

law nor any rule of equity insists on a general partition either of possession or of the property itself. We are unable to deal with the question of limitation on the merits, as the lower Court of appeal only dealt with the preliminary issue of law. We, therefore, reverse its decree and remand the appeal for a re-hearing: costs on the respondents.

Decree reversed and case remanded.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

LALUCHAND (ORIGINAL DEFENDANT), APPELLANT, v. GIRJA'PPA
(ORIGINAL PLAINTIFF), RESPONDENT.*

1895.

March 28.

Dekkhan Agriculturists' Relief Act (XVII of 1879), Sec. 15 D—Suit for account—Such suit no bar to subsequent suit for redemption—Civil Procedure Code (Act XIV of 1882), Sec. 43.

Under section 15 D of the Dekkhan Agriculturists' Relief Act (XVII of 1879) as amended by Act XXII of 1882, an agriculturist mortgagor can sue for an account upon a mortgage, without at the same time asking for redemption. Such a suit will not bar a subsequent suit for redemption. The section was expressly intended to remove the bar created by section 43 of the Code of Civil Procedure (Act XIV of 1882).

APPEAL from an order of remand passed by Ráo Bahádur C. N. Bhat, Joint First Class Subordinate Judge A. P. at Sátára.

The plaintiff filed a suit (No. 278 of 1884) under section 15 D of the Dekkhan Agriculturists' Relief Act (XVII of 1879) ⁽¹⁾ for an account of the principal and interest remaining unpaid on a certain mortgage.

*Appeal No. 1 of 1895 from order.

(1) The following are the sections referred to:—

15 B. (1) The Court may in its discretion in passing a decree for redemption, foreclosure or sale in any suit of the descriptions mentioned in section three, clause (y) or clause (z), or in the course of any proceedings under a decree for redemption, foreclosure or sale passed in any such suit, whether before or after this Act comes into force, direct that any amount payable by the mortgagor under that decree shall be payable in such instalments, on such dates and on such terms as to the payment of interest, and, where the mortgagee is in possession, as to the appropriation of the profits and accounting therefor, as it thinks fit.

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In this suit the Court passed a decree to the following effect :—

“On the date of the suit, Rs. 103 and Rs. 107-4-0 were due on the mortgage to defendants Nos. 1 and 2 respectively. Defendants should get interest at 9 per cent. per annum from the date of suit, and should account for the profits, which amounted to Rs. 45-8-0 per year.”

The plaintiff then filed a fresh suit, No. 127 of 1893, for redemption of the mortgaged property.

The Subordinate Judge dismissed this suit, holding that it was barred by section 43 of the Code of Civil Procedure (Act XIV of 1882). He was of opinion that section 15 D of the Dekkhan Agriculturists' Relief Act gave the agriculturist mortgagor the option to convert a suit for an account into one for redemption, and that, if he failed to exercise this option, a second suit for redemption would be barred by section 43 of the Code of Civil Procedure.

On appeal the Subordinate Judge A. P. held that the suit was not barred by section 43 of the Civil Procedure Code. His reasons were as follows :—

“The lower Court has properly held that section 15 D of the Dekkhan Agriculturists' Relief Act was passed after the decision of the case at I. L. R., 7 Bom., 378. The section was apparently intended to remove the inability of bringing a suit for an account of the principal and interest due on a mortgage without seeking redemption. If the omission to seek redemption bars a suit for redemption, the application

(2) If a sum payable under any such direction is not paid when due, the Court shall, except for reasons to be recorded by it in writing, instead of making an order for the sale of the entire property mortgaged or for foreclosure, order the sale of such portion only of the property as it may think necessary for the realization of that sum.

15 D. (1) Any agriculturist whose property is mortgaged may sue for an account of the amount of principal and interest remaining unpaid on the mortgage and for a decree declaring the amount.

(2) When any such suit is brought, the amount (if any) remaining unpaid shall be determined under the same rules as would be applicable under this Act if the mortgagee had sued for the recovery of the debt.

(3) At any time before the decree in the suit is signed, the plaintiff may apply to the Court to pass a decree for the redemption of the mortgage, or the mortgagee, if he would then have been entitled to sue for foreclosure or sale, may apply to the Court to pass a decree for foreclosure or sale (as the case may be), instead of a decree merely declaring the amount remaining unpaid, and the Court may, if it thinks fit, grant the application.

(4) The provisions of section 15 B shall apply to any decree passed under sub-section (3).

for a redemption decree can scarcely be called optional. The lower Court has failed to notice that the Court is not bound to grant such application. If the Court refuses to grant the application for passing a redemption decree, a new suit for redemption evidently will not be barred, and I see no reason why it should be barred under other circumstances. The lower Court has also failed to notice that by refusing plaintiff's suit for redemption because he did not make the application referred to in paragraph (3) of section 15 D, it has practically decreed foreclosure in favour of the defendants, although they did not make the application required by that clause. The section 15 D is intended to give the parties power to reserve the right of redeeming the property or recovering the mortgage by another suit, or to conclude the matter finally by an application to be made by one party or another as laid down in clause 3 thereof. The Court has, however, the power of interfering by granting or refusing the application, so that there may be no hardship in any particular case."

