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The plaintiff, therefore, is entitled to an ordinary mortgage decree with costs, (1) as regards defendants 1 to 6, other than defendant 3, in accordance with those consent terms except in so far as they may be inconsistent with this judgment and except that any application for a foreclosure and sale of the properties in Schedule C must be made hereafter by notice, and (2) as regards defendant 8 in accordance with this judgment. Defendant 7 can add his costs to his mortgage.

Liberty to apply.

Attorneys for the plaintiff: Messrs. *Pestonji, Rustim & Kolah.*

Attorneys for defendants 1 and 2: Messrs. *Shamrao, Minocheher & Hiralal.*

Attorneys for defendant 7: Messrs. *Dikshit, Dhanjishah & Soonderdas.*

Attorneys for defendant 8: Messrs. *Smetham, Byrne & Co.*

K. Mcl. K.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Rao.

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October 11.

RADHABAI, WIFE OF KRISHNAJI RAVJI (ORIGINAL PLAINTIFF) v. RAMCHANDRA VISHNU AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS; AND RAMCHANDRA VISHNU (ORIGINAL DEFENDANT 1), APPELLANT, v. RADHABAI, WIFE OF KRISHNAJI RAVJI (ORIGINAL PLAINTIFF), RESPONDENT.*

Dekkhan Agriculturists' Relief Act (XVII of 1879)—Wife of an agriculturist—Status—Suit by mortgagee to recover possession—Prayer for payment of principal and interest at certain rate—Decree—Payment of principal and interest—Payment of interest at certain rate till the principal is doubled—Contractual relation not superseded by the decree—Redemption suit—Accounts.

Under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) the wife of an agriculturist cannot claim to be an agriculturist.

* Cross Second Appeals Nos. 823 and 219 of 1908.

A decree obtained by a mortgagee in the year 1867 to recover possession of the mortgaged property set out that the plaintiff (mortgagee) was suing for possession of the mortgaged land with a prayer that until possession should be delivered over, or until the mortgage money was paid off, interest should be awarded at the rate of 2 per cent. per mensem. The decree then ordered that the mortgagor "should pay to the plaintiff (mortgagee) Rs. 300 and interest, Rs. 27, in respect of his claim. Until payment of the moneys, or until the principal is doubled, interest should be paid at the rate of 2 per cent. per mensem from 30th July 1867; and until payment of the moneys the land mortgaged, which was asked for in the suit, should be handed over according to agreement. And the defendant should redeem the land by paying the plaintiff's money."

Subsequently the mortgagor having brought a suit for redemption and accounts, it was contended that the plaintiff's right to have accounts taken from the mortgagee in possession was lost by reason of the aforesaid decree.

Held, that the terms of the decree did not deprive the mortgagor of a right to accounts. The decree did not supersede the contractual relation, but by putting the mortgagee into possession merely carried out the terms of the contract which for the rest it preserved and kept alive. There was no foreclosure either in fact or in intention, and t was in his capacity as mortgagee entitled by the contract to possession that he was put into possession by the said decree.

SECOND Appeal from the decision of C. Roper, District Judge of Satara, varying the decree of D. W. Bhat, Subordinate Judge of Tasgaum.

Suit for redemption of mortgaged property and accounts.

The lands in dispute originally belonged to one Vamnaji Govind, who mortgaged them to his creditor Vishnu Trimbak Paranjpe for Rs. 300 under a mortgage deed, dated the 14th July 1863. Subsequently both the mortgagor and mortgagee having died, the mortgagee's brother, Balkrishna, brought a suit, No. 797 of 1867, in the Court of the Subordinate Judge of Tasgaum against the mortgagor's widow, Lakshuibai *alias* Chandrabai, to recover possession of the mortgaged property. The plaint in the said suit contained the following prayer:—

Possession of the land described above may be awarded. Until the possession of the land is delivered or until the moneys are paid off, interest at the rate of rupees two per cent. per mensem, and (also) interest on the Court costs, may be awarded in cash from the defendant Lakshuibai *alias* Chandrabai.

