

(1942) 10 BOM CK 0013
In the Bombay High Court
Case No : Second Appeal No. 667 of 1940

Gopal Parsharam Namjoshi	Vs	APPELLANT
Damodar Janardan Bhagwat		RESPONDENT

Date of Decision : 06-10-1942

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 68, 73

Citation : AIR 1943 Bom 353 : (1943) 45 BOMLR 707

Hon'ble Judges : Sen, J;N.J. Wadia, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Sen, J.—The appellants are the sons of one Parsharam Mahadev Namjoshi, opponent No. 3 in Darkhast Not 452 of 1937 filed in the Court of the Subordinate Judge at Devrukh by one Bhagwat, respondent No. 1, in execution of a decree passed in the latter's favour on June 7, 1927, against opponents Nos. 1 and 2, judgment-debtors, named Vishnu Laxman Joshi and Ramakrishna Laxman Joshi. Bhagwat had been one of the Joshis' creditors and his claim was referred to arbitration, an award made and a decree passed in regular civil suit No. 80 of 1927. The decree directed that defendants Nos. 1 and 2 should pay to the plaintiff the principal amount of Rs. 2,178 within five years with interest at six per cent. per annum, that the past interest of Rs. 272 should be paid within a year from the date of the decree, and that if the defendants committed default in payment of this amount of interest in time, the plaintiff would be entitled to recover the whole amount payable by the sale of certain Immovable property on which a charge in respect of Rs. 2,178 was created, and it further provided that if the sale proceeds were insufficient, the deficit should be recoverable out of the remaining property of the defendants and from the defendants personally. There was a similar provision regarding interest accruing annually from the date of the decree. Default having been committed, Bhagwat, the decree-holder, brought the present darkhast for sale of six of the properties covered by the charge, and

further prayed that if the sale proceeds fell short of the money due to him, another property belonging to the judgment-debtors, viz. survey No. 40, should also be brought to sale. Prior to the present darkhast, Bhagwat had filed four darkhasts, viz. darkhast No. 247 of 1928, darkhast No. 195 of 1931, darkhast No. 436 of 1932 and darkhast No. 465 of 1934. In the last of those darkhasts he had prayed for rateable distribution of the sale proceeds which would be realised in another and prior darkhast No. 324 of 1934 filed by one Sane, a mortgagee of the Joshis, in execution of a decree for Rs. 426-8-2 obtained in civil suit No. 349 of 1929. In that darkhast the proceedings had been transferred to the Collector u/s 68 of the CPC and a sale ordered. The sale was to take place on June 10, 1935. On that day the Joshis applied for six days' time for arranging for a private sale, and on June 11 the Mamlatdar granted permission, purporting to act, it seems, under Order XXI, Rule 83, on condition that the money realised should be deposited in Court by June 15, 1935. The permission referred to three encumbrances on lots Nos. 9 to 14, the property in respect of which the present darkhast No. 452 of 1937 has been filed, viz. two encumbrances in favour of Sane, including the one which was being enforced in the execution proceedings, and one in favour of one Rajwade. The Joshis arranged for a sale of lots Nos. 9 to 14 with the appellant, Namjoshi. Rajwade agreed to forego his claim on lots Nos. 9 to 14 and to confine it to another property, viz. lot No. 15. In respect of the other encumbrance in favour of Sane the latter had obtained a decree in civil suit No. 348 of 1929 and an amount of Rs. 940 was due thereon. A sale-deed, exhibit 47, was passed on June 15, 1935, in favour of Namjoshi for Rs. 1,366-8-2 (the total of the two amounts due to Sane under the two decrees against the Joshis). It was recited therein that Rs. 426-8-2 due under the decree in regular civil suit No. 349 of 1929 was to be paid into Court for the complete satisfaction of the darkhast and that Rs. 940 was to be kept with the vendee, Namjoshi, for being paid in the execution proceedings of suit No. 348 of 1929. Namjoshi accordingly paid Rs. 426-8-2 into Court on June 15, 1935, and the sale-deed was taken to, the Sub-Registrar for registration on June 17, 1936. On the same day, but before the deed had been brought to the Sub-Registrar, Bhagwat made an application to the latter requesting him that in case a sale-deed in favour of Namjoshi was brought for registration, the vendee should be notified of his decree of 1927 for Rs. 2,178 and costs and interest. It is admitted that the Sub-Registrar duly notified Namjoshi of this application before the sale-deed, exhibit 47, was registered. Namjoshi did not at once deposit Rs. 940 in Court as ordered by the Mamlatdar; Sane had to file darkhast No. 320 of 1935 seeking to bring the property to sale, and Namjoshi thereupon deposited Rs. 975-13-0 in Court on April 7, 1936. On this amount being paid to Sane, the property in dispute became free from Sane's encumbrance.

