

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice.

1909.

August 5.

MAHIPATI VALAD SHAMLA (ORIGINAL DEFENDANT), APPLICANT, v.
NATHU VALAD VITHOBA AND OTHERS (ORIGINAL PLAINTIFFS),
RESPONDENTS.*

Dekkhan Agriculturists' Relief Act (XVII of 1879)—Civil Procedure Code (Act XIV of 1882), sections 373 and 622—Civil Procedure Code (Act V of 1908), section 115—Redemption suit—Sale really a mortgage—Section 10A(1) of the Dekkhan Agriculturists' Relief Act (XVII of 1879) not applicable—Oral evidence inadmissible—Application for withdrawal of suit—Suit allowed to be withdrawn with liberty to bring a fresh suit—Material irregularity.

Under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) the plaintiffs brought a redemption suit alleging that the document, though in the form of a sale-deed, was really a mortgage. The suit was not governed by section 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The defendant contended that oral evidence was not admissible to prove that the sale-deed was really a mortgage. After the issues were framed the plaintiffs applied for withdrawal of the suit with liberty to bring a fresh suit on the grounds that the different High Courts held different views as to the admissibility or otherwise of oral evidence and that section 10A of the Dekkhan

* Civil Application No. 53 of 1909 under extraordinary jurisdiction.

(1) Section 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) runs as follows :—

10A. Whenever it is alleged at any stage of any suit or proceeding to which an agriculturist is a party that any transaction in issue entered into by such agriculturist or the person, if any, through whom he claims was a transaction of such a nature that the rights and liabilities of the parties thereunder are triable wholly or in part under this chapter, the Court shall, notwithstanding anything contained in section 92 of the Indian Evidence Act, 1872, or in any other law for the time being in force, have power to inquire into and determine the real nature of such transaction and decide such suit or proceeding in accordance with such determination and shall be at liberty, notwithstanding anything contained in any law as aforesaid, to admit evidence of any oral agreement or statement with a view to such determination and decision.

Provided that such agriculturist or the person, if any, through whom he claims was an agriculturist at the time of such transaction.

Provided further that nothing in this section shall be deemed to apply to any suit to which a *bona fide* transferee for value without notice of the real nature of such transaction or his representative is a party where such transferee or representative holds under a registered deed executed more than twelve years before the institution of such suit.

Agriculturists' Relief Act (XVII of 1879) was not applicable. The Court passed an order for the withdrawal of the suit with liberty to bring a fresh suit.

Held, that the Court acted with material irregularity in passing the order.

The Court should not allow a suit to be withdrawn after the parties are ready for trial if such withdrawal may operate to the prejudice of the defendant.

A plaintiff cannot be allowed to withdraw a suit in order that he may wait and see if the law is not altered at some future date in such a way as to enable him to obtain a decree against the defendant who is ready for trial and prepared to resist the claim and certain of success on the law in force.

APPLICATION under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) against the order dated the 12th December 1908 passed by A. R. Gupte, Second Class Subordinate Judge of Sirpur in the Khândesh District, in original Suit No. 444 of 1908.

The plaintiffs sued to redeem the lands in dispute under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) alleging that the document sued on was in the form of a sale-deed but in reality it was a mortgage.

The defendant contended that the plaintiffs were not entitled to adduce oral evidence to prove that the transaction was a mortgage.

After the issues were framed and before the Court proceeded with the trial the plaintiffs presented an application for the withdrawal of the suit with liberty to file a fresh suit on the ground that they would suffer serious loss if they continued the suit inasmuch as the views of the different High Courts in India were different with respect to the admissibility of oral evidence in such cases, and section 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) was not made applicable to the Khândesh District.

The Subordinate Judge granted the plaintiffs' application and allowed the suit to be withdrawn with liberty to bring a fresh suit.

The defendant thereupon applied under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of

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1908) urging that the Subordinate Judge, in granting the plaintiffs' application, exceeded the jurisdiction vested in him by law. A *rule nisi* was issued requiring the plaintiffs to show cause why the order of the Subordinate Judge should not be set aside.

K. H. Kelkar appeared for the applicant (defendant) in support of the rule:—Section 373 of the Civil Procedure Code does not empower the Court to pass an order for the withdrawal of a suit like the present. The plaintiff launched the proceedings and he must proceed with the suit and cannot now retire with the object of taking advantage of a provision of law which was not in existence when the suit was filed and which he expects to come into force hereafter: *Watson v. The Collector of Rajshahye*⁽¹⁾, *Prabhakar v. Khanderao*⁽²⁾.

