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the case proved against all the defendants except Jaya. He should, therefore, have granted the plaintiff's prayer as regards the former persons and rejected it as regards Jaya. There is nothing in the language of the Mamlatdars' Act which prevents a part of the claim being allowed; see *Kashiram Vishnu Kamat* v. *Narayan Gopal* (1). We must, therefore, reverse the order of the Mamlatdar rejecting the claim so far as regards the defendants, except Jaya, and direct that an injunction do go under s. 4 of the Act restraining the said defendants from causing or attempting to cause any such further disturbance or obstruction as is alleged in the plaint.

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Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nanabhai Haridas.

RAMCHANDRA BABA SATHE (*Original Defendant*), *Appellant v.* JANARDAN APAJI (*Original Plaintiff*), *Respondent.**

[21st February, 1889.]

Mortgage—Redemption—Clause of conditional sale—Gahan lahan—*Valuation—Jurisdiction—Account—Suit for redemption of distinct mortgages—Dekkhan Agriculturists' Relief Act XVII* of 1879, s. 13—*Construction—Practice.*

In a suit upon a mortgage where the sum due upon the mortgage is unknown, what determines the value of the subject-matter of the suit is the amount of the mortgage the rights connected with which are the subject of contention.

The plaintiff sought to redeem two mortgages executed by his father in 1939 in favour of the defendant. The mortgages contained *gahan lahan* clauses, in virtue whereof the defendant denied the plaintiff's right to redeem, and contended that the lands mortgaged had become his absolute property, which contention the lower Courts disallowed, holding the lands redeemable.

Held, that the lower Courts were right in recognizing the plaintiff's right to redeem as still in existence, the rule laid down in the case of *Ramji* v. *Chinto*(2) being in force in the Presidency of Bombay with regard to mortgages containing clauses of conditional sale.

By two separate mortgages certain lands were mortgaged in 1830 by the plaintiff's father to the defendant. In 1882 the plaintiff as an agriculturist brought the present suit for redemption of the lands comprised in both mortgages.

[20] *Held*, that separate accounts of the two mortgages should be taken. The mortgages were distinct transactions relating to different lands, and s. 13 of the Dekkhan Agriculturists' Relief Act contains no words enabling the Courts to treat them as one. The fact of their being included in the same suit could not affect the question.

In taking the accounts of the above mortgages it was proved that on one mortgage there was a sum of Rs. 5,075-13-2 due to the plaintiff (mortgagor) by the defendant (mortgagee), and on the other mortgage a sum of Rs. 3,774-2-7 due to the defendant (mortgagee) by the plaintiff (mortgagor). The plaintiff (mortgagor) contended that although by the ruling in *Janoji* v. *Janoji* (3) he could not compel payment of the Rs. 5,075-13-2 due to him on the one mortgage, he was entitled to have so much of it as might be necessary set off against the Rs. 3,774-2-7 still due by him on the other mortgage.

Held, that on the authority of *Janoji* v. *Janoji* (3) the plaintiff had no legal claim to the Rs. 5,075-13-2, and, that being so the existence of that balance in his favour on account of one mortgage could not be treated as extinguishing the

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* Second Appeal, No. 823 of 1885.

(1) Printed Judgments for 1888, p. 102. (2) 1 B.H.C.R. 199. (3) 7 B. 185.

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claim of the defendant to the Rs. 3,774-2-7 due on the other mortgage. The plaintiff as an agriculturist mortgagor was enabled to free his land from both the mortgages on the favourable terms provided by the Dekkhan Agriculturists' Relief Act (XVII of 1879), but was precluded from compelling the mortgagee (defendant) to refund what the latter had personally acquired under the terms of his contract of mortgage.

[F. 14 B. 78 (81); 34 B, 260=12 Bom. L. R. 137=5 Ind. Cas. 864; **Appr.**, 6 Bom. L.R. 38 (39); **R.**, 14 C.P.L.R. 154; 8 Ind. Cas. 973=5 L.B.R. 208; 1910 U.B. R. 10; U.B.R. (1897—1901) 502; 16 Bom. L.R. 671]

SECOND appeal from a decision of W. H. Crowe, District Judge of Satara.

