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BARI
"RAMESHJI.

conclusion that as between this mortgagor and this mortgagee, money-lenders on both sides, there was no room for the protection afforded to the victims of unconscionable bargains. Had the mortgagor been an agriculturist (we merely take that as a typical case) the result might and probably would have been different, and it is instructive to note in this connection the 3rd illustration to the 16th section of the Contract Act as amended. In this respect each case must be determined according to its own circumstances.

The decree of the lower Court must, therefore, be varied by substituting Rs. 7,995 for Rs. 5,298-9-8, and it should be expressed in full not merely by reference to section 88 of the Transfer of Property Act. The appellant must get his costs of this appeal.

Decree varied.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

BHAGWANTAPPA BIN LUNGAPPA (OPPONENT), APPELLANT, v.
VISHWANATH AND ANOTHER (APPLICANTS), RESPONDENTS.*

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February 16.

Civil Procedure Code (Act XIV of 1882), sections 225, 228, 214, 588—Decree—Executed on—Decree passed without jurisdiction—Jurisdiction—Appeal—Practice.

When a decree passed by one Court is sent for execution to another the latter Court is entitled to go into the question whether the first Court had jurisdiction to pass the decree; and if that Court declines to become the executing Court the order so passed is not an order either under section 214 or section 588 of the Civil Procedure Code, and cannot be appealed against.

APPEAL from the decision of E. H. Leggatt, District Judge of Kánara, reversing the decree passed by G. N. Kelkar, Subordinate Judge of Sirsi.

The applicant obtained a mortgage decree against the opponent in the Court of the Subordinate Judge of Kunta in Suit No. 285 of 1894. The property mortgaged was situated within the local limits of jurisdiction of the Subordinate Judge's Court at Sirsi, and the decree directed sale of that property.

* Second Appeal No. 685 of 1903.

The applicant then presented *darkhast* No. 298 of 1902 in the Court of the Subordinate Judge of Sirsi for execution of the decree. The judgment-debtor contended that the decree was invalid inasmuch as the Kumta Court had no jurisdiction to entertain the original suit and that it was not open to the Sirsi Court to execute an invalid decree.

The Subordinate Judge of Kumta rejected the *darkhast*, holding that as the Kumta Court had no jurisdiction to entertain it, the decree was on its face invalid for want of jurisdiction, and was void *ab initio*.

The applicant appealed to the District Judge of Kánara who reversed the decree passed by the Subordinate Judge and directed that execution should proceed. The following were his reasons :

“Under the ruling in the case of *Chogalal v. Trueman* (I. L. R. 7 Bom., p. 481), it is laid down that a Court cannot refuse to execute the decree on the ground that the Court which passed the decree had no jurisdiction but may adjourn the execution proceedings to enable the party interested to make an application to the Court passing the decree.

For the respondent's I am referred to the contrary ruling in *Imdad Ali v. Jagan Lal* (I. L. R. 17 All., p. 478), but I am bound by the ruling of the Bombay High Court.

I am also referred to *Haji Musa Haji Ahmed v. Purmananda Nursey* (I. L. R. 15 Bom., p. 215 at p. 219); but that case was concerned with the judgment of a foreign Court and I do not think that the remark on page 219 that the executing Court would decline to consider such an objection because it would be bound by the provision of section 13 of the Code to refuse to retry an issue already determined by the competent Court, can mean that it would only decline if the issue had been specifically raised and decided by the trying Court. For these reasons I hold that the lower Court could not refuse altogether to execute the decree.

I think further that the matter must be considered to be *res judicata*. In the previous *darkhast* No. 165 of 1895 and No. 362 of 1900, the point was not specifically decided, but Exhibit 8 in No. 362 of 1900 shows that the Subordinate Judge had doubts of the jurisdiction of the trying Court. In No. 165 of 1895, however, the Subordinate Judge ordered execution to proceed and no appeal was made against this order. It is true that owing to applicant's default execution was not carried out, but on consideration I think that as no such objection was raised in that *darkhast* and a definite order for execution was passed the question cannot now be raised in a *darkhast* between the same parties. Opponent was bound to raise it at first and not having done so is now barred.

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This being so it is not necessary to consider whether the trying Court had jurisdiction."

The opponent appealed to the High Court.

Nilkantha Atmaram, for the appellant :—In this case the lower Court is wrong when it says that the executing Court cannot refuse to execute the decree on the ground that the Court which passed it had no jurisdiction. Section 225 of the Civil Procedure Code (Act XIV of 1882) clearly recognizes such a power in the executing Court. Section 223 says that the decree may be executed by the Court which passed it or by the Court to which it is sent for execution: and section 228 says that the Court executing a decree sent to it for execution shall have the same powers in executing such decree as if it had been passed by itself. A Court can refuse to execute its own decree if it subsequently finds that it was passed without jurisdiction. If this be so, the executing Court can do so under section 228.

