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treated the terms of the agreement with the *Gávkars* as having been impliedly incorporated in the grant made subsequently by the Chief of Sávantvádi and by the Killedar on behalf of the Raja of Kolhápur, what should be the effect in law? One term of the grant in that case would be that the grantee should be liable to pay to Government a fixed amount as rent and no more. That is the primary agreement between the parties. The other term, that if the rent be raised the excess shall fall on the village, is in the nature of a clause providing for compensation in the event of a breach of the former. But if the former term is enforceable, Government are not entitled to say that it should not be enforced because a remedy for its breach is provided by the terms of the grant.

On these grounds I am of opinion that the decree appealed against should be affirmed with costs.

Decree affirmed.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Chandavarkar.

SAKARLAL JASWANTRAI (JUDGMENT-DEBTOR), APPELLANT, *v.* BAI PARVATIBAI (DECREE-HOLDER), RESPONDENT.*

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Injunction—Light and air—Decree in light and air suit—Death of defendant after decree—Decree ordered to be executed against the deceased defendant's legal representative—Execution—Mode of enforcing decree—Civil Procedure Code (Act XIV of 1882), sections 234 and 260.

Plaintiff obtained a decree against defendant, restraining the latter from obstructing the access of light and air to her windows. The plaintiff applied for execution, praying that the portion of the defendant's house which obstructed her windows should be pulled down. While this application was pending the defendant died and his son and heir (the appellant) was brought on the record. The lower Courts directed that the decree should be executed as prayed for and directed the appellant (the son and heir of the deceased defendant) to pull down the obstructing portion of the house in question within a given time, and in case of his failing to do so, empowered an officer of the Court to have it pulled down. On second appeal to the High Court it was contended (1) that as the

* Second Appeal No. 338 of 1901.

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judgment-debtor had died after the commencement of the proceedings a fresh application should have been made instead of continuing the *darkhást* issued against him against his son (the present appellant), and that no notice had been issued under section 248 of the Civil Procedure Code (XIV of 1882); (2) that the lower Courts should have made their orders under section 260 of the Civil Procedure Code (XIV of 1882); and (3) that the original defendant having died, the injunction could not be enforced against his son (the appellant) as an injunction does not run with the land.

Held, as to the first objection, that as it was not raised in the lower Courts, it could not be entertained on second appeal.

As to the second objection, *Held* that the order passed by the lower Courts was wrong. Their order should have been made under section 260 of the Code of Civil Procedure (XIV of 1882). The application for execution was not in proper form, but the High Court allowed it to be amended.

As to the third objection, *Held* that having regard to the provisions of section 234 of the Civil Procedure Code, 1882, the injunction ordered against the deceased defendant might be enforced against his son as his legal representative: *Dahyabhai* v. *Bapalal* (1) distinguished.

SECOND appeal from the decision of G. D. Madgaonkar, Assistant Judge, F. P., at Broach, confirming the order passed by Ráo Sáheb Vadilal T. Parekh, Subordinate Judge of Broach.

Suit for injunction restraining interference with light and air.

In 1885 the plaintiff filed this suit, complaining that the defendant, by adding to his house, had obstructed the access of light and air to her (the plaintiff's) windows.

On 30th September, 1886, the Subordinate Judge of Broach passed a decree for plaintiff, restraining defendant from interfering with the access of light and air to plaintiff's windows and ordering the defendant to lower the roof of his house so as not to cause any obstruction.

The decree was confirmed on appeal by the Assistant Judge at Broach on 27th March, 1888, and by the High Court on the 12th February, 1890.

In 1892 plaintiff applied for execution of the decree and again in 1893, which latter application stood over until 13th November, 1896.

On 14th December, 1898, the plaintiff made the present application for execution, praying that the Court should have the

(1) (1901) 26 Bom. 140.

obstruction removed or allow her to remove it, charging the defendant with the costs.

Shortly after this application was presented the defendant (Jaswantrai Jadavrai) died, and Sakarlal (the present appellant) was brought upon the record as his son and heir. Subsequently, the Subordinate Judge heard the application and ordered "that the decree be executed as prayed for," and he directed that Sakarlal should carry out the necessary alterations within a month or, on his default, that the officer of the Court should do so at his expense.

Sakarlal appealed to the Court of Assistant Judge, F. P., at Broach. The learned Judge dismissed the appeal. In doing so he said :

> The appellant's pleader has abandoned the point of limitation. His second ground, that execution cannot issue against the appellant, is untenable, as the latter is admittedly the heir of the judgment-debtor and has succeeded to the ownership and possession of the roof and the house in respect of which the order was made. The third ground has more reason in its favour; and sections 235 (*j*) and 260 of the Civil Procedure Code as well as the opinions of the learned Judges in *Protap Chunder Doss* v. *Peary Chowdharin* (I. L. R. 8 Cal. 176) and *Shah Karamchand* v. *Ghelabhai* (I. L. R. 19 Bom. 34) led me to doubt whether it would not have been better to employ the ordinary remedies against the judgment-debtor if he proves recalcitrant, rather than have the work carried out by an officer of the Court. Nevertheless, as the High Court has affirmed the order of the Subordinate Judge in Darkhást No. 1372 of 1893, wherein this alteration was laid down, I do not think it open to me to interfere.

Sakarlal preferred a second appeal to the High Court, contending (*inter alia*) that the prayer in the *darkhást* was not in accordance with the decree; that the decree could not be executed against him; that section 260 of the Civil Procedure Code (Act XIV of 1882) did not authorize such a prayer, and the order passed by the Courts below was illegal; and that the application was not according to law, and must be rejected.

