

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Pratt.

1907.

February 26.

PANACHAND POMAJI MARWADI (ORIGINAL APPLICANT), APPELLANT, v.
SUNDRABAI KOM THAKURJI MARWADI (ORIGINAL OPPONENT),
RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), sec. 232—Decree—Execution—Execution of money-decree—Transfer of the decree to one judgment-debtor—Execution of the decree by one judgment-debtor against his co-judgment-debtor allowed where the decree is passed against them as legal representative of the deceased relations and against the property of the deceased—Direction in the decree that the personal liability of the judgment-debtors be determined in execution proceedings does not make the decree a money-decree.

C. obtained a decree against P. as the legal representative of A. and against S. as the legal representative of L. It directed among other things that C. should recover Rs. 22,748 and costs from the property of A. and L.; that C. was entitled to get back from the possession of P. and S. as heirs respectively of A. and L. all books of account, bonds and other papers belonging to C.'s father; and that "it will be decided during the execution proceedings as to how far the heir defendants are personally liable in this suit."

C. died after he had obtained this decree leaving P. as his heir, to whom the decree was transferred by operation of law. P. then applied for execution of the decree against S. The Subordinate Judge rejected the application on the ground that P. was precluded by the proviso to section 232 of the Civil Procedure Code from executing the decree against his co-judgment-debtor S.

Held, (1) that there was nothing in the decree which saddled P. and S. with any personal liability to pay money, either jointly or severally; the amount of Rs. 22,748 and costs which was recoverable under the decree was made payable not by P. and S., but out of the property of A. and L.

(2) That although by reason of the direction in the decree that the question of the personal liability of P. and S. should be determined in execution proceedings there might be subsequently, when that liability had been determined, a decree for money against them; until then it was a mere contingency, which could not make the decree as it existed a decree for money against P. and S.

(3) That, therefore, P. was entitled to execute the decree against the estate of L. in the hands of S.

In section 232 of the Civil Procedure Code (Act XIV of 1882) the phrase "a decree for money against several persons" means a personal decree for the payment of money by two or more defendants jointly. Clause (b) of the proviso to the section does not extend to a decree which may become a decree for money

against several persons on determination by the Court. It applies only where in the decree there is a distinct order upon the defendants personally to pay the money.

APPEAL against the decree passed by J. L. Thakor, First Class Subordinate Judge at Poona.

Proceedings in execution.

One Bhagwan Ramji Marwadi died at Poona on the 15th November 1897. A day before his death he made his will, whereof he appointed Amrin and Loma Gomaji executors. The executors were to manage the property on behalf of Bhagwan's son Chela (plaintiff), who was then in his native country Marwar. On Bhagwan's death the executors Amrin and Loma took possession of all his property consisting of deeds, documents, ornaments, etc.

Amrin and Loma next applied for probate of the will under the Probate and Administration Act (V of 1881). The Court held the will proved, but required Amrin and Loma to furnish security before taking out probate. This they did not do, but they remained in possession of the property left by Bhagwan.

Amrin died on the 2nd July 1899 and Loma on the 28th July 1899. After their death the property went into the hands of Panachand Pomaji (as the brother of Amrin) and Sundrabai (daughter-in-law of Loma). Disputes arose between Panachand and Sundrabai, in consequence of which Sundrabai made a criminal complaint against Panachand. Bhagwan's son Chela then claimed that the property with respect to which the proceedings were taken belonged in fact to him. The police thereupon took possession of a portion of the property.

Chela then filed a suit against Panachand Pomaji (as the legal representative of Amrin) and Sundrabai (as the legal representative of Loma) to recover the possession of Bhagwan's property which had come into their possession.

This suit ended in a decree in favour of the plaintiff. The operative part of the decree ran as follows :—

"It is ordered that the plaintiff should recover Rs. 22,748 and the costs of this suit from the property of the deceased Amrin Pomaji and Loma Gomaji; that the plaintiff is entitled to get back from the possession of the defendants who are descendants as the heirs of the deceased Amrin and Lomaji or from the

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possession of any other people who may have got them from the present defendants all the books of account and bonds and other papers whatever there may be belonging to the deceased father of the plaintiff; that the plaintiff is entitled to take out a warrant for the attachment of the said books of accounts and other papers, etc., and that when the said books of accounts, deeds and bonds and other papers are produced in Court, the plaintiff is bound to prove them to belong to the father of the plaintiff. The plaintiff has not given a list as to what books and books of accounts, etc., are in the possession of the defendants, nor has he proved it and hence the relief asked for by the plaintiff in the shape of money in respect of books of account and bonds, etc., cannot be granted. The ornaments that are in the possession of the Nazir of the District Court or in the possession of the Police will be given to the plaintiff on his proving his rights to them and satisfaction to the extent of the value thereof according as it may be settled should be entered in the decree. It will be decided during the execution proceedings as to the conditions on which the estate of the minor is to be allowed to remain in the possession of his heir relation. It will also be decided during the execution proceedings as to how far the heir defendants are personally liable in this suit."

Shortly after obtaining this decree Chela died and Panachand being his heir, the decree was transferred to him by operation of law.

Panachand applied to execute the decree against the estate of Loma in the hands of Sundrabai.

The Subordinate Judge rejected the application on the ground that the decree was one for money against Panachand and Sundrabai "jointly as well as severally," and that therefore execution thereof was barred under clause (b) of the proviso to section 232 of the Civil Procedure Code (Act XIV of 1882).

Panachand appealed to the High Court.

