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KASTURCHAD GUJAR v. PARSHA MAHÁR.

The question referred by the Subordinate Judge for the High Court's decision was:—

Has a Court in British India jurisdiction to transfer its decree to a foreign Court, or to a Court in a Native State, for execution by the latter?

The Subordinate Judge's opinion on the point was in the negative.

Chimanlál Hirálál for the plaintiff:—The decree can be sent for execution to the Court in a Native State. The term "Court" as used in section 223 of the Civil Procedure Code will include a foreign Court. In section 12 the word is qualified expressly by the addition of "foreign", and the intention of the Legislature may be gathered from this, that where "Court" is used alone it must include all Courts, and should not be confined to a Court in British India.

Motilál M. Munshi, for the defendant, contended that the British Courts cannot send their decrees for execution by Courts out of British India.

SARGENT, C. J.:—The Courts of British India have no authority to send their decrees for execution to Courts not in British India.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

YASHVANT SHENVI AND OTHERS, (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* VITHOBÁ SHETI, DECEASED, BY HIS MINOR SON, (ORIGINAL DEFENDANT), RESPONDENT.*

1887. *September* 22.

Mortgage—Mention in mortgage-deed of another debt due to mortgagee distinct from sum advanced at date of mortgage—Clause in deed undertaking to pay off old debts when taking back the land—Old debt not a charge on land, but redemption conditional on payment of both debts—Execution—Claim to attached property—Order passed against claimant—Neglect of claimant to sue within a year after date of order—Civil Procedure Code (Act XIV of 1882*), Secs.* 278, 279, 280, *and* 283—*Limitation Act XV of* 1877, *Sch. II, Art.* 11.

* Second Appeal, No. 498 of 1885.

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V. mortgaged certain land to the defendant's father for a sum of Rs. 64 advanced by the latter at the date of the mortgage. The mortgage-deed stated that V. owed the mortgagee another debt of Rs. 100, which was due on a separate bond, and it contained a clause in the following terms :—

"The principal sum of *huns* (coins) due on that document, as also this document, I will pay at the same time, and take back the land along with this document as well as that document. Till then you are to continue to enjoy the land * * * ". The plaintiff having obtained decree against the mortgagor attached the land in execution. The defendant, (son of the original mortgagor), thereupon claimed that he held a mortgage upon it to the extent of Rs. 164. On the 9th March, 1881, the Court executing the plaintiff's decree made an order allowing the defendant's claim only to the extent of Rs. 64, and directed that the land should be sold subject to the defendant's lien for that sum. The plaintiffs bought the land at the execution sale, and offered the defendant Rs. 64 in redemption of his mortgage, which the defendant refused. The plaintiffs then brought the present suit to recover possession.

Held, that the charge on the land did not include the old debt of Rs. 100. There were no words in the mortgage-deed expressly making that debt a charge on the property. The provisions in the deed only made the equity of redemption conditional on the payment of both the debts.

Quære—whether, under the circumstances of the case, the purchaser at the execution sale would be bound by such a condition.

Held, also, that the object of the defendant's application in March, 1881, was virtually that the Court should allow his mortgage to the extent of Rs. 164, and the Court, having allowed his claim only to the amount of Rs. 64 by its order, *pro tanto* rejected his application. It was, therefore, an order passed against him, and having neglected to establish his right by suit within a year from the date of that order, he was now estopped from insisting on the condition—Civil Procedure Code (Act XIV of 1882), secs. 278, 279, 280 and 283 ; Limitation Act XV of 1877, Sch. II, art. 11.

SECOND appeal from a decision of A. H. Unwin, Acting District Judge of Kánara.

One Vithobá mortgaged to the father of the defendant the land, which was the subject-matter of the present suit, for the sum of Rs. 64, then actually borrowed. The mortgage-deed then executed contained a clause, which stated that there was another debt of Rs. 100 due by the mortgagor to the mortgagee upon a separate bond, and it gave an undertaking in the following terms :—

"The principal sum of *huns* (coins) due on that document, as also this document, I will pay at the same time, and take back

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the land along with this document as well as that document. Till then you are to continue to enjoy the land * * * ".

The plaintiffs in the present suit were holders of a decree against the mortgagor, and in execution of that decree they attached the land in question. The defendant, (the son of the original mortgagee), by his mother and guardian thereupon claimed that he held a mortgage upon it to the extent of Rs. 164. The Court executing the plaintiff's decree, however, on the 9th March, 1881, allowed his lien only to the extent of Rs. 64, and ordered the land to be sold, subject thereto. The sale took place, and the plaintiffs purchased the land. The plaintiffs then sought to redeem the defendant's mortgage, and offered him Rs. 64, which the defendant refused to accept.

The plaintiffs then brought the present suit against the defendant in 1883 to recover possession of the land. The defendant contended that the land was subject to the aggregate debt of Rs. 164, due on the two bonds.

