

1881

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MARCH 25.

[604] APPELLATE CIVIL.

APPEL-
LATE
CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice M. Melwill.

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SHANKARAPA DARGO PATEL (*Original Plaintiff*), Appellant v.
DANAPA VIRANTAPA (*Original Defendant*), Respondent.*
[25th March, 1881.]

Dekkhan Agriculturists' Relief Act XVII of 1879, ss. 20, 74—Mortgage-decree—Decree in suit in mortgage—Payment by instalments—Civil Procedure Code (Act X of 1877), s. 210.

The words "decree passed against an agriculturist" in s. 20 of the Dekkhan Agriculturists' Relief Act XVII of 1879 mean a decree passed against an agriculturist *personally*, and do not include a decree for the recovery of money by the sale of mortgaged property.

The effect of that section must be taken to be an enlargement of the indulgence granted by s. 210 of the Civil Procedure Code (Act X of 1877), but only in those cases to which the latter section applies. By s. 210 of the Civil Procedure Code the Court may, after the passing of a decree in money suits, order the amount to be paid by instalments, provided the decree-holder consents. By s. 20 of Act XVII of 1879 the Court may make the same order in similar suits, *without the consent* of the decree-holder.

In the case of a debt secured by a mortgage, the agriculturist's remedy lies in a suit, not for an account, but for redemption; and the only decree which can be made in such a suit, in the absence of any special provision in the Act, is the ordinary decree for payment of the whole amount within six months, or, in default, for foreclosure.

Hardeo Das v. Hukan Singh (1) referred to and approved.

[R., 5 B. 614; 7 B. 332 (335); 15 C.W.N. 1083=11 Ind. Cas. 736; D., 20 B. 469 (471).]

THIS case was submitted for the decision of the High Court by M. B. Baker, Senior Assistant Judge at Sholapur in the District of Poona, under s. 617 of Act X of 1877. The case came before him in appeal, and was stated by him, with his own opinion thereon, as follows:—

"This is an appeal against an order passed by the Second Class Subordinate Judge of Sholapur on the 30th day of July, 1880, in application No. 24 of 1880 of his file.

"Plaintiff appeals on the grounds that—

"Under s. 20 of Act XVII of 1879 instalments can only be awarded in decrees for money. His decree is to recover money by the sale of mortgaged property, and the Subordinate Judge, consequently, erred in awarding payment by instalments.

[605] "In Original Suit No. 963 of 1878 plaintiff sued to recover Rs. 400 principal and Rs. 400 interest, deducting as received Rs. 246-8-0 under a mortgage-deed, dated April 26th, 1873. In default of payment, he sought to recover by the sale of certain land situated at Sangdari and Chusti.

"On December 5th, 1878, plaintiff obtained a decree, *ex parte*, awarding him Rs. 551-8-0, to be recovered from the mortgaged property.

"On January 11th, 1879, plaintiff presented a *darkhast* for execution, and a warrant for attachment was issued. On September 17th, 1879, plaintiff petitioned that the sale might not be conducted by the Collector, but by the Court. On February 27th, 1879, one Sheewapa Rewapa

* Civil Reference No. 13 of 1881.

petitioned to raise the attachment on half of the property, on the ground that it belonged to him, and the attachment was raised accordingly on June 14th, 1879.

"On January 18th, 1880, defendant petitioned, asking that he might be allowed to pay off the debt by yearly instalments of Rs. 25.

"The Subordinate Judge ordered that defendant should pay Rs. 100 per annum, until he had paid Rs. 625, the amount of the decree and costs with interest at six annas per cent. till date of payment. In default of payment, the amount to be recovered by sale of the mortgaged property as well as from defendant personally.

"The issues on appeal are—

"I. Whether the provisions of s. 20 of Act XVII of 1879 apply to decrees passed on mortgage-deeds. II. Whether the provisions of the said section apply to proceedings pending at the time when the Act came into force.

"No further issues are desired.

