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the strictest rules." At page 42, Vol. I, of Ameer Ali's Muhammadan Law, 3rd edition, the author remarks:—"A *hiba bil mushaa* or gift of an undivided joint property, is not void, but only invalid, and possession remedies the defect." He goes on to cite various authorities in support of this view. The learned advocate for the respondents refers to the cases cited on page 434 of Macnaghten's Principles of Muhammadan Law and also to the opinion expressed by that author in paragraph 6, Chapter 5, page 50. It is not easy to reconcile all the authorities, but having regard to the findings of the Courts below that Ayesha did get possession of her half, and to the passage cited from the judgment of the Privy Council, I am of opinion that the appeal must succeed. I accordingly set aside the order of the Court below and restore the order of the Court of first instance. The appellant will have his costs here and in the Court below.

Appeal decreed.

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April 2.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

PHUL CHAND AND ANOTHER (DEFENDANTS) *v.* CHAND MAL, (PLAINTIFF).*

Civil Procedure Code, section 266—*Execution of decree—Attachment—Mortgage—Right of mortgagor in respect of mortgage money promised but not paid.*

Where money promised as a loan by a mortgagee is not advanced in full, the mortgagor is only entitled to recover, if anything, damages for non-payment of the balance: he cannot sue for specific performance of the agreement to lend the full sum promised, and the non-payment of a portion of the loan does not constitute a debt which can be the subject of attachment and sale under section 266 of the Code of Civil Procedure. *The South African Territories Company, Limited* v. *Wallington* (1) referred to.

THE facts of this case are as follows. On the 18th of April 1903 one Sheo Ram and another executed two mortgages in favour of the defendants Phul Chand and Gulab Chand to secure the principal sums of Rs. 1,000 and Rs. 6,000 respectively. It has been found that only Rs. 2,135-11 were paid by the mortgagees and that the remainder is unpaid. Some creditors of the

* First Appeal No. 198 of 1906, from a decree of Parmatha Nath Banerji, Subordinate Judge of Jhansi, dated the 28th of May 1906.

(1) [1898] A. C., 309.

mortgagors obtained a money decree against them and in execution of that decree proceeded to attach what they described as the right of the mortgagors to receive the balance of the mortgage money and put this up for sale. This so-called right was purchased by the plaintiff on the 25th of November 1903. The suit out of which this appeal has arisen was then instituted by the plaintiff against the mortgagees for recovery of the amount alleged to be due by them and a decree for portion of the amount claimed was passed in favour of the plaintiff. The mortgagees thereupon appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellants.

The Hon'ble Pandit *Sundar Lal* and Babu *Durga Charan Banerji*, for the respondent.

STANLEY, C. J., and BURKITT, J.—The question involved in this appeal is one out of the ordinary course. On the 18th of April 1903 one Sheo Ram and another executed two mortgages in favour of the defendants Phul Chand and Gulab Chand to secure the principal sums of Rs. 1,000 and Rs. 6,000 respectively. It has been found that only Rs. 2,135-11 were paid by the mortgagees and that the remainder is unpaid. Some creditors of the mortgagors obtained a money decree against them and in execution of that decree proceeded to attach what they described as the right of the mortgagors to receive the balance of the mortgage money and put this up for sale. This so-called right was purchased by the plaintiff on the 25th of November 1903. The suit out of which this appeal has arisen was then instituted by the plaintiff against the mortgagees for recovery of the amount alleged to be due by them and a decree for portion of the amount claimed was passed in favour of the plaintiff. The present appeal was then preferred, and the main ground of appeal is that there was no debt due by the mortgagees to the mortgagors which could be attached within the meaning of section 266 of the Code of Civil Procedure; that the promises of the mortgagees to lend the amounts mentioned in the mortgage-deeds did not constitute debts which could be attached, and that the only remedy, if any, of the mortgagors against their mortgagees was a suit for damages for breach of contract, if any damages could be proved.

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The question is not free from difficulty, but it appears to us that a decision of the House of Lords, which was brought to our notice by the learned advocate for the respondents, must be taken by us to be conclusive on the point. This is the case of *The South African Territories Company, Limited* v. *Wallington* (1). The facts of that case were shortly as follows. The plaintiff Company issued sixteen debentures to the defendant Wallington on his undertaking to pay the face value of the debentures by instalments. Wallington paid some of the early instalments, but failed to pay the balance, and thereupon a suit was instituted against him for specific performance of his agreement or for damages. Wright, J., before whom the trial took place, held that the claim for specific performance could not be sustained, but gave judgment for the plaintiff Company for damages on the ground that a debt had been created by the defendant's promise to pay, contained in his letter of application for the debentures. Judgment was entered for the plaintiffs for £520, the amount of the instalments due and unpaid up to the date of the writ, and costs. An appeal was preferred, which was heard by Lord Esher, M. R., and Lopes and Chitty, L. J. J., who reversed the decision of the Court below and entered up judgment for the defendant. An appeal was preferred to the House of Lords, with the result that the decision of the Court of Appeal was upheld. Their Lordships held that on the default of Wallington to make the payments which he had undertaken to pay, the moneys remaining due by him for unpaid instalments did not constitute a debt to the Company; that the Company was only entitled to damages for actual loss caused by the breach of contract. Lord Halsbury, L. C., in his judgment, with respect to the claim for specific performance, remarked that "a long and uniform course of decision has prevented the application of any such remedy, and I do not understand that any Court or any member of any Court has entertained a doubt but that the refusal of the learned Judge below to grant a decree for specific performance was perfectly right. But of course in this, like any other contract, one party to the contract has a right to complain that the other party has broken it, and if he establishes that proposition he

(1) [1898] A. C., 309

is entitled to such damages as are appropriate to the nature of the contract." Lord Watson in the course of his judgment observed that "the only engagement made by the respondent with the Company consisted in a promise to advance money to them in loan; and it is settled in the law of England that such a promise cannot sustain a suit for specific performance," and later on he says:—"The only remedy open to the Company was by action against the respondent for any loss or damage which they might sustain through his breach of promise." The other Lords endorsed this view, namely, that no suit will lie to compel a party to fulfil an agreement to advance money. This decision is in entire accord with the view which we expressed at an early stage of the hearing and carrying the weight which it necessarily does, must conclude this appeal. The mortgagees were never in a position to enforce specific performance of the agreement of the mortgagees to advance the full sum agreed to be lent by them. The unpaid portion of the loan did not constitute a debt due by them to the mortgagors such as could be attached under the Code of Civil Procedure. It may be that the mortgagors have some ground of complaint against the mortgagees, and they may be in a position to obtain damages for the breach by the mortgagees of their contract, but this matter is not before us and we express no opinion upon it. We merely hold that the plaintiff has no cause of action against the mortgagees. We allow the appeal, set aside the decree of the Court below and dismiss the plaintiff's suit with costs in both Courts.*

Appeal decreed.

* [Cf. Sher Singh v. Sri Ram, *Supra* p. 246—Ed.]