

APPELLATE CIVIL.

Before Mr. Justice Aston and Mr. Justice Beaman.

MARTAND TRIMBAK GARDE AND ANOTHER (ORIGINAL PLAINTIFFS),
APPELLANTS, v. VINAYAK KASHINATH KHASGIWALE (ORIGINAL
DEFENDANT), RESPONDENT.*

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August 13.

Practice—Decree—Execution of decrees—Transfer of decree from one district to another—Rules of execution different in the two districts—Procedure.

Where in different districts, different modes of execution are prescribed, and where the question is how a decree passed in one, but of which execution is sought in another of such districts, is to be executed, the executing Court must be guided by the rules in force in its own district.

APPEAL under section 244 (c) of the Civil Procedure Code (Act XIV of 1882), from the decision of C. D. Kavishwar, First Class Subordinate Judge at Násik, in execution proceedings.

The plaintiffs obtained a decree against the defendant in the Court of First Class Subordinate Judge at Poona. The decree was in terms of an award filed. It provided that the plaintiff should pay off certain debts of the defendant (who was a minor) in addition to the sum of money that the plaintiff had advanced: and on his doing so, the defendant's property (*viz.*, the dwelling house in Poona and lands and house in the Násik District) were to go as security for the loan. The defendant was to pay the money within two years of the date of award, and on his failure to do so, the plaintiff was to recover his money by sale of the defendant's property secured to him.

The defendant made a default in payment, whereupon the plaintiff executed his decree in the Poona Court and got the defendant's house in Poona sold through the Court. The whole claim of plaintiff was not satisfied by the sale-proceeds, the plaintiff, therefore, applied to the First Class Subordinate Judge at Poona to transfer the execution proceedings to the First Class Subordinate Judge's Court at Násik for sale of the lands and a house belonging to the defendant situate in the Násik District. The execution proceedings were accordingly transferred to the Násik Court.

* First Appeal No. 147 of 1905.

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The rules governing execution of decrees in the districts of Poona and Násik were different. The rules ran as under :—

- No. 2600, dated the 21th May 1880.
- No. 762, dated the 9th February 1892.
- No. 8039, dated the 27th November 1930.

Under the Government Notifications shown in the margin, decrees of the nature shown against the following districts shall be transferred to the Collector for execution :—

Poona.
Sátára.
Sholápur.
Ahmednagar.

Decrees ordering the sale of any immoveable property belonging to a person who is an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act, which has been specifically mortgaged for the repayment of the debt to which any such decree relates.

All other districts.

- (1) Decrees for money in the execution of which a Court has ordered the sale of immoveable property belonging to any person who earns his livelihood either wholly or principally by agriculture.
- (2) Decrees ordering the sale of immoveable property belonging to any such person in pursuance of a contract specifically affecting the same.

In the Násik Court, the defendant, taking advantage of the difference in the rules of execution, raised the contention that as he principally maintained himself on agriculture, the execution proceedings should be transferred to the Collector for sale of the property.

The Subordinate Judge at Násik acceded to this contention and held that the sale should be made through the Collector of the District.

The plaintiff appealed to the High Court.

P. P. Khare, for the appellant :—The defendant should not be allowed to raise the plea that he was an agriculturist at the stage of proceedings that he had done. He was not described as an agriculturist either in the award or in the decree that followed upon it. The execution proceedings were commenced in 1894, and the Poona Court sold defendant's house in Poona in June 1901. The decree was then transferred for execution to the Násik Court; and it was there in June 1903 that he first raised the plea that he was an agriculturist. This plea he has raised too

late. The present case is the converse of the proposition laid down in *Gyanmal v. Ramchandra*⁽¹⁾. The lower Court should not therefore have accepted the plea of the defendant that he was an agriculturist, and it should not have transferred the execution proceedings to the Collector.

R. R. Desai, for the respondent (defendant):—The lower Court has arrived at the finding as a finding of fact that the defendant maintained himself principally by agriculture. The Násik District is not one of the four districts mentioned in the Government Notifications⁽²⁾. Hence either clause 1 or 2 applies to the present case. The present is a decree for recovery of money and the Court has ordered the sale of immoveable property belonging to the defendant. The execution proceedings were under a mortgage-decree and hence clause 2 of the rules would also apply.

P. P. Khare, in reply.—The defendant must make out that he was entitled to have the execution proceedings transferred to the Collector as tested by the rules obtaining in Poona, the execution proceedings having first commenced in Poona. Further clauses 1 and 2 of the rules do not apply. The present decree is not a mere money decree and so clause 1 does not apply. Nor does the clause 2 apply for there was merely an award and the property was to be sold not under the terms of a contract but in execution of a decree in terms of the award.

ASTON, J.—The only question in this case is, whether the decree was properly sent by the lower Court to the Collector for execution. The decree in question awards to the decree-holder a sum of money to be recovered from the defendant, and it is left to the judgment-creditor to apply for the sale of certain property secured by the decree. It is common ground that subsequent to the decree, an order for the sale of immoveable property was passed.

Mr. P. P. Khare has contended that the lower Court has no jurisdiction to allow the defendant to plead in the execution-proceedings his status as an agriculturist or more accurately his status as a person earning his livelihood principally by agricul-

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(1) (1896) P. J. p. 312.

