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[739] APPELLATE CIVIL.

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Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

MAHALAVU (Original Plaintiff), Appellant v. KUSAJI (Original Defendant), Respondent.* [21st November, 1893.]

Dekkhā Agriculturists' Relief Act (XVII of 1879), s. 225—Amending Act (XXII of 1882), s. 9—Mortgage by agriculturist—Subsequent money decree against mortgagor—Sale of his equity of redemption in execution—Such sale invalid—Equity of redemption is immoveable property—Suit for redemption.

Raghoji, an agriculturist, mortgaged the land in dispute to the defendant in 1872. In 1875 one Dagdu obtained a decree against Raghoji (the mortgagor), who was then represented by his widow, the plaintiff. In execution of this decree Raghoji's equity of redemption was sold on the 10th February, 1883, and was bought by the son of the defendant (the mortgagee). On the 12th April, 1883, the sale was confirmed, and on the 10th November, 1883, the purchaser took formal possession of the land. In 1891 the plaintiff (widow and heir of the mortgagor Raghoji) brought this suit to redeem the mortgage and to recover possession of the land, contending that under s. 22 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) the sale of the equity of redemption was a nullity. The lower Court dismissed the suit, holding that although the sale might be illegal, so long as the certificate of sale remained in force it was a bar to the plaintiff's right to redeem.

Held, that the plaintiff, being found to be an agriculturist, the Dekkhan Agriculturists' Relief Acts (XVII of 1879 and XXII of 1882) applied. The provisions of that Act applied, although the decree and order for sale under which the sale took place [740] were made before the Act was passed. The Act expressly forbids the immoveable property of an agriculturist to be sold in execution, and an equity of redemption is immoveable property within the contemplation of the Act. The sale, therefore, on the 10th February, 1883, of the equity of redemption in the mortgaged lands was illegal and a nullity, and was no defence to the plaintiff's suit to redeem the mortgage.

[R., 21 B. 226 (228); 27 B. 415=15 Bom.L.R. 278=19 Ind. Cas. 591.]

THIS was a second appeal from the decision of A. D. Pollen, District Judge of Poona.

Suit for redemption.

On the 28th June, 1872, one Raghoji mortgaged the lands in question to the defendant Kusaji for Rs. 400 with possession.

In 1875 one Dagdu obtained a decree against the mortgagor Raghoji, who was then dead, but was represented by his widow the plaintiff

* Second Appeal No. 343 of 1892.

† Section 22 of the Dekkhan Agriculturists' Relief Act as amended by s. 9 of the Amending Act of 1882 :—

2. No agriculturist's immoveable property shall be attached or sold in execution of any decree or order passed whether before or after this Act comes into force unless it has been specifically mortgaged for the repayment of the debt to which such decree or order relates, and the security still subsists.

But the Court, on application or of its own motion, may, when passing a decree against an agriculturist or in the course of any proceedings under a decree against an agriculturist passed whether before or after this Act comes into force, direct the Collector to take possession, for any period not exceeding seven years, of any such property of the judgment-debtor to the possession of which he is entitled, and which, in the opinion of the Collector, is not required for his support and the support of the members of his family dependent on him, and the Collector shall thereupon take possession of such property and deal with the same for the benefit of the decree-holder in manner provided by section twenty-nine.

The provisions of section thirty-one shall, *mutatis mutandis*, apply to any property so dealt with.

Mahalavu. In execution of this decree the lands were sold on the 10th February, 1883, and were purchased by the defendant's son. On the 12th April, 1883, the sale was confirmed, and on the 10th November, 1883, the auction-purchaser took formal possession.

In 1891 the plaintiff (widow of the mortgagor Raghoji) filed the present suit claiming to redeem the mortgage and recover possession of the land.

She alleged that she and her husband (the mortgagor) were agriculturists, and that the auction sale was void, inasmuch as the equity of redemption was immovable property, and could not be legally sold under the Dekkhan Agriculturists' Relief Act (XVII of 1879), and, further, that the sale was fraudulent. She prayed that an account might be taken, and the balance of the debt, if any, should be made payable by annual instalments of Rs. 50 each.

The defendant denied that the plaintiff or her husband was an agriculturist, and contended that the Dekkhan Agriculturists' Relief Act did not apply; and that the suit not being one to set aside the sale could not be maintained.

The Subordinate Judge found (1) that the plaintiff was an agriculturist, and (2) that the plaintiff was not entitled to question the validity of the sale. He, therefore, dismissed the suit.

On appeal by the plaintiff the Judge confirmed the decree, holding that, as long as the certificate of sale remained in force, [741] it was necessarily a bar to the plaintiff's suit for redemption, and the sale could not be regarded as a nullity, and that in a suit to set it aside, the former decree-holder and the auction-purchaser were necessary parties.

The plaintiff preferred a second appeal.