In 1839 the plaintiff's father mortgaged to the defendant by two separate deeds, for the several considerations of Rs. 1,250, and Rs. 3,000, certain lands situate at Parkhande, Sarurand Wai, in the Satara District, which was not then incorporated within British India. The deeds stipulated that the defendant was to be absolute owner of the lands under the *gahan lahan* clauses therein, if the mortgage-debt was not paid within the period of seven and three years respectively mentioned therein as the time agreed for discharge of the debt.

In 1882 the plaintiff, as an agriculturist, brought the present suit to redeem and recover possession of the said lands, alleging that they had been in the possession and enjoyment of the defendant since the date of the mortgage, and that the debt was satisfied. The plaintiff also prayed that account might be taken under the provisions of the Dekkhan Relief Act, and surplus, if any, awarded to him.

[21] The defendant denied that the plaintiff was an agriculturist, and contended (*inter alia*) that by virtue of the *gahan lahan* clauses in the mortgage-deeds he had become absolute owner of the lands.

The Second Class Subordinate Judge of Wai held, among other things, that the plaintiff was an agriculturist, that the *gahan lahan* clauses were inoperative, and that Rs. 13,646 were due to the defendant from the plaintiff on taking account of the two mortgages together, under ss. 12 and 13 of the Dekkhan Relief Act XVII of 1879.

The plaintiff appealed to the District Judge on the following among other grounds :—

"That separate accounts with reference to the two bonds Nos. 9 and 10 should have been drawn up."

The defendant filed among his objections under s. 561 of the Civil Procedure Code (Act XIV of 1882) the following grounds :—

"That the *gahan lahan* stipulation should have been enforced.

"That the subject-matter being above Rs. 5,000 in value the Court had no jurisdiction over the suit."

The District Judge held that the account was rightly taken, that the *gahan lahan* clauses were not operative, that the Court had jurisdiction, and that nothing was due by the plaintiff.

From this decision the defendant preferred a second appeal to the High Court.

Jardine (*Mahadev C. Apte* with him), for the defendant appellant):—The *gahan lahan* clauses should be held operative, as the mortgages in question were executed before Satara was incorporated within British India. The rule in *Ramji* v. *Chinto* (1) is a rule of equity, and should not

(1) 1 B. H. C. R. 199.

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govern mortgages executed in the Native States. This case has been disapproved of in *Thumbusawmy* v. *Hossain Rowthen* (1). The terms of the mortgage are to be enforced, and the plaintiff cannot now redeem his right of redemption long gone under the *gahan lahan* clauses. A considerable sum of money has been spent by the defendant on the property, in the faith that it was no longer redeemable. My client became absolute owner of the property in 1846 and 1849 under [22] the two deeds. As to the jurisdiction of the Subordinate Judge, that the valuation ought to have been according to what is due on the mortgage, and that amount exceeds the Subordinate Judge's pecuniary jurisdiction—*Rupchnd Khemchand* v. *Balvant Narayan* (2). The accounts, we admit, ought to have been separately taken, and not together, for the mortgages were two distinct transactions.

Telang (*Ganesh Ramchandar Kirloskar* with him), for the plaintiff (respondent) :—The objection to the jurisdiction ought to have been taken at the institution of the suit. The amount of the mortgage is to form the basis of the claim in a redemption suit where nothing further is known without taking the account. The *gahan lahan* clauses are of no avail. The rule in *Ramji* v. *Chinto* (3) is still good law in the Bombay Presidency, as held in *Bapuji Apuji* v. *Senavaraji Marvadi* (4). It is optional with the mortgagee to take advantage of the *gahan lahan* clause. Here he has not availed himself of it and it cannot operate by itself in his favour.

JUDGMENT.