"The decree from which these proceedings have arisen was passed on a mortgage-bond. Execution proceedings were taken out before Act XVII of 1879 came into force, and only the actual sale remained for their completion when, on January 18th, 1880, respondent appeared for the first time and applied, under s. 20 of Act XVII of 1879, to have the decree made payable by instalments. The Subordinate Judge granted the application, holding that the [606] words 'any decree against an agriculturist' includes decrees passed on mortgage-bonds.

"So far as I can find, the points raised in the present appeal have never been authoritatively decided by the High Court; and as these points are of importance, and I have arrived at my decision with considerable hesitation, I have determined to refer it to the High Court under s. 617, Civil Procedure Code."

"The words 'any decree' in s. 20 are very wide, and at first sight bear the construction which the Subordinate Judge has put upon them; but, considering the place which s. 20 occupies in the Act and the provisions of s. 22, I am in doubt whether this construction is right. It seems to me that the provisions of chap. iii, as far as s. 21, refer to money decrees, and it is clear that this is not a 'money decree,' within the meaning of the Act. The effect of the Subordinate Judge's order is not only to vary the decree in a manner which is not allowed by the Civil Procedure Code, but also to alter entirely the contract made between the parties. The provisions of s. 20 are retrospective, while those of s. 22 are prospective; but it seems to me that, notwithstanding the object of the Act, it can hardly have been intended that the holder of a decree on mortgage before the Act came into force should be put in a worse position than he would be if he had obtained a decree after the Act came into force. The agriculturist debtor would certainly be relieved, but the creditor would suffer more than he would do, if the procedure laid down in s. 22 were adopted. It has been held in *Dipchand v. Gokuldas* (1) that s. 21 does not apply to decrees passed before November 1st, 1879, and this decision seems to favour the view which I have taken; for, if the holder of such a money decree can imprison his agriculturist debtor as well as attach and sell his immoveable property, *a fortiori* should a decree-holder be entitled to recover from property specifically mortgaged.

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“ Act XVII of 1879 is silent as to pending proceedings. It is true that no sections of the Civil Procedure Code are expressly repealed, but some of them are superseded. Under these circumstances, [607] I think that in spite of the words ‘at any time’ in s. 20, s. 6 of the General Clauses Act applies, and that s. 20 has not a retrospective effect, so far as pending proceedings in execution are concerned.

“ I find on both issues in the negative, contingent on the opinion of the High Court, and I reverse the Subordinate Judge’s order. Each party to pay his own costs in appeal.”

There was no appearance for either of the parties in the High Court.

The following is the judgment of the Court :—

JUDGMENT.

MELVILL, J.—We think that the Senior Assistant Judge is right in holding that the words “decree passed against an agriculturist” in s. 20 of Act XVII of 1879 mean a decree passed against an agriculturist *personally*, and do not include a decree for the recovery of money by the sale of mortgaged property.

The Allahabad Court has held (1) (and we think rightly) that s. 210 of the Code of Civil Procedure (which by s. 74 of Act XVII of 1879 governs proceedings under that Act) does not empower a Court to make payable by instalments a decree for the recovery of money by sale of mortgaged property. Nor is there anything in Act XVII of 1879 which enables a Court, at the time of passing such a decree, to order it to be payable by instalments. Sections 16 and 17 seem to indicate a contrary intention. They provide that in certain cases suits may be brought by an agriculturist for an account; and that the amount ascertained may be decreed to be due, and be made payable by instalments. But comparing the words of s. 16 with the words of s. 3, cl. (w), it is clear that the debts in respect of which an account may be sued for, are debts *not secured by mortgage*, and that it is only in respect of such debts that s. 17 authorizes an order for payment by instalments. In the case of a debt secured by a mortgage, the agriculturist’s remedy lies, not in a suit for an account, but in a suit for redemption (s. 3, cl. (z)); and there being no special provision in the Act authorizing instalments, the only decree which can be made in such a suit is the ordinary decree for payment of the whole amount within six [608] months, or in default for foreclosure. If it had been intended to give to an agriculturist mortgagor the benefit of instalments, it may reasonably be supposed that ss. 16 and 17 would have been made applicable to suits under cl. (z), as well as under cl. (w) of s. 3; but, as we have said, the wording of s. 16 shows that this is not so.

