

to be examined on commission. It is said, therefore, that the result is that the defendant is concluded in this appeal by the evidence of a witness whom no Judge has ever seen. However that may be, it has been the invariable practice of these Courts that when a remand of this nature is ordered, the District Court sends down the case to the first Court in order that the evidence may be taken there, and this is done in the interests of the parties themselves and for their convenience. But nevertheless the lower appellate Court still remains empowered by the order of remand to take what evidence it may see fit to take, and record its findings upon it.

We are of opinion, therefore, that the defendant has no just grievance in the matter of the course which this remand has taken.

The result is that the decree of the lower Court will be confirmed with costs.

*Decree confirmed.*

G. B. R.

## APPELLATE CIVIL.

*Before Mr. Justice Batchelor and Mr. Justice Heaton.*

SHANKAR SHAMRAO (ORIGINAL DEFENDANT 1), APPELLANT, v. SHANKARGAUDAYA BIN BASALINGANGAUDA AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS 2 AND 3), RESPONDENTS.\*

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March 23.

*Dekkhan Agriculturists' Relief Act (XVII of 1879), section 15B, clauses (1) and (2)<sup>(1)</sup>—Decree on Mortgage—Payment by instalments—Sale on default in payment of an instalment—Application to make the decree absolute—Extension of the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) to the District—Application for payment by instalments.*

The Court of the First Class Subordinate Judge of Dhárwár passed a decree on a mortgage which directed payment of the debt by instalments and on

\*Appeal No. 192 of 1907.

(1) Section 15B, clauses (1) and (2) of the Dekkhan Agriculturists' Relief Act (XVII of 1879), runs thus :—

15B. Power to order payment by instalments in case of decree for redemption, foreclosure or sale :—(1) The Court may in its discretion, in

1908 default of the payment of an instalment the debt to be recovered by the sale of the mortgaged property!

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The judgment-debtor having failed to pay an instalment the decree-holder applied for the decree to be made absolute. In the meanwhile the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) were extended to the Dhárwár District and the judgment-debtor having thereupon applied for instalment under section 15B of the Act.

*Held*, that there is nothing in section 15B of the Dekkhan Agriculturists' Relief Act (XVII of 1879) to warrant the view that the legislature intended that when a decree allowing instalments had already been obtained, the whole matter should be re-considered afresh in execution with a view to substitute some new scheme of instalments.

*Held* further, that the second clause of section 15B refers only to those cases where directions for payment have already been given under the first clause of that section.

APPEAL against an order passed by R. G. Bhadbhade, First Class Subordinate Judge of Dhárwár, making absolute a decree for sale of mortgaged property.

On the 17th December 1903 the plaintiff obtained against the defendants a decree on a mortgage in the Court of the First Class Subordinate Judge of Dhárwár. The decree was made by R. R. Gangoli, First Class Subordinate Judge, in the following terms :—

The plaintiff should recover the claim Rs. 6,548 and Court costs and also future interest by three equal instalments as mentioned below.

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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 any proceeding 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.

1. Rupees 2,183 and one-third of the costs and interest from the date of the institution of the suit up to the 30th March 1904 A. D., or up to the payment of the money at the rate of six per cent. per annum on Rs. 4,000 should be paid to the plaintiff by the defendant No 1 on the 31st March 1904 A. D., or before that date.

2. Rupees 2,183 and one-third costs and interest from the 1st of April 1904 A. D., up to the 31st March 1905 A. D., or till payment of money at the rate mentioned above on Rs. 2,000 should be paid on the 31st of March 1905 A. D., or before that date.

3. Rupees 2,182 and one-third costs should be paid on the 31st of March 1906 A. D., or before that date. If default be made in the payment of any instalment and if the defendants Nos. 3 and 4 should not pay the money to the plaintiff and redeem the property the plaintiff to cause the property in mortgage to be sold and recover the said money with interest and costs also. The defendant No. 1 to pay the costs of the defendants Nos 3 and 4 and bear his own costs. If the other property be not sufficient (to pay the plaintiff's money) the property given in mortgage to the defendant No. 3 should (also) be sold.

Costs of the Suit.

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Owing to failure to comply with the provisions of the decree, the plaintiff applied that the decree should be made absolute. In the meanwhile the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) were extended to the Dhárwár District and defendant 1 taking advantage of such extension applied that the decretal amount be made payable by instalments under the provisions of section 15B of the Act. The First Class Subordinate Judge (R. G. Bhadbhade) found that defendant 1 was an agriculturists and passed the following order :—

*Order.*

The plaintiff has described defendant 1 as a writer but on examining defendant 1 I think his profession is that of agriculture. As to 1st defendant's prayer for instalments I cannot grant it because the decree itself allowed three instalments—further some of the lands mortgaged to plaintiff appear to be in possession of defendants 3, 4, who are not agriculturists.

Execution to be transferred to the Collector, Decree for sale made absolute.

Against the said order defendant 1 preferred an appeal.

*K. H. Kelkar* for the appellant (defendant 1)

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*S. R. Bakhle* for respondents 1 and 2 (heirs and legal representative of plaintiff).

BATCHELOR, J.:—The appellant here is the judgment debtor-mortgagor, and the decree had been obtained against him before the introduction of the Dekkhan Agriculturists' Relief Act into the Dhárwár District.

That decree provided for payment of the mortgage-debt in three instalments, and it was ordered that if default were made in the payment of any instalment, then the mortgagee was to be empowered to bring the property to sale.

Default having been made, an application was presented by the mortgagee for the sale of the property. This application was granted by the First Class Subordinate Judge at Dhárwár.

In appealing from that order the judgment-debtor has taken two points before us. In the first place it was said that inasmuch as the Dekkhan Agriculturists' Relief Act had been extended to the Dhárwár District when this application in execution came before the Subordinate Judge, he should have re-considered the whole matter under section 15B of the Dekkhan Agriculturists' Relief Act and should have passed such order as to instalments as to him seemed fit. But there is nothing in section 15B to warrant the view that the legislature intended that where a decree allowing instalments had already been obtained, the whole matter should be re-considered afresh by another Court, with a view to the substitution of some new scheme of instalments, and we do not think that this was intended. Secondly, it was urged that the lower Court's order deprived the mortgagor of the benefit which he might have obtained under the second clause of section 15B. But, in our opinion the second clause refers only to those cases where directions for payment have already been given under the first clause, and that is not the case here.

We must, therefore, confirm the order under appeal and dismiss this appeal with costs.

*Order confirmed.*

G. B. R.