APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1909. *September* 7.

MUGAPPA CHANBASAPPA SAWADATTI (ORIGINAL PLAINTIFF), APPELLANT, *v.* MAHAMADSAHEB VALAD IMAMSAHEB (ORIGINAL DEFENDANT), RESPONDENT.*

Decree—Execution of decree—Decree for rent—Suit for redemption—Taking of accounts under the Dekkhan Agriculturists' Relief Act (XVII of 1879)—Result of account showing that mortgagee overpaid himself from rents and profits—Mortgagee's right to execute decree for rent.

In virtue of a decree for four years' rent, passed at a time when the provisions of the Dekkhan Agriculturists' Relief Act did not apply, the plaintiff (mortgagee) became entitled to recover a certain sum from the defendant (mortgagor). After the introduction of the Dekkhan Agriculturists' Relief Act, the latter sued the former for redemption of the mortgage of the land in respect of which the rent-note sued on had been passed; on taking accounts in the way directed by the Act, it was found that the plaintiff as mortgagee had overpaid himself from the rents and profits of the land. The plaintiff thereafter applied to execute his decree for rent. Both the lower Courts dismissed the application on the ground that the plaintiff had already recovered more than was due to him as mortgagee from the rents and profits of the land. On appeal:—

Held, that the rent decree must be executed as it stood, having regard to the fact that the provisions of the Dekkhan Agriculturists' Relief Act did not apply when it was passed, and that the accounts which were taken for the purposes of the subsequent decree were taken for a special purpose—that is, for enabling the defendant to redeem on favourable terms, and did not entitle him to recover anything from the plaintiff by way of set-off.

SECOND appeal from the decision of T. D. Fry, District Judge of Dhárwár, confirming the order passed by G. N. Kelkar, Joint Subordinate Judge at Dhárwár.

Proceedings in execution.

The defendant mortgaged certain land with the plaintiff on the 25th September 1892 with possession. On the same day, the defendant passed a rent-note in respect of the land in favour of the plaintiff and the defendant entered on the land as plaintiff's tenant.

In 1904, the plaintiff sued the defendant on the rent-note to recover from him four years' rent (1899 to 1903), and obtained

* Second Appeal No. 472 of 1908.

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a decree for Rs. 1,378-4-1. At the date of the decree, the provisions of the Dekkhan Agriculturists' Relief Act did not apply.

The provisions of the Dekkhan Agriculturists' Relief Act were made applicable to the district in 1905.

The defendant sued in 1906 for redemption of the mortgage. In the course of the suit accounts were taken of the dealings in the way provided for by the Act, and they showed that not only had the mortgage been satisfied by February 1898 but that the mortgagee had received over Rs. 900 in excess.

The plaintiff then applied to execute the decree for rent.

The Subordinate Judge rejected the application on the following grounds:—

"The original mortgage-debt has been more than satisfied by the usufruct of the mortgaged lands, and the mortgagee has already received nearly Rs. 950 in excess of what was due to him under the mortgage. This complete satisfaction of the mortgage-debt took place before April 1898. This decree is for the four years' rent subsequent to April 1898. The account taken in Suit No. 114 of 1906 shows that after February 1898 nothing was due to the mortgagee under his mortgage, and that since then he has enjoyed the profits for nothing. Under these circumstances I think the decree-holder cannot be allowed to execute this decree. If the Court allowed him to execute this decree, it would be helping him to get money to which he is not entitled after the complete satisfaction and discharge of the mortgage-debt. This would be going against the spirit of the Dekkhan Agriculturists' Relief Act. There is no question of going behind the Court's decree or of disturbing any jural relations. The question is "whether the Court can lend its assistance to one seeking to make an undue gain and to cause undue loss to another"? I think the Court cannot do this.

This decree was confirmed by the District Judge.

The plaintiff appealed to the High Court.

Jayakar, with *K. H. Kelkar*, for the appellant.—The lower Court has misconceived the question; it is whether the first decree, being a subsisting decree, is capable of execution or not. The question that at the date of that decree, *viz.*, 8th July 1905, Rs. 1,378-4-1 were due is *res judicata* in the execution proceedings, the defendants are estopped from questioning this finding in execution proceedings. The execution proceedings are only a carrying out of the decree and the only question which

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the Court can go into in execution proceedings is the question of the satisfaction of the decree under section 258, old Civil Procedure Code, and Order 21, rule 2, new Civil Procedure Code. But the Court has not proceeded under this section, since this is not a case of subsequent payment or satisfaction of the decree. Here the defendants want to counteract the finding in the first decree that Rs. 1,378-4-1, was due, by pleading against it, in execution proceedings, the finding in the redemption suit that nothing was due from defendant at the date of the first decree and that the defendants had paid Rs. 950 more than was due. This cannot be allowed to be done in execution proceedings.