There being, therefore, no special provision in the Act authorizing a decree in a mortgage suit to be made payable by instalments, we must fall back on the provisions of s. 210 of Act X of 1877, and these do not authorize such a decree. It seems to us to follow that s. 20 of the Act cannot be made applicable to decrees in mortgage suits. It is impossible to suppose that the Legislature would authorize a Court to convert a decree made according to law into a decree which, if it had been made in the first instance, would have been contrary to law. And, speaking generally, we may say that it is very improbable that the Legislature would authorize the Courts to compel the sale of immoveable property in small lots, and

(1) 2 A. 320.

at different times,—a procedure which would be likely greatly to reduce the selling price, and be certain to multiply the law costs.

The effect of s. 20 of Act XVII of 1879 must be taken to be an enlargement of the indulgence granted by s. 210 of Act X of 1877, but only in those cases to which the latter section applies. By s. 210 of the Code the Court may, after the passing of a decree in money suits, order that the amount be paid by instalments, provided that the decree-holder consent. By s. 20 of Act XVII of 1879 the Court may in the same suits make the same order *without the consent* of the decree-holder.

5 B. 609.

[609] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Pinhey.

R. AND N. MODHE, *Plaintiffs* v. S. DONGRE, *Defendant*.*

[2nd August, 1881.]

Civil Procedure Code (Act X of 1877), ss. 32, 34 and 53—First hearing—Plaint—Practice—Amendment of plaint—Issues.

The words in paragraph 1 of s. 53 of the Code of Civil Procedure (Act X of 1877) "at or before the first hearing" are merely directory and not mandatory, and, therefore, a plaintiff may, subsequently to the "first hearing," amend his plaint, provided such amendment does not alter the original character of his suit.

The plaintiffs (mortgagors) in a suit against their mortgagees sought only for production of the mortgage-deed or for an account, although the averments in the plaint warranted a prayer for redemption. Subsequently to the first hearing of the suit they applied to be allowed to amend the plaint by adding a prayer for redemption. *Held* that the provisions of s. 53 of the Civil Procedure Code (Act X of 1877) did not preclude the Court from permitting the amendment to be made.

It is competent to a Court, at any time before passing a decree, to frame an additional issue embracing a matter not included in the plaint (provided it be not inconsistent with it), or in the written statement, but which may appear upon the allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties or persons.

Section 34 of the Civil Procedure Code (Act X of 1877) limits the time within which a defendant may object for want of parties, but it does not so limit the right of the plaintiff to add parties. In some cases s. 34 would not prevent even a defendant from objecting to the want of a proper party *after the first hearing*, e.g., where after the first hearing and before decree a co-parcener or remainderman or reversioner is born, or where a woman (who is a party) is married to a man who is not a party to the suit. The objection did not exist at or before the first hearing, and, therefore, could not have been made or waived by the defendant; and if he made it at the earliest opportunity after it came into existence, he would have satisfied the spirit of s. 34.

[Diss., 7 A. 79 (97—101); R., 7 B. 155 (161); 13 B. 664; 14 B. 31 (39); 22 A.W.N. 35; 4 Ind. Cas. 488 (489); 110 P.R. (1882); 159 P.R. (1889).]

THIS was a reference from Rao Sahab V. V. Wagle, Subordinate Judge, at Shevgaon in the Ahmednagar District, under s. 617 of Act X of 1877.

The suit was under s. 16 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The plaintiffs alleged that in the year 1869 or 1870 they passed to the defendant a deed of mortgage for Rs. 100, and made over possession of two fields as security, the profits of which he was to enjoy for five years; that this period had elapsed, but the defendant

* Civil Reference No. 22 of 1881.