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to the Bank. It was held that there was a good equitable assignment of the debt to the Bank. It is unnecessary to consider whether the assignment would have been valid if the Kayastha Trading and Banking Corporation had refused to recognize the assignment, for it expressly recognized the assignment. It is quite clear that, with consent of the Banking Corporation, if not without it, Majid Husain Khan was entitled to assign to any person whom he pleased either absolutely or by way of a charge the debt due or about to become due to him, from the Banking Corporation. It seems to us quite clear that in the present case there was an effective transfer of the debt due to Majid Husain Khan in favour of the Gorakhpur Bank by way of a charge. Therefore the Gorakhpur Bank were entitled to a charge on the fixed deposit as against the attaching creditors. The appeal fails and is dismissed with costs.

Appeal dismissed.

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May, 27.

Before Mr. Justice Ghamier and Mr. Justice Muhammad Rafiq.

NARAIN DIKSHIT (DEFENDANT) *v.* BINAIK BHAT AND ANOTHER (PLAINTIFFS)*

Civil Procedure Code (1908), *order XLI, rule 4—Appeal—Discretion of court—Decree based on ground common to all defendants—Court not bound to set aside decree as against non-appellant defendant.*

Where an appellate court reverses a decree in favour of a plaintiff upon grounds common to all the defendants, it is not bound to set aside the decree as against a defendant who has not appealed from it. *Seshadri* v. *Krishnan* (1) referred to.

THE facts of this case were as follows:—

The plaintiff sued to recover Rs. 1,939, on the basis of a mortgage executed by one Gajadhar deceased (uncle of defendant No. 1 and grand uncle of defendants Nos. 2 and 3). Defendant No. 1 pleaded that the bond was not genuine and that Gajadhar was not the manager of the family and had no right to alienate joint family property. Defendant No. 4, the minor Maharaja of Ajudhia, pleaded that the piece of land which was alleged to be Gajadhar's was endowed property. The first court gave a decree in favour of the plaintiffs. On appeal by the receiver of the

* Second Appeal No. 439 of 1913 from a decree of G. A. Paterson, District Judge of Benares, dated the 10th of December, 1912, modifying a decree of Ganga Sahai, Additional Subordinate Judge of Benares, dated the 15th of April, 1912.

(1) (1884) I. L. R., 8 Mad., 192.

Ajudhia estate the lower appellate court held that plaintiffs had failed to prove legal necessity, and dismissed the suit in so far as it affected the Adjudhia estate. The heir of the mortgagor who was not an appellant before the lower appellate court came up in second appeal.

Pandit *Rama Kant Malaviya*, (with the Hon'ble Dr. *Tej Bahadur Sapru*), for the appellant, submitted that, inasmuch as the court below had come to the conclusion that the plaintiff had failed to prove that Gajadhar had any valid legal necessity for borrowing the money, and had passed the decree on a ground common to all the defendants the suit ought to have been dismissed *in toto*. He referred to *Kulaikada Pillai* v. *Viswanatha Pillai* (1), *Abdul Rahiman* v. *Maidin Saiba* (2) *Mul Chand* v. *Ram Ratan* (3), *Intu Meah* v. *Dar Baksh Bhuiyan* (4) and *Seshadri* v. *Krishnan* (5).

Babu *Lalit Mohan Banerji*, for the defendants, submitted that the defendant's appeal did not fall within the purview of section 100 of the Code of Civil Procedure. Narayan Dikshit did not appeal from the decree of the court of first instance. The other defendants tried to set up a new case in the lower appellate court as Narayan Dikshit had tried to set up a case quite defferent to that set up by him in his written statement.

CHAMIER and MUHAMMAD RAFIQ, JJ.—This appeal arises out of a suit upon a mortgage. The plaintiff was the son of the mortgagee. Defendants 1 and 2 were the nephew and grand nephew of the mortgagor. Defendants 4 and 5 were representatives of the late Maharaja of Ajudhia, to whom part of the mortgaged property was transferred by the mortgagor after the mortgage. Defendants 6, 7, 8 and 10 were impleaded as trustees of part of the property under a deed of endowment executed by the Maharaja.

Defendant 1 pleaded that there was no legal necessity for the mortgage, and the same plea, among many others, was put forward by defendants 6 and 10.

The Subordinate Judge decreed the claim, holding that legal necessity for the mortgage had been proved.

(1) (1904) I. L. R., 28 Mad., 229. (3) (1898) I. L. R., 20 All., 493.

(2) (1896) I. L. R., 22 Bom., 500. (4) (1911) 15 C. W. N., 798.

(5) (1884) I. L. R., 8 Mad., 192.

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Defendants 5 and 10 appealed separately to the District Judge, who allowed both appeals, holding that legal necessity for the mortgage had not been established. The learned Judge dismissed the suit with costs so far as it related to the property in possession of the appellants before him. Defendant 1, who was a respondent in the court of the District Judge, contended that the suit should be dismissed altogether, but the District Judge expressly declined to do this.

Defendant 1 has appealed to this Court. As he did not appeal to the lower appellate court it is doubtful whether he has any right of appeal to this Court. We will assume, however, that he is entitled to appeal. It is urged, on his behalf, that inasmuch as the decree of the court of first instance proceeded on a ground common to all the defendants, i.e., that the mortgage was made for legal necessity, the District Judge on holding that legal necessity had not been made out was bound to reverse the decree in favour of all the defendants. Order XLI, rule 4, provides that the appellate court in such a case *may* reverse or vary the decree in favour of all the defendants. The use of the word *may* shows in our opinion that the appellate court is given a discretion in the matter. It may be that a wholly unreasonable and indefeasible exercise of this discretion might be a good ground for a second appeal. But we need not decide that, for the District Judge has considered the question and has given his reason for refusing to reverse the decree in favour of all the defendants and we are unable to say that his decision is unreasonable. We must, therefore, decline to interfere. The view which we have taken seems to be supported by the remarks of the Madras High Court in *Seshadri* v. *Krishnan* (1). The appeal is dismissed with costs.

Appeal dismissed.

(1) (1884) I. L. R., 8 Mad., 192.