

(1907) 02 BOM CK 0025
In the Bombay High Court
Case No : First Appeal No. 62 of 1906

Panachand Pomaji

APPELLANT

Vs

Sundrabai Thakurji

RESPONDENT

Date of Decision : 26-02-1907

Acts Referred:

Citation : (1907) 9 BOMLR 409

Hon'ble Judges : Pratt, J;Chandavarkar, J

Bench : Division Bench

Judgement

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 Manvadi, 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 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 &c." Fourthly, the decree directed the plaintiff to recover, from the Nazir 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."

2. 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 either joint or several. 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 u/s 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 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 if in the decree there is a distinct order upon the defendants personally to pay the money. See *Lalla Bhagun Pershad v. Holloway* I L R (1885) Cal, 393. In *Fazil Howlador v. Krishna Bundhoo Boy* I L R (1897) Cal. 580 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 if necessary.

3. The decision of the Calcutta High Court in *Degumbari Debi v. Aushootosh Banerjee* I L R (1890) Cal. 610, 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.

4. 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.