V. R. Joglekar for the appellants:—The suit is barred both under section 13, explanation 3, and section 43 of the Code of Civil Procedure—*Bháu Báláji v. Hari Nilkanthráv*⁽¹⁾. Section 15 D of Act XVII of 1879 does not permit a fresh suit for redemption. If it did, each time a suit for an account is brought, a fresh suit would lie for redemption, and the mortgagee would be harassed by a multiplicity of suits.

B. A. Bhágvat for respondent (plaintiff):—The case cited does not apply. It was decided before section 15 D was introduced by the Amending Act XXII of 1882. Under this section the Court has a discretion to grant or refuse redemption. If it refuses redemption, can it be contended that the mortgagor who has brought a suit for an account loses his right to bring a redemption suit? Section 43 of the Code of Civil Procedure does not, therefore, bar such a suit.

RA'NADE, J.:—The principal point in issue in this appeal turns upon the construction of section 15 D, clauses 1, 3, of Act XVII of 1879 (as modified by the Amending Act XXII of 1882), and the extent to which this special provision relaxes the strictness of the bar created by section 43 of the Civil Procedure Code (Act XIV of 1882). The point has not expressly come before this Court on any previous occasion, the decisions in *Shankarúpa v. Dánápa*⁽²⁾, *Hari v. Lakshman*⁽³⁾ and *Bháu v. Hari*⁽⁴⁾ being passed in reference to the old law as it stood before the Amending

⁽¹⁾ I. L. R., 7 Bom., 377.

⁽²⁾ I. L. R., 5 Bom., 604.

⁽³⁾ I. L. R., 5 Bom., 614.

⁽⁴⁾ I. L. R., 7 Bom., 377.

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Act of 1882 introduced section 15D as a part of Act XVII of 1879.

Under the old law, it was no doubt ruled that clause (a) of section 3 and section 16 of Act XVII of 1879 did not refer to suits for account in mortgage transactions, and that the mortgagor-agriculturist could only sue for an account in a redemption suit. It was felt that this was a serious hardship, and the Legislature introduced the section 15 D which declares in clause 1 that an agriculturist may sue for an account of the principal and interest remaining unpaid on a mortgage effected by him, and for a decree declaring that amount. The Court of first instance appears to be under the impression that, if this clause had stood alone, the present suit for redemption brought by the respondent might be maintained, notwithstanding that he had in 1884 brought a suit for a mortgage account, and obtained a decree declaring that amount. That Court, however, was of opinion that clause 3 of this same section was intended to restrict this freedom of the mortgagor-agriculturist, and that the mortgagor-plaintiff who first brought a suit for account, if he desired redemption of the mortgaged lands, was bound to avail himself of the permission granted by clause 3, and turn his account suit into a redemption suit, and that if he failed to do so, he could not bring a separate suit for redemption, because of the bar created by section 43 of the Civil Procedure Code. The lower Court of appeal took a different view of the scope of this Amending Act of 1882, and held that clause 3 was not meant to restrict the effect of the general permission given to agriculturist-mortgagors to bring account suits with a view to ascertain the balance due in respect of their mortgage dealings.

Clause 3 provides that before a decree in an account suit brought under clause 1 is signed, the mortgagor-plaintiff may apply to the Court to pass a decree for the redemption of the mortgage, or the mortgagee may apply to the Court to pass a decree for foreclosure, instead of a decree merely declaring the amount remaining unpaid, and the Court may, if it thinks fit, grant the application. The power conferred on the Court to turn an account suit into a suit for redemption, is, in the first place, a power in which the fullest discretion is left to the Court.

It is, moreover, balanced by an alternative power to turn the account suit into a suit for foreclosure or sale, if the mortgagee applies for such conversion, and the Court sees fit to grant his application. The appellants' pleader admitted that this permission to turn an account suit into a foreclosure suit cannot be construed into a prohibition to the mortgagee to bring a separate suit for foreclosure or sale, if he does not avail himself of clause 3, or if the Court sees no reason to grant his application. By parity of reasoning, the discretionary power conferred upon the Court to turn an account suit into a redemption suit must be similarly construed. The mortgagor *may* apply for such conversion, and the Court *may* grant his application, or refuse it at its own discretion. Such a power so worded could never have been intended to restrict the general scope of clause 1 of section 15 D. It could only have been intended to be an additional facility afforded to the litigant parties to settle their disputes without unnecessary litigation, which is one of the most important objects aimed at in this relief legislation. The law had already provided separately for redemption suits under clause (z) of section 3, and for account suits under clause (a), section 3, and section 16. The decisions of this Court construed sections 3 and 16 in a way to prevent agriculturist-mortgagors from availing themselves of clause (a), section 3, and section 16 without at the same time incurring the risks and responsibilities involved in suing for redemption under clause (z), section 3. The Legislature expressly intervened to remove the hardship thus caused, and introduced a new section removing all doubts, and permitting agriculturist debtors to bring account suits in respect of mortgage dealings without at the same time seeking for the redemption of their mortgaged lands.

