

I am, therefore, of opinion that the account falls within clause 87 of Schedule II of Act IX of 1871, and that the plaintiff's claim is not barred. I ought to mention that in the recent case of *Khushalo v. Behari Lal* <sup>(1)</sup>, before the Allahabad High Court, the Court expressed an opinion that clause 85 of Act XV of 1877 (the Limitation Act now in force), which is similarly worded to clause 87 of Act IX of 1871, would apply to ordinary banking accounts.

The case must, therefore, be set down for hearing on the merits.

*Judgment for the plaintiffs.*

Attorneys for the plaintiffs.—Messrs. *Hearn, Cleveland, and Little*

Attorneys for the defendant.—Messrs. *Craigie, Lynch, and Owen.*

(1) I. L. R., 3 All., 523.

## APPELLATE CIVIL.

*Before Sir M. E. Westropp, Kt., Chief Justice, and Mr. Justice Pinhey.*

KRISHNAJI RAVJI GODBOLE (ORIGINAL PLAINTIFF), APPELLANT, v. GANESH BAPUJI PATVARDHAN (DECEASED) AND ANOTHER.\*

September 25.

*Mortgage—Right to redeem—Vendor and purchaser—Good title at time of hearing of suit—certificate of sale.*

The property in dispute was mortgaged by its owner to the defendant with possession on the 3rd October, 1847. On the 3rd December, 1861, A obtained a money-decree against the son and heirs of the mortgagor. In execution of that decree the property was sold subject to the mortgage, and purchased by B on the 12th August, 1861. Before confirmation of the sale, B, on the 1st September, 1864, sold it to C, who, on the 30th March, 1877, conveyed it by deed to the plaintiff. On the 27th September, 1877, the plaintiff brought a suit for redeeming the property, and at the hearing produced a certificate of sale, dated the 27th October, 1877. The certificate was applied for in May, 1877, and issued to C, reciting the sale to B, and the sale by B to C. The Court of first instance allowed the plaintiff to redeem on payment of a certain sum of money to the defendant. The Assistant Judge, in appeal, reversed the decree of the first Court on the ground that the certificate of sale was not in existence at the date of the institution of the suit, and that, therefore, the plaintiff had then no complete title. On appeal to the High Court,

\* Second Appeal, No. 53 of 1881.

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Held that the plaintiff, having purchased and paid for the equity of redemption, was entitled to redeem, although the certificate of sale was not issued until after the suit had commenced.

If a party, whose title is to some extent imperfect, seeks to redeem, and is able to prove a perfect title at the hearing of his cause, he should have a decree for redemption.

*Harkisandas Narandas v. Bai Ichha* (1) and *Lalbai Lakhmidas v. Naval Mirkamaludin Husen Khan*, referred to and distinguished.

This was a second appeal from the decision of J. W. Walker, Assistant Judge at Ratnagiri, reversing the decree of K. S. Joglekar, First Class Subordinate Judge at the same place.

The plaintiff Krishnaji instituted this suit for the redemption of certain land. The facts of the case are stated in the head-note, and more fully in the judgment of the High Court.

The Subordinate Judge made a decree, allowing the plaintiff to redeem the property on payment of Rs. 955-13-7 to the defendants. On appeal, the Assistant Judge reversed that decree, and dismissed the suit on a preliminary point, as stated in the following extract from his Judgment:—

“The first point for determination is, whether the plaintiff’s right to sue as the representative of the mortgagor is proved. My finding is in the negative.

“The plaintiff’s case is that the mortgagor’s right was sold at a Court sale in execution of a decree to one Govind Chatre on the 12th August, 1864, and that Govind sold his right, on the 1st September, 1864, to one Yashwant Lingshet, who sold his right to plaintiff on the 30th March, 1877. The defendant contends that the sale to plaintiff is illegal.

“The certificate of the Court sale to Govind Chatre was not obtained until *after* this suit was brought. It is the only evidence of the sale, and, hence, the plaintiff’s suit must fail: *Harkisandas Narandas v. Bai Ichha* (2) and *Padu Malhari v. Rakhmai* (3). Further, under the old Procedure Code, sec. 256, the Court sale was not made absolute until one month after the date of sale. But the auction-purchaser Govind sold his right before the expiration of that month. As, therefore, Govind’s title was

(1) I. L. R., 4 Bom., 155.

(3) I. L. R., 4 Bom., 155.

(2) 12 Bom., H. C. Rep., 247.

(4) 10 Bom., H. C. Rep., 435.

not then complete, he could not make a valid transfer of his right."

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The plaintiff appealed to the High Court on the 9th January, 1881.

The Hon. Rao Saheb *V. N. Mandlik* appeared for the appellant. *Pandurang Balibhadra* appeared for the respondents.

