

demeanour of the witnesses. It is perfectly clear that he did not believe the story put forward by Shammugam, supported by Sathappa and Naina, and it was inevitable that he should have been influenced in his judgment by the view he formed of the credibility of the witnesses as they were examined before him.

Their Lordships therefore are of opinion that there is no safe ground for differing from the conclusions of the trial Judge under all the circumstances, and they will humbly advise His Majesty that this appeal should be allowed, that the judgment of Das, J., and the decree dated the 9th March 1926, should be restored, and that the respondents should pay to the appellants both the costs of the appeal in the High Court of Judicature at Rangoon and of this appeal.

1929
NETHER-
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R.M.P.
CHETTIAR
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Solicitors for appellants : *Cutler, Allingham & Ford.*

Solicitors for respondents : *Bramall & Bramall.*

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Mya Bu.

THE BURMA OIL COMPANY, LTD.

v.

MA TIN AND OTHERS.*

1929

Apl. 11.

Civil Procedure Code (Act V of 1908), O. 21, rr. 18, 20—Cross decrees for money—Distinction between decree for money with personal remedy and without personal remedy—Decree for sale of property in enforcement of mortgage when a decree for payment of money under rule 18, and when not—Decree for sale of mortgage property without personal decree not a decree for sale in enforcement of a mortgage under rules 18 and 20.

A mortgage decree for the sale of the mortgaged property, while there is no remedy except against the property and where there is no obligation on the part of the mortgagor personally to pay any sum of money, is not a decree for

* Civil First Appeal No. 26 of 1929 from the order of the District Court of Magwe in Civil Execution No. 13 of 1928.

1929

THE
BURMA OIL
COMPANY,
LTD.
v.
MA TIN.

the payment of a sum of money, within the purview of Order 21, rule 18 of the Civil Procedure Code. Consequently such a mortgage decree-holder cannot claim to set off against the amount due to him in respect of the mortgage decree the amount due by him under a simple money decree to the other party. There is a material difference between a case where there is a personal remedy for money under the decree and a case where there is no such remedy. Rule 20 of Order 21 merely applies the provisions of Rule 18 to decrees for sale in enforcement of a mortgage, but where a decree does not enable a sum to be recovered otherwise than out of the property sold then such a decree is not an ordinary decree for sale in enforcement of a mortgage.

Sheo Shankar v. Chinni Lal. 38 All. 669—referred to.

Nagir Md v. Ram Chaud. 33 All. 240; *Vaidhinalhasamy v. Somasundaram,* 28 Mad. 473—distinguished.

Krishnan v. Venkatafathi, 29 Mad. 318—dissented from.

Mootham for the appellants.

N. M. Cowasjee and *Kyaw Din* for the respondents.

HEALD, J.—In 1907 two brothers, Po Kan and Po San, as owners of six oil-well sites, leased those sites to one Lim Chin Tsong for 25 years and in 1908 they mortgaged the same sites to the same Chin Tsong for Rs. 75,000. Chin Tsong assigned his rights under both the lease and the mortgage to the present appellants.

In Suit No. 21 of 1926 of the District Court of Magwe the present respondent Ma Tin, who was Po Kan's widow and sole heiress, and her father, the present respondent Po Gon, sued appellants to recover certain moneys which they alleged to be due in respect of the lease. Their case was that at the time of the lease Po Kan was the sole owner of the sites, Po San being merely his *benamidar*, that on Po Kan's death his widow Ma Tin became sole owner of the sites, that Ma Tin had assigned part of her interest in the sites to her father Po Gon, and that therefore Ma Tin and Po Gon as owners of the sites were entitled to moneys due in respect of the lease. In

the result they obtained a decree for over Rs. 25,000 but were ordered to pay certain costs and court-fees.

In Suit No. 25 of 1926 of the same Court appellants sued the same Ma Tin and Po Gon, as well as Po Kan's brother Po San for sale of the sites in enforcement of the mortgage. They impleaded Po San not only because he was a party to the mortgage but also because he claimed an interest in one of the sites on the strength of an award in respect of a claim which he had made against Po Kan's estate. Po San admitted, it may be noted, that Po Kan was sole owner of the sites at the time of the lease and the mortgage. Appellants obtained a final decree for the sale of the sites in enforcement of their mortgage for over a lakh and a quarter of rupees.

Appellants then claimed that under rule 18 read with rule 20 of Order 21 of the Code they were entitled to set off against the amount due to them in respect of the mortgage decree the amount due by them under the decree in Suit No. 21.