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On the 28th September 1887 the Court passed a decree as follows:—

The defendant Vamnaji Govind, deceased, (represented) by his widow Lakshmbai *alias* Chandrabai should pay to the plaintiff Balkrishna principal Rs. 300 (three hundred) and interest Rs. 27 in respect of his claim. Until the payment of the moneys or until the principal is doubled, interest should be paid at the rate of 2 per cent. per mensem from the 30th of July 1887; and until payment of the moneys the mortgaged land having the above four boundaries which is asked for in the suit should be handed over according to the agreement. And the defendant should redeem the land by paying the plaintiff's moneys. The defendant do pay the Court costs incurred by the plaintiff as detailed below.

Under the said decree the mortgagee having recovered and continued in possession the plaintiff Radhabai, the daughter and heir of the mortgagor Vamnaji Govind, brought the present suit in the Court of the Subordinate Judge of Tasgaum against the mortgagee's son Ramchandra Vishnu Paranjpe to redeem and recover possession of the property in suit, alleging that she was an agriculturist, that the profits of the property had satisfied the mortgage debt and that the defendant refused to render her a true and proper account of the mortgage transaction. Ramchandra Vishnu Paranjpe was joined as defendant 1, and the other defendants, being in possession as tenants under defendant 1, they were joined as defendants 2—5.

Defendant 1 denied the plaintiff's status as an agriculturist and contended *inter alia* that the amount due to him under the mortgage was Rs. 1,038-4-11 including Rs. 380, which he had to pay to a prior mortgagee for recovering possession.

Defendant 2 did not tender a written statement.

Defendant 3 was absent though duly served.

Defendants 4 and 5 stated that they were tenants under defendant 1 and that they would give up possession on the expiry of the period of their tenancy.

The Subordinate Judge found that the plaintiff was not an agriculturist, that defendant 1 had recovered Rs. 2,549-4-3 as the income of the mortgaged property and that nothing was due to him on account of the mortgage transaction. A decree was,

therefore, passed directing the plaintiff to recover possession without paying anything to defendant 1.

On appeal by defendant 1, the District Judge, following the rulings in *Navlu v. Raghu*⁽¹⁾, *Rambhat v. Ragho Krishna Deshpande*⁽²⁾ and *Tani Bagvan v. Hari bin Bhavani Dubal*⁽³⁾, found that defendant 1 was not liable to render an account to the plaintiff, who was bound to pay the sum due under the decree in Suit No. 797 of 1867, exhibit 38, before recovering possession of the property in suit. The decree of the Subordinate Judge was, therefore, varied by directing the plaintiff to recover possession on payment, within two years, of Rs. 627 to defendant 1.

The plaintiff and defendant 1 preferred cross second appeals, No. 823 and No. 219 of 1908 respectively.

Nilkantb Atmaram for the appellant (plaintiff) in Second Appeal No. 823 and respondent in Second Appeal No. 219 of 1908:—

There are two points in the case:—(1) Whether the plaintiff, being the wife of an agriculturist, can claim her husband's status, and (2) whether the decree of 1867 precludes an account being taken from the mortgagee in possession.

With respect to the first point we submit that the plaintiff is an agriculturist under the terms of the Dekkhan Agriculturists' Relief Act, being the wife of a person who is an agriculturist. She has got no independent source of income to live upon. The wife of an agriculturist cannot but be an agriculturist. In the eye of the law, the husband and wife are one person.

As regards the second point, we submit that the first Court took a correct view of the decree, exhibit 38. In that suit the mortgagee merely asked for possession to which he was entitled under the terms of the mortgage bond and the decree gave it to him. The relation that subsisted between the mortgagor and mortgagee prior to the decree continued after the decree with this difference that under the decree the

(1) (1834) 8 Bom. 303.

(2) (1892) 16 Bom. 656.

(3) (1887) 16 Bom. 659.

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mortgagee got possession. A mortgagee in possession is liable to render account of the profits to the mortgagor:—*Dattatraya Ravji v. Anaji Ramchandra*⁽¹⁾, *Sri Raja Papamma Rao v. Sri Vira Pratapa H. V. Ramchandra Razu*⁽²⁾, *Pandu v. Vithu*⁽³⁾, and section 77 of the Transfer of Property Act. The cases relied on by the learned District Judge are distinguishable.

