

## APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batty.

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June 20.

NANCHAND KHEMOHAND GUJAR (ORIGINAL DEFENDANT NO. 2),  
APPELLANT, v. YENAWA KOMANNA AND ANOTHER (ORIGINAL PLAINTIFF  
AND DEFENDANT NO. 1), RESPONDENTS.\*

*Succession Certificate Act (VII of 1889), section 4—Certificate—Personal  
decree—Suit for sale on a mortgage.*

Section 4 of the Succession Certificate Act (VII of 1889) limits the necessity of a certificate under the Act to those suits in which the Court is called upon to pass a personal decree against a debtor of a deceased person for payment of his debt; and does not apply to a suit for a sale on a mortgage.

*Kanchan Modi v. Baij Nath Singh*(1), *Baid Nath Das v. Shamanand Das*(2) and *Mahomed Yusuf v. Abdur Rahim*(3) followed. *Fateh Chand v. Muhammad Bahsh*(4) not followed. *Santaji Khanderao v. Ravji*(5) distinguished.

SECOND APPEAL from the decision of B. S. Joshi, Joint First Class Subordinate Judge, A. P., at Satara, reversing the decree passed by K. R. Natu, Subordinate Judge of Islampur.

The plaintiff sued to recover Rs. 198 either by possession of the mortgaged property or by its sale, alleging that the defendant No. 1 had passed to her deceased husband a mortgage-bond for Rs. 99 on the 15th September, 1890.

Defendant 1 admitted the execution of the mortgage-bond, but contended that the bond was satisfied; and that he was not liable to the plaintiff's claim as he had sold the land to defendant No. 2 on the 19th October, 1897. Defendant No. 2 contended that the bond was satisfied.

One of the issues raised in the Court of first instance was: Is a certificate under Act VII of 1889 necessary in this case? This issue was found in the affirmative by the Subordinate Judge who dismissed the suit on the merits, holding that the bond in suit was satisfied.

This decree was, on appeal, reversed by the lower Appellate Court, who passed a decree in favour of plaintiff. The Court

\* Second appeal No. 755 of 1902.

(1) (1892) 19 Cal. 336.

(3) (1899) 26 Cal. 839.

(2) (1894) 22 Cal. 143.

(4) (1894) 18 All. 252.

(5) (1890) 15 Bom. 105.

held that a certificate under the Succession Certificate Act (VII of 1889) was not necessary in the circumstances of the case. The following were the reasons :—

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“On the question of the necessity or otherwise for a certificate under Act VII of 1889, I think that fiscal enactments must always be construed strictly and in favour of the subject. This has been the tendency of all Courts of Justice. In the absence of any ruling, therefore, of our High Court directly in point, I would choose to follow the decisions of the Calcutta High Court, viz., I. L. R. 19 Cal. 336; *ib.* 22 Cal. 143; *ib.* 26 Cal. 839, in preference to the ruling of the Allahabad High Court relied on by the lower Court (I. L. R. 16 All. 259), and more especially in this case, in which the principal prayer is for possession and the one for realization of the mortgage-debt by sale of the mortgaged property only secondary and in the alternative. It is to be noticed that there is no prayer herein for a personal decree.”

Defendant 2 appealed to the High Court.

*S. R. Bakhale*, for the appellant :—We say that a mortgage debt like all other debts comes within the definition of debts under Succession Certificate Act, 1889. This Court has decided that in the case of mortgage-debts a certificate is necessary : *Santaji Khanderao v. Ravji*<sup>(1)</sup>. The Allahabad High Court also has taken the same view : *Fateh Chand v. Muhammad Bakhsh*<sup>(2)</sup>.

*K. H. Kelkar*, for the respondent :—The object of the Succession Certificate Act, 1889, is to protect a debtor against being required to pay money to a person who may not be the heir at all. Hence, the provision about security. In a decree for sale or foreclosure no such contingency can arise because the decree is against land or some immoveable property. The property is not lost and can always be pursued. It is not a personal decree. The debtor is not compelled to pay. The case of *Santaji Khanderao v. Ravji*<sup>(3)</sup> does not touch the point at all. The only point decided in that case was that a consent decree was within the purview of the Act. The decree in question was a personal decree. This view is supported by the Calcutta High Court : *Kanchan Modi v. Baij Nath Singh*<sup>(4)</sup>; *Baid Nath Das v. Shama-nand Das*<sup>(5)</sup>; and *Mahomed Yusuf v. Abdur Rahim*<sup>(6)</sup>. The Calcutta High Court has considered the Allahabad case and dissented from it.

