

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nanabhai Haridas.

TATYA VITHOJI (ORIGINAL DEFENDANT), APPELLANT, *v.* BAPU
BALAJI (ORIGINAL PLAINTIFF), RESPONDENT.*

1883
June 14.

*Dekkhan Agriculturists' Relief Act XVII of 1879, Sec. 13—Decree—Contract—
Opening account.*

Where a contract has been made the subject of adjudication by the Civil Court, and a decree has been passed, the contract is thereupon merged in the decree, and section 13(1) of Act XVII of 1879 furnishes no warrant for the revision of the decree, and opening of the account, between the agriculturist debtor and his creditors from the commencement of the transaction, since a decree, though based upon a contract and giving effect to it in a particular way, is yet a very different thing from the contract, and in case of revision entirely different principles apply to the two cases.

THIS was a second appeal from the decision of R. F. Mactier, Judge of Satara, confirming the decree of the Subordinate Judge of Wai.

The plaintiff, an agriculturist, on the 29th of August, 1881, sued the defendant, a money-lender, to redeem a piece of land mortgaged on the 16th of December, 1868, for Rs. 95. He stated that the defendant had sued him in 1873 and obtained a decree, dated 12th December of that year, directing the plaintiff to pay Rs. 160, and, in default, to let the land remain with the defendant till the liquidation of the said money; that the defendant accordingly obtained possession of the land in 1874 and had continued in possession ever since; and that the reception of the rents and profits had not only paid off the defendant, but had left a balance in favour of the plaintiff.

* Second Appeal; No. 304 of 1882.

(1) Section 13.—When the Court enquires into the history and merits of a case under section 12, it shall—

Notwithstanding any agreement between the parties or the person (if any) through whom they claim, as to allowing compound interest or setting off the profits of mortgaged property without an account in lieu of interest, or otherwise determining the manner of taking the account

and notwithstanding any statement or settlement of account, or any contract purporting to close previous dealings and create new obligations

Open the account between the parties from the commencement of the transactions and take that account according to the following rules (that is to say) :—

The defendant contended that, since his occupation of the land in 1874, he had paid the Government assessment, and had not realized more than 15 rupees in satisfaction of his judgment-debt.

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The Subordinate Judge of Wái entertained this claim under section 13 of the Dekkhan Agriculturists' Relief Act, 1879. He took an account between the parties from 1874, and found Rs. 203-14-1 due by the defendant to the plaintiff, on payment of which he decreed redemption. The District Judge confirmed the decree of the Subordinate Judge.

The defendant appealed to the High Court.

V. M. Pandit for the appellant.

G. R. Kirloskar for the respondent.

The judgment of the Court was delivered by

WEST, J.—The Court in a case like the present is not at liberty to go behind a previous decree between the parties. This was ruled in *Apáji Yaduv Kulkarni v. Atmárám Dáji Kulkarni* (1).

Here the decree, it is argued, gives effect to a contract in a mortgage in a particular way, and is, therefore, to be regarded as a contract subject to revision under section 13 of Act XVII of 1879. But the distinction between a contract and a judgment is so great that the latter extinguishes the former, as Lord Selborne says in *Lockyer v. Ferriman* (2); and that entirely different principles apply to them in case revision should be sought, was shown in *Bálkrishna Bhalchandra v. Gopál Raghunáth* (3). Hence the revision and re-adjustment of the account made by the Courts below were not warranted. We have to look to the precise relation created by the earlier decree, and the extent to which it has been satisfied, and to these alone, to determine the present relations of the parties under that decree. The defendant was to pay Rs. 160. The plaintiff was to hold and enjoy the mortgaged land until that sum should be paid. The defendant was also to pay the plaintiff's costs. He actually paid Rs. 40. The costs amounted to Rs. 22-15-4, and the plaintiff might properly.

(1) Printed Judgment for 1882, p. 125.

(2) L. R., 2 Ap. Ca., 519.

(3) I. L. R., 1. Bom., 73.

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appropriate so much out of the Rs. 40 to that part of his claim. There then remained due to him a sum of Rs. 142-15-4. This sum the defendant (now plaintiff) still owes, and under the decree of 1874 must pay as the consideration of recovering his land.

It is said there was a subsequent agreement between the parties, modifying the terms of the decree ; but this, not having been certified to the Court, cannot be taken notice of as against the mortgagee's rights as judgment-creditor, though it may be made the ground for a separate suit.

The decrees of the Courts below are reversed, and the rights and obligations of the parties defined as aforesaid. The plaintiff is to pay the defendant's costs throughout.

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhái Hariddás.

MAHADAJI V. KARANDIKAR, PLAINTIFF, v. HARI D. CHIKNE,
DEFENDANT.*

1883
June 28.

The Code of Civil Procedure, Act X of 1877, Secs. 210, 320, 321, 322 and 325—Mortgage—Decree for sale sent to Collector for execution—Collector no power to vary decree—Responsibility of Collector to judgment-creditor—Power of Court to call for record.

A Collector, to whom a decree for sale of mortgaged property has been transferred for execution under section 320 of the Civil Procedure Code, is limited to one of the three courses specified in section 321, and may not depart from them ; much less may he do what the Court itself could not do in such a case—allow payment of the debt to be made by instalments.

A Collector, to whom a decree has been so transferred for execution, acts ministerially, and, when he delegates his functions to an Assistant or a Mámlatdár, incurs a risk of having to answer in damages to the person who is by any error or mistake deprived of the fruits of his judgment ; and this risk attaches independently of malice or negligence.

The Court that has made a decree or judicial order, which has been transmitted to the Collector for execution, is not deprived of the judicial powers with respect to it which may still at any particular time be competent to such Court, and which it would have had had the order been placed in the hands of its own ordinary officer, the názir. In the exercise of such powers the Court has authority to recall its own record transmitted to the Collector.

* Civil Reference, No. 62 of 1882.