for money against him and it may be proper to describe the decree as one giving an option like the decree for foreclosure. In *Sheo Shankar v. Chummi Lal*(2) the person against whom the decree was sought to be set off was the purchaser of a portion only of the mortgaged property and he was under no personal liability. In such a case it may be said that he was filling a different character in the mortgage suit from the one in the decree sought to be set off. In the present case there is a personal decree against the plaintiff. By saying he is liable for all the deficiency that may remain after the sale, the true character of his liability is known. If the sale realizes nothing, he is liable for the whole amount. In such a case to say that the sale must first be held and only for the balance

VENKATA
REDDI
v.
DORASAMI
PILLAI.
—
RAMESAM J.

(1) (1910) I.L.R. 33 All. 240.

(2) (1916) LL.R. 33 All. 669.

VENKATA
REDDI
v.
DORASAMI
PILLAI.
—
RAMESAM J.

the judgment-debtor in the mortgage decree is personally liable is to look at the matter too technically and to cause unnecessary expense to the parties. In such a case it may be very equitable and just to deduct the amount of the money decree from the mortgage decree and to permit execution for the balance only. The case in *The Burma Oil Company, Ltd. v. Ma Tin*(1) is also a case of a mortgage decree in which it is not clear that the mortgagor will be liable personally for the deficiency. In that case the decree at the time the question arose was only against the property and the decree provided for liberty to apply for a personal decree for the amount of the balance and one does not know how the application may end. On the actual facts I think that the decisions in *The Burma Oil Company, Ltd. v. Ma Tin*(1) and *Sheo Shanker v. Chunni Lal*(2) are correct; but they do not apply to the facts of the case before us. Therefore in this case there is no objection to the set-off claimed. The set-off is a satisfaction of the decree to that extent and, if the balance after set-off is paid, the whole decree must be regarded as satisfied. We now direct the Subordinate Judge of Vellore to proceed with the execution of the mortgage decree after setting off the money decree towards it and to proceed with the execution for the balance. The appellant will be entitled to his costs in appeal. In the Court below, each party will bear his own costs.

PAKENHAM WALSH J.—I agree.

A.S.V.

(1) (1929) I.L.R. 7 Rang. 505.

(2) (1916) I.L.R. 38 All. 669.