(1) (1890) 15 Bom. 105.

(4) (1892) 19 Cal. 336.

(2) (1894) 16 All. 259.

(5) (1894) 22 Cal. 143.

(3) (1890) 15 Bom. 105.

(6) (1899) 26 Cal. 839.

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CHANDAVARKAR, J.:—Section 4 of the Succession Certificate Act has been construed by the Calcutta High Court as limiting the necessity of a certificate under the Act to those suits where the Court is called upon to pass a personal decree against a debtor of a deceased person for payment of his debt and as not applying to a suit for a sale on a mortgage: see *Kanchan Modi v. Baij Nath Singh*<sup>(1)</sup>; *Baid Nath Das v. Shamanand Das*<sup>(2)</sup>; and *Mahomed Yusuf v. Abdur Rahim*<sup>(3)</sup>.

A Full Bench of the Allahabad High Court has, on the other hand, held in *Fateh Chand v. Muhammad Bakhsh*<sup>(4)</sup> that the section applies also to a suit for sale on a mortgage. There is no decision of this Court directly in point. *Santaji Khanderao v. Ravji*<sup>(5)</sup> was a case where the suit was for a personal decree against the defendant and also for a sale of the mortgaged property, and the only point decided was that a consent decree is a decree against a debtor, within the meaning of section 4 of the Succession Certificate Act. That decision is, however, useful for the purpose of the point now before us inasmuch as it was held there that the Succession Certificate Act was "intended for revenue purposes as well as to facilitate collection of debts." Being partly a fiscal Act, it must be construed strictly, and the words in section 4, *viz.*, "a decree against a debtor" must be interpreted *prima facie* to mean a personal decree. The reasoning of the Allahabad Full Bench, however, is that "money lent on the security of a mortgage is a debt due from the mortgagor to the mortgagee, although from the terms of the contract it may not be recoverable from the mortgagor personally or except by a decree for sale of the mortgaged property. A mortgagee who brings his suit for sale is bringing his suit against his debtor, the mortgagor, for payment of his debt, and the decree which he seeks in that suit is a decree for payment of his debt by sale of the mortgaged property<sup>(6)</sup>." Assuming that such a suit is one for the payment of a debt, still the payment has to be made not by the debtor but by sale of the mortgaged property. In other words, it is the property which the suit seeks to, and the decree does, make liable,

(1) (1892) 19 Cal. 386.

(2) (1894) 22 Cal. 143.

(3) (1897) 26 Cal. 839.

(4) (1894) 16 All. 254.

(5) (1890) 15 Bom. 105.

(6) (1894) 16 All. n. 267.

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whereas what section 4 provides is that "no Court shall pass a decree *against a debtor* for payment of his debt." It is true, as pointed out in their judgment by the Allahabad Full Bench, that "a decree for sale under section 88 of Act IV of 1882 (The Transfer of Property Act, 1882) orders that "an account be taken of what will be due to the plaintiff for principal and interest on the mortgage," or the decree for sale declares "the amount so due at the date of such decree." The decree for sale also orders that in default of the defendant paying the amount found or declared to be due "the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is so found due to the plaintiff, &c." And the Allahabad Full Bench infer from this language of section 88 of the Transfer of Property Act that "a suit for sale is a suit in which, if the plaintiff succeeds, the decree which the Court passes is one form of a decree for payment of a debt." It may be a decree for payment of the debt, but the question is—Payment by whom? So long as the decree does not direct the defendant to pay the debt, but merely provides that if he does not pay, the mortgaged property shall be sold in satisfaction of the debt, it cannot, we think, without straining the language of section 4 of the Succession Certificate Act, be said to be a decree against the debtor. Had the Legislature intended that the section should apply to a suit for a sale on a mortgage, they would have used apt words to convey that meaning. If it were correct to say that because a decree which the Court passes in a suit for a sale on a mortgage is one form of a decree for payment of a debt, therefore, it must be regarded as a decree against the debtor within the meaning of section 4 of the Succession Certificate Act, the same process of reasoning ought to apply to decrees for foreclosure as well. A foreclosure decree may also be regarded as one form of a decree for payment of a debt. But the Allahabad Full Bench in their judgment concede that a suit for foreclosure cannot in any sense be considered as a suit for a decree for payment of a debt. In one sense, no doubt, every suit on a mortgage, including a suit where a personal decree is sought against the mortgagor, may be regarded as a suit for a decree for payment of a debt. But it is one thing to pass a