The Court of first instance awarded the plaintiffs' claim, holding that the land was subject to the charge of Rs. 64 only.

On appeal by the defendant, the District Judge reversed the lower Court's decree.

The plaintiffs preferred a second appeal to the High Court.

Náráyan Ganesh Chandávarkar for the appellants, (plaintiffs):—The mortgage was only for Rs. 64. The old debt of Rs. 100, due upon a separate bond, was not made a charge on this land. The mere mention, in the mortgage-deed, of this old debt did not make it a charge—*Náráyan* v. *Rávji*[1].

The defendant ought to have sued to establish his right after the order disallowing the rest of his claim under section 278 of the Civil Procedure Code (Act XIV of 1882) had been made on the 9th March. The defendant cannot now impeach that order, as more than one year has elapsed—*Rango Vithal* v. *Rikhivadás*[2].

Ghanashám Nilkánth Nádkarni for the respondent:—The mortgage-deed expressly made the whole sum of Rs. 164 a charge on the land. There was no claim made, under section 278

(1) Printed Judgments for 1884, p. 254. (2) 11 Bom. H. C. Rep., 174.

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of Act XIV of 1882, to raise the attachment. The defendant merely asserted his right as a mortgagee, in order to enable the Court to declare the land subject to the encumbrance as provided by section 287, and the property was sold subject to it. The purchaser at the execution sale bought only the right, title, and interest of the judgment-debtor. The time for payment of both the debts is the same.

SARGENT, C.J.:—We think that the Subordinate Judge was right in his construction of the mortgage-deed, (exhibit 29). There are no words in that instrument which expressly make the old debt of Rs. 100 a charge on the property. The mortgagor undertakes to pay it together with the Rs. 64 when he takes back the land, and also agrees to the mortgagee's continuing in the enjoyment of the land till he pays off both the debts; but these provisions are satisfied by construing them as intended to make the equity of redemption conditional on the payment of both the debts. This construction, moreover, receives corroboration from the allusion to the old debt as a distinct and separate transaction, which would have no significance if the intention was to make the Rs. 100 a charge equally with the Rs. 64. It is further to be observed that the entire income of the property had been previously appropriated in lieu of the interest on the debt of Rs. 64. But although the Rs. 100 was not, in our opinion, made a charge on the property, the equity of redemption was made conditional on the payment of the two debts; and we do not think that the remarks of the Court in *Ráma* v. *Mártand*[1] would be applicable to such a condition. The by-agreement in that case was in the most general and indefinite terms, and would necessarily have embarrassed the mortgagor in the exercise of the equity of redemption.

Whether the purchaser, under the special circumstances under which the property was put up for sale, would be bound by the above condition, it is not necessary to decide, as we are of opinion that the plaintiff is right in his contention that as the first defendant has not taken proceedings to establish his right within a year, notwithstanding the order made against him in March, 1881, in

(1) L. R., 9 Bom., p. 236, note.

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the summary proceedings, he is now estopped from insisting on the condition. It has been urged, indeed, on behalf of the defendant, that although his application was headed as made under section 278, the order which was passed on it was not one contemplated by sections 280 and 281. The application was, in terms, that "an order might be made that proceedings should go on keeping alive his lien" which he had previously stated in the application to be for Rs. 164. The Court by its order only gave effect to this application to the extent of Rs. 64. It thus appears that the object of the defendant, although not in terms, was virtually that the Court should allow only the equity of redemption on discharge of a mortgage for Rs. 164 to be attached and sold, and the Court by its order *pro tanto* rejected the application. It was, therefore, clearly an order passed against the defendant, and one which he could not say the Court had not jurisdiction to make. We may also remark that section 280 contemplates not only the entire release of the property from attachment, but also the retention of the attachment to such extent as the Court thinks fit. His right should, therefore, have been established by suit within a year. We must, therefore, reverse the decree of the Court below, and restore that of the Subordinate Judge. Costs on defendant throughout.

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice Nánábhái Haridás and Mr. Justice Jardine.

BÁLA'JI LAKSHMAN, (PLAINTIFF), *v.* DÁDÁ JOTI, (DEFENDANT).*

1887. *November* 24.

Civil Procedure Code (Act XIV of 1882), Sec. 258—Decree—Satisfaction of decree out of Court—Payment uncertified—Suit to recover money paid in satisfaction of decree.

The plaintiff had been a surety for the defendant on a bond for Rs. 50 passed to G. by the defendant. G. obtained a decree against the plaintiff on this bond, and the plaintiff satisfied the decree by paying G. Rs. 38 in full satisfaction. The payment was made out of Court, and was not certified to the Court. The plaintiff now sued the defendant to recover the money so paid by him to G. He called G. as a witness, who acknowledged he had received Rs. 38 from the plaintiff in full satisfaction of the decree.

* Civil Reference, No. 34 of 1887.