P. B. Shingne appeared for the opponents (plaintiffs) to show cause:—The decision in *Prabhakar v. Khanderao*⁽²⁾ contemplates withdrawal of a suit with the intention of taking advantage of a substantial provision of law newly enacted. While in the present case we want to take advantage of section 10A of the Dekkhan Agriculturists' Relief Act which is a provision of adjective law. Section 373 of the Civil Procedure Code is broad enough to cover a case like the present: *Misser Debee Pershad v. Buldeo Pershad*⁽³⁾, *Koomar Poresh Narain Roy v. Ranee Surut Soonduree Debee*⁽⁴⁾, *Mussamut Khatoon Koonwar v. Baboo Hurdoot Narain Singh*⁽⁵⁾.

The case falls under section 622 of the Civil Procedure Code, therefore, it will not be in consonance with the provisions of that section to interfere in a case of this kind.

SCOTT, C. J.:—The plaintiffs filed this suit for redemption alleging that the document which had been passed by them in favour of the defendant in the form of a sale-deed was really a mortgage.

(1) (1869) 13 Moo. I. A. 160.

(3) (1873) 5 N. W. P. R. 116.

(2) (1908) 10 Bom. L. R. 625.

(4) (1871) 16 W. R. 100 (Civ. Rul.).

(5) (1873) 20 W. R. 163 (Civ. Rul.).

The defendant disputed this allegation and contended that evidence was not admissible for the purpose of proving that the sale-deed was really a mortgage.

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Issues were raised and the further hearing was fixed for a certain date. After the raising of the issues but before the hearing, the plaintiff put in the following application:—"This is a suit for redemption: plaintiff and defendant had entered into a mortgage transaction and the defendant has taken from the plaintiff a mortgage in the form of a sale-deed. We have got evidence to show that the sale-deed is really a mortgage. The defendant has now given a petition contending that oral evidence is inadmissible though he did not say so in the written statement. The different High Courts have taken different views as to whether oral evidence was admissible or not. Further, section 10A of the Dekkhan Agriculturists' Relief Act states that oral evidence is admissible. The third part of the Dekkhan Agriculturists' Relief Act has been applied to this district. But section 10A is not included in it. Therefore the point in dispute is whether oral evidence is admissible or not. In such a state of things if this suit is further prosecuted, plaintiff is likely to suffer loss. Therefore the plaintiff should be permitted to withdraw this suit and then to bring a fresh suit."

The application was in effect a confession that upon the law as it then stood the plaintiffs would not be able to give evidence which would entitle them to succeed.

Notwithstanding the protest of the defendant the Subordinate Judge granted permission to the plaintiffs to withdraw the suit with liberty to file a fresh suit hereafter.

The defendant feeling aggrieved by that order has applied to this Court under section 115 of the Civil Procedure Code of 1908 for revision, on the ground that the lower Court has acted without jurisdiction or with material irregularity in the exercise of its jurisdiction. Section 373 of the Civil Procedure Code of 1882 under which the order of the Subordinate Judge was passed provides that "If, at any time after the institution of the suit, the Court is satisfied on the application of the plaintiff that the

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suit must fail by reason of some formal defect or that there are sufficient grounds for permitting him to withdraw from the suit or to abandon part of his claim with liberty to bring a fresh suit for the subject-matter of the suit or in respect of the part so abandoned, the Court may grant such permission on such terms as to costs or otherwise as it thinks fit."

In the case of *Muddun Ram Doss v. Israil Ali Chowdhry*⁽¹⁾, Mr. Justice Kemp of the Bengal High Court held upon the words of section 97 of the Civil Procedure Code of 1859 which provided that the Court on being satisfied that there was sufficient ground for permitting the plaintiff to withdraw the suit, might grant permission, that such a permission should not be granted except in cases where the suit had failed by reason of some formal defect, following the decision of the Judicial Committee in *Watson v. The Collector of Rajshahye*⁽²⁾.

The words of the Code of 1882 are different from the words construed in that case by Mr. Justice Kemp, for, the Court is authorized to permit withdrawal not only where the suit must fail by reason of some formal defect but also where there are sufficient grounds for permitting the plaintiff to withdraw.

"It is impossible to lay down any exhaustive definition of what are sufficient grounds within the meaning of section 373 but I think that the Court should not allow a suit to be withdrawn after the parties are ready for trial if such withdrawal may operate to the prejudice of the defendant. The power of the Court in India appears to me under the Civil Procedure Code to be no greater than the power of the Court in England under Order XXVI, Rule 1. With regard to that Rule Lord Halsbury in delivering the Judgment of the House of Lords in *Fox v. Star Newspaper Company*⁽³⁾, said "The substance (of the new procedure) is that when it once comes into Court, and when the plaintiff offers no support to his action, there must be a verdict for the defendant." That, as I have pointed out, is in effect the situation here. The plaintiffs by their application confess upon

(1) (1874) 21 W. R. 291 (Civ. Rul.).

(2) (1869) 13 Moo. I. A. 160.

(3) [1909] App. Cas. 19.