SARGENT, C.J.—This is a suit to redeem two mortgages executed in 1839 for Rs. 1,250 and Rs. 3,000. An objection was taken, on first appeal, that the District Judge had no jurisdiction as the value of the subject-matter of the suit, it was alleged, was more than Rs. 5,000, and the Second Class Subordinate Judge had no jurisdiction to try it. A *dictum* of Vice-Chancellor Malins in *Cotterell* v. *Stratton* (5) has been relied on to the effect that the value of the subject-matter of such a suit is the amount remaining due on the mortgage, which in the present case was found by the Subordinate Judge to be over Rs. 13,000. There, however the question arose after the trial in order to determine the scale on which the costs were to be taxed, and the rule, therefore, as laid down by the Vice-Chancellor was easy of application. But where the question arises, as in the present case, for the purpose of determining the jurisdiction, the sum really due is at the time an unknown quantity, and the value of the subject-matter must, therefore, be determined by other considerations. The question [23] doubtless admits of being regarded from different points of view. However in *Kondaji Bagaji* v. *Anau* (6) and *Rupchand Khemchand* v. *Balvant Narayan* (2) it was held after a review of the cases that the amount of the mortgage the rights connected with which are the subject of contention in a mortgage suit may be taken to determine the value of the subject-matter, and we think it advisable that that ruling should be followed.

Passing to the merits, an objection has been taken that as the mortgages were executed under the Satara Government and before the district in which the mortgaged lands are situated was incorporated within British India, the rule laid down in *Ramji* v. *Chinto* (3) did not apply.

(1) 1 M. 1=2 I. A. 241. (2) 11 B 591. (3) 1 B.H.C.R. 199.
(4) 2 B. 231. (5) L.R. 17 Eq. 543. (6) 7 B. 448.

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The district in question was brought under the Regulations and Acts of the Presidency in 1863, and from that time all matters in litigation relating to lands situated in it were governed by the law as administered by the ordinary Indian tribunals. That law might perhaps recognize a well-established custom relating to *gahan lahan* mortgages in the Satara districts at the time the mortgages were passed, by which the equity of redemption was excluded, but none has been attempted to be proved. Reliance, however, was placed on the judgment of the Privy Council in *Thumbusawmy Moodelly* v, *Hossain Rowthen* (1) in which the decision in *Ramji* v. *Chinto* (2) is disapproved of and described as an assumption by the Courts of the functions of the Legislature. However, in *Bapuji Apaji* v. *Senavaraji Marvadi* (3), the judgment of the Privy Council in the above case was fully considered by Westropp, C. J., and West, J., and the conclusion arrived at was that the rule in *Ramji* v. *Chinto* (2) " is still in force in the Presidency of Bombay with regard to mortgages containing clauses of conditional sale." We must hold, therefore, that the Courts were right in recognizing the plaintiff's right to redeem as still in existence.

An objection, however, was taken to the account of the two mortgages being taken as one, which we think should prevail. The mortgages were perfectly distinct transactions relating to [24] different lands, and we find no words in s. 13 of the Dekkhan Relief Act of 1879 which enable the Court to treat them as one. The fact of their being included in the same suit for redemption, cannot affect the question. The vakils for the parties have agreed that if the accounts be taken separately Rs. 3,774-2-7 will be due by the mortgagor on the mortgage, Ex. 10, and Rs. 5,075-13-2 will be due by the mortgagee on the mortgage, Ex. 9.

It has been, however, contended by the mortgagor that although by the ruling in *Janoji* v. *Janoji*(5) he cannot compel payment of the Rs. 5,075-13-2 by the mortgagee, he is entitled to have so much of it as may be necessary set-off against the Rs. 3,774-2-7 still due by him on the first mortgage. By that decision the mortgagor has no legal claim to the Rs. 5,075-13-2, and that being so we are not aware of any principle on which it can be rightly treated as extinguishing the Rs. 3,774-2-8 due on mortgage, Ex. 10. The result will be that the agriculturist mortgagor will be enabled to free his lands from both the mortgages on the favourable terms provided by the Dekkhan Relief Act, and will only be precluded from compelling the mortgagee to refund what the latter had personally acquired under the terms of his contract of mortgage, Ex. 10.

