APPELLATE CIVIL.

Before Chief Justice Scott and Mr. Justice Heaton.

1908
July 13.

DADABHAI MUSE VALLI AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* DADABHAI VALLI ABHRAM (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), section 12 and 13—Usufructuary mortgage—Redemption—Payment of the amount found due on taking accounts.

Section 13 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) is imperative and the amount due in a suit for redemption of a usufructuary mortgage in which the provisions of section 12 of the Act have been complied with is the amount which is found to be due upon taking accounts in the manner provided by section 13.

SECOND appeal from the decision of G. D. Madgavkar, District Judge of Broach, varying the decree of Keshavlal V. Desai, Second Class Subordinate Judge of Broach.

The plaintiffs, who stated that they were agriculturists, sued to redeem and cover possession of the properties in suit, alleging that they were mortgaged by their fathers to the defendants for Rs. 2,499 on the 3rd May 1898; that they had no knowledge of the consideration of the mortgage; that the defendants were in possession of the porperties and enjoyed the profits thereof; that accounts should be taken and that the amount, if any be found due to the defendants, be made payable by instalments.

The defendants answered *inter alia* that the plaintiffs were not agriculturists and were not entitled to go behind the mortgage deed, that there was consideration for the mortgage and that the plaintiffs were not entitled to instalments.

The Subordinate Judge found that the plaintiffs were agriculturists; that Rs. 2,314 was the consideration for the mortgage; that the mortgage was with possession; that Rs. 2,499 were due to the defendants on the mortgage and that the said amount should be paid by the plaintiffs to the defendants by ten instalments, the tenth instalment to be of Rs. 249.

On the said findings the Subordinate Judge passed the following decretal order:—

* Second Appeal No. 857 of 1907.

Plaintiffs do on payment of defendants' costs of this suit recover possession of those of the plaint properties which are in defendants' possession. Plaintiffs do pay to defendants 9 instalments of Rs. 250 and the 10th of Rs. 249 with interest at 3 per cent. per annum on 15th March 1907, 15th March 1908, 15th March 1909, 15th March 1910, 15th March 1911, 15th March 1912, 15th March 1913, 15th March 1914, 15th March 1915, and 15th March 1916, respectively. Defendants' charge to continue till the whole debt is paid off. Defendants at liberty to apply under section 15 B after waiting for six months if any of the instalments is not duly paid. Plaintiffs to bear their own costs.

With respect to the accounts of the mortgage transaction the Subordinate Judge made the following observations:—

A commission was issued to Lalbhai G., Clerk of the Court, and Jadavrai P., a Karkun of this Court, to make up these accounts Their report is filed at Exhibit 148. I have not been scrupulously careful in examination of these calculation as more than Rs. 2,499 are to be found due under any version. I cannot allow more than Rs. 2,499 to defendants as even in the case of nonagriculturists they could not have got more. The Act is meant for relief of agriculturists.

Against the decree of the Subordinate Judge both the parties appealed and the District Judge varied the decree in minor details which are not material for the purpose of this report.

The defendants preferred a second appeal.

G. N. Thakur for the appellants (defendants):—The plaintiffs were found to be agriculturists and they prayed for accounts. The accounts were made by first Court according to the porvisions of the Dekkhan Agriculturists' Relief Act. They cannot now be allowed to back out simply because the result of the accounts was found to go against them. The lower Courts should have awarded to us the sum actually found due under the accounts. Once the history of past transactions has been investigated into for the purpose of taking accounts after setting aside all the previous agreements between the parties, the Courts have no option but to enforce the provisions of section 13 of the Dekkhan Agriculturists' Relief Act. The word used in the first para. of the section is *shall*, which is imperative. After the accounts are taken under the earlier provisions of the section, clause (*g*) of the section designates the amount which shall be deemed to be the amonnt due. The Courts are therefore bound to award the amount

1908

DADABHAI
v.
DADABHAI.

found to be due after taking accounts irrespective of any other considerations.

The ordinary law relating to redemption suits based on usufructuary mortgages cannot help the present plaintiffs. The Dekkhan Agriculturists' Relief Act came into force in the year 1879 and the Transfer of Property Act was passed in the year 1882. Section 2, clause (*a*) of the latter Act expressly saves the provisions of an enactment not expressly repealed by it. As the Dekkhan Agriculturists' Relief Act is not expressly repealed, the provisions of section 13 of that Act remain intact and govern the present case: *Bhagawan* v. *Ganu*[1]. The Courts have, in dealing with suits under the Dekkhan Agriculturists Relief Act, deviated from the practice of ordering repayments of excess amounts in cases where the mortgagee is found to have been overpaid: *Janoji* v. *Janoji* [2]. This ruling has been followed in other cases: *Ramchandra Baba Sathe* v. *Janardan Apaji* [3].

