

APPELLATE CIVIL.

Before Mr. Justice Russell, Acting Chief Justice, and Mr. Justice Beaman.

1906.
October 1.

MANCHERJI HORMUSJI (ORIGINAL DEFENDANT 1, JUDGMENT-DEBTOR),
APPELLANT, *v.* THAKORDAS HARKISANDAS (ORIGINAL PLAINTIFF,
JUDGMENT-CREDITOR), RESPONDENT.*

*Dekkhan Agriculturists' Relief Act (Act XVII of 1879), section 15 B(1)—
Extension of the Act to the District—Decree on mortgage for sale—Order for
sale in execution—Application for payment by instalments—Decree nisi—
Decree absolute.*

In execution of a decree for the sale of mortgaged property a portion of the property was sold and the rest was ordered to be sold by the Collector to whom the decree was transferred for execution. In the meanwhile the Dekkhan

* First appeal No. 157 of 1905.

(1) Section 15 B of the Dekkhan Agriculturists' Relief Act (Act XVII of 1879):—

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 3, 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.

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.

(3) In passing a decree for redemption or foreclosure in any such suit as aforesaid, the Court may direct that the amount payable by the mortgagor shall be discharged by continuing the mortgagee in possession for such further period as will enable him to recover his principal with reasonable interest, and that on the expiry of such period the property mortgaged shall be restored to the mortgagor.

(4) When the amount payable to a mortgagee in possession has been determined in any such suit as aforesaid, the Court may in its discretion, instead of making an order for payment thereof, direct that the mortgagee be continued in possession for such period [to be specified by the Court] as will in the opinion of the Court be sufficient to enable him to recover from the profits the amount payable by the mortgagor together with reasonable interest, and that on the expiry of such period the property mortgaged shall be restored to the mortgagor.

Agriculturists' Relief Act (Act XVII of 1879) having been made applicable to the District, the mortgagor applied to the Court for payment by instalments under section 15 B of the Act. The application was refused by the Court on the ground that the decree having been transferred to the Collector, it had no power to grant instalments.

Held on appeal by the mortgagor, reversing the order of the lower Court, that payment by instalments could be decreed. The application for payment by instalments having been made within one month from the time the Dekkhan Agriculturists' Relief Act (Act XVII of 1879) was made applicable, no question of limitation arose.

Per RUSSELL, Ag. C. J.:—The term 'decree' in section 15 B of the Dekkhan Agriculturists' Relief Act (Act XVII of 1879) refers to 'decree nisi' as well as to 'decree absolute.'

Per BEAMAN, J.:—There is a perceptible difference between the case of a 'decree absolute' for sale and for foreclosure. Theoretically the latter leaves nothing more to be done; there is nothing left to be paid by any one, no further step to be taken by the creditor or the Court. All is over. But that is not so when a decree for sale is made absolute. The amount for which the decree was passed is still payable, and though strictly speaking, it may not be payable by the "mortgagor," it is payable out of what, but for the decree absolute, would be still his property.

APPEAL against the order of J. E. Modi, First Class Subordinate Judge of Surat, in the matter of an application for payment by instalments of a decree on mortgage under the provisions of the Dekkhan Agriculturists' Relief Act (Act XVII of 1879).

Plaintiff Thakordas Harkisandas filed a suit against his mortgagor Mancherji Hormusji in the Court of the First Class Subordinate Judge of Surat and obtained a decree for the recovery of his debt. He then applied to execute the decree by the sale of the mortgaged property. The decree was, therefore, transferred to the Collector under section 320 of the Civil Procedure Code (Act XIV of 1882). In execution the Collector sold a portion of the mortgaged property and realized more than Rs. 20,000. He had ordered the rest of the property to be sold. In the meanwhile the Dekkhan Agriculturists' Relief Act (Act XVII of 1879) was made applicable to the Surat District. Defendant Mancherji Hormusji, therefore, made an application for the payment of the decretal debt by instalments under sections 15 B and 20 of the Act.

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The plaintiff objected to the payment by instalments.

The Subordinate Judge found that the application was in time, that section 20 of the Act was not applicable and that the defendant was not entitled to apply for instalments at the stage which the case had reached. He, therefore, rejected the application. The following is an extract from his judgment:—

I have made the order absolute for sale; and thenceforth the execution is transferred to the Collector and I am not to use any of the powers granted to the Collector, and these include the power of sale and of adjourning the sale (section 325, Civil Procedure Code). The section 15 B of the Relief Act seems to pre-suppose some proceeding before the Court; I am afraid the proceedings of the Collector are not proceedings before me. It is all right to call him a ministerial officer—and a Nazir. But he has got independent powers; and I do not like to interfere with him. And I do not like to interfere with him under cover of the Relief Act in the absence of express legislation to that effect. There is no proceeding before me in the course of which I can make the order.

The defendant appealed.