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decree against the debtor and another to pass a decree against the property mortgaged by him. The Transfer of Property Act itself makes a distinction between a suit where a debt is recoverable from the debtor and one where it can be recovered by a sale of his property mortgaged for the debt. See section 58, the definition of a simple mortgage and of an English mortgage, and section 90. This last section is referred to in the judgment of the Allahabad Full Bench in support of their view that a suit for a sale on a mortgage is one in which the Court is called upon to pass a decree for payment of a debt within the meaning of section 4 of the Succession Certificate Act. But section 90 provides that where under a decree for a sale, the mortgaged property having been sold, "the net proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such sum." A decree so passed is undoubtedly a personal decree against the debtor which entitles the decree-holder to attach and sell in execution property belonging to the judgment-debtor but not mortgaged for the debt. To that section 4 of the Succession Certificate Act must apply. But it does not follow that such a decree can be passed in every suit for a sale upon a mortgage. Section 90 of the Transfer of Property Act restricts it to cases where "the balance is recoverable from the defendant otherwise than out of the property sold"—only where, that is, the defendant by his contract or otherwise is personally liable for the payment, partly or wholly, of the debt. If the Allahabad Full Bench intended to hold that section 4 of the Succession Certificate Act applied only to such a suit for a sale on a mortgage and not to every suit for a sale, their ruling should not conflict with the view of the Calcutta High Court as to the applicability of that section. Having regard then to the fiscal character of the Succession Certificate Act and the language of section 4, we have arrived at the conclusion that the interpretation put upon that section by the Calcutta High Court is correct. It may be that, as the Allahabad Full Bench point out, "a mortgagor needs as much protection as any other debtor when sued for a debt by a person claiming to be entitled to the effects of his deceased

creditor"; but, on the other hand, as to this question of protection, there is a difference between a mortgagor who has made himself personally liable to pay and also mortgaged his property as security for the debt and one who has made the property alone security therefor. In the former case, he may be sued by one who may not be the legal representative of the creditor and in that case he may have to pay twice over, if the rightful heir sues without being able to recover from the wrong person if the person be insolvent. In the latter, if a wrong person sues and obtains a decree and sells the property, the rightful heir cannot enforce payment from the mortgagor, but must hold the property alone liable and the property remains liable all the same. The mortgagor is no loser and needs no protection.

We think, therefore, that the lower Appellate Court is right in holding that a succession certificate was not necessary in the present case, and we confirm the decree with costs.

*Decree confirmed.*

## APPELLATE CIVIL.

*Before Sir L. H. Jenkins, K.C.L.E., Chief Justice, and Mr. Justice Aston.*

KRISHNAJI NILKANTH SANE AND ANOTHER, SONS AND HEIRS OF DECEASED NILKANTH GOVIND SANE (ORIGINAL PLAINTIFFS), APPELLANTS, v. HARI BIN JANU (ORIGINAL DEFENDANT), RESPONDENT.\*

*Dekhan Agriculturists' Relief Act (Act XVII of 1879), Chapter II (C)—Suit based on dispossession of an existing possession—Incidental reference to mortgage as in plaint.*

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possession does not fall within Act (Act XVII of 1879). the plaintiff does not affect the

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No. 737 of 1903.

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(1) Chapter II of the Dekhan Agriculturists' Relief Act. Of the hearing of certain suits by Subordinate Judges.

3. The provisions of this Chapter shall apply to—

(a) Suits for an account whatever be the amount or value of the subject-matter thereof instituted on or after the first day of November, 1879, by an agriculturist in the Court of a Subordinate Judge under the provisions hereinafter contained, and