2. In this darkhast, No. 452 of 1937, the following objections were taken by the appellant, Namjoshi, the judgment-debtors remaining absent :

(1) The previous darkhast No. 465 of 1934 was not an application made in accordance with law, and therefore the present darkhast was barred under

Article 182, Clause (5), of the first schedule to the Indian Limitation Act; (2) the appellant was a bona fide purchaser for value without notice of the charge created in favour of Bhagwat; Bhagwat, therefore, could not enforce his decree against him; and (3) even if Bhagwat could do so, the appellant was entitled to claim subrogation as he had satisfied the two encumbrances of Sane which were prior to Bhagwat's charge. The trial Court held that none of the objections were tenable, and ordered the sale of the property mentioned in the darkhast application. The appeal to the District Court was dismissed.

3. The objection on the point of limitation is this. Rateable distribution which was sought in darkhast No. 465 of 1934 could not, it is urged, have been granted u/s 73 of the CPC as that section applies only to applications made to the Court "in execution of decrees for payment of money against the same judgment-debtor"; it is contended that Bhagwat's decree was not such a decree and that, therefore, the previous darkhast was not in accordance with law. The learned District Judge who has decided the first appeal has found this argument untenable on the following grounds. Though in other parts of the Code of Civil Procedure, for instance, in Order XXI, Rules 20 and 53 and Section 54, a decree for money simpliciter is placed in contradistinction from a decree for sale in enforcement of a mortgage or charge, and though the view taken by both Sir Dinshah Mulla and Chitaley of the law would support this contention, he has held, following *Hart v. Tara Prasanna Mukkerji* ILR (1885) Cal. 718 *Kommachi Kather v. Pakker* ILR (1896) Mad. 107 and *Vaidhinadasamy Ayyar v. Somasundram Pillai* ILR (1905) Mad. 473 that a decree by virtue of which money is payable is to that extent a "decree for money" (the phraseology used in Section 296 of the Code of 1882 under which these cases were decided), which expression the learned District Judge has apparently considered to be equivalent to the expression "decree for the payment of money " to be found in the present Section 73. Other decisions (*Fazil Howladar v. Krishna Bundhoo Roy* ILR (1897) Cal. 580 *Kartick Nath Pandey v. Juggernath Ram Marwari* ILR (1899) Cal. 285, *Ram Charan Bhagat v. Sheobarat Rai* ILR (1894) All. 418 and *Pahalwan Singh v. Narain Das* ILR (1900) All. 401 which appear to take a contrary view have been distinguished, on the ground that they were mostly cases u/s 48 of the present Code or the old Section 230 corresponding thereto, and that they were not cases u/s 73. The learned District Judge has further held that under the sub-clause "thirdly" in Clause (3) of the proviso to Section 73 mete encumbrances which have been incorporated into decrees are contemplated and that under the sub-clause "fourthly" must be included "encumbrances which are merged in a decree," apparently including a decree for sale in enforcement of a mortgage or charge.

4. The learned District Judge has next relied on *Pitambar jana v. Damodar Guchait* ILR (1926) Cal. 664, *Ramgopal Shrimm v. Ramgopal Bhutada* (1933) 36 Bom. L.R. 643, *Firm Johar Mal-Paran Ram Vs. Bindeswari Prasad Singh and Others, Sita Ram Rai v. Madho Prasad* [1939] All. 97, *Nathubhai Kasandas v. Pranjivan Lalchand* ILR (1909) 34 Bom. 189 *Bando Krishna v. Narasimha* ILR (1912) 37 Bom. 42 *Janardan Govind v. Narayan Krishnaji* ILR (1918) 42 Bom.

420 and Hargovind Fulchand v. Naja Sura 20 Bom. L.R. 872 s.c., and held that as the application for rateable distribution conformed with the requirements of Order XXI, Rule 11, was accepted by the Court, and was registered and duly disposed of, and as the Court did not dispose of it on the ground that it was contrary to law, the relief asked for was one substantially in accordance with law, and that there was a mere inaccuracy in asking for the relief such as would not render it absolutely nugatory for purposes of limitation. "It was open to the Court to decide either that the relief prayed for would fall under the clause "fourthly" or under clause "thirdly" and that would have been a decision on merits."

5. The prayer clause in darkhast No. 465 of 1934 was as follows :

Regular darkhast No. 324 of 1934 is pending against the defendants in this Court. Out of the sale proceeds that will be realised in that darkhast rateable distribution should be allowed for Rs. 3,433-3-4 the amount due under this decree; costs of these execution proceedings and future interest on Rs. 2,178 at 6 per cent. per annum till the date of repayment should be allowed.

6. The question is whether this is "an application made in accordance with law for execution or to take some step in aid of execution" within the meaning of Clause (5) of Article 182 of the Indian Limitation Act.