The Court held that in view of the fact that appellants had no personal remedy against respondents in respect of the mortgage debt, their debt which was due to respondents personally could not be set off against the amount of the mortgage decree.

Appellants appeal on the ground that the provisions of Order 21, rule 20 give them an absolute right to set off the one debt against the other.

Rule 20 says that the provisions contained in rule 18 shall apply to decrees for sale in enforcement of a mortgage, and the decree which appellants have obtained is undoubtedly a decree for sale in enforcement of a mortgage. If therefore the provisions of rule 18 can be applied to that decree they must be so applied.

1929
THE
BURMA OIL
COMPANY,
LTD.
v.
MA TIN.
HEALD, J.

1929

THE
BURMA OIL
COMPANY.
LTD.
v.
MA TIN.
—
HEALD, J.

Rule 18 says that where applications are made to the Court for the execution of cross decrees in separate suits for the payment of two sums of money passed between the same parties and capable of execution at the same time by such Court, then one of those two sums of money may be set off against the other. It says further that the holder of a decree passed against several persons jointly and severally may treat it as a cross decree in relation to a decree passed against him singly in favour of one or more of such persons. It goes on to say that the rule shall not be deemed to apply unless the decree holder in one of the suits in which the decrees have been made is the judgment-debtor in the other and each party fills the same character in both suits.

In the present case there is in my opinion no question that Ma Tin and Po Gon fill the same character in both suits. Ma Tin became owner of the properties which were leased and mortgaged as being her husband's sole heiress and she has since transferred part of her interest in the properties to her father Po Gon. In each case they were parties to the suit as being owners of the sites which were the subject in the one case of the lease and in the other of the mortgage. Application has been made to the Court for execution of both decrees and both decrees are capable execution by that Court at the same time. So far as Ma Tin and Po Gon were concerned the decrees were passed between the same parties, namely between them and appellants, and the provisions of clause 4 of rule 18 meet any objection on the score of Po Gon's being a party to one of the decrees. Thus far therefore it seems that the provisions of rule 18 are applicable to the present case. Nevertheless I find it difficult to hold that a mortgage decree for the sale of the mortgaged property, while

there is no remedy except against the property and where there is no obligation on the part of the mortgagors personally to pay any sum of money, is a decree for the payment of a sum of money.

Unfortunately the case law on the application of rules 18 and 20 of Order 21 is very meagre.

Appellants' learned advocate has referred us to the case of *Krishnan v. Venkatapathi* (1), which was decided before rule 20 of Order 21 became law. In that case a third party obtained a decree against Krishnan for the recovery of money by the sale of certain lands, while Krishnan held a simple money decree against the same third party. Venkatapathi attached the decree against Krishnan in favour of the third party in execution of a decree for money which he held against the third party. Krishnan objected to the attachment on the ground that he was entitled to set off the money decree, which was made against the third party in his favour, against the third party's decree against him for sale of the lands. The question to be decided was whether the decree for money could be set off against the decree for the sale of the lands, and the decision of the learned Judges was that the decree for the recovery of money by the sale of lands was essentially a decree for money and that therefore a decree for money could be set off against that decree, so that the amount for the recovery of which the lands were to be sold could be reduced by the amount due under the decree for money. The case of *Vaidhinathasamy v. Somasundaram* (2), on the authority of which the learned Judges came to that decision, was a mortgage suit in which there was a personal remedy against the mortgagors as well as a remedy against the mortgaged property and anything which

1929

THEBURMA OIL
COMPANY,

LTD.

v.

M A TIN.

HEALD J.

1929

THE
BURMA OIL
COMPANY,
LTD.
v.
MATTIN.
HEALD, J.

was said in that case with reference to a case where there was no personal remedy must necessarily have been *obiter*. For the consideration of the question whether a decree is or is not a decree for the payment of sums of money, there seems to me to be a material difference between a case where there is a personal remedy for money under the decree and a case where there is no such remedy, and in view of the fact that the learned Judges did not consider that difference I think that the correctness of their judgment, for which they gave no reasons beyond their opinion that a decree for the recovery of money by the sale of property is essentially a decree for money and their reference to the earlier case, is seriously open to doubt.

Appellant's learned advocate referred us also to the case of *Nagar Mal v. Ram Chana* (1). In that case Nagar Mal held a simple money decree against Ram Chand and Ram Chand held a decree against Nagar Mal for a larger amount in respect of a charge on immoveable property. Nagar Mal applied for execution of his decree but the Court allowed Ram Chand to set it off against his decree. It does not appear whether or not in that case there was a personal liability against Nagar Mal under the decree in respect of the charge, but if there was a personal remedy that case is in my opinion no guide for the decision of the present case.