We say this case has nothing to do with the Dekkhan Agriculturists' Relief Act, since the first decree was passed before the introduction of that Act. The Act cannot be construed retrospectively: see *Fatmabibi* v. *Ganesh*(1). The amount of Rs. 950, found as overpaid, is arrived at by taking accounts on the footing of the Dekkhan Agriculturists' Relief Act.

But assuming that the Dekkhan Agriculturists' Relief Act applied, there is nothing in that Act enabling the Courts to depart from the ordinary rule of practice that the Court executing the decree has no power to vary the decree: see *Ramchandra* v. *Kondaji*(2) and the cases cited there. The sections of the Act which are most favourable to such a case are sections 12 and 13 but even these sections, it has been held, cannot apply to decrees passed previously: see *Goverdhan* v. *Yesu bin Anaji* and *Apaji* v. *Atmaram*(3); *Tatya Vithoji* v. *Bapu Balaji*(4); *Navlu* v. *Raghu*(5).

As for the second part of the finding in the redemption suit that Rs. 950 were over-paid, I submit, assuming that the Dekkhan Agriculturists' Relief Act governed this case, there is nothing in the Act to allow defendants to claim a set-off of an amount found as owing to them at the foot of an account taken on the basis provided by the Act. The Act being a special piece of legislation passed for a particular object cannot be so construed

(1) (1907) 31 Bom. 630.
(2) (1896) 22 Bom. 221 at p. 224.
(3) P. J. for 1882, p. 125.
(4) (1883) 7 Bom. 330.
(5) (1884) 8 Bom. 303 at p. 305.

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as to cover purposes which were never contemplated: see *e.g.*, *Janoji* v. *Janoji*[1] where even a refund was disallowed.

The first decree was never mentioned or referred to in the redemption litigation in 1906: see *e.g.*, the plaint in that suit. It was not taken into account in the latter suit, the question of the first decree was expressly left open in the redemption judgment: see the judgment.

D. A. Khare for the respondent.—The first decree has been paid off. That is the finding in the second decree, which must be accepted, though the Court has not made an actual order for payment of the amount found to be over-paid. The Court could not make such an order in that suit.

The defendant could have brought a suit to recover the amount over-paid under the Dekkhan Agriculturists' Relief Act: see *Williams* v. *Davies*[2]. If undue influence, or wrong advantage or any other equitable defence is proved, the Court sets aside the transaction. I ask the Court to act on the same principles here: see *Janoji* v *Janoji*[3]; *Sheo Saran Singh* v. *Mohabir Pershad Shah*[4]; *Ramchandra Baba Sathe* v. *Janardan Apaji*[5].

CHANDAVARKAR, J.:—We must set aside the decree of the lower Court and allow the execution in this matter to proceed. The decree for rent, it is admitted, remains unexecuted. But what is relied upon for the respondent is that, according to a subsequent decree for redemption, a certain amount over and above that due to him as mortgagee was appropriated by the appellant, during the time that he was in possession of the property as mortgagee. That amount is adjudged to have been so appropriated upon account taken under the Dekkhan Agriculturists' Relief Act. It is conceded that the Act did not apply at the time the decree for rent was obtained. That decree gave a right to the appellant to recover a certain amount from the respondent. The fact that in a subsequent decree passed under the Dekkhan Agriculturists' Relief Act, it was found upon taking accounts in the way directed by the Act that the appellant as

(1) (1882) 7 Bom. 185.
(2) (1829) 2 Sim. 461.
(3) (1882) 7 Bom. 185.
(4) (1905) 32 Cal. 570.
(5) (1889) 14 Bom. 19.

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mortgagee had over-paid himself from the rents and profits cannot affect the right he had acquired under the previous decree which stands in all its force. The Dekkhan Agriculturists' Relief Act nowhere provides that where, upon an account taken under it, it is found that a mortgagee in receipt of rents and profits has overpaid himself, the overpaid amount becomes a debt due from him to the mortgagor and that the latter becomes entitled to recover it from the mortgagee. As was held in *Ramchandra Baba Sathe* v. *Janardan Apaji*[1], a mortgagor under such circumstances is only enabled by the Act to redeem his mortgaged property on favourable terms upon an account taken in the special mode directed by the Act; but the Act does not entitle the mortgagor to claim the payment from the mortgagee of any amount received from the property over and above the amount due on the mortgage on the footing of the account so taken. If that is so, the set-off allowed by the lower Court is plainly contrary to law.