P. P. Khare for the respondent (defendant 1) in Second Appeal No. 823 and appellant in Second Appeal No. 219 of 1908:—

On a proper construction of the decree, exhibit 38, it will be found that the view taken by the lower Court is the correct one and the mortgagee cannot, after a decree on the mortgage has been passed, be called upon to account. In addition to the cases cited in the Judgment of the lower Court we rely on *Tatya Vithoji v. Babu Balaji*⁽⁴⁾ and the unreported judgment in Second Appeal No. 568 of 1901, *Valabh Krishna v. Natha*. The last unreported case is on all fours with the present one.

With respect to our second appeal, No. 219 of 1908, we contend that the lower Court committed an error in not awarding us Rs. 380 which we had to pay to a prior mortgagee for recovering possession: section 74 of the Transfer of Property Act.

BACHELOR, J.:—The plaintiff sued as an agriculturist to redeem a mortgage and to recover possession of the mortgaged property on payment of any sum which the Court might find to be still owing to the defendants, the representatives of the original mortgagee. The mortgage was executed in 1863, and the sum secured was Rs. 300. It was admitted that the mortgagee went into possession in 1867 under the decree of the Court, and has since remained in possession.

The defendants denied that the plaintiff was an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act, and claimed that Rs. 1,038-4-11 were due on the mortgage, including a sum of Rs. 380 which the mortgagee had to pay to prior mortgagee before he could go into possession under the decree of 1867.

(1) (1886) P. J., p. 273.

(2) (1896) 19 Mad. 249.

(3) (1894) 19 Bom. 140.

(4) (1883) 7 Bom. 330.

The Court of first instance found that the plaintiff was not an agriculturist, and that, on accounts taken, the mortgagee had already received Rs. 2,549-4-3 from the rents and profits of the mortgaged property: it, therefore, decreed redemption without any further payment, but it made no order for the refund to the plaintiff of the excess payment.

The defendants appealed to the District Court, where it was held that the plaintiff was not an agriculturist, and that the defendants were relieved of any liability to account by reason of the former decree in the suit of 1867. The mortgagee's claim to the Rs. 380 was also refused.

Dealing first with the plaintiff's appeal, we have to determine whether the Court below was wrong (1) in holding that the plaintiff is not an agriculturist within the Act, and (2) in holding that the plaintiff's right to have accounts taken from the mortgagee in possession was lost by reason of the decree of 1867.

On the first point we have no hesitation in agreeing with the District Judge. The sole ground on which the plaintiff claims to be an agriculturist is that she is the wife of an agriculturist; but that circumstance does not, we think, constitute her an agriculturist within the meaning of the Act. She does not earn her livelihood by agriculture, but by being the wife of her husband; he might change his occupation to-morrow, but she would not be affected by the change. It seems to us that she can no more be called an agriculturist because her husband is an agriculturist than she could be called an engineer, or a doctor if her husband happened to follow one of those professions.

As to the second point the decree of 1867 is exhibit 38 in the case. It sets out that the then plaintiff, the mortgagee, was suing for possession of the mortgaged land, that is, we infer for possession under the terms of the mortgage bond; and there was a prayer that, until possession should be delivered over, or until the mortgage money was paid off, interest should be awarded at the rate of 2 per cent. per mensem. The decree then orders that the mortgagor "should pay to the plaintiff (the mortgagee) Rs. 300 and interest, Rs. 27, in respect of his claim. Until payment of the moneys, or until the principal is doubled,

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interest should be paid at the rate of 2 per cent. per mensem from 30th July 1867; and until payment of the moneys the land mortgaged, which is asked for in the suit, should be handed over according to the agreement. And the defendant should redeem the land by paying the plaintiff's money." It should be noted that the instrument of mortgage is not produced.

The question is whether the terms of this decree deprive the mortgagor of a right to accounts in the present suit.

For the respondents reliance is placed on *Navlu v. Raghu*⁽¹⁾ and *Rambhat v. Ragho Krishna Deshpande*⁽²⁾, it being argued that the case of *Dattatraya Ravji v. Anaji Ramchandra*⁽³⁾ is distinguishable on the precise ground on which in the Full Bench decision in *Tani Bagavan v. Hari*⁽⁴⁾ it was distinguished from *Navlu v. Raghu*, namely, that in *Dattatraya's*⁽³⁾ case the decree simply awarded possession of the mortgaged property, whereas here, as in *Tani Bagavan v. Hari*, the decree directs the payment of a certain sum found to be due and enjoins that, until that sum is paid, possession is to remain with the mortgagor.