The ruling in *Janoji* v. *Janoji* [2] is also an authority for the contention that in cases of accounts under the Dekkhan Agriculturists' Relief Act, the contractual relations are to be set aside.

The preamble of the Act cannot help the plaintiffs. Section 13 of the Act is quite clear and express in its terms and cannot be governed by the preamble. The plaintiffs have got the benefit of the Act inasmuch as they were allowed to file the suit without payment of any Court fees and further the decretal amount is made payable by instalments. They must therefore abide by the full results of the operation of the Act.

The instalments extend over a long time. Therefore interest at 7½ per cent. should have been allowed on the amount remaining due especially as the first Court considered that rate to be reasonable.

M. N. Metha for the respondents (plaintiffs) :—We merely prayed for redemption which could only be allowed on payment of the amount stated in the mortgage bond. The prayer for account was merely incidental. The accounts were asked for to ascertain

(1) (1899) 23 Bom. 644 at p. 651. (2) (1882) 7 Bom. 185.
(3) (1889) 14 Bom. 19.

if anything less could be found due to the defendants, the transaction being a usufructuary mortgage. The accounts have not been scrupulously examined by the Courts. In fact they have not been finally accepted.

The rate of 7½ per cent. for interest is not finally allowed by the Courts. The first Court expressly stated that it would have awarded less and would have squared off profits against interest. The mortgage bond expressly provides for redemption on payment of the amount stated therein. Therefore the decree passed by the Courts was correct.

The defendants have all along been in possession as the plaintiffs' possession was in the capacity of tenants and even if the defendants had not been in possession, then according to the ruling in *Mahadaji* v. *Joti*[1] they cannot get any relief.

Section 62 (*b*) of the Transfer of Property Act applies to usufructuary mortgages of this kind Even in the case of ordinary usufructuary mortgages nothing more than the amount of the bond can be awarded under the section. Agriculturist-debtors for whose benefit the Dekkhan Agriculturists' Relief Act was passed should not be placed in a worse position. Section 13 of the Act merely relates to procedure and is not inconsistent with the provisions of the Transfer of Property Act.

SCOTT, C. J.:—This is a suit for redemption in which both parties are agriculturists, and there is no doubt that the provisions of the Dekkhan Agriculturists' Relief Act apply.

In accordance with the provisions of section 12 of that Act the lower Courts have gone into the origin and nature of the transaction which was upon the face of it a usufructuary mortgage to secure payment of Rs. 2,499 and upon a consideration of the history of the transaction they have come to the conclusion that Rs. 2,499 is the true consideration for the mortgage.

It is provided by section 13 of the Act that when the Court enquires into the history and merits of the case under section 12, it shall notwithstanding any agreement as to setting off the profits of the mortgaged property without an account in lieu of

(1) (1892) 17 Bom. 425.

1908

DADABHAI v. DADABHAI.

interest, open the account between the parties from the commencement of the transaction and take that account according to the rules specified in sub-sections (a) to (f); and when the account has been so taken the balance appearing due shall be deemed to be the amount due at the date of the suit.

The lower Courts seem to have considered that the provisions of section 13 were not imperative and that they had done their duty when they had ascertained the consideration for the mortgage deed after an inquiry under section 12.

It is however clear from that part of the section to which we have referred that section 13 is imperative and that the amount due in a suit for redemption of a usufructuary mortgage in which the provisions of section 12 have been complied with, is the amount which is found to be due upon taking accounts in the manner provided by section 13.

The accounts appear to have been taken in accordance with the provisions of the section by the commissioners appointed by the first Court, with the result that they brought out a sum payable to the defendants in excess of Rs. 2,499. This apparently was a result which was not expected and one by which the lower Courts did not feel bound. They accordingly disregarded the result of the account and have awarded only Rs. 2,499.

In this we think, they were in error. We therefore remand the case in order that the Court may take an account according to the provisions of section 13 and thus ascertain the amount payable to the defendants as the price of redemption When that amount has been ascertained it will be open to the Court to decide how the decree should be made payable, in what instalments and what rate of interest, if any, should be allowed upon the amount payable.

We set aside the decree. The plaintiffs must pay the defendants' costs in this Court and in the lower appellate Court.

The original order as to costs in the first Court we think was right. In any fresh decree which may be passed, provision should be made for the further costs of the hearing.

Decree set aside.

G. B. R.