The suit in which the decree was passed was brought on a hypothecation bond and it is admitted that the property was without the jurisdiction of the Court in which the suit was brought. It is therefore clear that that Court would have no jurisdiction: see Civil Procedure Code (Act XIV of 1882), section 16; *Vithalrao v. Vaghoji*.⁽¹⁾ Therefore no duty is cast upon the executing Court to execute the decree: *Haji Musa Haji Ahmed v. Purmanand Nursey* ⁽²⁾; *Imdad Ali v. Jagan Lal* ⁽³⁾; *Muhammad Sulaiman Khan v. Fatima* ⁽⁴⁾; *Abdul Haiyai Khan v. Chunia Kuar*.⁽⁵⁾

G. S. Mulgaonkar, for the respondents :—There is a personal covenant to pay in the hypothecation bond, and therefore the case would come under the proviso to section 16 of the Civil Procedure Code (Act XIV of 1882). Again section 223 (c) of the Code contemplates that the decree like the one in question could be executed; and when a certificate is issued as provided for by section 224 the whole defect is cured. We rely upon *Chogalal v. Trueman*.⁽⁶⁾ The case of *Haji Musa Haji Ahmed v.*

(1) (1892) 17 Bom. 570.

(2) (1890) 15 Bom. 216.

(3) (1895) 17 All. 478.

(4) (1889) 11 All. 814.

(5) (1886) 8 All. 377.

(6) (1883) 7 Bom. 481.

Purmanand Nursey ⁽¹⁾ relied upon by the appellant does not apply, for that was a judgment of a foreign Court.

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Nilkantha Atmaram, in reply :—The proviso to section 16 of the Civil Procedure Code (Act XIV of 1882) has no application here: see *Vithalrao v. Vaghaji*.⁽²⁾ It relates to a suit for the specific performance of contracts respecting land and the like. Section 223 (c) of the Code has reference to section 19. It is an error to say that by the grant of a certificate the entire defect is cured. What we contend is not that the decree is defective, but that there is no decree to execute: see *Ali Shah v. Husain Bakhsh*.⁽³⁾

CHANDAVARKAR, J.:—The decree of which execution is sought was passed by the Subordinate Judge's Court at Kumta and sent by that Court for execution to the Subordinate Judge's Court at Sirsi, because the lands in respect of which the execution is sought and to which the decree relates are situated within the jurisdiction of the Sirsi Court.

The Subordinate Judge of Sirsi, to whom the decree was sent for execution, finding that the lands in dispute to which the decree relates were situated within his jurisdiction, declined to execute it on the ground that the Kumta Court had no jurisdiction to entertain the suit and pass the decree. From this order an appeal was preferred to the District Judge, who has held that the question of the Kumta Court's jurisdiction is *res judicata* in favour of the decree-holder and directed execution to proceed in the Sirsi Court. The point of *res judicata* has not been relied upon by the respondent before us and the only question properly arising and argued is whether the Sirsi Court had jurisdiction to go into the question of the Kumta Court's jurisdiction to pass the decree sent to it for execution.

Mr Nilkanth has argued that the Subordinate Judge of Sirsi to whom the decree of the Kumta Court was sent for execution had jurisdiction to decide the question whether the Kumta Court's decree was one passed with jurisdiction or not and in support of his contention he has cited *Haji Musa Haji Akmed v. Purmanand*

(1) (1890) 15 Bom. 216.

(2) (1892) 17 Bom. 570.

(3) (1876) 1 All. 558.

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Nursery.⁽¹⁾ Looking at sections 224 and 225 of the Civil Procedure Code, which bear on this point, we find that the Court to which a decree is sent for execution has jurisdiction to decide the preliminary question whether the decree sent to it for execution was passed with jurisdiction or not. Section 225 points out the conditions which must be fulfilled to the satisfaction of the Court to which the decree is sent for execution before it can exercise the functions of an executing Court. The phraseology of that section, as contrasted with the phraseology of section 228, Civil Procedure Code, is very significant. In section 225 it is "the Court to which a decree is sent" while under section 228, it is "the Court executing a decree." It is clear from this that when a decree is sent to a Court for execution, that Court can go into the question of the jurisdiction of the Court passing the decree, if it sees reasons to do so. It is when that Court is satisfied, that the Court passing the decree had jurisdiction that the former is converted from a "Court to which a decree is sent" to a "Court of execution." Therefore so long as the Court to which "a decree is sent," has not been converted into a "Court executing the decree" under section 228, it remains simply a Court to which "a decree is sent" under section 225 and it does not fall within the purview of section 228. If the Court, to which a decree is sent, comes to the conclusion that it has no jurisdiction, then its hands are stayed and the parties have to go back to the Court which passed the decree; the Court to which the decree is sent having declined to become the executing Court: see *Chogalal v. Trueman.*⁽²⁾ This act of the Court to which the decree is sent is not an order either under section 244, Civil Procedure Code, or under section 588; and it cannot be appealed against.

We hold that the District Judge, Kārwar, had no jurisdiction to pass the order which he has passed, as the order of the Subordinate Judge at Sirsi was not appealable. We reverse the order of the District Judge under our Extraordinary Jurisdiction, and leave the parties to take such course as they think proper. Each party to bear his own costs of the appeal to the lower Appellate Court and of the appeal to this Court.

Order reversed.

(1) (1890) 15 Bom. 216.

(2) (1888) 7 Bom. 481.