7. The contentions of Mr. Desai on the point of limitation may be thus summarised :

(1) A distinction has been made in the CPC between decrees for payment of money (the expression used in Section 73) and decrees for sale in enforcement of a mortgage or charge (see Section 48, Order XXXIV, Rule 11, Order XXI, Rule 20, Order XXI, Rule 11(1), Order XI, Rule 53 and Order XXXIV, Rules 4 to 6).

(2) Hart v. Tara Prasanna Mukherji ILR (1885) Cal. 718, Kommachi Kather v. Pakker ILR (1896) Mad. 107, and Vaidhinadasamy Ayyar v. Somasundram Pillai ILR (1905) Mad. 473 relied on by the learned District Judge, were all decided u/s 295 of the Code of 1882, where the expression used was "decree for money." In Hart v. Tara Prasanna Mukherji, the suit was under the last clause of Section 295, corresponding to Clause (2) of Section 73. and it had been filed before payment had been made to the wrong person. It was, therefore, held that the suit was premature, and the observations on which the learned District Judge has relied, therefore, appear to be obiter. " Decree for money " may mean something more than a decree for the payment of money and may include a decree under which money is recoverable, e.g. by sale or otherwise.

(3) Mulla's commentary at page 293 of the CPC is against construing the expression "decree for payment of money" as including "decree for sale in enforcement of a mortgage or charge."

(4) There are several cases which construe the expression " decree for the payment of money," which occurred in Section 230 of the old Code, corresponding to the present Section 48, e.g. Fazil Howladar v. Krishna Bundhoo

Roy ILR (1897) Cal. 580 and Kartik Nath Pandey v. Juggernath Ram Marwari ILR (1889) Cal. 285 where decrees were similar to the one in Kammachi Kather v. Pakker ILR (1896) Mad. 107, and it was held that the decrees were not decrees for the payment of money. This construction of the expression cannot be brushed aside as inapplicable to cases falling u/s 73.

(5) Sub-clauses "thirdly" and "fourthly" of Clause (3) of the proviso to Section 73 relied on by the District Judge do not support his interpretation.

(6) It is not enough that the application in darkhast No. 465 of 1934 should have complied with provisions, e.g. Order XXI, Rule 11, which prescribe the formalities to be observed in filing an application for execution, Nathubhai Kasandas v. Pranjivan Lalchand ILR (1909) 34 Bom. 189 and Bando Krishna v. Narasimha ILR (1912) 37 Bom. 42 show that the Court must be competent to grant the relief asked for, and that the party applying must have the right to apply in the manner in question [see also Munawar Husain v. jani Bijai Shankar ILR (1905) All. 619

8. Mr. Walawalkar's answer to the above arguments is two-fold :

(1) The decree we have to deal with is an award decree and not a decree for sale in enforcement of a mortgage or charge. It is similar to a consent decree, and the relief asked for in the darkhast of 1934 was the realization of an amount of money, and this was within the decree. See Shah J.'s judgment in Janardan Shankar Vs. Krishnaji Balkrishna Bhate, which was held to be correct in Gurappa Gurushiddappa v. Amarangji Vanichand (1940) 43 Bom L.R. 26. Both these were cases of consent decrees in terms similar to those of the present decree, and it was held in those cases that it was open to the decree-holder to seek to realize a part of his money claim without first proceeding against the mortgaged or charged property. The considerations which would apply to mortgage decrees would be inapplicable to an award decree such as we are dealing with : it is in form different from that of a mortgage decree.

(2) The formal requirements of law in filing the darkhast, such as those prescribed by Order XXI, Rule 11, were duly complied with in the application in darkhast No. 465 of 1934, and it was not dismissed on the ground that it was not in accordance with law. The question whether the decree was one for payment of money or not could only be decided after examining the nature and the meaning of that decree, i.e. it would be a question for trial on the merits. There are decided cases in support of both views. A possible inaccuracy or error in the mode in which the decree was sought to be executed, based on one of the two views which was well arguable, cannot make the application one not in accordance with law.

9. I propose to examine first the second of Mr. Walawalkar's arguments. If that is found acceptable, it would, it seems to me, render it unnecessary to examine the contentions of Mr. Desai.

