5 B. 614.

1881
AUG. 17.

APPELLATE CIVIL.

APPELLATE CIVIL.

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

HARI AND ANOTHER (*Plaintiffs*) *v.* LAKSHMAN AND ANOTHER (*Defendants*).* [17th August, 1881.]

5 B. 614.

The Dekkhan Agriculturists' Relief Act XVII of 1879, *s.* 16—*Mortgage—Suit by a mortgagor for account only—Decree—Execution of a money decree obtained by mortgagee.*

Under the Dekkhan Agriculturists' Relief Act XVII of 1879, s. 16, an agriculturist mortgagor has no right to sue his mortgagee in a mere action for account.

[615] Ordinarily a suit for an account upon a mortgage cannot be maintained by a mortgagor, unless he asks for redemption also. Where a mortgagee is entitled to a personal decree against the mortgagor, or his heir, or representative, and takes a mere money decree against him upon the mortgage without any direction that the amount of the decree shall be recovered by sale or otherwise from the mortgaged property, the mortgagee has nevertheless the right to attach and sell that property under the money decree, and such sale transfers to the purchaser the interest both of mortgagor and mortgagee in the same manner as if the sale had been made under an express direction in the decree. Even though the officer of the Court should mention merely the right, title, and interest of the mortgagor as what is sold, the interest of the mortgagee who has promoted the sale passes by way of estoppel, although the mortgage executes no conveyance to the purchaser.

The only difference in execution between a money decree upon a mortgage and one not upon a mortgage is that where the mortgaged lands are attached under the former, their sale is deferred until six months or some other reasonable period expires, in order to give the mortgagor an opportunity to redeem, which he would have in a suit for foreclosure or redemption.

[F., 7 B. 377; R., 12 B. 678 (682); 18 B. 444 (447); D., 20 B. 469 (471).]

THIS case was referred for the opinion of the High Court by Dr. A. D. Pollen, Special Judge, under Act XVII of 1879, with the following remarks:—

"As any decision passed by me is final, I have the honour to refer the question—whether a mortgagor may bring a suit for an account under s. 16 of the said Act—for the decision of the Honourable Judges of the High Court. I think he may, as otherwise s. 16 would be almost inoperative; but, having regard to ss. 42 and 43 of the Civil Procedure Code, I entertain some doubts, and as many such suits are pending, I think it right to submit the question."

Shantaram Narayan appeared for the defendants, and contended that the right of a debtor to sue for an account and no other relief was new, and not extended by Act XVII of 1879 to mortgagors or those deriving title under them.

There was no appearance for the plaintiffs.

JUDGMENT.

The following is the judgment of the Court delivered by

WESTROPP, C.J.—The plaintiffs, who are agriculturists in the Deccan, have, as mortgagors of immoveable property, instituted this suit against their mortgagees in possession, the defendants, by virtue of a mortgage, dated Shake 1789 (July 5th, A.D. 1867), for Rs. 1,997, praying

* Civil Reference No. 36 of 1880.

1881
AUG. 17.
APPELLATE CIVIL.
5 B. 615.

simply for an account in respect of the [616] mortgage and no other relief. In the absence of any prayer for redemption and the mortgagors being unable to pay the Court-fee requisite for a redemption suit, the Subordinate Judge of Talegaon rejected the plaint. The Special Judge of the Dekkhan having, under s. 53 of Act XVII of 1879, called for the proceedings in the suit, has referred to this Court the question whether a mortgagor may bring a suit under s. 16 of Act XVII of 1879 for an account, and no more.

Ordinarily a suit for an account upon a mortgage cannot be maintained by a mortgagor unless he asks also for redemption (1). The 42nd and 43rd sections of the Civil Procedure Code are opposed to the maintenance of such an action: inasmuch as it would not afford ground for a final decision and would not include the whole of the plaintiff's claim in respect of the cause of action. It remains to be considered whether the Dekkhan Agriculturists' Relief Act XVII of 1879 has, contrary to the ordinary law, conferred upon the agriculturists, to whom that Act is applicable the right to bring against their mortgagees a mere action to account. In the recent case of *Shankarapa* v. *Danapa* (2), where the question was whether a decree in a mortgage suit might be made payable by instalments, which question we ruled in the negative, we incidentally expressed an opinion on the present question as follows: "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 not being any special [617] 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 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." In a recent supplemental communication, received from the learned Special Judge of the Deccan, he makes the following suggestion: When a mortgagor brings a suit for an account, he does not seek either to redeem his land, or to be allowed to pay by instalments. He simply asks that the present state of his money debt may be ascertained or determined. In most mortgage bonds the debtor, besides charging his lands, binds himself to repay the money personally, and in most suits for the sale of mortgaged property, the creditor also asks for a decree against the defendant personally. In most mortgage cases, therefore, it is possible to conceive of the money debt apart from the property on which it is secured, and, from this point of view, it might be argued that the debtor has a right to bring a suit for an account in order to see how his money debt is affected by the provisions of ss. 12 and 13 of the Act, and to judge whether he is yet in a position to demand, or