V. G. Ajinkya, for the appellant (Panachand):—The lower Court has erred in holding that the decree under execution falls within the purview of clause (b) of proviso to section 232 of the Civil Procedure Code. It is not a decree for money: it is only a decree against the estate of deceased executors Amrin and Loma. The defendants Panachand and Sundrabai have no personal liability under the decree: and if indeed any such liability potentially exists, it is to be determined in execution proceedings. See *Lalla Bhagun Pershad v. Holloway* (1).

M. V. Bhat for the respondent Sundrabai :—The allegations in the plaint were that the legal representatives of the deceased against whom the suit was brought were actually in possession of the property. The Court has power to pass a personal decree against the legal representative of a deceased person under Bombay Act VII of 1866 when the representative has not duly applied the deceased's property which has come into his possession. Section 252 of the Civil Procedure Code provides that such a decree shall be executed against the legal representative as if the decree had been against him personally.

The mere fact that the amount of the decree is made payable out of the estate of the deceased in the hands of the defendants or that it contains other provisions necessary to make the decree legally complete does not alter its real nature, *viz.*, a decree for payment of money. See *Prince Gholam Mahomed v. Indrachandra Jahuri* (1).

V. G. Ajinkya was heard in reply.

CHANDAVARKAR, J. :—The question of law in this appeal is, whether the decree, of which execution is sought by the appellant, is “a decree for money against several persons” within the meaning of clause (b) of the proviso to section 232 of the Code of Civil Procedure. Under that clause, “where a decree for money against several persons has been transferred to one of them, it shall not be executed against the others.” The decree in the present case, of which the appellant seeks execution, was passed against him as the legal representative of his brother, Amrin Pomaji, deceased, and against the respondent, Sundrabai kom Thakurji Marwadi, as the legal representative of her father-in-law Loma Gomaji, deceased. The decree directed that the plaintiff, who had obtained it, should recover Rs. 22,748 and costs from the property of each of the two deceased above-mentioned. Next, the decree declared that the plaintiff was entitled to get back from the possession of the defendants (the present appellant and the present respondent) as heirs respectively of the two deceased persons, or from any other persons who might “say they have got them” from the defendants, “all the books of

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(1) (1871) 7 Ben. L. R. 318 at p. 320.

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account, bonds and other papers whatever" there might be "belonging to the deceased father of the plaintiff." Thirdly, the decree declared the plaintiff entitled "to take out a warrant for attachment of the said books of account and other papers, etc." Fourthly, the decree directed the plaintiff to recover, from the Názir of the Court or the Police, ornaments in the possession of either of them. And lastly, the decree said :—"It will also be decided during the execution proceedings as to how far the heir defendants are personally liable in this suit."

The plaintiff having died after he had obtained this decree, the appellant has become his heir, to whom the decree is transferred by operation of law. His application to execute the decree has been rejected by the Court below upon the ground that it is a decree for money against the appellant and the respondent "jointly as well as severally." But there is nothing in the decree which saddles the appellant and the respondent with any personal liability to pay money, either jointly or severally. On the other hand, the question whether they are personally liable, and, if so, whether the liability is joint or several, is expressly reserved by the decree for determination in the course of execution proceedings. The amount of Rs. 22,748 and costs, which is recoverable under the decree, is made payable, not by the appellant and the respondent personally, but out of the property of the deceased Amrin Pomaji and Loma Gomaji. "A decree for money against several persons" means a personal decree for the payment of money by two or more defendants jointly. The form of such a decree is given in Form No. 127 of the 3rd Schedule to the Code of Civil Procedure. That form has the sanction of the Legislature under section 644 of the Code. None of the directions in the present decree falls within the meaning of the term, whether according to that form or the obvious interpretation of the words. No doubt by reason of the direction in the decree that the question of the personal liability of the appellant and the respondent shall be determined in execution proceedings there may be hereafter, when that liability has been determined, a decree for money against them. But at present it is a mere contingency which cannot make the decree as it exists a decree for money against the appellant and the

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respondent. Clause (b) of the proviso to section 232 does not extend to a decree which may become a decree for money against several persons on determination by the Court. It applies only where in the decree there is a distinct order upon the defendants personally to pay the money: (See *Lalla Bhagun Pershad v. Holloway*⁽¹⁾.) In *Fazil Howladar v. Krishna Bundhoo Roy*⁽²⁾, it has been held by the Calcutta High Court that where there is no distinct order upon the defendant personally to pay money, but "there is merely that which is tantamount to a declaration that if the property be insufficient, the personal liability is to remain," the decree is not one for payment of money. That was decided with reference to a decree which directed the realization of the decretal amount from the hypothecated property and, if the proceeds so realized proved insufficient, made the defendant personally liable. The present case is stronger than that, because by the decree here there is no personal liability whatever of the appellant and the respondent determined whether as absolutely existing or as arising upon a certain event. The Court which passed the decree has left that to be the subject matter of another decree, so to say, if necessary.

The decision of the Calcutta High Court in *Degumbari Debi v. Anshootosh Banerjee*⁽³⁾, on which the lower Court has relied, has no application here. It simply decides that a suit to recover certain specified articles and money alleged to have been wrongfully seized and taken possession of by the defendant or to recover the value thereof is a suit for money within the meaning of section 380 of the Code of Civil Procedure. Here the question is not whether the suit was for money, but whether the decree of which execution is sought is one for money against several persons.

The decree of the lower Court must be reversed and the *darkhast* sent back to that Court to be dealt with according to law. The appellant must have his costs of the *darkhast* incurred till now in this Court and the Court below from the respondent.

Decree reversed.

(1) (1885) 11 Cal. 398.

(2) (1907) 25 Cal. 580 at p. 582.

(3) (1890) 17 Cal. 610.