10. Looking at the matter apart from authorities, it appears to me, in the first

place, that a mere compliance with the formal requirements of the CPC as to the manner of filing, and the particulars to be shown in, an application for execution would not suffice to make it an application in accordance with law. A decree-holder seeking enforcement of a money decree, e.g. might seek to bring to sale property not belonging to the judgment-debtor and not covered by the decree and yet might follow the requirements of O. XXI in framing his application. Such an application would on the face of it be one not in accordance with law. It also seems to me that the expression "not in accordance with law" cannot be construed so as to mean "not in accordance with law on the face of the application." Where the Legislature has wanted to refer to a mistake or error apparent on the face of the record, it has made express mention of it, as in Order XLVII, Rule 1. No provision in the Indian Limitation" Act is based on such a qualification, which would appear to "be altogether foreign to the kind of considerations that arise on a question of limitation. It, therefore, appears to me that the expression "in accordance with law" must have some reference to the material content, apart from the form and formal content, of the application for execution. The particulars of a written application for execution required to be shown are given in Order XXI, Rule 11(2), the tabular form-mentioned therein being Form 6 in appendix E to the Code. The most material particular is Clause (j), "the mode in which the assistance of the Court is required." The last sub-clause under that clause is "(i) otherwise, as the nature of the relief granted may require." It seems to me essential that this mode must be one in accordance with law. In the present case the mode in which the Court's assistance was required was rateable distribution u/s 73. If, therefore, the decree-holder was not entitled to ask for the relief in that "mode" and if the Court had no power to grant such relief, it seems prima facie that the application would be one "not in accordance with law." With reference to the" last Sub-clause (v) of Clause (j) of O. XXI, Rule 11, Sub-rule (2), it is to be noted that Section 235, Clause (j), of the Code of 1882, corresponding thereto required the application for execution to state "the mode" in which the assistance of the Court is required as the nature of the relief sought may require" and not "as the nature of the relief granted may require," as in the present Code. This appears to be a material alteration; prima facie under the old Code even if the relief sought was not strictly claimable, yet the application would necessarily not be bad in itself, whereas under the present provision it has to conform to the nature of the relief actually granted by the decree.

11. Coming now to the authorities, we have" first two cases of this Court, Nathubhai v. Pranjivan and Bando Krishna v. Narasimha, In Nathubhai v. Pranjivan there had been a decree on June 30, 1900, ordering partition of Immovable property and making the execution of the decree conditional on the payment 6th the proper court-fees. On June 29, 1903, an application for the execution of the decree was made, but it was dismissed as it was not accompanied by the payment of court-fees. A second application to execute the decree was presented on June 27, 1906, accompanied by payment. The lower

Courts dismissed it on the ground that it was time-barred inasmuch as the first application made in 1903 had not been one in accordance with law as required by Article 179 of Schedule II to the Indian Limitation Act. In support of that order it was argued that the application of 1903 had asked the Court to do what it was not competent to do, i.e. to make the partition without payment of court-fees. It was held that as payment was prescribed under the decree as a condition of partition, but not as a condition of the making of the application for partition, the application asked for something within the decree and was, therefore, in accordance with law, for it was competent to the Court to order the execution to begin on the court-fees being paid within a certain period. In *Bando Krishna v. Narasimha* the plaintiff obtained a decree against the defendants, and he sought to execute the decree by filing six darkhasts, all within time. The lower Court held that the sixth darkhast was not filed within time, for the first five darkhasts could not be taken into consideration for purposes of limitation, as they had not been "in accordance with law," because every one of them had sought relief or reliefs which on considering the merits of the darkhasts the Court could not have granted. It was held that each of those darkhasts claimed the relief granted by and therefore within the decree and that the question whether on a consideration of all the facts the Court could in the events that had happened grant the relief was only a question for trial on the merits. Their Lordships in that case were concerned with the construction of Article 179 of the Indian Limitation Act Of 1877, Clause (4), which contained the words "the date of applying in accordance with, law to the proper Court for execution," etc. Chandavarkar J. pointed out the difference between Section 235(j) and the last words of Order XXI, Rule 11(2), Clause (j) "as the nature of the relief granted may require," and remarked (p. 49) :-

If a person other than one entitled to apply applies for execution, or if the person entitled applies for execution in a mode and for a relief outside the decree, the application is not in accordance with law for the plain reason that the decree of which execution is sought is not in reality the decree to which the application professes to relate but some other decree, one not existing and, therefore, incapable of execution according to law. The decree in such a case not existing, the application made as to it shares its fate and is treated as non-existent, Where, on the other hand a decree gives certain reliefs, and the application for execution seeks some or all of them, it may be that, after going into the merits of the application and considering on evidence all the circumstances and equities of the case, the Court comes to the conclusion that the particular relief or reliefs sought shall not be granted. But that decision of the Court on the merits cannot affect the application for the purposes of the question whether it is by itself in accordance with law, provided it meets in substance the requirements of the CPC or any other law relating to execution.

The test applied, therefore, was whether the decree-holder applied in a mode and for a relief not outside the decree. Batchelor J. thought that the words "in accordance with law" were an adverbial qualification of the word "applying." "It is

not even an application but it is the applying which must be in accordance with law." This appears to me to be too subtle a distinction hardly applicable to the phraseology adopted in the present Article 182. Batchelor J. added (p. 52) :-

On the other hand if it is to be said that a decree-holder is not applying in accordance with law merely because he asks for something, which under the decree the Court cannot grant him, we are, I think, confronted, at least in all cases where the decree is complicated or intricate, with this difficulty that the question whether an applying is made according to law can only be decided by an adjudication of the application on its merits. I venture respectfully to doubt whether that is intended. If the applying complies with the forms and the procedure prescribed in that behalf, I should be disposed to say that the applying was in accordance with law, and not the less so, because, on the merits of the application, whether for one reason or another, the application had to be refused; nor do I think that the difficulty which I have mentioned is satisfactorily removed by any distinction between what appears on the face of the application and of the decree and what appears by a more careful consideration of those documents; for in practice I should doubt whether it would be possible to maintain any such distinction.