Mahadeo Chimnaji Apte for the appellant (plaintiff):—The sale of the land was a nullity, and the plaintiff is entitled to redeem the mortgage and to recover possession. The point involved is whether the equity of redemption held by an agriculturist can be sold. Under s. 22 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) no immovable property of an agriculturist is liable to sale. The equity of redemption of an agriculturist is immovable property, and it, therefore, cannot be sold. Immoveable property of an agriculturist is not even liable to attachment—*Chatur Khushalchand v. Mahadu* (1); *Shivram Udaram v. Kondiba Muktaji* (2). The sale is a nullity. Further, the proviso to s. 22 added by the Amending Act (Act XXII of 1882) lays down that the immovable property of an agriculturist shall not be sold even under decrees passed before the Amending Act came into force on the 1st February, 1883. The decree under which the property was sold, was passed before the Dekkhan Agriculturists' Relief Act came into force; still the order under which the property was sold was passed after that Act came into operation, and that being so, the sale is governed by the original Act and the Amending Act which is part and parcel of the original Act.

Ganesh Krishna Deshmukh for the defendant (respondent):—We object to the finding that the appellant is an agriculturist. Her husband may have been an agriculturist at the time of the mortgage in 1872, but it is not shown that the appellant was an agriculturist in the year 1891 when she filed this suit. That fact should be shown in order that the

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(1) 10 B. 91.

(2) 8 B. 340.

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plaintiff may get the benefit of the Dekkhan Agriculturists' Relief Act—
Tulsidas v. Virbussapa (1).

[742] Next, we contend that the auction sale was not void. If the order for sale and the proceedings under which the sale was ordered took place before the Amending Act (XXII of 1882, s. 9) came into force, then the sale would not be void. There is nothing in the case to indicate the time when the attachment was levied; but it is probable that the attachment was made before, and the sale and confirmation of sale after, the coming into operation of the Amending Act, which was on the 1st February 1883, and the sale took place on the 10th February of the same year.

The language of s. 312 of the Civil Procedure Code (Act XIV of 1882) shows that if objections contemplated by s. 311 be not raised, then the Court is bound to confirm the sale. The objections under s. 311 relate only to the publishing and conducting the sale. The confirmation of sale is a necessary step which the Court must take in the absence of objections under s. 311. The proceedings with respect to the confirmation follow as a natural consequence of the proceedings of sale. The plaintiff does not allege that the sale is invalid on the grounds mentioned in s. 311; and the Court cannot set aside the sale on any other ground; and that being so, the suit must fail.

The plaintiff was a party to the former suit and, therefore, she could have made an application to set aside the sale. She did not do so, and she cannot now contend that the sale is a nullity under the Dekkhan Agriculturists' Relief Act.

Immoveable property contemplated by s. 22 of the Act means tangible property. An equity of redemption is not of that class. No doubt the Registration Act (III of 1877) lays down that an equity of redemption is immoveable property. But as that Act deals with interests in immoveable property, it includes the equity of redemption in that kind of property. Further, the definition given in the Registration Act cannot be accepted for the purposes of the Dekkhan Agriculturists' Relief Act, because under the former Act a standing crop is moveable property, while under the latter it is immoveable property.

[743] We urge that it was necessary for appellant to join the decree-holder and auction-purchaser as parties to the suit. The Judge was right in holding that the suit was not properly framed.

Further, the decree in execution of which the property was sold, was satisfied by the purchaser's son. Therefore, if the sale be set aside, the amount which was paid in satisfaction of the decree should be refunded to us in justice and equity.

Mahadeo Chimnaji Apte, in reply:—According to s. 2 of the Dekkhan Agriculturists' Relief Act, it is not necessary for a party to be an agriculturist at the time of the suit. It is sufficient if he is an agriculturist at the time of the accrual of the liability. Therefore, the question to be considered is whether the mortgagor was an agriculturist at the time of the mortgage, and the Subordinate Judge found, on the evidence, that he was. The finding of the lower Court is, therefore, correct—*Banu v. Krishnambhat* (2). The provisions of the Civil Procedure Code do not apply in their entirety to proceedings in execution of a decree under the Dekkhan Agriculturists' Relief Act. The amending Act clearly

(1) 4 B. 624.

(2) P.J. (1886), 159.

lays down that the immoveable property of an agriculturist cannot be attached or sold.

Though the property was purchased by the mortgagee's son, he had purchased it out of the family funds. Therefore, the purchase was for the mortgagee himself. The mortgagee is now dead, and, therefore, the question of his being a necessary party cannot arise.

JUDGMENT.

SARGENT, C. J.—This is a suit by the appellant, who was found by the Subordinate Judge to be an agriculturist, to redeem certain land mortgaged by her late husband to the defendant.

It appears that subsequently to the mortgage the equity of redemption was on the 10th February, 1883, sold in execution of a money decree obtained by a third party against plaintiff's husband (represented in the suit by the plaintiff). The defendant's son became the purchaser, and the sale was confirmed on 12th April, 1883.

