

## APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1911.  
February 28.

GOVINDRAO NARHAR PINGLE (ORIGINAL DEFENDANT—JUDGMENT-DEBTOR), APPELLANT, v. AMBALAL MOHANLAL (ORIGINAL PLAINTIFF—DECREE-HOLDER), RESPONDENT.\*

*Dekkhan Agriculturists' Relief Act (XVII of 1879), section 15 B †—Power to order payment by instalments—Decree—Award on arbitration out of Court.*

A decree was passed in terms of an award, which was arrived at on arbitration out of Court. On proceedings being taken to execute the decree, the judgment-debtor applied to the Court for an order to make the decretal amount payable by instalments under section 15 B of the Dekkhan Agriculturists' Relief Act, 1879 :—

*Held*, that the Court had no power to make any order as to instalments under section 15 B of the Dekkhan Agriculturists' Relief Act, 1879, which did not apply, inasmuch as the application to file the award was not a suit of the description mentioned in section 3, clause (g), of the Act.

*Mohan v. Tukaram*<sup>(1)</sup> and *Ghulam Jilani v. Muhammad Hassan*<sup>(2)</sup>, commented on.

PROCEEDINGS in execution.

The decree under execution was passed in 1896, in terms of an award published by arbitrators on reference without the intervention of Court whereby Rs. 7,001 was found due on a mortgage,

\* First Appeal No. 91 of 1910.

† The Dekkhan Agriculturists' Relief Act (XVII of 1879), section 15 B, runs as follows :—

(1) The Court may in its discretion, in passing a decree for redemption, foreclosure or sale in any suit of the descriptions mentioned in section 3, clause (g) or clause (z), or in the course of any proceedings 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.

(1) (1895) 21 Bom. 63.

(2) (1901) L. R. 29 I. A. 51 at p. 58.

In 1908, the decree-holder applied to the Court to execute the decree. The judgment-debtor, being an agriculturist, also applied to the Court to make the decretal amount payable by instalments, under the provisions of section 15 B of the Dekkhan Agriculturists' Relief Act, 1879.

The Court found that the amount payable under the decree on the 22nd November 1909, was Rs. 11,692-12-9. It ordered the judgment-debtor to pay Rs. 2,692-12-9 to the decree-holder in part payment of the decree; and on such payment the mortgaged property to be restored to the judgment-debtor. The remaining amount of Rs. 9,000 was made payable in annual instalments of Rs. 1,000 each.

The judgment-debtor appealed to the High Court contending that the lower Court was wrong in ordering the payment of Rs. 2,692-12-9 prior to the delivery of possession and that the amount of instalments was too high. The decree-holder filed cross-objections contending that the lower Court erred in making the order as to instalments.

*Coyaji*, with *N. V. Gokhale*, for the respondent, in support of cross-objections:—A decree passed in terms of an award is not a decree in a suit of the nature mentioned in clauses (y) and (z) of section 3 of the Dekkhan Agriculturists' Relief Act, 1879. To such a decree, the provisions of section 15 B of the Act cannot apply: see *Mohan v. Tukaram* and *Gangadhar Sakharam v. Mahadu Santaji*<sup>(2)</sup>.

*Jayakar*, with *P. P. Khare*, for the appellant, in reply:—The decree in question is a decree for sale on failure to pay redemption money; and as such is a decree contemplated by clauses (y) and (z) of section 3 of the Dekkhan Agriculturists' Relief Act. Referred to *Ghulam Jilani v. Muhammad Hassan*<sup>(3)</sup>.

CHANDAVARKAR, J.:—So far as the appeal is concerned, it must fail. We disposed of the points argued in the course of the hearing.

The cross-objections of the respondent must be allowed for the following reasons.

(1) (1895) 21 Bom. 63.

(1883) 8 Bom. 20.

(3) (1901) L. R. I. A. 51 at p. 58.

1911.