With great respect, it seems to me clear that at least so far as the present provisions of Order XXI, Rule 11, Sub-rule (2), Clause (j), are concerned, the Legislature did not intend that a mere formal compliance" with the form and procedure prescribed should be enough : one indication of this appears to be provided by the amendment of the words "as the nature of the relief sought may require" by replacing the word "sought "by ".granted." I would interpret Chandavarkar J.'s dictum that the relief sought must not be "outside" the decree" as meaning that it must be within the power of the Court to grant such relief as is sought, though in the particular case the relief may not in fact happen to be granted.

12. In Pitambar Jana v. Damodar Guchait ILR (1926) Cal. 664 the question that arose for consideration was whether an application returned to the decree-holder under Order XXI, Rule 17, for amendment and not filed within the time allowed by the Court was an application in accordance with law, and their Lordships observed (p. 673) :-

...the expression "in accordance with law" in Article 182(5) should be taken to mean that the application though defective in some particulars was such upon which execution could be issued. If the omissions were such as to make it impossible for the Court to issue execution upon it, as was the case in Asgar Ali v. Trailokya Nath Ghose ILR (1890) Cal. 631, where the list of the properties to be attached and sold was not supplied with the application for execution, it should be held that such an application is not in accordance with law. But where the application is such as to enable the Court to take further steps in execution it cannot generally be said that such an application, if not defective in material and substantial matters is an application not in accordance with law.

In *Rama v. Varada* ILR (1892) Mad. 142 the High Court of Madras, following its earlier decision in *Ramanadan v. Periatambi* ILR (1883) Mad. 250, held that an application for execution, if defective in matters which cannot be said to be material or substantial, should be considered to be an application in accordance with law. In *Chattar v. Newal Singh* ILR (1889) All. 64 it was held that the term "applying in accordance with law" means applying to the Court: to do something which by law that Court was competent to do; it did not mean applying to the Court to do something which, either from the decree-holder's direct knowledge of facts or his presumed knowledge of law, he knew that the Court was incompetent to do. This was followed in *Munawar Husain v. Jani Bijai Shankar* ILR (1905) All. 619. In *Ramgopal Shriram v. Ramgopal Bhutada* (1933) 36 Bom. L.R. 643 though it was not necessary for the purposes of that decision to pronounce any opinion on the point, Divatia J. expressed the view that in order to see whether a particular application for execution was or was not in accordance with law, what had to be looked to in each particular case was whether the executing Court would or would not issue execution on the application for execution as preferred to it, and he approved of the test laid down in *Pitambar Jana v. Damodar Guchait* ILR (1926) Cal. 664.

13. From the above authorities the main test of an application for execution being in accordance with law would appear to be whether it is possible for the Court to issue execution upon it, i.e. whether it is within the power of the Court to grant the kind of relief asked for, though in the particular case the relief may not, on the merits, be granted, e.g. owing to some finding on facts, not to the nature of the application itself. I think, as I have already said above, that this is what was meant by Chandavarkar J. when he said that the relief sought must not be outside the decree.

14. The question, therefore, now arises whether, on such a test being applied, darkhast No. 465 of 1984 was an application made in accordance with law. In that application no notice was issued to the judgment-debtor and the Court dismissed it as premature. The question whether it was an application in accordance with law was not raised in those proceedings, and it must, therefore, now be decided in the present darkhast. It may not be an easy question to decide, and there appear to be authorities both ways. That being so, it was obviously difficult for the decree-holder to know, if the question were put to him, whether the Court had or did not have the power to grant the relief he was asking for. Prima facie, therefore, it does not appear fair or equitable that he should be exposed to the risk of having his application declared in a subsequent application for execution to have been an application not in accordance with law. But in a recent Privy Council decision, *General Accident Fire and Life Assurance Corporation, Limited v. Janmahomed* (1940) 43 Bom. L.R. 346. their Lordships quoted with approval the following remarks made in *Mitra's Law of Limitation and Prescription* (Tagore Law Lectures), 6th edition (1932) 1 . 256:-

A law of limitation and prescription may appear to operate harshly or unjustly in

particular cases, but where such a law has been adopted by the State,...it must, if unambiguous, be applied with stringency;...the rule must be enforced even at the risk of hardship to a particular party. The Judge cannot, on equitable grounds, enlarge the time allowed by the law, postpone its operation, or introduce exceptions not recognised by it.