(1) 2 Fisher on Mortgages (3rd ed.), p. 716, pl. 1170. (2) 5 B. 604.

sue for redemption of his lands." In relation to those remarks, we should observe, first, that Reg. V of 1827, s. 15, enacts that "when a creditor is placed in possession of property by mortgage, or otherwise as security for a debt, his claim over such property shall, in the absence of other special agreement, constitute his sole security for payment of the debt, or such part of it as the said property may have been given in security for, and interest thereon is to be considered as included in the said security." Secondly, assuming that the debtor has specially agreed or covenanted to pay the amount, which may become due upon the mortgage, such an agreement or covenant would personally bind himself alone and would not justify a personal decree against his heir or other representative, unless such heir or respresentative had received assets of the deceased mortgagor, and, instead of applying them in [618] due course of administration, had wasted or misappropriated them, so that those assets were not available for payment of the debts of the mortgagor. This was always so in the island of Bombay (while under British rule) with respect to all persons, even including Hindus, and has been made so in the Mofussil of this Presidency, as regards Hindus also, by Mr. White's Act (Bombay Act VII of 1866). Previously to that Act, Hindus were, in the Bombay Mofussil, an exception to the general rule, and were held personally responsible for the legitimate debts of their fathers and grandfathers independently of the receipt of assets sufficient to meet those debts. The non-liability of heirs and representatives for their ancestors' debts, except where those heirs or representatives have received and misapplied assets of the ancestors has the effect of greatly limiting the number of cases in which personal decrees in mortgage cases could be obtained by mortgagees. Thirdly, even when the mortgagee is entitled to personal decree against the mortgagor or his heir or representative, and takes a mere money decree against him upon the mortgage without any direction that the amount of the decree should be recovered by sale or otherwise from the mortgaged property, the mortgagee nevertheless would have the right to attach and sell that property under the money decree, and such sale would transfer to the purchaser the interest both of the mortgagor and mortgagee in the same manner as if the sale had been made under an express direction in the decree: *Syed Iman Momtazoodeen Mahomed* v. *Rajkumar Ghose* (1), *Narsidas Jitram* v. *Joglekar* (2). Even though the officer of the Court may merely mention the right, title and interest of the mortgagor as what is sold, the interest of the mortgagee who has promoted the sale passes by way of estoppel (3), although the mortgagee executes no conveyance to the purchaser. We perceive that an inference to the contrary was sought to be drawn in the argument in *Narsidas Jitram* v. *Joglekar* from *Tukaram* v. *Ramchandra* (4). That inference, however, is not sustainable, inasmuch as the money decree in *Tukaram* v. *Ramchandra*, under which the sale was made, was not obtained in [619] respect of the mortgage, but upon another cause of action vested in the mortgagee and wholly unconnected with the mortgage. The only difference, which we make in execution between a money-decree upon a mortgage and a money-decree not upon a mortgage, is that, where the mortgaged lands are attached under the former, the sale of them is deferred until six months, or some other reasonable period expires in order to give to the mortgagor the

(1) 14 B.L.R. 408 (421), (F.B.) (2) 4 B. 57.
(3) *Vide* 11 B.H.C. R. 142, and cases cited at p. 140, and see 5 B. 8 (13).
(4) 1 B. 314.

1881 AUG. 17. APPELLATE CIVIL. 5 B. 614.

opportunity of redeeming, which would be afforded to him in a suit for foreclosure or redemption.