The amendment appears thus to have been expressly intended to remove the bar created by section 43 of the Civil Procedure Code, and this seems to us to be the most reasonable construction of the entire section. The present suit was brought for the redemption of the mortgaged lands; and the prayer for this relief was based on the relief already accorded in the previous account suit. Before the amendment, the mortgagor-plaintiff was not entitled, under the general law, to sue for accounts except as ancil-

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lary to the relief implied in a redemption proceeding. Since the amendment, he became so entitled, and his first suit thus included the whole of the claim in respect of his separate cause of action for accounts. There was, therefore, no relinquishment or omission on his part in separating the two causes of action, and the terms of section 43 are thus in every respect satisfied. The decision in the account suit was, in effect, a settlement of accounts and a determination of the debt found due. A private settlement of the accounts between mortgagor and mortgagee would not come in the way of a redemption suit, and the judicial settlement could not alter the nature of the transaction. The decisions on section 43, moreover, recognize a distinction between causes of action which must be and those which might be joined together, but which the party interested is not bound to join. A suit, for instance, by a mortgagee against his mortgagors does not bar a subsequent suit to enforce the mortgage lien against purchasers or mortgagors and subsequent mortgagees—*In the matter of Huree Mohun Paramanick*⁽¹⁾; *Rájá Rám Tewary v. Luchmun*⁽²⁾; *Hira Lal v. Prosunno*⁽³⁾; *Háfiz Mahomed Khán v. Abdul Gunny*⁽⁴⁾.

We feel accordingly satisfied that the lower appellate Court acted properly in remanding the case back to the Court of first instance for disposal on the merits.

We reject the appeal and confirm the order. Appellants to pay the costs of this appeal.

JARDINE, J.:—I concur. The present suit of 1892 for redemption is governed by the Dekkhan Agriculturists' Relief Act (XVII of 1879) as amended by Act XXII of 1882, section 15 D. So was the same plaintiff's suit for account of 1884. The Amending Act was passed in consequence of the decisions of this Court. The older law is clearly interpreted in *Hari v. Lakshman*⁽⁵⁾. The general rule was laid down as follows:—"Ordinarily a suit for an account upon a mortgage cannot be maintained by a mortgagor unless he asks also for redemption. The 42nd and 43rd sections of the Civil Procedure Code are opposed to the maintenance of such an action, inasmuch as it would not afford ground

(1) 15 Cal. W. R., 486.

(3) 12 Cal. L. R., 556.

(2) 8 Cal. W. R., 15.

(4) 7 *Ibid.*, 257.

(5) I. L. R., 5 Bom., 614.

for a final decision, and would not include the whole of the plaintiff's claim in respect of the cause of action." The Court then went on to hold that the Act XVII of 1879 had not created a special rule or privilege for agriculturist mortgagors. The Amending Act by section 15 D (1) does create the exception by allowing suit for account. The power given in clause 3 to either the plaintiff-mortgagor or the defendant-mortgagee to apply to the Court to deal with redemption or foreclosure is comparable to an application to amend the plaint or otherwise enlarge the scope of the suit. I think the power to apply to, and the discretion conferred on, the Court may have been given to advance the remedy and at the same time check the annoyance to the mortgagee pointed out at page 620. It is evident, however, that section 15 D (2) was passed to avoid the operation of sections 42 and 43 of the Code, which would have barred a later suit for redemption if, at the time of filing an earlier suit for account, the redemption suit might have been brought then. We ought, therefore, to interpret section 15 D (3) as giving a separate cause of action, *i.e.*, one concerned with account only, and, therefore, distinct from the right to demand redemption. In this view, section 43 creates no bar, for "the correct test is whether the claim in a new suit is, in fact, founded on a cause of action distinct from that which was the foundation of the former suit"—*Moonshee Buzloor v. Shumsoonnissa*⁽¹⁾ followed in *Rajah of Pittdapur v. Sri Rajah Venkata*⁽²⁾.

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Remand order confirmed.

(1) 11 M. I. A., 551.

(2) L. R., 12 I. A., 116.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade

RAMCHANDRA BHIA'SKAR NA'NAL (ORIGINAL PLAINTIFF), APPELLANT,
v. BAGHUNA'TH BA'CHA'SHET SONAR (ORIGINAL DEFENDANT),
RESPONDENT.*

1895.

March 28.

Land Revenue Code (Bombay Act V of 1879), Sec. 108—Khoti Act (Bombay Act I of 1880), Sec. 17—Evidence Act (I of 1872), Sec. 40—Res judicata—Dhara land—Khoti land.

An entry of a record prepared under section 108 of the Land Revenue Code, Bombay Act V of 1879, by the survey officer, describing certain lands as *khoti*

* Second Appeal, No. 525 of 1893.