Their Lordships went on to remark (p. 369) :-

Very little reflexion is necessary to show that great hardship may occasionally be caused by statutes of limitation in cases of poverty, distress and ignorance of rights; yet the statutory rules must be enforced according to their ordinary meaning in these and in other like cases.

In *Nagendranath De v. Sureshchandra De* ILR (1932) Cal. 1, their Lordships remarked that in construing provisions as to limitation "equitable considerations are out of place, and the strict grammatical meaning of the words is, their Lordships think, the only safe guide."

15. I will now take up Mr, Walawalkar's first contention that the relief asked for being the realization, of an amount of money was within the decree and was, therefore, such as the Court was competent to give, the decree being similar to those in *Janardan Shankar Vs. Krishnaji Balkrishna Bhate*, and *Gurappa Gurushiddappa v. Amarangji Vanichand* (1940) 43 Bom. L.R. 26. The decree in the present case was based on an award, the original claim being a money claim of Rs. 2,450. The decree said, in the first place, that the defendants should pay to the plaintiff the principal amount of Rs. 2,178 within five years from April 3, 1927, the interest accruing every year being payable every year and the interest which, had accrued till then, Rs. 272, being payable within a year. It then proceeded to state that if the defendants committed default in payment of this amount of Rs. 272 within a year, the whole amount payable to the plaintiff should be recoverable by sale of the Immovable property on which a charge for the whole amount was placed under the decree. "If that amount be insufficient," further declared the decree, " the amount of deficit should be recovered out of the remaining property of the defendants and from the defendants personally." This was followed by a somewhat similar provision which was to come into operation in case the annual amounts of subsequent interest were not paid in time, one month's grace for payment of such amounts being given. At the date of darkhast No. 465 of 1934, i.e. September 15, 1934, about six and a half years had elapsed from the date of the decree and only Rs. 300 had been paid. The decree-holder was, therefore, entitled to bring the whole property charged to sale. It seems to me clear that under the terms of the decree he was not then entitled to recover the amount due from the judgment-debtor in any other way. In *Janardan v. Krishnaji* there had been a consent decree passed in a mortgage suit under which the defendants were to pay annual instalments of Rs. 300, and in default of payment of any two instalments, the decree-holder was entitled to recover the whole of the amount then due by sale of the mortgaged property. Thereafter the decree ended with these words : "The whole of the sum due to

the plaintiff should be paid up in instalments by paying Rs. 300 each year as above." The instalments provided for were not paid, and on the judgment-debtor's failure to pay two instalments, the decree-holder applied to the Court for the sale not only of the mortgaged property but also of other property belonging to the defendants. It was contended for the judgment-debtors that the only remedy open to the decree-holder was to recover the whole amount by the sale of the mortgaged property only. Shah J. said (p. 956) :

I see no reason to limit the plain meaning of the decree as to the payment of the full amount in instalments by the provision as to the realisation of the full amount by the sale of the mortgaged property in default of the payment of any two instalments. The decree directs the defendants to pay the full amount, and the obligation is not in my opinion limited by the provision relating to the sale of the mortgaged property.

This was approved in the full bench case, *Gurappa Gurushiddappa v. Amarangji Vanichand*, where the Chief Justice said (pp. 33-34) :-

But I cannot see any reason why one should apply the analogy of a mortgage decree to a consent decree, which must be construed according to the terms of the language used.... In arranging consent decrees of the nature in question, it is usually the creditor, and not the debtor, who is master of the situation, and I can see no justification for holding that, by taking a charge upon specific property, the primary object of which, as I have pointed out, is to secure him against other creditors, the creditor abandons his right to proceed against other property of the debtor. Such an abandonment should not be presumed in the absence of language making clear the intention to abandon.

16. The decree in the present case, however, is not a consent decree, in arranging which the creditor could be said to have been the master of the situation, so that he could not have abandoned the general right which he would have, under a money decree, of proceeding against any property of the debtor. The charge was created under the award on which the decree was based, and it seems to me unlikely that the arbitrators not only created such a charge for the benefit of the creditor but also left him the option of proceeding against any property of the debtors even though not covered by the charge. It appears to me that the part of the decree which we are dealing with is intended to operate in the manner of a final decree for sale under Order XXXIV, Rule 5, and that the part of the decree providing for the contingency of the sale-proceeds being insufficient to discharge the judgment-debtor's liability (corresponding to a decree passed under Order XXXIV, Rule 6) cannot be said to have yet become operative. It, therefore, seems to me that though the consent decrees in *Janardan, v. Krishnaji* and *Gurappa Gurushiddappa v. Amarangji Vanichand* might have been decrees for the payment of money, the ground on which they might be so construed is not available to the present decree-holder. For the purpose of construing the present decree with reference to the question whether it is a decree for payment of money within the meaning of Section 73 I think that it

should be regarded as on the same footing as a decree for sale for enforcement of a mortgage or charge, and it is on this footing that the" decree has been dealt with in the Courts below.