The following is the judgment of the Court delivered by

WESTROPP, C. J.—Balaji Sadashiv mortgaged his one-sixth share of a khoti village to Ganesh Patvardhan for Rs. 422 on the 3rd October, 1847, with possession on certain conditions. Subsequently on the 3rd December, 1861, Hari Ganesh, having obtained a money decree against Vital Balaji (son of the deceased mortgagor) and his heirs, attached the share, and, subject to the mortgage, that share was sold on the 12th August, 1864, for Rs. 53 to Govind Chatre, who, before confirmation of the sale, sold the share to Yashwant Lingshet, who, on the 30th March, 1877, sold and conveyed it by deed to Krishnaji, the plaintiff. The plaintiff instituted the present suit for redemption on the 27th September, 1877, and at the hearing produced a certificate of sale, dated 27th October, 1877, to Yashwant Lingshet reciting the sale to Govind Chatre and the sale by Govind Chatre to Yashwant Lingshet. The delay which has occurred in obtaining the certificate of sale is, no doubt, due to the circumstance that the mortgagees were in possession, and that probably Yashwant Lingshet was not sufficiently in funds to be able to redeem the mortgage. It may be contended that the application for the certificate of sale was so long deferred that the right to it was barred by the law of limitation. Whether that was so or not, it is unnecessary for us to decide; for, as a matter of fact, the certificate was granted by the Court which originally sold the property, and, not having been since set aside, is in full force. Moreover, it appears that it was applied for in May, 1877, before this suit commenced, though not issued until the 27th October, 1877, after this suit had been instituted. The ground upon which the Assistant Judge has reversed the decree of the Subordinate Judge for redemption is, that the certificate of sale was not in existence when the suit was brought, and that, consequently, the plaintiff

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had not then a complete title. The Assistant Judge relied on the case of *Harkisandas Narandas, deceased, his heir, his widow Bai Jamna, v. Bai Ichha*<sup>(1)</sup>; and the case of *Lalbhai Lakhmidas v. Naval Mirkamaludin Husen Khan*<sup>(2)</sup> has been cited to us for the respondents, but these were suits in ejectment on the title. This suit for redemption is of an equitable nature. Equitably the plaintiff and, before the conveyance to him, Yashwant Lingshet, were entitled to redeem. They had successively purchased and paid for the equity of redemption, although the certificate of sale was not issued until after this suit had begun. It is quite true that a purchaser at a judicial sale is not, strictly speaking, entitled to possession until a certificate of sale has been granted to him (*Basapa v. Marya*<sup>(3)</sup>); but, as a matter of fact, he not unfrequently is put into possession after the confirmation of the sale and before the issuing of the certificate; and, as will be seen by the observations in *Tukaram v. Satvaji*<sup>(4)</sup>, it is exceedingly doubtful that he could be ousted merely for want of the certificate. Sir R. Couch, C. J., was satisfied with proof of the order confirming a sale where the certificate of sale was unregistered, and, therefore, inadmissible in evidence,—*Raj Kishen Mookerji v. Radha Madhub Holdar*<sup>(5)</sup>. Where time is not of the essence of a contract of sale, and the title is bad, but the defect can be cured, if the vendee is unwilling to stay, Lord St. Leonard says "the vendor should file a bill to enforce the contract; for it is sufficient, if the party, entering into articles (of agreement) to sell, has a good title at the time of the decree. And where the vendor, at the time he filed the bill, had only a term of years in the estate, of which he had articed to sell the fee, and after the bill filed, procured the fee by means of an Act of Parliament, as the day on which the contract was to be carried into execution was not material, a specific performance was decreed"<sup>(6)</sup>. If this be so in the case of a contract for sale, we do not see any reason why if a party (whose title is to some extent imperfect) seeking to redeem is, at the hearing of his cause, able to prove

(1) I. L. R. 4 Bom., 155.

(2) 12 Bom. H. G. Rep., 247.

(3) I. L. R., 3 Bom., 433.

(4) I. L. R., 5 Bom., 207.

(5) 21 Calc. W. Rep., 349.

(6) Sugden's Vendors and Purchasers, Ch. VI, sec. 3, pl. 2, pp. 263, 264, (14th ed.), where the authorities are collected.

a perfect title, he should not have a decree for redemption. We cannot perceive that we should confer any benefit upon the mortgagees by rejecting the present suit. The plaintiff might to-morrow file another suit for the same purpose if we were to reject this suit.

We reverse the decree of the Assistant Judge, and remand the cause in order that the District Court may take an account of what is due to or from the mortgagees, the defendants, and may make the usual decree for redemption of the premises. Any sum or sums which the plaintiff may have paid into Court in virtue of the decree of the Subordinate Judge should be taken into consideration by the District Court in making its decree. The plaintiff should pay the costs of the suit up to the present time. The defendants must pay the costs of this appeal. The costs of the appeal to the District Court should be disposed of by that Court.

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## APPELLATE CIVIL.

Before Sir M. R. Westropp, Kt., Chief Justice.

LADUBHAI PREMCHAND, PETITIONER, v. REVICHAND VENICHAND  
 AND ANOTHER, OPPONENTS.\*

December 23.

The Indian Contract Act (IX of 1872), Sec. 265—Appeal—Stamp—Court Fees' Act VII of 1870, Sec. 7, Cl. iv (f).

The stamp duty payable on an appeal from an order made by a District Judge on an application under section 265 of the Indian Contract Act (IX of 1872) should be an *ad valorem* fee, as in a suit for accounts, under section 7, clause iv (f) of the 'Court Fees' Act VII of 1870.

*Javali Ramasami v. Sathambakami*(1) and *Lachman Lall v. Ram Lall*(2) referred to and approved.

This was a reference by the Taxing Officer of the High Court under section 5 of the Court Fees' Act VII of 1870.

The petitioner under section 265 of the Indian Contract Act (IX of 1872) applied to the District Court of Poona to wind up the partnership business which had existed between him and two others. The Judge made an order from which the petitioner proposed to appeal.

\* Reference by the Taxing Officer under section 5 of the Court Fees' Act.

(1) I. L. R., 1 Ma 1., 340. (2) I. L. R., 6 Calc., 521.