

creditor"; but, on the other hand, as to this question of protection, there is a difference between a mortgagor who has made himself personally liable to pay and also mortgaged his property as security for the debt and one who has made the property alone security therefor. In the former case, he may be sued by one who may not be the legal representative of the creditor and in that case he may have to pay twice over, if the rightful heir sues without being able to recover from the wrong person if the person be insolvent. In the latter, if a wrong person sues and obtains a decree and sells the property, the rightful heir cannot enforce payment from the mortgagor, but must hold the property alone liable and the property remains liable all the same. The mortgagor is no loser and needs no protection.

We think, therefore, that the lower Appellate Court is right in holding that a succession certificate was not necessary in the present case, and we confirm the decree with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

KRISHNAJI NILKANTH SANE AND ANOTHER, SONS AND HEIRS OF DECEASED NILKANTH GOVIND SANE (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* HARI BIN JANU (ORIGINAL DEPENDANT), RESPONDENT.*

1904.

June 20.

Dekhan Agriculturists' Relief Act (Act XVII of 1879), Chapter II(1)—Suit based on dispossession of an existing possession—Incidental reference to a mortgage in plaint.

A suit based on a dispossession of an existing possession does not fall within Chapter II of the Dekkhan Agriculturists' Relief Act (Act XVII of 1879). An incidental reference to a mortgage in the plaint does not affect the

* Second appeal No. 737 of 1903.

(1) Chapter II of the Dekkhan Agriculturists' Relief Act. Of the hearing of certain suits by Subordinate Judges.

3. The provisions of this Chapter shall apply to—

(a) Suits for an account whatever be the amount or value of the subject-matter thereof instituted on or after the first day of November, 1879, by an agriculturist in the Court of a Subordinate Judge under the provisions hereinafter contained, and

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question when the suit is one to recover possession from a person who is not the mortgagor.

Mulchand v. Ravji⁽¹⁾ followed.

SECOND APPEAL from the decision of L. Crump, District Judge of Satara, confirming the decree of H. D. Rendall, Assistant Judge.

The plaintiff sued to recover possession of the property in suit, alleging that it was mortgaged to him by the owner Nana bin Govind, that he was put in possession and was wrongfully dispossessed by the defendant.

The defendant denied the plaintiff's title and the alleged dispossession.

The suit, in which the claim was valued at Rs. 101-14-0, was originally filed in the Court of the First Class Subordinate Judge of Satara, and after he had framed issues, it was transferred for

(1) (1883) P. J., p. 184.

(b) Suits of the descriptions next hereinafter mentioned and instituted on or after the same date—

(1) when such suits are heard by Subordinate Judges of the First Class and the subject-matter thereof does not exceed in amount or value five hundred rupees, or

(2) when such suits are heard by Subordinate Judges of the Second Class and the subject-matter thereof does not exceed in amount or value one hundred rupees, or

(3) when such suits are heard by Subordinate Judges of the Second Class and the subject-matter thereof exceeds one hundred rupees, but does not exceed five hundred rupees in amount or value and the parties to the suits agree that such provisions shall apply thereto.

The descriptions of suits referred to in clause (b) are the following (namely):—

(w)	*	*	*	*	*
(x)	*	*	*	*	*

(y) Suits for foreclosure or for the possession of mortgaged property, or for sale of such property, or for foreclosure and sale, when the defendant, or any one of the defendants is an agriculturist.

(2) 51. The District Judge may—

(a) transfer any application pending before a conciliator to the file of any other conciliator;

(b) transfer to his own file any suit or other matter pending before the Court of any Subordinate Judge under Chapter II, Chapter IV or Chapter VI of this Act, and may dispose of the same as if he were a Subordinate Judge; or

(c) stay the proceedings in any such suit or matter, and sit together with such Judge as a Bench to dispose of such suit or matter in accordance with the provisions of this Act.

If the members of any Bench sitting under this section differ in opinion, the opinion of the District Judge shall prevail.

trial to the Court of the Assistant Judge by the order of the District Judge. The Assistant Judge dismissed the suit on the ground that the plaintiff's mortgagor had no authority to mortgage the property.

On appeal by the plaintiff the Judge confirmed the decree. The following is an extract from his judgment :—

The suit was instituted in the Court of the First Class Subordinate Judge, Satara, and was transferred for hearing to the Court of the Assistant Judge. It is a suit of the nature defined in section 3 of Dekkhan Agriculturists' Relief Act. The argument put forward is that the order of transfer is *ultra vires*. The District Judge transferred the suit of his own motion, and it cannot be doubted that, failing the provisions of the Dekkhan Agriculturists' Relief Act, he had power to do so under section 25 of the Civil Procedure Code. It is argued, as section 51⁽²⁾ of the Dekkhan Agriculturists' Relief Act gives the District Judge the power of transfer to his own Court in the case of suits falling under Chapter II, and as the appointment of a Special Judge under section 54⁽³⁾ ousts the jurisdiction of the District Judge, the latter has no

(3) 54. The Local Government from time to time may, and if the Government of India so direct shall, appoint any officer, as Special Judge, to discharge in the place of the District Judge all the functions of the District Judge under this Act in respect of the proceedings of all Subordinate Judges, Village Munsiffs and Conciliators, and may cancel any such appointment.