17. Apart from the authorities, it is to be observed that a distinction appears to have been made in the Code between decrees for the payment of money and decrees for sale in enforcement of a mortgage or charge. Section 34 deals with cases in which the Court may order interest "where and in so far as the decree is for the payment of money;" whereas Order XXXIV, Rule 11, deals with the question of interest "in any decree passed in a suit for foreclosure, sale or redemption." Section 48, Sub-section (7), Clause (6), speaks of a decree or any subsequent order directing "any payment of money or the delivery of any property." Order XXI, Rule 20, makes the provisions contained in Rules 18 and 19 applicable to decrees for sale for enforcement of a mortgage or charge; and Rules 18 and 19 deal respectively with execution in the case of cross-decrees in separate suits for the payment of two sums of money passed between the same parties and execution in the case of cross-claims under the same decree for the recovery of sums of money by two parties from each other. Mulla's note under Rule 20 correctly, in my opinion, states that that rule shows impliedly that the expression "decree for the payment of money" and other similar expressions in the Code do not include a decree for the sale in enforcement of a mortgage or charge. Again, Sub-rule (1) of Order XXI, Rule 11, deals with the power of the Court, where the decree is for the payment of money, to order, on the oral application of the decree-holder at the time of the passing of the decree, the immediate arrest of the judgment-debtor prior to the preparation of a warrant if he is within the precincts of the Court. Such power obviously cannot vest in the Court where the decree is for sale in enforcement of a mortgage or charge. This Sub-rule (1) corresponds to Section 256 of the Code of 1882, which begins thus : "When a decree is passed for a sum of money only, and the amount decreed does not exceed a sum of one thousand rupees the Court may," etc, "Order XXXIV, Rules 4 and 5, deal respectively with the preliminary and the final decrees in a suit for the sale of mortgaged property; and Rule 6 of the same order directs that where the net proceeds of any sale held under Rule 5 are found insufficient to pay the amount due to the plaintiff, the Court, on application from him, may, if the balance is legally recoverable from the defendant otherwise than out of the property sold, pass a decree for the balance. It is contended by Mr. Desai on behalf of the appellant, and rightly contended in my opinion, that only where such a decree is passed do we get. in a suit for sale of mortgaged property, a decree for the payment of money. In Order XXI, Rule 53, both the expressions are used : "where the property to be attached is a decree, either for the payment of money or for the sale in enforcement of a mortgage or charge," etc. We thus find throughout all the provisions a clear distinction drawn between the two kinds of decrees.

18. It is to be remembered that the expression "decree for the payment of money" is not to be found in Section 295 of the Code of 1882, corresponding to

Section 73 of the present Code. The expression there" used was "decree for money." All the three cases relied on by the learned District Judge were decided in reference to the old section. The words "decree for money" are certainly not so precise as "decree for the payment of infancy" : they seem to be capable of meaning " decrees under which money is payable or recoverable."

19. The first case relied on by the learned District Judge, *Hart v. Tara Prasanna Mukherji* ILR (1885) Cal. 718 was a suit falling under the last clause of the old Section 295, corresponding to Clause (2) of the present Section 73. That suit having been filed before any payment had been made to a person not entitled thereto, it was dismissed as premature. That being so, the observations made in that decision on which the learned District Judge has relied must, in the first place, be strictly regarded as obiter. It was there held that the object of the section was to provide for rateable distribution amongst all persons who had obtained decrees ordering the payment of money to them by the judgment-debtor and that every decree by virtue of which money was payable was to that extent a "decree for money" within the meaning of that section, even though other reliefs might be granted by the decree. One ground for this view was thus stated (p. 730) :

If it were not so, and if the holder of a mortgage decree, or of any decree under which money was payable and other relief granted, was held not to be the holder of a decree for money, this result would apparently follow, that before he could claim rateable distribution he would be obliged to sue again for his money only. This could hardly have been the intention of the Legislature.