GOVINDRAO  
NARHAR  
v.  
AMBALAL  
MOHANLAL.

The appellant, who is found by the lower Court to be an agriculturist within the meaning of that term as defined in the Dekkhan Agriculturists' Relief Act, had an award made against him and in favour of the respondent by arbitrators on reference without the intervention of the Court on a mortgage, with directions as to payment of the mortgage money and sale in case of failure to pay. The award was filed in Court by the respondent and a decree made in its terms. The respondent having applied for execution of the decree, the appellant prayed for relief under section 15 B of the Act. The lower Court granted the prayer.

It is now contended before us by the respondent, in support of his cross-objections to the decree, that the Court had no power to act under section 15 B, because (it is urged) the original decree, of which execution was sought, having been passed on an award, is not a decree in a suit for sale as contemplated by that section read along with section 3, clause (g), of the Act. In support of that contention the respondent's counsel relies on the decision of this Court in *Mohan v. Tukaram*<sup>(1)</sup>, where it was held that an application under section 525 of the Code of Civil Procedure (Act XIV of 1882) to file an award, to which agriculturist-debtors are parties, is not a suit within the meaning of sections 3, 12, or 47 of the Dekkhan Agriculturists' Relief Act. The appellant's pleader, on the other hand, replies that the decision in question should no longer be regarded as good law binding on this Court, having regard to the judgment of the Judicial Committee of the Privy Council in *Ghulam Jilani v. Muhammad Hassan*<sup>(2)</sup>, where their Lordships say, of an award made by arbitrators on reference by parties without resort to litigation, that "proceedings described as a suit and registered as such must be taken..... to bring the matter" under the cognizance of the Court, and that the order made thereon is a 'decree' within the meaning of the expression in the Civil Procedure Code.

It is to be remarked at the outset that the reasoning of the judgment of this Court in *Mohan v. Tukaram*<sup>(1)</sup> proceeds partly on the consideration that the procedure laid down in the Civil Procedure Code with reference to an application to file a private

(1) (1895) 21 Bom. 63.

(2) (1901) L. R. 29 I. A. 51 at p. 58.

award is different from that prescribed for the hearing of an ordinary suit. But though the procedure varies, the result is the same in one respect. In either case the Court passes a decree. And a decree, as defined in the Code, is a final adjudication on the rights of the parties in a *suit*. That makes a proceeding, which ends in a decree in terms of a private award filed in Court, a suit.

To that extent the reasoning of the judgment in *Mohan v. Tukaram*<sup>(1)</sup> is fairly open to criticism. But a careful examination of the judgment with reference to the point, which the Court had to decide, shows that that reasoning was not necessary for the actual decision, and that the broad conclusion from that reasoning—viz., that an application to file an award is not a suit within the meaning of the term in the Code of Civil Procedure—is an *obiter dictum*.

If we look to the actual point decided by the judgment in question and to that part of the reasoning in it, which was necessary to support it, no inconsistency will be found between *Mohan v. Tukaram*<sup>(1)</sup> and the Privy Council decision in *Ghulam Jilani v. Muhammad Hassan*<sup>(2)</sup>.

What the Court had to decide in *Mohan v. Tukaram*<sup>(1)</sup> was, whether a private award, to which agriculturist-debtors are parties, can be filed by Civil Courts without adjusting the account under the Dekkhan Agriculturists' Relief Act. For that purpose the Court had to consider whether such an application was a suit within the meaning of sections 3, 12, or 45 of the Act.

That was the narrow question for decision. It was whether an application to file an award was a suit of the kind contemplated by the Act.

The latter portion of the judgment in *Mohan v. Tukaram*<sup>(1)</sup> examines some of the sections of the Act to answer it. Section 47 (mistaken in the judgment apparently for section 48) enables parties to refer their dispute through a conciliator to arbitration. According to the Act, effect has to be given by the Court to the

(1) (1895) 21 Bom. 63.

