

1883

RADHAKISAN
HAKUMJI
v.
BALVANT.
RAMJI.

As regards the second question, the exemption of a dwelling from attachment depends on its answering the description already given at the time when the decree-holder seeks to attach it. If his original judgment-debtor is dead, he proceeds against his representative as liable under the decree, and the representative taking the place of the deceased as to liability under section 266, takes his place also as to the protection afforded by clause (c) of the section. If, having become owner, he is in good faith occupying the house sought to be attached as an agriculturist, it is exempt from attachment. He is not by this freed from responsibility in other ways; and he will not be allowed, by the artifice of removing from his former dwelling to one that has devolved on him from a deceased judgment-debtor, to defraud a decree-holder of his just claims, and thus unrighteously enrich himself by taking an estate without its burdens.

APPELLATE CIVIL.

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

LADU CHIMAJI (ORIGINAL PLAINTIFF), APPLICANT, v. BABAJI

KHANDUJI (ORIGINAL DEFENDANT), OPPONENT.*

Dekkhan Agriculturists' Relief Act XVII of 1879 as amended by Act XXII of 1882, Sec. 15 (B)—Mortgage—Foreclosure—Instalments.

The applicant, an agriculturist mortgagor, sued the defendant, the mortgagee, for redemption on the terms provided by the Dekkhan Agriculturists' Relief Act, 1879. The account was made up, and the mortgagor was directed to pay the sum found to be due within six months, or to be for ever foreclosed. He failed to pay within the time fixed; and afterwards applied, under section 15 (B) of the Act as amended by Act XXII of 1882, to be allowed to pay the amount of the decree by instalments.

Held that the order asked for could not be made. An order for foreclosure when the time appointed by the order has expired, itself operates to transfer the ownership; and the ownership having once passed to the mortgagee cannot be taken away from him by a subsequent order not founded on any new transaction of the parties, except on some special ground, such as fraud or inevitable accident.

THIS was a reference by Rao Saheb Balaji, Mahadev, Subordinate Judge of Khed, under section 617 of the Code of Civil Procedure, for the orders of the High Court.

He stated the case thus :—

“ In Original Suit No. 622 of 1882 the agriculturist plaintiff, the mortgagor, obtained a redemption decree, falling under Chapter II of the Dekkhan Agriculturists’ Relief Act, on the 15th November, 1882, against the mortgagee, defendant. The decree directed that the plaintiff should pay Rs. 71-13-3 found due against him to the defendant, and to recover possession of the property in the suit from him within six months from the date of the decree, and, in default, the plaintiff’s right to redeem would be foreclosed. The six months’ time allowed by the decree expired on the 15th May, 1883.

“ The plaintiff has now (Miscellaneous Application No. 78, dated 23rd June, 1883,) applied for instalments. Notice having been issued to the defendant to show cause why the application should not be granted, he has put in a written statement (exhibit 3) contending that the plaintiff’s right to redeem has been already foreclosed, and his application is beyond the six months’ time allowed by the decree.

“ The question is, whether the plaintiff’s right has been foreclosed, and whether he is now precluded from asking for instalments by the provisions of section 15 (B) of the Dekkhan Agriculturists’ Relief Act as amended by Act XXII of 1882.

“ My own opinion on the question referred is in the negative, for the following reasons :—Before the enactment of the above section the law did not authorize the granting of instalments in mortgage cases. And this provision having been found to be detrimental to the interests of the agriculturists in the Deccan, the above section has been especially enacted to afford relief to agriculturists, whose property in the large majority of cases has been burdened with debts. The section, I think, must be liberally construed in favour of the agriculturists to give full effect to the intention of the Legislature. If the intention of the Legislature were otherwise, there was no necessity for enacting the above section, which gives the Court discretion to grant instalments to the mortgagor at the time of passing the decree, or after the decree has been passed, either before or after the Act comes into force. For these reasons I am of opinion that the plaintiff in the present

1883

LADU
CHIMAJI
v.
BABAJI
KHANDUJI.

1883

LADU
CHIMAJI
v.
BABAJI
KHANDUJI.

case is not precluded from applying for instalments, though the time allowed by the decree for the payment of the money found due by him and for the recovery of possession of the mortgaged property has expired."

No one appeared in the High Court.

WEST, J.—The applicant in this case, being the mortgagor of property of the defendant, sued to enforce redemption on the terms provided by the Dekkhan agriculturists' Relief Act. The account was made up as that Act directs, and the mortgagor was directed to pay the sum found to be due within six months, or to be foreclosed for ever against redemption. He failed to satisfy the condition; and the property thus, according to the ordinary practice of the Mofussil, vested in the mortgagee. The second order—which, according to the practice of the English Equity Courts, is applied for after the expiration of the time prescribed for redemption—is made as of course on such application⁽¹⁾. It appears to be contemplated by the Form No. 129 appended to the Code of Civil Procedure, but it is not prescribed in the Act itself. In this Presidency it has not been used. The mortgage, called *lahan-gahan*, stipulates for transfer of the ownership to the mortgagee, on non-payment of the debt at a specified date. The Court interferes with the literal terms of this contract, but on condition of satisfaction being made within a defined time. Failing this effect is given to the contract by allowing the property to pass to the mortgagee and conditional vendee. No second order is jurally necessary when a condition has been fulfilled which has made a prior order operative. The ownership is constituted by an act of the Court equally under a first order as under a second or a third, which would be made as of course.

In the cases in which the mortgage deed has not so expressly provided for a transfer of the ownership on failure of payment, the analogy of the *lahan-gahan* mortgage has, in many instances, been followed. Sometimes a sale is ordered, sometimes a foreclosure. The latter is the common order when a mortgagor sues the mortgagee to redeem the property. It gives him time to make the requisite arrangement, and if he had desired a sale he could

(1) Fisher on Mortgages (1876), § 1771.

have applied for it. When the order for a foreclosure is made, it operates of itself to transfer the ownership when the time has expired, and the ownership having passed to the mortgagee cannot be taken back from him by a subsequent order not founded on any new transaction or change in the jural relations of the parties. Until the order operates to transfer the ownership, it is subject to revision on good cause shown. After it has operated, the effect can be get rid of only on some special ground, such as fraud or inevitable accident, which should be the subject of a special proceeding. The Court would thereon consider the possibility of acceding to the application without injustice, especially to new rights which might have intermediately arisen. A mere application to the Court for an order to pay by instalments cannot give the Court authority to take away the property vested by its previous order. The new owner may have sold the property, and boundless confusion might arise from the allowance of such applications as the one made in the present case. We think it cannot be entertained.

1883

 LADU
 CHIMAJI
 v.
 BABAJI
 KHANDUJI.

 APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nanabhai Haridas
 ERAKSHAH DHANJISETH, PETITIONER, v. ADARJI DORABJI
 AND ANOTHER, OPPONENTS.*

 1883
 September 6.

*Court fees—Petition to wind up partnership—Indian Contract Act (IX of 1872),
 Sec. 265—Plaint—Court Fees Act VII of 1870, Sch. I, Art. 1.*

An application for the winding up, by the Court, of the business of a firm after the termination of partnership, under section 265 of the Indian Contract Act (IX of 1872), whatever it be called, is essentially a plaint, and must be paid for in fees at the same rate as any other plaint for an account extending to a like amount of valuation.

THIS was a reference by E. Cordeaux, Judge of Poona, under section 617 of the Code of Civil Procedure, for the orders of the High Court. In submitting the case he said :—

“In the present case the relief contemplated by section 265 of the Contract Act was sought by a petition on an eight-anna stamp paper, and the question is whether this petition should be

* Civil Reference, No. 29 of 1883.