With all respect, it seems to me that this argument is hardly justified in view of the provisions relating to secured creditors to be found in the three provisos to Section 73. Besides, apart from the fact that the language of the old Section 295 under which this case was decided is not the same as that of the present Section 73, it is to be noted that the decree with which the case was concerned contained a distinct order to the mortgagor personally to pay the amount of the mortgage debt. *Kommachi Kather v. Pakker* ILR (1896) Mad. 107 purported to follow *Hart's* case, but the last feature was absent therefrom, the decree directing the mortgagor to pay the mortgage debt within the period fixed by the Court and providing that on default the mortgaged property should be sold, the balance (if any) being recoverable from the mortgagor. The decrees in *Fazil Howladar v. Krishna Bundhoo Roy* ILR (1897) Cal. 580 and *Kartick Nath Pandey v. Juggernath Ram Marwari* ILR (1899) Cal. 285 were similar to the decree in *Kommachi's* case, and those cases turned on the meaning of the expression "decree for the payment of money "which occurred in Section 230 of the Code of 1882, corresponding to Section 48 of the present Code; and it was held that the decrees were not "decrees for the payment of money" within the meaning of that section. The decision in *Ram Charan Bhagat v. Sheobarat Rai* ILR (1894) All. 418 and *Pahalwan Singh v. Narain Das* ILR (1900) All. 401 are also to the same effect. Sir Dinshah Mulla has remarked at p. 294 of his Code of Civil Procedure,

11th edition :

There is little doubt that if these High Courts were called upon to decide whether a decree of the character in the Madras case was a "decree for the payment of money" within the meaning of this section, they would hold that it was not. In any event the Madras decision cannot be sustained under this Code : See Order 21, Rule 20.

It seems to me difficult to distinguish a construction of the expression "decree for the payment of money" occurring in Section 73 from that of the same expression in the old Section 230, as the learned District Judge appears to have done. The wording of the present Section 48, Sub-section (1), Clause (b), is, "Where the decree or any subsequent order directs any payment of money or the delivery of any property;" while the old Section 230 began thus : "Where an application to execute a decree for the payment of money or delivery of other property has been made under this section and granted." The phraseology used in the present section appears to supply the meaning of the expression in question; and I can see no good reason for supposing that that expression bears different meanings in the present Section 73 and the old Section 230.

20. The third case relied on by the learned District Judge, Vaidhinadasamy Ayyar v. Somasundram Pillai ILR (1905) Mad. 473 is a full bench case which approved of Kommachi's case and followed Hart's case. The decree in that case contained an order for the sale of the mortgaged property and also an order for the recovery personally from the judgment-debtor and from his other property of what might remain undischarged by the sale-proceeds of the mortgaged property. The question for consideration was whether in execution of the decree the judgment-debtor could set up as a bar to execution an adjustment which had not been certified u/s 258 of the old Code; it had been held in Mallikarjuna Sastri v. Narasimha Rao ILR (1901) Mad. 412 that Section 258 was inapplicable to such a case. Their Lordships overruled Mallikarjuna's case and said : "Section 258 must be held applicable to cases in which decree is as here." Section 258 of the old Code corresponds to the present Order XXI, Rule 2, where the language used is : "Where any money payable under a decree is paid out of Court." This case approved of and followed the dictum in Hart's case that every decree by virtue of which money was payable was to that extent a decree for money. It seems to me, however, that the construction put on the language of the old Section 295 in Hart's case is inapplicable to the words in Section 73 which we are now concerned with, and that, therefore, this case cannot be regarded as an authority for the purpose of construing those words.

21. The learned District Judge has also relied on sub-clauses "thirdly" and "fourthly" of Clause (c) of the proviso to Section 73. In his opinion they go to show that Section 73 does not exclude holders of mortgage decrees from its operation, for under "thirdly" encumbrances which have not been incorporated into decrees are contemplated, while under "fourthly" are included encumbrances which have merged in a decree. Sub-clause "thirdly" is to the effect that the

proceeds of sale shall, after the expenses of the sale have been met and the amount due under the decree under which the sale has been held discharged, be applied in discharging the interest and principal monies due on subsequent encumbrances (if any). That certainly does not make the holders of such encumbrances participants in the rateable distribution, which is dealt with in the next sub-clause "fourthly." Sub-clause "thirdly" guarantees the preservation of the interest of the holders of subsequent encumbrances in full, who would thus have no necessity for the benefits of the rateable distribution. As for the sub-clause "fourthly," that provides for rateable distribution among holders of "decrees for the payment of money " against the judgment-debtors who have applied to the Court in conformity with the earlier part of Sub-section (1). This sub-clause, therefore, uses the same expression as is used in that part of the sub-section, and it would obviously be begging the question to say that it applies to holders of mortgage decrees. In my opinion, the arguments of the learned District Judge based on these two Sub-clauses cannot be sustained by the language and the scheme of the section.

22. In the result, it seems to me that the contentions of Mr. Desai must prevail over those urged by Mr. Walawalkar, and it must, therefore, be held that the darkhast of 1934 was not an application for execution made "in accordance with law." That being so, the present application for execution, not having been made within three years from the date of the darkhast which immediately preceded that darkhast, is barred by limitation under Clause (5) of Article 182 of the Indian Limitation Act.

23. [After dealing with points not material to this report, the judgment concluded :] In the result, Mr. Desai's contention on the point of limitation must be upheld, though his other contentions fail. The appeal will, therefore, be allowed, the orders of the lower Courts set aside and the darkhast must be dismissed with costs throughout.