(2) (1901) L. R. 29 I. A. 51 at p. 58.

1911.

GOVINDRAO  
NARHAR  
v.  
AMBALAL  
MOHANLAL.

award without scrutiny (section 45). Section 12 requires the Court to give effect to an agreement to refer a dispute to arbitration, when the parties are before the Court, and to file it under section 522 of the Code of Civil Procedure (Act XIV. of 1882). From these provisions the judgment proceeded to draw its conclusion in the following words:—"If the Legislature has thus thought fit to preserve the full effects of an award in the case of a reference to arbitrators made after proceedings begun, there is, we think, no reason for presuming that it had a contrary intention in the case of a reference and award prior to such proceedings. We think we ought to follow the ruling in *Gangadhar Sakharam v. Mahadu Santaji*<sup>(1)</sup>, and hold that the award should be filed without inquiry under section 12."

In other words, the Court is not empowered by the Dekkhan Agriculturists' Relief Act to reopen an award made on a private reference and go behind it for the purpose of taking accounts between the parties and pass a fresh decree under the Act. That is the point of the decision in *Mohan v. Tukaram*<sup>(2)</sup> following *Gangadhar Sakharam v. Mahadu Santaji*<sup>(1)</sup> and the ground necessary and sufficient to support it, as given in the judgment, consists in the scheme and intention of the Act, according to which an application to file such an award is not a suit of the kind contemplated by it.

This ground is, I think, unassailable. If, according to the scheme and intention of the Dekkhan Agriculturists' Relief Act, a private award must be given effect to by the Court when it is filed and a decree passed on it without reference to the provisions of the Act as to examination of the merits of the case from the commencement of the transactions between the parties, and as to the taking of an account between them, it would be nullifying the scheme and intention of the Legislature to hold that an application to file such an award is a suit of the kind contemplated by the Act.

The principle of *Mohan v. Tukaram*<sup>(2)</sup> and *Gangadhar Sakharam v. Mahadu Santaji*<sup>(1)</sup> so far is not touched by the judgment of

(1) (1883) 8 Bom 20.

(2) (1895) 21 Bom. 63.

the Privy Council. The Dekkhan Agriculturists' Relief Act has been amended in some respects since both *Gangadhar Sakharam v. Mahadu Santaji*<sup>(1)</sup> and *Mohan v. Tukaram*<sup>(2)</sup> expounded the law in 1883 and 1895 respectively, and yet the Legislature has not modified the Act so as to show that the law in question is contrary to its intention.

That principle applies to the present case. Here we have a decree for sale passed in terms of a private award filed in Court on application. Such an application may be a suit, but it is not a suit for sale within the meaning of clause (y) of section 3 of the Dekkhan Agriculturists' Relief Act, because a suit for sale contemplated by the Act is one in which the Court is required to do certain things, which the Act by necessary implication forbids in the case of applications to file private awards.

On these grounds the lower Court's decree must be reversed and the *darikhast* remanded for fresh hearing and disposal. Appellant to pay the costs of this appeal and cross-objections to the respondents. Other costs of the *darikhast* to be costs at the fresh hearing.

HEATON, J.:—The appellant, the judgment-debtor, asks for a decree more favourable to him than that modified by the First Class Subordinate Judge of Poona, but I see no good reason to suppose that the discretion exercised by the First Class Subordinate Judge was erroneously or even injudiciously exercised. Therefore I would dismiss the appeal with costs.

The respondent submits by way of cross-objections that the Subordinate Judge had no power under section 15 B of the Dekkhan Agriculturists' Relief Act to alter the decree. His reason is that the decree was not obtained in a suit for redemption, foreclosure or sale of the descriptions mentioned in section 3, clause (y) or clause (z) of the Dekkhan Agriculturists' Relief Act. If there was not such a suit, then section 15 B does not apply and the Subordinate Judge had no authority to alter the decree.