G. S. Rao for the appellant (defendant):—The mere fact that the decree was transferred to the Collector for execution did not oust the jurisdiction of the Judge to pass an order for instalments under section 15 B of the Dekkhan Agriculturists' Relief Act. The Judge was wrong in holding that he could not pass the said order because he had not the record of the case before him. He should not have refrained from considering our application on the ground that the Collector had got independent powers and that he did not like to interfere. The rules framed by the Local Government do not give the Collector any power to grant instalments. Such power is vested in the Court.

Manubhai Nanabhai for the respondent (plaintiff):—Section 20 of the Dekkhan Agriculturists' Relief Act does not apply to a decree on the mortgage; *Balkrishna v. Dnyanoba* ⁽¹⁾, *Shankarapa v. Danapa* ⁽²⁾.

Section 15 B of the Act also cannot apply. There are now no proceedings before the Court under a 'decree for sale.' A 'decree for sale' is classed with a decree for redemption or foreclosure. It has been held with respect to the last two that

(1) (1889) P. J. p. 25.

(2) (1881) 5 Bom. 604.

section 15 B can only apply before 'order absolute' is made: *Ladu v. Babaji* ⁽¹⁾, *Datto v. Balwant* ⁽²⁾. Therefore decree in such cases means 'decree nisi.' This is also the distinction observed in the English practice and in the Transfer of Property Act. Sections 92, 86 and 88 of that Act provide for (1) decree for redemption, (2) decree for foreclosure and (3) decree for sale respectively. Wherever these terms are used they stand for decree *nisi* (see Form 128, Schedule IV, of the Civil Procedure Code). The final orders are always called 'orders absolute.' Section 15 B of the Dekkhan Agriculturists' Relief Act and the Transfer of Property Act were passed almost simultaneously. 'Proceedings under a decree for foreclosure' under section 15 B would, therefore, mean proceedings contemplated by sections 87, 89 and 93 of the Transfer of Property Act, and culminating in an 'order absolute' for foreclosure, &c. If 'decree' is held to mean 'order absolute,' it would go against the rulings of this Court, because in the section itself no distinction is made between decrees for foreclosure and redemption and those for sale, and the proposed interpretation of 'decree' as meaning 'decree *nisi*' would apply equally to all.

The words 'any amount payable by the mortgagor under that decree' should be considered. No amount is payable by the mortgagor under an 'order absolute' for sale. He can pay the amount only under a 'decree *nisi*.' If he fails to pay then 'order absolute' is passed which does not repeat the previous direction to pay but simply orders that the property should be sold. See sections 89 and 90 of the Transfer of Property Act.

Looking at clauses (2), (3) and (4) of section 15 B and sections 15 A, 15 C and 15 D which were added to the Dekkhan Agriculturists' Relief Act by Act XXII of 1882; the word 'decree' can only mean 'decree *nisi*.' To construe it as 'order absolute' would render the sections quite meaningless in some places.

There is no procedure by which Courts can call back proceedings from the Collector in order to pass an order for instalments.

(1) (1883) 7 Bom. 532.

(2) (1885) P. J. p. 248.

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There is also the bar of limitation. Article 175, Schedule II of the Limitation Act gives only six months from the date of the decree. The article is not confined to applications under section 210 of the Civil Procedure Code but covers all applications for instalments. The fact that section 15 B of the Dekkhan Agriculturists' Relief Act was extended recently can make no difference, as no exception is made under the Limitation Act on such grounds.

Rao in reply:—'Decree for sale' must include any decree for sale when the Legislature has not confined its meaning to 'decree nisi.' The analogy of decree for foreclosure and redemption is not applicable because the principle in those cases is different.

The Dekkhan Agriculturists' Relief Act was made applicable to the Surat District within six months of our application, hence there can be no bar of limitation.

RUSSELL, Ag. C. J.:—In this case a decree for sale of mortgaged property was passed some years ago and the execution thereof transferred to the Collector. He sold some of the mortgaged property and realized more than Rs. 20,000. The rest he has ordered to be sold. In the meantime the Dekkhan Agriculturists' Relief Act has been applied to the District of Surat and the judgment-debtor asks for instalments under sections 15 B and 20 of the Act.

The other question is limitation.

As to the first question, section 20 does not apply to suits on mortgage-decrees, so the question really depends on the construction of section 15 B of the Act. Before dealing with that section it is material to notice that the Act in the preamble says that "it is expedient to relieve the agricultural classes of the Dekkhan from indebtedness." Further, it has been laid down by Ranade, J., (*Bhagawan v. Ganu* ⁽¹⁾) that the Dekkhan Agriculturists' Relief Act in several of its provisions is inconsistent with the Transfer of Property Act. [His Lordship read the passage, top of page 652. "Of course.....Act IV of 1882"]. Further, it was held in *Mahadaji v. Hari* ⁽²⁾ that the powers of the Collector are limited by section 321 of the Civil

(1) (1890) 23 Bom. 344 at p. 652.

(2) (1883) 7 Bom. 332.

Procedure Code and that Officer cannot order the payment of a decree by instalments.

