

(1921) 08 BOM CK 0012

Bombay High Court

Case No: None

Ganesh Eknath Kaulgi and
Another

APPELLANT

Vs

Bhausahab Bhavanrao
DeshmukhRESPONDENT

Date of Decision: Aug. 2, 1921**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 34 Rule 6, 47
- Transfer of Property Act, 1882 - Section 90

Citation: (1922) ILR (Bom) 345**Hon'ble Judges:** Fawcett, J**Bench:** Single Bench

Judgement

Fawcett, J.

The Subordinate Judge has held that the application in effect asks him to vary the prescribed mode of satisfaction under the decree on the law and that as an executing Court he cannot do so. It seems to me that he is justified in that view; for the award decree clearly contemplates satisfaction by payment of an annual sum out of the profits of certain mortgaged lands, whereas the Court is now asked to recover the full amount due by attachment and sale of other property in the hands of the mortgagor or his legal representatives.

2. The appellant's pleader relies on the provision in the decree that, if the payment should fall short of Rs. 125 in any particular year, then the mortgagor should make good the amount from his other private resources. It is open to question whether that particular provision is a valid one, in view of the decisions in *Hargovandas v. Mohanbhai* (1900) 2 Bom. L.R. 225 and *Damodar v. Vyanku* (1906) 31 Bom. 244 to the effect that no money decree against a mortgagor can come into existence until the stage provided for by Section 90 of the Transfer of Property Act (now Order XXXIV, Rule 6, Civil Procedure Code) has been reached. That stage has certainly not

been reached in the present case. But even assuming that this particular provision could be authority for the application now under consideration, it seems to me that this will not avail the applicant. The real objection to the Darkhast is the fact that under the ruling in *Padapa v. Dwamirao* (1900) 24 Bom. 556 the mortgage was in its inception void against the heir of the Vatandar. That being so, any arrangement, or even any decree, based on the mortgagee's rights under such mortgage must also be void against the heir of the Vatandar, Such an arrangement or decree cannot be put on any higher footing than the transaction of mortgage on which it is based. No doubt it is possible that the applicant may have certain rights to recover what the opponent's father has failed to pay under the decree, e.g., in consequence of the liability of a Hindu son to pay the debts of his father. But that is an entirely distinct cause of action, and the Subordinate Judge has rightly held that any such claim can only be made in a properly framed suit. It is obviously not a case that can be dealt with u/s 47, Civil Procedure Code, for the claim will not be one relating to the execution, discharge or satisfaction, of the decree but will arise from a right different from applicant's rights under the decree. The appeal is, therefore, summarily dismissed.