We think that this contention must be conceded, and that so far the present case does fall outside the ruling in *Dattatraya v. Anaji*⁽³⁾. But it still remains to consider whether in other respects it can be brought within *Navlu v. Raghu*⁽¹⁾ and the cases which followed that decision and which are, whether we agree with them or not, binding upon us.

We entirely concur in what was said by Farran, J., in *Tani Bagavan v. Hari* as to the manner in which such a case as this should be approached. In such a suit, said that learned Judge, "all that the Court is at liberty to do is to construe the decree in the former suit, to ascertain its intention from the expressions contained in it, and to give effect to that intention when so ascertained." We must, therefore, be guided primarily by the actual terms of the particular decree of 1867, and for that reason we have set them out in full. Among those terms is a provision

(1) (1884) 8 Bom. 303.

(3) 1886 P. J., p. 237.

(2) (1892) 16 Bom. 656.

(4) (1887) 10 Bom. 659.

for future interest, which at once distinguishes this decree from the decrees considered in the cases cited for the respondents and shows that the relation of mortgagor and mortgagee was intended to continue. The decree on its face contemplates the taking of an account in the future to ascertain the amount of accrued interest due to the mortgagee, and, since the remedies between the parties are mutual, that implies that an account be taken also of rents and profits debitable to the mortgagee. It may be observed further that, under the decree, possession is to be delivered to the mortgagee "according to the agreement," that is, we understand, according to the mortgage agreement, so that this provision also negatives the theory that the decree was intended to act as a foreclosure decree or to extinguish the contractual relation between the parties. This point is made still clearer by the order that the mortgagor should, that is, should at some future date, redeem the property by paying the sum due; and we can only read these words as contemplating a future suit to redeem on payment of such sum as may then be found to be due. We are, therefore, of opinion that the decree did not supersede the contractual relation, to employ the language of West, J., in *Navlu v. Raghu*⁽¹⁾, but by putting the mortgagee into possession merely carried out the terms of the contract, which for the rest it preserved and kept alive.

There was no foreclosure either in fact or in intention, and it was in his capacity as mortgagee, entitled by the contract to possession, that the defendant's predecessor was put into possession by the Court's decree. The facts thus resemble those which were before the Judicial Committee in *Sri Raja Papamma Rao v. Sri Vira Pratapa H. V. Ramchandra Razu*⁽²⁾ where their Lordships say, in language which appears appropriate to the present suit:—"It is sufficient that the mortgagee, not being entitled to foreclosure and not asking for it, got a decree which did not purport to work foreclosure. It purported to give possession 'as provided in the terms of the bond'... and did not purport to put an end to the bond and to the relations of mortgagor and mortgagee altogether. It could, though

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(1) (1884) 8 Bom.1303.

(2) (1896) 19 Mad. 249.

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subject to correction on appeal, give possession, and did so. The mortgagee thereupon became mortgagee in possession; and as such he must submit to be redeemed."

If the above decision is in point, it is manifest that it cannot be displaced by any ruling of this Court, and that would be sufficient answer to Mr. Khare's reference to the unreported case of *Vallabh Krishna v. Natha*, which was decided in 1902 by Sir Lawrence Jenkins, C. J., and Batty, J., in Second Appeal No. 568 of 1901. There, moreover, the Court observed that "as redemption could be only on the terms expressed in the decree, the taking of accounts is beside the question." The decree then in question is not now before us, but we infer from the words cited that it contained a clause definitely negating the taking of accounts in future; in the decree with which we are concerned there is no such provision.

On these grounds we hold that the Subordinate Judge was right in allowing accounts to be taken; and since the mortgagor did not appeal against the order absolving the mortgagee from liability for any surplus receipts over and above the sum necessary for redemption, we cannot now impose any further liability in that respect.

It is clear also that the Subordinate Judge was right in allowing the mortgagee credit for the Rs. 380 which he paid to the prior mortgagees in order to obtain possession. Under section 74 of the Transfer of Property Act the mortgagee was entitled to redeem the earlier encumbrance.

For these reasons we reverse the decree of the District Judge and restore that of the Subordinate Judge. The appellant will have his costs throughout in Appeal No. 823 of 1907, and in Appeal No. 219 of 1908 there will be no order as to costs.

Decree reversed.

G. P. R.