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recover possession of different properties from different defendants. If that were so, it was, in my opinion, clear that recourse could not be had to Order II, Rule 2 of the Schedule of the Civil Procedure Code. My detailed reasons for holding this need not be further stated as they have already been given in the case of *Sonu valad Khushal* v. *Bahinibai*[0].

It seems to me, therefore, that we ought to restore the decree of the trial Court and reverse that of the first appeal Court.

Appeal allowed.

R. R.

[0] (1915) 40 Bom. 351 at p. 357.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice.

1919. *September 30.*

IBRAHIM WALAD GOOLAM HUSENBUX (ORIGINAL DEFENDANT), APPELLANT *v.* NIHALCHAND WAGHMUL AND ANOTHER, PARTNERS OF THE FIRM OF WAGHMUL VURDHAJI (ORIGINAL EXECUTION-CREDITORS) RESPONDENTS.*

Civil Procedure Code (Act V of 1908), Order XXXIV, Rule 14—Mortgage—Property mortgaged with possession—Simultaneous execution of a rent note by mortgagor—Decree obtained by mortgagee on the rent note—Execution of the decree by sale of mortgaged property—Claim arising out of mortgage transaction—Mortgagee's right to bring the mortgaged property to sale otherwise than by suit.

One H mortgaged with possession his property to F, and on the same date executed a rent note in favour of F for a period of twelve months. H having failed to pay the rent under the rent note, the mortgagee F filed a suit and obtained a decree for the rent due. The mortgagee sought to execute the decree by sale of the mortgagor's equity of redemption in the mortgaged property. It was contended that the mortgagee could not be allowed to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage under Order XXXIV, Rule 14 of the Civil Procedure Code, 1908:

* Second Appeal No. 1144 of 1918.

Held, upholding the contention, that on the facts of the case, the claim on which the mortgagee got a decree was really a decree for payment of money in satisfaction of the claim arising out of the mortgage and therefore fell under Order XXXIV, Rule 14 of the Civil Procedure Code, 1908.

SECOND appeal against the decision of P. J. Taleyarkhan, District Judge of Thana, confirming the decree passed by R. B. Gogte, First Class Subordinate Judge at Thana.

Proceedings in execution.

On the 10th June 1913, Ibrahim walad Goolam Husenbux (defendant) mortgaged the property in suit with possession to Fojmal Navalji and others (plaintiffs) for Rs. 2,999 and on the same date Ibrahim executed a rent note in favour of the plaintiffs for a period of twelve months.

Ibrahim failed to pay the rent due under the rent note. The plaintiffs, therefore, filed a suit No. 152 of 1916 for the recovery of the rent and obtained a decree for Rs. 1,000 in December 1916. The decree was subsequently assigned by the plaintiffs-decree-holders to Nihalchand Waghmul and another (respondents) who made an application for execution of the decree by attachment and sale of the mortgaged property.

The defendant, judgment-debtor, contended that under Order XXXIV, Rule 14 of the Civil Procedure Code, the execution creditors were precluded from bringing the mortgaged property to sale.

The Subordinate Judge held that the decretal claim was not a claim arising under the mortgage and so Order XXXIV, Rule 14 did not apply. He, therefore, rejected the application.

On appeal, the District Judge confirmed the decree.

The defendant appealed to the High Court.

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M. K. Thakore, for the appellant:—The respondents are precluded under Order XXXIV, Rule 14, Civil Procedure Code, 1908, from bringing the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage. The decretal claim was one arising under the mortgage transaction and not a claim arising out of a transaction independent of the mortgage. The circumstances under which the rent note was executed clearly show that it was entered into only to provide a means for realizing interest. The mortgage and the rent note formed merely different parts of the same transaction. There is no case of our High Court where this question was decided. In *Azim-ullah* v. *Najm-un-nissa*[1] and *Altaf Ali Khan* v. *Lalta Prasad*[2], it was held that the mortgagee's correct remedy was to institute a suit for sale in enforcement of the mortgage. The latest case on the point is *Kadma Pasin* v. *Muhammad Ali*[3].

The respondents in this case are assignees of the decree and are bound by the same conditions which applied to the assignors, the mortgagees: *Chhagan* v. *Lakshman*[4]; *Jivarathnam Mudaliar* v. *Srinivasa Mudaliar*[5].

W. B. Pradhan for the respondent:—I rely on the changed wording of the section. The legislature thought it fit to confine the disability of the mortgagee only to the claim arising under the mortgage and properly because if it is open to mortgagee to buy the equity of redemption by a private arrangement with the mortgagor subsequent to the mortgage, there is no reason why it should not be open to him to have it sold in satisfaction of a claim unconnected with the

(1) (1894) 16 All. 415.
(2) (1897) 19 All. 496.
(3) (1919) 41 All. 399.
(4) (1907) 31 Bom. 462.
(5) (1907) 31 Mad. 33.

mortgage. The claim for the satisfaction of which the property is sold, is a claim arising under the rent note, on a suit brought on the rent note. The contention that the rent note and the mortgage are one transaction is not urged at the time of the original suit in which the decree is passed nor when the sale took place. The case of *Kadma Pasin* v. *Muhammad Ali*[1] is different on facts.

It is held that a claim for costs in a suit on the mortgage is not a claim arising under the mortgage: *Haribans Rai* v. *Sri Nivas Naik*[2].

Secondly, the bar under Order XXXIV, Rule 14, is personal and does not extend to the assignee: *Narhar* v. *Shivram*[3]. To hold otherwise would mean that the assignee could not recover the money due to him under the assignment unless a suit, which it is not in his power to bring, is brought: *Banh Bal* v. *Manni-Lal*[4], *Husein* v. *Shankargiri*[5].