The rent decree must be executed as it stands, having regard to the fact that the provisions of the Act do not apply to it, and that the accounts which were taken for the purposes of the subsequent decree were taken for a special purpose—that is, for enabling the respondent to redeem on favourable terms, not for entitling him to recover anything from the appellant.

The decree of the lower Court is reversed and the Darkhast is remanded to the Subordinate Judge to be executed according to law.

Costs up to this throughout upon the respondent.

Costs incurred hereafter to abide the result.

HEATON, J.:—I have very great sympathy with the decision which has been arrived at by both the lower Courts; and I have no doubt that our decision will be received by them with considerable surprise and will be regarded as militating against the intention of the Dekkhan Agriculturists' Relief Act. But, after all, we have to administer the law as it is, not as we think it ought to be. And although, both the lower Courts have regarded

(1) (1889) 14 Bom. 19.

the claim which the decree-holder has made in execution of his decree with some thing almost amounting to amazement, and as something, which if allowed, would be grossly unfair; yet it is to be remembered that the decree for redemption has only been made by setting aside the terms of the mortgage, that is, by setting aside the contract between the parties, which the Dekkhan Agriculturists' Relief Act allows the Judge to do and by then proceeding to take an account in which only a moderate rate of interest is allowed. If the mortgage contract had been allowed to proceed, unaffected by the provisions of the Dekkhan Agriculturists' Relief Act, the mortgagee would still be entitled to the possession of the land, would be entitled to the annual profits, and would so remain for something like ten years more. And, therefore, although it is pointed out very clearly and emphatically that the mortgagee has received considerable sums in excess of what after the account was taken under the Act, was found due to him, yet it must be remembered, that all that he has received, and also all that he claims under this decree which he now seeks to execute would be due to him but for the operation of the Dekkhan Agriculturists' Relief Act, and even after he has executed the decree, the mortgagee will have obtained far less than he would have received if the contract between the parties had been allowed to proceed. This may be an example of the great need that the Court should be allowed to break contracts of this kind and re-settle the relations between the parties on a fair basis. But it seems to me that there is nothing that can be described as unjust or unfair in allowing a creditor to receive that which the law entitles him to receive and permits him to receive. Until the Dekkhan Agriculturists' Relief Act was introduced into the Dhárwár District, the mortgagee in this case was entitled to the rent fixed by the rent-note, and he was entitled to that for the years for which he obtained the decree for it. That decree was perfectly right as the law then stood. It has never been set aside, and it seems to me that we are bound to let that decree be executed whatever our opinions may be as to whether the decree-holder is fairly entitled to the rent or not. We are bound to let that decree be executed unless it can be shown that in law, or for

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some reason or another recognized by the law, it ought not to be executed. It is one of the first principles of our law, that when a decree is made, that decree, unless set aside by a Court of competent jurisdiction, is a good decree and the holder of it can enforce execution of it until it becomes time-barred. Therefore this decree must be executed unless it has been satisfied, and nobody contends that it has, or unless there is some set off which can be placed against it. Nobody can make out anything in the nature of a legal set off; or that there is any money due by the mortgagee to the mortgagor which the latter is entitled to say must be regarded as payment of the decree in whole or in part; because although in the redemption suit, it was found that under the method of taking accounts peculiar to the Dekkhan Agriculturists' Relief Act the mortgagee's debt was more than paid off, yet the mortgagor has not obtained a decree on the excess payments and therefore they cannot be pointed to as monies due from the mortgagee to the mortgagor. Therefore, as the decree is still in force and has not been paid and there is nothing which can be pointed to as a set-off in law against what is due under that decree, it seems to me that it must be allowed to be enforced.

This result is not more peculiar than that which was arrived at recently in England in the case of *Poulton* v. *Adjustable Cover and Boiler Block Company*(1). In that case it was held that a decree obtained must be enforced though after events showed that no such decree would have been made had the true circumstances been known. Here we have a decree perfectly lawful and good and not based on any misconception of fact, but it is proposed to forbid its execution on account of a change in the law made after the decree was obtained, which change does not either directly or by implication affect the decree. That change in the law cannot be permitted to annul the decree.

Decree reversed.

R. R.

(1) [1908] 2 Ch. 430.