(2) See *ante*, p. 6.

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ture. He has contended that the Court had no such jurisdiction, because in the suit, and in certain proceedings taken in Poona before the decree was transferred to Násik for further execution, no question of the status of the defendant was raised: Mr. Khare has also contended that if such a question was to be raised at all, it ought to have been raised in Poona and before transfer of the decree to Násik for execution, and has relied on the case of *Gyanmal v. Ramchandra* ⁽¹⁾. But the facts in that case are wholly different from the present proceedings. In that case it is said—

“We think that the Subordinate Judge had no jurisdiction in the execution proceedings to re-open the question of the defendant's status as an agriculturist, which had been decided in the course of the suit, the decree in which was in process of execution.”

In my opinion, the Násik Court had no option, but to obey the rule issued by Government under section 320, Civil Procedure Code, and embodied in Government Notifications (Rule 17, page 53, of the Civil Circulars), and as soon as it was brought to its notice that the decree came within that rule, the Násik Court was bound to transfer the execution-proceedings to the Collector.

Mr. Khare's second point was, that the decree in question does not come within that rule, and he contended that it was not a decree for money, in the execution of which the Court has ordered sale of immoveable property of any person who earns his livelihood either wholly or principally by agriculture.

In my opinion, that contention is not sustainable, when the terms of the decree are looked at. The decree is a decree for money, and it is a common ground that in execution, the Court ordered the sale of immoveable property belonging to a person who earns his livelihood wholly or principally from agriculture. Although the question seems to have been in issue in the lower Court, “whether judgment-debtor is an agriculturist” the finding of the lower Court that he does earn his livelihood principally by agriculture is not questioned in this appeal.

We confirm the decree of the lower Court with costs on appellants.

(1) (1893) P. J. p. 342.

BEAMAN, J.—The principal point pressed on us in this appeal is, that the Násik Court, as merely a Court of execution, had no jurisdiction to raise and try the issue whether the judgment-debtor was an agriculturist, that issue not having been pleaded, raised or tried in the Court of Poona, either in the suit or the subsequent execution-proceedings there. Now if this had really been a true question of status, as Mr. Khare, who argued the appeal with much ingenuity, evidently thought it was, there might, I think, have been some force in the contention. And it would, then, have been necessary to examine more closely the cases that were cited to support it. But I think that the question with which we are now concerned falls to be decided on a different and a narrower ground. Where in different Districts, different modes of execution are prescribed, and where the question is how a decree passed in one, but of which execution is sought in another, of such Districts is to be executed, it appears to me plain that the executing Court must be guided by the rules in force in its own District. Now the Notifications of Government (to be found at Rule 17, page 53, of the Civil Circulars) show that the execution of certain kinds of decrees is governed by slightly different rules in Poona and in Násik. When this decree was sent by the Poona Court to be executed in Násik, the first thing that the executing Court had to do was to decide whether the decree was of the kind defined by the rules prescribing a special procedure. In the opinion of my learned colleague it was. Not without considerable doubt and hesitation I adopt that opinion. That, too, was the view taken by the Court below: and whether it be a right or a wrong view, there can be no doubt but that when the Court took it, it had no option but to apply the rest of the rule prescribing special modes of executing decrees within the definition. The Court had not to try any question of status, had not to determine whether the judgment-debtor was an “agriculturist” within the meaning of the Dekkhan Agriculturists’ Relief Act, as the Court in Poona, no doubt, might have had to do; but after coming to the conclusion that the decree fell within the definition of the rule prescribing special modes of execution for that kind of decrees in Násik subject to another condition, the Court was bound to determine

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whether or not that condition also had been fulfilled. It had to determine, in other words, whether or not the judgment-debtor was a person earning his livelihood wholly or principally by agriculture. This the Court did, and finding that he was, it was again compelled to send the decree for execution to the Collector. I think, therefore, that this appeal fails, and that the decree of the Court below must be confirmed with costs.

Decree confirmed.

R. R.

FULL BENCH.

APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, Mr. Justice Aston,
 Mr. Justice Beaman and Mr. Justice Heaton.*

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 August 3.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, APPLICANT, v.
 BHAGIRATHIBAI (ORIGINAL PLAINTIFF), OPPONENT.*

Civil Procedure Code (Act XIV of 1882), sections 411 and 412—Plaintiff permitted to sue as a pauper—Compromise—Withdrawal by plaintiff without permission—Success—Failure.

If a plaintiff, who has been permitted to sue as a pauper, withdraw from the suit without permission under section 373 of the Civil Procedure Code (Act XIV of 1882) as the result of a compromise by which he obtained a substantial part of the relief claimed, he does not succeed in the suit within the meaning of section 411 but he fails in the suit within the meaning of section 412 of the Civil Procedure Code.

APPLICATION under section 622 of the Civil Procedure Code (Act XIV of 1882) against an order passed by G. R. Gokhle, Joint First Class Subordinate Judge of Sholapur, in Civil Suit No. 555 of 1904.

The plaintiff Bhagirathibai was permitted to file a suit *in forma pauperis* against her deceased husband's relations for the recovery of her maintenance and for residence. During the progress of the suit an award was made between the parties

* Civil Application No. 456 of 1905.