The ruling in *Chhagan* v. *Lakshman*[6] no doubt modifies the view taken in *Narhar* v. *Shivram*[3] but the in other side has failed to take advantage of the procedure laid down there; if the present objection had been raised before the actual sale took place, perhaps matters would have stood differently.

MACLEOD, C. J.:—This is an appeal from the order of the District Judge of Thana disallowing the appellant's contention, that the execution of the decree passed against him in favour of Fojmal Navlaji and others could not proceed by bringing the mortgaged property to sale. Fojmal Navlaji and others were mortgagees of the appellant under a mortgage of the 10th of June 1913. That was a usufructuary mortgage.

(1) (1919) 41 All. 399.
(2) (1913) 35 All. 518.
(3) (1905) 7 Bom. L. R. 816.
(4) (1905) 27 All. 450.
(5) (1898) 23 Bom. 119 at p. 121.
(6) (1907) 31 Bom. 462.

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On the same day the defendant mortgagor executed a rent-note in favour of the mortgagees for a period of twelve months, and as he did not pay the rent under that rent-note the mortgagees filed a suit, and obtained a decree for Rs. 1,000. Then they assigned that decree to the present respondents who sought to issue execution by sale of the mortgagor's equity of redemption in the mortgaged property.

It has been contended for the appellant that the respondents cannot be allowed to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage under Order XXXIV, Rule 14 of the Civil Procedure Code. Now in cases of usufructuary mortgages it is not unusual for the mortgagees to allow the property to remain in the possession of the mortgagor on his executing a rent note. But as a matter of fact that is merely a method of securing the interest by special agreement, that is to say, the mortgagor collects the usufruct and pays a certain amount to the mortgagee under the rent note instead of the mortgagee collecting the usufruct himself.

It does not seem that the question which arises in this appeal has been decided in any reported case of this Court, although in more than one case which has lately come before this Bench, it has appeared that a mortgagee has obtained a rent-note from his mortgagor, and issued execution on a decree under that rent-note. At first sight it might appear that there is not a decree for the payment of money in satisfaction of a claim arising under the mortgage.

This question was considered very fully in a recent Allahabad decision in *Kadma Pasin* v. *Muhammad Ali*.[1] The facts were very similar to the facts in this

[1] (1919) 41 All. 399.

case. There the property was mortgaged by a usufructuary mortgage, and a subsequent agreement was entered into between the parties, whereby the mortgagor bound herself to pay annually a fixed sum of money in lieu of the offerings, and also, in case of default, to pay interest thereon. Default having been made, the mortgagee sued on the agreement and obtained a decree for money against the mortgagor. In execution of this decree he attached the mortgaged property and sought to have it sold. Upon objection by the mortgagor, judgment-debtor, it was held that the mortgagee could not bring the mortgaged property to sale in execution of the decree, as the claim under the subsequent agreement was one arising under the original contract of mortgage within the meaning of Order XXXIV, Rule 14, of the Code of Civil Procedure. Mr. Justice Piggott at p. 407 says :—"In the case now before us the money for which this decree was obtained represented the usufruct of the mortgaged property to which the mortgagee was entitled as part of his contract of mortgage. His right to receive this money rested upon his position as mortgagee. The mortgagor had become liable to pay the mortgagee this money in consequence of an agreement entered into between the parties subsequent to the mortgage : but it seems to me, in the first place, that the money for which the decree was passed was an essential part of the mortgage money, just as much as arrears of interest, which, if falling due on a contract of simple mortgage, become part of the mortgage money ; in the second place it seems to me that it would be doing violence to the plain language of the rule to say that the claim in satisfaction of which this decree was passed was not a claim arising under the original contract of mortgage."

I agree with these remarks, and they apply even more strongly to the facts of this case, as the agreement

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whereby the mortgagor agreed to pay rent was passed at the same time as the mortgage, and was, therefore, part of the mortgage transaction.

It has been urged that the respondents, who are assignees of the original mortgagee's decree, are in a better position than their assignors. But it seems to me perfectly clear that a mortgagee who has obtained a decree which he cannot execute by sale of the mortgaged property, cannot put his mortgagor in a worse position by assigning his decree to a third party. That question was considered in *Chhagan* v. *Lakshman*.[1] The learned Judges there referred to a dictum by Tindal C. J. in *Booth* v. *Bank of England*[2]: "Whatever is prohibited by law to be done directly, cannot legally be effected by an indirect and circuitous contrivance."

Therefore, on the facts of this case, it seems to me that this claim on which the mortgagee got a decree was really a decree for payment of money in satisfaction of the claim arising out of the mortgage; and, therefore, comes within Order XXXIV, Rule 14, of the Code. The appeal must be allowed with costs throughout.

Decree reversed.

J. G. R.

[1] (1907) 31 Bom. 462. [2] (1840) 7 Cl. & F. 509 at p. 540.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice.

1919
October 7.

MAHAMAD EBRAHIM ALIAS ALLIMIYA WALAD MAHAMAD SALYA HURJUK (ORIGINAL DEFENDANT No. 2), APPELLANT v. SHAIKH MAHOMAD VALAD SHAIKH ALLI ARAB AND OTHERS (ORIGINAL PLAINTIFFS Nos. 1 TO 7 AND DEFENDANTS Nos. 1 AND 3 TO 6), RESPONDENTS.*

* Second Appeal No. 1164 of 1917.