The decree was obtained on an award the result of arbitration out of Court. The present decree-holder made an appli-

1911.

GOVINDRAO  
NARHAR  
O.  
AMBALAL  
MOHANLAL.

(1) (1883) 8 Bom. 20.

(2) (1895) 21 Bom. 63

1911.

GOVINDRAO  
NARIKAR  
v.  
ABDALAL  
MOHANLAL.

cation to have the award filed. It was filed and a decree in its terms was made. It is this decree which the First Class Subordinate Judge, purporting to act under the authority given by section 15 B of the Dekkhan Agriculturists' Relief Act, has modified.

The award related to a mortgage debt and provided how that debt was to be discharged. It has become a decree and is substantially, it is said, a mortgage decree or a decree such as is made in a mortgage suit. This I will admit, for though it is not in form a decree which could be made under the Transfer of Property Act and perhaps not strictly in the form of a decree which could be made under the provisions of the Dekkhan Agriculturists' Relief Act, it is in substance the adjustment or settlement of a mortgage debt. Nevertheless the suit in which that decree was obtained was not a suit of the descriptions mentioned in section 3, clause (g) or (s) of the Dekkhan Agriculturists' Relief Act. The suit was a suit to file an award. That is how the suit can be and must be described. It cannot be described as a suit for foreclosure, or for the sale of property or for redemption; and it is the description of the suit with which we are concerned. But in substance also there is no similarity between a suit to file an award even though the award relates to the discharge of a mortgage debt, and a suit for foreclosure, sale or redemption. In the former the Court is not asked to and does not determine the amount of the mortgage debt or the conditions on which or the way in which that debt is to be discharged. All these matters are determined out of Court and the Court only has to decide, if the question be raised, whether there was an award which the law regards as binding. In the latter kind of suit the Court goes into the relations existing between mortgagee and mortgagor, determines the amount of the mortgage debt, and how it is to be discharged.

To me the two suits are essentially different; not alike either in description or in form or in nature. Therefore I would set aside the order of the First Class Subordinate Judge and allow the cross-objections with costs.

I have not based my decision on the argument that an application to file an award is not a suit as was held in the case of *Mohan v. Tukaram*<sup>(1)</sup>, for there are difficulties in the way of following that decision in consequence of the observations of the Privy Council in the case of *Ghulam Khan v. Muhammad Hassan*<sup>(2)</sup>. Whether the difficulties are insuperable it does not seem to me to be necessary here to enquire.

*Decree reversed.*

R. R.

(1) (1895) 21 Bom. 63.

(2) (1961) 29 Cal. 167 : L. R. 29 I. A. 58.

## APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

LAKMIDAS KHUSHAL (ORIGINAL PLAINTIFF), APPELLANT, *v.* BHAJI KHUSHAL AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.\*

1911

March 7.

*Practice—Subordinate Judge—Personal view of disputed premises—  
Appreciation of evidence based on the personal view.*

The plaintiff, in a suit to establish easement of passing his rain-water over the defendants' field, tried to make out his right by the evidence of his witnesses who deposed that the passage for the rain-water had all along existed and was still visible to the eye. The Subordinate Judge visited the spot in question, at the request of both parties, to test the veracity of the witnesses; but, finding that there was no passage at the spot, he disbelieved the witnesses and dismissed the suit. On appeal, it was contended that the Subordinate Judge had wrongly decided the case, because he had disposed of it, not by appreciating the evidence, but by the light of his own view of the passage:—

*Held*, that there was no error in the procedure adopted by the Subordinate Judge.

SECOND appeal from the decision of Vadilal Tarachand Parekh, First Class Subordinate Judge, A. P., at Broach, confirming the decree passed by P. C. Desai, Subordinate Judge at Wagra.

Suit to establish the right to an easement.

The plaintiff filed this suit alleging that he had the right of passing the rain-water on his land, over the adjoining field

\* Second Appeal No. 935 of 1909.