With respect to interest, we think it should run at 9 *per cent.* up to date on Rs. 2,829 6-7 (the portion of Rs. 3,774-2-7 representing the principal) from 14th April, 1886, when the mortgagor obtained possession of the lands comprised in the mortgage, Ex. 10, after the decree of the Court below. The respondent should be allowed to amend his plaint by mentioning "six hours of water" instead of "three hours of water" in the description of the property in the mortgage, Ex. 10. As the mortgagee denied the mortgagor's right to redeem, parties should pay their own costs throughout.

We, therefore, hereby declare that the property described in the mortgage-deed, Ex. 9, now in the possession of the plaintiff, mortgagor,

(1) 1 M. I.=2 I. A., 241. (2) 1 B.H.C. R. 199. (3) 2 B. 231.
(4) 7 B. 185.

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be continued in his possession free from any [25] mortgage claim on the part of the defendant, mortgagee, and with respect to the property described in the mortgage-deed, Ex. 10, also now in the possession of the plaintiff, mortgagor, we hereby direct that it be so continued in his possession redeemed from defendant's mortgage upon his payment to defendant within the period of six months from the date of this decree, of the sum of Rs. 3,774-2-7 with interest as directed above, but that on plaintiff's making default in such payment within such period, the mortgage be deemed to be foreclosed, and possession of the said property described in Ex. 10 be delivered to the defendant.

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14 B. 25.

REVISIONAL CRIMINAL.

Before Mr. Justice Jardine and Mr. Justice Candy.

In re ATMARAM NARYAN PARAB AND OTHERS.*

[19th March, 1889.]

Criminal Procedure Code (Act X of 1882), s. 147—Dispute about the right of performing worship and other religious rights in temples—Jurisdiction of Magistrates to interfere in cases where Civil Courts cannot grant relief—Procedure to be adopted where breach of the peace is apprehended.

A Magistrate, First Class, made an order under s. 147 of the Criminal Procedure Code (Act X of 1882) forbidding certain persons from taking part in the worship and other religious ceremonies connected with certain temples. As to the right to perform these ceremonies, the High Court had previously held that Civil Courts could not determine trivial question of mere dignity or privilege.

Held, that the matters in dispute not being adjudicable by a Civil Court, s. 147 did not give the Magistrate jurisdiction to forbid the persons named in the order from taking part in the ceremonies in question.

Held, also, that the order was bad in form, as it contained no restriction of the time during which it was to operate.

Held, further, that in cases where a Magistrate apprehends a breach of the peace, his proper course is to act under the provisions of chap. VIII of the Criminal Procedure Code (Act X of 1882).

[D., Rat. Unr. Cr. Cas. 708 (709).]

THE applicants Atmaram Narayan, Babaji Vishram and Vishram Vithu belonged to the family of Parabs at Vengurla. There were disputes between the members of this family as to the right to receive *man pans* and take part in certain religious ceremonies in connection with the temples of Rameshvar, Bharavasacha Purvas, Bhumkai, and Ravalnath at Vengurla. These disputes were the subject-matter of several suits, in which [26] the High Court ultimately decided (1) that Civil Courts could not grant relief in respect of the rights in question.

On 11th October, 1888, the First Class Magistrate of Ratnagiri acting on the report of the police instituted proceedings, under s. 147 of the Code of Criminal Procedure (Act X of 1882), against the applicants and others, and passed an order, declaring, Gama Madhe Parab, Sato Sadashiv Parab and Lakshman Lado Parab to be alone entitled to take part in the religious ceremonies in the temples in question, and forbidding the rest from obstructing them in the exercise and enjoyment of their rights.

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* Criminal Revisional Nos. 519 of 1888 and 22 of 1889.

(1) 10 B. 233.