Such Special Judge shall not, without the previous sanction of the Government of India, discharge any public function except those which he is empowered by this Act to discharge.

* * * * *

No appeal shall lie from any decree or order passed by the District Judge under this Chapter (VII), or by the Special Judge, or by an Assistant or Subordinate Judge appointed under section 52 or by a Bench, in any suit or proceeding under this Act.

* * * * *

(4) 74. Except in so far as it is inconsistent with this Act, the Code of Civil Procedure shall apply in all suits and proceedings before Subordinate Judges under this Act.

(5) 11. Every suit of the description mentioned in section 3, clause (w), (that is, suits for the recovery of money) may, if the defendant, or when there are several defendants, one only of such defendants, is an agriculturist, be instituted and tried in a Court within the local limits of whose jurisdiction such defendant resides and not elsewhere.

Every such suit in which there are several defendants who are agriculturists may be instituted and tried in a Court within the local limits of whose jurisdiction any one of such defendants resides, and not elsewhere.

Nothing herein contained shall affect sections 22 to 25 (both inclusive) of the Code of Civil Procedure.

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power to transfer any suit to which the provisions of Chapter VII (II⁹) apply. There is, however, nothing in the Dekkhan Agriculturists' Relief Act to destroy the general power given by section 25 of the Civil Procedure Code. Section 74⁽⁴⁾ applies to procedure in Subordinate Judges' Courts, while section 11⁽⁵⁾ distinctly preserves the general power of transfer in so far as it might be deemed to be affected by that section. That the Special Judge has a certain jurisdiction does not necessarily imply that the District Judge cannot deal with the same matter. Section 54 clearly contemplates a possible conflict of authority.

The plaintiff preferred a second appeal.

J. R. Gharpure for the appellant (plaintiff):—The Judge was wrong in his opinion that there is nothing in the Dekkhan Agriculturists' Relief Act to affect the provisions of the Civil Procedure Code. The Code is a General Act and the Dekkhan Agriculturists' Relief Act being a special enactment, the passing of that Act abrogated, as far as may be, the provisions of the Code, *generalia specialibus non derogant*, Maxwell on Statutes, pp. 243, 246. This Court has held that the provisions of the Civil Procedure Code are to be applied only when they are not inconsistent with the provisions of the Dekkhan Agriculturists' Relief Act: *Dulichand v. Dhondi*⁽¹⁾; *Shankarapa v. Danapa*⁽²⁾.

Apparently the Judge was misled by the last paragraph of section 11 of the Dekkhan Agriculturists' Relief Act. Owing to the appointment of the Special Judge, the District Judge ceases to have any jurisdiction in cases to which Chapter II of the Act applies. Thus the transfer of the suit to the Court of the Assistant Judge by the order of the District Judge was *ultra vires*: see sections 51, 54 and 74 of the Act.

S. R. Bakhle, for the respondent (defendant):—The Dekkhan Agriculturists' Relief Act applies only to suits for possession by mortgagees on the basis of the mortgage. The present is a suit to recover possession by a dispossessed mortgagee from a person who is not the mortgagor but a different person altogether. Therefore section 3, clause (g), of the Dekkhan Agriculturists' Relief Act does not apply: *Mulchand v. Ravji*⁽³⁾.

(1) (1880) 5 Bom. 184.

(2) (1887) 5 Bom. 604.

(3) (1883) P. J., p. 184.

Gharpure (in reply) :—There is nothing in section 3, clause (g), which excludes suits like the present from its operation, but on the contrary it distinctly relates to suits for possession of mortgaged property.

JENKINS, C. J. :—In our opinion this suit does not fall under Chapter II of the Dekkhan Agriculturists' Relief Act, because it is a suit based on a dispossession of an existing possession, so that the reference to the mortgage in the plaint was incidental and not really necessary. Therefore the case falls within the principle of *Mulchand v. Rarji* ⁽¹⁾.

We accordingly confirm the decree with costs.

Decree confirmed.

(1) (1883) P. J., p. 184.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

RANGNATH SAKHARAM (ORIGINAL PLAINTIFF), APPELLANT, v. GOVIND NARASIN V AND OTHERS, SONS AND HEIRS OF DECEASED NARASIN V SAKHARAM (ORIGINAL DEFENDANTS), RESPONDENTS.*

1904.
June 21.

Indian Contract Act (IX of 1872), section 16—Amending Act VI of 1899—Fraud—Voidable Contract—Defendant entitled to plead fraud—Lapse of time—Undue influence.

Fraud does not make a transaction void but only voidable at the instance of the person defrauded.

The plaintiff sued in 1900 to recover from the defendant the amount due for interest on a mortgage-bond dated the 15th April, 1893, by sale of the mortgaged property. The defendant contended that he did not execute the bond with free consent and that it was obtained from him under pressure of criminal proceedings.

Held, that the defendant was entitled to resist the claim made against him by pleading fraud, and that he was entitled to urge that plea though he had not brought a suit to set aside the transaction.

Held, further, that under the circumstances he was not precluded from urging that plea by lapse of time: *Jagabas v. Ambashankar* ⁽¹⁾ distinguished.

* Second Appeal No. 790 of 1903.

(1) (1883) 12 Bom. 401.