It is clear, therefore, that it is the Subordinate Judge who has the power to do so.

And it appears that the Collector sent the record to the Subordinate Judge for the necessary order to be passed.

Section 15 B of the Dekkhan Agriculturists' Relief Act was introduced therein by Act XXII of 1882—the Transfer of Property Act was applied to Bombay on the 1st January 1893.

Mr. Manubhai argued that the "decree" in section 15 B must refer to a decree *nisi* and not to a decree absolute. But in my opinion the word "decree" must be taken to mean decree *nisi* as well as decree absolute. No authority was cited for the proposition that these two classes of decrees are different, and in fact they cannot be.

If this is not the true construction of the word-decree, it seems an extraordinary thing that the Legislature did not point out the difference in the section. [His Lordship read the section.]

Clause 3 evidently contemplates a power in the Court either in the decree *nisi*, or when it is made absolute, to direct that the amount payable by the mortgagee shall be discharged by continuing the mortgagee in possession. Under this clause, therefore, decree *nisi* for foreclosure can be converted into one for continuing the mortgagee in possession. Whether after a decree for foreclosure has actually operated and the transfer of ownership has been thereby effected, an order for payment by instalments can be made is a question which does not arise in this case.

The words of section 15 B applicable to this case appear to me perfectly plain "or in the course of any proceeding under a decree.....for sale passed in any suit." The present are proceedings under a decree for sale and therefore payment by instalments can be decreed.

As regards limitation the point does not arise, as the Dekkhan Agriculturists' Relief Act was not applied to Surat till the 15th August 1905, and the present application was made within one month after that date.

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The result is that the decree of the Court below must be reversed and the case remanded for decision on the merits. Costs will abide the result.

BEAMAN, J.:—I concur.

I am of opinion that Act XVII of 1879 was intended to afford the amplest protection to those classes within its scope. Possibly for that reason section 15 B has been advisedly framed somewhat loosely and with a want of technical precision. But reading the section as a whole, and in the light of what I believe to have been the policy underlying the Act throughout its history, I cannot seriously doubt that in all the cases mentioned in the section, the intention of the Legislature was to afford the debtor a *locus penitentie* up to the very last moment before the property had actually and finally passed. It has been strenuously contended that the decrees for redemption, foreclosure or sale mentioned in the section must mean and be limited to decrees *nisi* for redemption, foreclosure or sale; and therefore that the words "or in the course of any proceedings, etc., payable by the mortgagor under that decree" can only refer to proceedings, etc., between the decree *nisi* and the decree absolute, except in the case of a foreclosure decree, as to which there is authority, while the principle itself is clear and intelligible. This is still an open question and a question of difficulty. The argument in effect is that since when a decree for redemption or sale is made absolute, the mortgagor's right *qua* mortgagor is extinguished: the Court cannot direct that any money be paid by the mortgagor under that decree, or commute such amount from a lump sum to instalments, for there is no longer any amount payable under the decree by the mortgagor. Still he remains a judgment-debtor, though not a mortgagor and therefore execution can be taken out against him. That would in a sense be a proceeding under such a decree, but not a proceeding of the kind in which the Court could allow the debtor to virtually annul the decree and re-assume his character of mortgagor by granting him instalments. It cannot be denied that there is some force in this reasoning. But while as I have said, I think that the language of the section is advisedly loose and general, I entertain little, if any, doubt

that the result thus arrived at was not the result which the Legislature contemplated or desired. I think that there is, for example, a perceptible difference between the case of a decree absolute for sale, and for foreclosure. Theoretically the latter leaves nothing more to be done ; there is nothing left to be paid by any one, no further step to be taken by the creditor or the Court. All is over. But that is not so when a decree for sale is made absolute. The amount for which the decree was passed is still payable, and though strictly speaking it may not be payable by the "mortgagor," it is payable out of what but for the decree absolute would be still his property. Nor is the Court bound to sell the whole of it. There is again no reason why the debtor himself could not come in at the Court-sale and buy his own property. He has as much chance of doing so as any one else. And giving the words their ordinary and natural meaning, it might fairly be said that what remains to be done under the decree absolute for sale, is still a proceeding under that decree, within the meaning of section 15 B. Allowing the debtor still to take advantage of the Act, even at that late hour, appears to me to be precisely accordant with the spirit and purpose of the whole piece of Legislation. I am confirmed in this opinion by the fact that cases of the kind are, I believe, of not infrequent occurrence, and that the point which has been most pressed against the debtor in this appeal has never been pressed before, or if so, not pressed successfully enough to have engaged the attention of any Bench of this Court. To exemplify how common this kind of case is, I may add that we have another appeal pending before us, and that in the course of the argument we were referred to two recent decisions by the Honourable the Chief Justice and Heaton, J., and the Honourable the Chief Justice and myself upon an exactly similar state of facts, where, while this difficulty was once indicated, it was not gone into or made the ground of either decision.

Decree reversed and case remanded.

G. B. R.

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