The plaintiff contends that the sale of the equity of redemption in execution of the above decree was void under s. 22 [744] of the Dekkhan Agriculturists' Relief Act of 1879. The lower appeal Court dismissed the suit on the ground that, whatever invalidity there might be in the sale, as long as the certificate of sale remained in force, it was necessarily a bar to plaintiff's right to redeem, and that it could not be set aside without making the decree-holder and auction-purchaser parties.

A preliminary objection was taken for the respondent (defendant) that the Subordinate Judge's finding that plaintiff was an agriculturist was contrary to law. But this objection is not, in our opinion, well founded. The Court properly made use of the fact that plaintiff's husband and son were agriculturists as showing that she gained her livelihood wholly or mainly by agriculture, which was the test when the suit was brought—*Baru v. Krishnambhat* (1).

The appellant's contention is that in virtue of s. 22 of the Dekkhan Agriculturists' Relief Act she is entitled to treat the sale of the equity of redemption as a nullity although uncanceled. In *Tuffazal Hossein Khan v. Raghunath Prasad* (2), their Lordships of the Privy Council had to consider the effect of the attachment and sale of a particular description of property with reference to s. 205 of Act VIII of 1859, and speaking of the sale of such property (which they ultimately held not to fall within the several descriptions of property mentioned in the above section) they say: "The real objection, however, to this sale, if sustainable in law, is not one of irregularity; it is one which, from its nature, as founded on a want of power in the Court, affects equally, if it be valid in law, the title of a purchaser under a strictly regular sale.

"Assuming the decision under appeal to be correct, the sale would be simply inoperative, though uncanceled."

If, then, this sale was invalid under s. 22 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), it was simply inoperative, and the defendant cannot set it up in this suit as a defence to the right of the plaintiff (who is the original mortgagor's heir) to redeem the mortgage.

[745] We proceed, therefore, to consider whether the sale in question falls under that section. We cannot doubt that an equity of redemption being

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(1) P.J. (1886), 159.

(2) 7 B. L. R. 186 (193) (P.C.).

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an estate in the land, as it has always been considered in England and in this country, is immovable property within the contemplation of that section. The decree, in execution of which the equity of redemption was sold, was passed prior to the Dekkhan Agriculturists' Relief Act of 1879; but the Amending Act, XXII of 1882, came into force on 1st February, 1883, before the sale took place on 10th February, 1883, by s. 9 of which the words "passed whether before or after this Act comes into force" were introduced into s. 22 of the Act of 1879 after the words "decree or order." It was suggested that the order of sale was made before the Amending Act came into force. Whether this was so or not, does not appear on the evidence in the case. But it is, in our opinion, immaterial, as s. 9 of the Amending Act of 1882 expressly provides for the case of a sale in execution of an "order" made prior to that Act.

We must, therefore, reverse the decree of the Court below and send back the case for a decree on the merits. The plaintiff to have his costs of this appeal and in both the Courts below.

Decree reversed and case sent back.

18 B. 745.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

GURUNATH SHRINIVAS DESAI (*Original Defendant*), *Applicant v.*
 CHENBASAPPA (*Original Plaintiff*), *Opponent.** [21st November, 1893.]

Registration—Evidence—Lease—Agreement to indemnify contained in lease—Suit for indemnity.

A lease of land for nine years contained a clause by which the lessor agreed to indemnify the lessee in case he should incur any loss in consequence of disputes which might arise as to the land between the lessor and his kinsmen. The lease was not registered. After the lessee had held the land under the lease for two years, a suit for possession was brought against him, and the lessor and he were dispossessed and obliged to pay mesne profits. He then brought this suit against the lessor under the above clause in the lease.

[746] *Held*, that the lease being unregistered was not admissible in evidence and could not be looked at. The clause on which the plaintiff sued could not be separated from the lease itself, and the plaintiff's claim must, therefore, be rejected.

[F., 10 Bom. L.R. 1146 (1150) = 33 B. 610; [Appl., 1 N.L.R. 47 (49); Cons., U.B.R. (1904) 4th Cr., Registration I.]

THIS was an application under the extraordinary jurisdiction of the High Court (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of J. L. Johnston, District Judge of Dharwar.

In December, 1881, the applicant Gurunath (the defendant) granted a lease of certain land for nine years to the opponent Chenbasappa (the plaintiff) which contained a clause by which Gurunath agreed to indemnify Chenbasappa for any loss which the latter might incur by reason of any dispute which might arise between Gurunath and his kinsmen with reference to the land. The lease was not registered.

Chenbasappa held the land under the lease for about two years, but in 1883 one Venkaji Krishnaji sued both him and Gurunath for possession

* Application No. 78 of 1893 under extraordinary jurisdiction.