The only other case cited before us was *Sheo Shankar v. Chunni Lal* (2). In that case Sheo Shankar held two money decrees against Chunni Lal and Chunni Lal held a mortgage decree for sale of certain properties one of which belonged to Sheo Shankar having been bought by him from the mortgagor.

(1) (1910) 33 All. 240.

(2) (1916) 38 All. 669.

after the date of the mortgage. Chunni Lal claimed to set off his mortgage decrees against Sheo Shankar's money decrees. Sheo Shankar pleaded that although he was bound by the mortgage decree so far as that part of the mortgaged property which belonged to him was concerned he was not liable personally for the amount of that decree or any part of it. He said that the mortgage decree gave him merely an option to save his property from sale by paying the mortgage money, that he was not bound and did not propose to exercise that option, and that, so far as he was concerned, the decree-holder's remedy under the mortgage decree for sale was solely against his property which was subject to the mortgage. The learned Judges said that the matter depended on the interpretation to be placed on rules 18 and 20 of Order 21 of the Code. They pointed out that for the application of rule 18 it was necessary that the decrees should be decrees "for the payment of sums of money" and that each party should fill the same character in both suits. They pointed out further that Sheo Shankar had obtained the money decrees in his favour in his individual and personal capacity and that in the mortgage suit he was not ordered to pay any sum of money in his individual and personal capacity but was only given an option to do so if he liked, in order to save from sale some property in which he was interested. For this reason they held that the character in which Sheo Shankar was sued in the case on the mortgage was different from the character in which he obtained his decrees for money and that therefore, in spite of the provisions of rule 20, rule 18 could not be applied to the case.

In the present case, as I have said above, the parties do in my opinion fill the same character in

1929

THE

BURMA OIL

COMPANY,

LTD.

v.

MA TIN.

HEALD, J.

1929

THE
BURMA OIL
COMPANY,
LTD.
v.
MA TIN.
HEALD, J.

both suits, but the fact that there was no personal liability under the mortgage decrees was common to both cases and in my view the real reason why such cases cannot be brought within the purview of rule 18 is that the mortgage decree in such cases is not a decree "for the payment of sums of money". It may be noted that ordinarily a mortgage decree for sale is a decree for the payment of a sum of money. In the form of a preliminary mortgage decree for sale, which is given as Form No. 4 of Appendix D to the Code it is provided that if the net proceeds of the sale are insufficient to pay the mortgage debt with interest and costs the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance, and rule 6 of Order 34 says that where the net proceeds of the sale of the mortgaged property are found to be insufficient to pay the amount of the mortgage debt the Court may pass a decree for the balance if such balance is legally recoverable otherwise than out of the property sold. If the balance is not so recoverable, the decree is not an ordinary decree for sale in enforcement of a mortgage, and since in my opinion it cannot be regarded as a decree for the payment of a sum of money I would hold that rule 18 cannot be applied to it.

Respondent's learned advocate has pointed out that in the present case the application of that rule would involve hardship on the respondents. It is said, and it seems highly probable, that by reason of the appellants having allowed the mortgage to run on for many years, the mortgage debt is now very much in excess of the value of the mortgaged property. By reason of appellants' delay in filing their suit on the mortgage they have lost their right to recover the mortgage debt except out of the

property. If they are allowed to set off the debt due by them to Ma Tin and Po Gon against the mortgage debt they will receive by virtue of their mortgage decree more than that decree entitles them to recover to the extent of the personal decree against them, and to that extent by reason of the accident that a decree has been given against them in favour of their mortgagors personally they will be relieved against the consequences of their own default in allowing their personal remedy to become time-barred and in allowing the mortgage debt to exceed the value of the mortgage security. Such a result could hardly have been intended by the Legislature when it enacted rule 20, but if that rule could be applied the hardship which would result would of course be no excuse for refusing to apply it. But as I have said rule 20 merely applies the provisions of rule 18 to decrees for sale in enforcement of a mortgage, and as I am of opinion that rule 18 is inapplicable, to this particular decree by reason of the fact that it is not a decree for the payment of a sum of money, I would dismiss the appeal with costs, advocate's fee to be ten gold mohurs.

MYA BU, J.—I concur.

1929
THE
BURMA OIL
COMPANY,
LTD.
v.
MA TIN.
HEALD, J.