D. A. Khare for the appellant (defendant):—The order of the lower Courts is wrong. The decree of which execution is prayed for consists of an injunction directed against the original defendant, Jaswantrai Jadavrai. He is dead. His son Sakarlal has now been brought on the record. He cannot be proceeded

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against under the decree, as it has been ruled that an injunction does not run with the land: *Vithal* v. *Sakharam* [1]; *Dahyabhai* v. *Bapalal* [2]; and Kerr on Injunctions, page 191.

Further, the decree in this case cannot be executed in the way ordered by the lower Courts. It is not competent to a Court to depute an officer of the Court to execute the decree by pulling down any portion of our house.

[JENKINS, C.J., referred to *Bhoobun Mohun Mundul* v. *Nobin Chunder Bullub*.[3]]

The decree-holder, therefore, not having applied under section 260 of the Civil Procedure Code, the lower Courts ought to have rejected her *darkhást* as not being in accordance with law: see *Sha Karamchand* v. *Ghelabhai Chakaldas*.[4]

Ratanlal Ranchhoddas for the respondent (decree-holder):—We admit that the prayer in the *darkhást* is not correct; but we contend that the *darkhást* should not for that reason alone be dismissed. We should be allowed to amend our prayer, or the Court may, notwithstanding the incorrect form of prayers, pass the proper order: see *Protap Chunder* v. *Peary Chowdhrain*.[5]

As to the objection that the decree passed against the deceased defendant cannot be executed against his representative, we submit that the cases cited by the other side do not apply here. They are cases in which the property regarding which an injunction was given had passed to a purchaser. Here the original defendant is dead. The appellant is brought on the record as his legal representative. As such he is liable to be proceeded against in execution of the decree against the deceased, under the provisions of section 234 of the Civil Procedure Code (Act XIV of 1882).

JENKINS, C.J.:—This appeal arises out of proceedings in execution of a decree whereby the defendant (Jaswantrai Jadavrai) was ordered to lower his roof so that the holes in the plaintiff's house might be free from obstruction. The plaintiff's prayer, as expressed in his *darkhást*, is "that the Court may be

(1) (1899) P. J. p. 481; 1 Bom. L. R. 854.
(2) (1901) 26 Bom. 140.
(3) (1872) 18 Cal. W. R. Civ. 282.
(4) (1893) 19 Bom. 34.
(5) (1881) 8 Cal. 174.

pleased to recover and pay to me Rs. 24-5-10, which are due to me in all from the defendant, with costs of this execution, to get the defendant's roof lowered and to make the lattices, two in number, free from obstruction, and should he fail to do so to get the same done at my (*i.e.* plaintiff's) expense, and to order the said expense to be treated as costs of execution of the *darkhást* and to recover the same from the defendant, and to recover Rs. 24-5-10 for costs from the defendant by attachment and by sale by auction of the moveable property or to attach and sell by auction the moveable property from the place where my man may point the same out." Both the lower Courts have granted the applicant's prayer, hence this appeal.

Before us several objections have been urged. First, it is said that, as the judgment-debtor died after the commencement of these proceedings, a fresh application should have been made instead of continuing the present *darkhást* against the present appellant. This objection has been urged here for the first time, and is not one which at this stage of this protracted litigation should be entertained. Similarly, we think that no weight is due to the objection that no notice has been given under section 248.

This brings us to the only points of substance in the case. The first is that the executing Courts had no power to pass the order they did, but that they should have passed an order in accordance with section 260 of the Civil Procedure Code. Mr. Ratanlal has very properly conceded this, but he argues that, notwithstanding the form of the applicant's prayer, we ought to make such order as the law permits and to allow any amendment that may be necessary for that purpose. This contention is, we think, right.

Next, it is urged that as the original judgment-debtor is dead, the injunction cannot be enforced against his son, the present appellant, and for this purpose reliance has been placed on the rule that an injunction does not run with the land, and on our decision in *Dahyabhai* v. *Bapalal*.[1] Our decision was concerned with an application to enforce an injunction against a purchaser of land, and for such a case there is no statutory provision. It is otherwise, however, where there is a devolution on death. For

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that contingency an express provision is made by section 234 of the Civil Procedure Code which is in these terms:

If a judgment-debtor dies before the decree has been fully executed, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

Such representative shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and for the purpose of ascertaining such liability the Court executing the decree may, of its own motion or on the application of the decree-holder, compel the said representative to produce such accounts as it thinks fit.

This case falls precisely within the terms of that section, but we are asked to hold that it has no application to those decrees which are described in section 260. We can see no sufficient reason for withholding from the words of section 234 their ordinary meaning, nor has Mr. Khare been able to suggest any inconvenience that would result from our giving to those words of section 234 their natural force. On the other hand, it is not difficult to see that if we were to accede to Mr. Khare's argument, we would be placing yet another obstacle in the way of a successful litigant's reaping the benefit of a decree passed in his favour.

In our opinion, therefore, the decree in this case is one to which the provisions of section 234 are applicable. The suggestion that the appellant is not the legal representative of the judgment-debtor cannot now be entertained; for it is explicitly stated in the judgment of the lower Appellate Court that the present appellant "is admittedly the heir of the judgment-debtor and has succeeded to the ownership and possession of the roof and house in respect of which the order is made." Having regard to the last paragraph of section 234, the execution against the appellant will be limited to the attachment of the property of the deceased come to his hands and not duly disposed of, and to such further process in relation to that property as is contemplated by section 260. Having regard to all the circumstances, each party must bear his own costs throughout.

Decree confirmed.