Reverting to Act XVII of 1879, we find that its 3rd section treats of two classes of suits, *viz.*:—"(*a*) suits *for an account* instituted on or after the 1st day of November, 1879, *by an agriculturist* in the Court of a Subordinate Judge under the provisions hereinafter contained," and "(*b*) suits of the description next hereinafter mentioned and instituted on or after the same date." The descriptions of suits referred to in cl. (*b*) are specified under letters (*w*), (*x*), (*y*) and (*z*). All of these are, with the single exception of those falling under (*z*), suits *against* an agriculturist; suits under (*z*), being suits for redemption of mortgaged property, would be brought *by* agriculturist mortgagors, their heirs, or representatives. Suits under (*y*) and (*z*) relate exclusively to mortgages, and when the Legislature intended to subject such suits to certain provisions of the Act relating also to other suits, we find that it did so in express terms, as, for instance, in s. 12, which enables the Court to inquire into the history and merits of the case from the commencement of the transactions between the parties in the manner subsequently pointed out in s. 13. Section 12 expressly includes the three different species of suits falling under cls. (*w*), (*y*) and (*z*) in s. 3. So the Legislature makes it perfectly clear that in mortgage cases, as well as cases described in cl. (*w*), the history of each case is to be investigated *ab initio*. But when we come to s. 16, which enables the agriculturist debtor to take the initiative by suing for an account, we find that the transactions specified in that section, in respect of which he may so sue, are *verbatim* the same as those described in cl. (*w*) of s. 3 only. No doubt that clause comprises (*inter alia*) suits for the recovery of money due "on a written or unwritten engagement for the payment of [620] money," as s. 16 comprises cases where money is due by the agriculturist plaintiff, to the defendant on such an engagement; but the subsequent cls. (*y*) and (*z*), of which the one relates to suits for possession, foreclosure, or sale in respect of mortgages, and the other to redemption of mortgages, show that mortgages, being thus specially provided for, were not intended to be included amongst the written or unwritten engagements for the payment of money falling within cl. (*w*) of s. 3, and, therefore, not within s. 16, where the class of cases mentioned in cl. (*w*) of s. 3 only is specified. And this omission of mortgage cases from s. 16 is what might have been expected. Ordinarily, in respect of the transactions comprised in cl. (*w*) of s. 3 and in s. 16, the debtor could not, under the pre-existing law, sue for an account, whereas the mortgage-debtor could do so by bringing a suit for redemption—the species of suit the subject of cl. (*y*) of s. 3. But, in such a suit, the mortgage-debtor was and is bound to pay the balance (if any) found due by him under the mortgage within a reasonable time allowed for redemption—usually six months, and the decree, if properly drawn, contains a direction for foreclosure or sale (usually the latter) if he do not pay within the given time. We can well understand why the Legislature should refrain from giving to mortgagors the power to harass their mortgagees in possession with suits *de anno in annum* to ascertain what those mortgagees annually received from the lands over and above their necessary expenses in relation to those lands, such suits being brought without any present intention on the part of the mortgagors to pay to the mortgagees the balance due upon the mortgage, and without liability to a decree therein either for foreclosure or sale. The Legislature seems to have thought that it had done quite enough for the mortgagors by

1881 AUG. 17. APPELLATE CIVIL. 5 B. 614.

providing, as it has, that in suits for foreclosure or sale by the mortgagees, and in suits for redemption by mortgagors, the account between the parties should be taken on the abnormally favourable principles laid down in ss. 12, 13 and 14 of the Act for the guidance of the Courts of the Deccan in such cases. It must be further observed that it is manifest that, if suits for an account, and no more, can be brought against mortgagees under s. 16, decrees for payment of the money [621] due upon mortgages by instalments may be made under s. 17. This we have already, without doubt, held not to be sanctioned by the Act (1), and we have pointed out that, if it had been so sanctioned, the sale of the mortgaged lands piecemeal in order to meet the unpaid instalments would be detrimental alike to debtor and creditor. We do not perceive any sufficient ground for altering the views which we entertained in that case.

Our reply to the question "whether a mortgagor may bring a suit for an account under s. 16 of Act XVII of 1879?" is in the negative.

We leave to the Special Judge of the Deccan the disposal of the question as to the costs of this reference. In relation to that question we should mention that there was not any appearance here for the plaintiff; but Mr. Shantaram Narayan appeared and argued the case on behalf of the defendants, who have been successful.

---

5 B. 621.

APPELLATE CIVIL.

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

KASTUR BHAVANI, SON AND HEIR OF THE DECEASED BHAVANI RAMCHANDRA (*Original Defendant*), *Appellant v.* APPA AND SITARAM HARJIRAV, MINORS (*Original Plaintiffs*), *Respondents.** [10th August, 1876.]

Hindu law—Sale of ancestral property by father for debts incurred for immoral purposes—Son's interest in ancestral estate—Evidence—Stamp—Intention to defraud Government of stamp revenue—Reg. XVIII of 1827, *s.* 13—*Act XXXIV of* 1860, *s.* 13—*Act X of* 1862, *s.* 15—*Admissibility of insufficiently stamped documents—Issues.*

Where a document was admitted in evidence by the Court of first instance without any objection by the parties, but the Assistant Judge in appeal held it inadmissible, because it was insufficiently stamped, although no objection was made to it in the memorandum of appeal.

Held, that the Assistant Judge ought not to have excluded it from his consideration.

[622] On documents insufficiently stamped under Reg. XVIII of 1827, the question does not properly arise under s. 13 of that Regulation whether the intention of the parties is not sufficiently stamping them was to defraud Government of its revenue. That question was rendered important, first, by s. 13 of Act XXXVI of 1860, and subsequently, in a more explicit manner, by s. 15 of Act X of 1862.

The plaintiffs (two of whom were minors) sued to set aside the sale and recover possession of certain ancestral lands, on the ground that they had been sold by their father to pay off debts contracted for immoral purposes. The documentary evidence in the case showed that the lands had been originally mortgaged by the grandfather and father of the plaintiffs to the father of the defendant for Rs. 1,600; that they had subsequently taken from him other loans which, together with

---

* Special Appeal No. 124 of 1876.

(1) *Shankarapa* v. *Danapa*, 5 B. 604.