

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

JEEWANBAI, PLAINTIFF, v. MANORDAS LACHMONDAS
AND OTHERS, DEFENDANTS.*

1910,

August 12.

*Mortgage—Assignment of mortgage—Application of rule of damdupat—
Transfer of Property Act (IV of 1882), section 2 (d).†*

The fact that the person entitled to sue on a mortgage happens by assignment to be a Parsee cannot affect the (Hindu) mortgagor's right to claim the advantage of the rule of damdupat, if it existed when the mortgage was entered into.

It is not proper to infer that, because it has been expressly enacted that nothing in Chapter II of the Transfer of Property Act (IV of 1882) shall be deemed to affect any rule of Hindu Law, the Legislature has deprived a Hindu mortgagor of the protection afforded him by the rule of damdupat.

The right of a mortgagee to sue for his principal and interest is a right arising from a contract and must be taken to be made subject to the usages and customs of the contracting parties.

ON 29th May 1890 Pandu Powshia mortgaged his interest in certain immoveable property at Dadar to Manekchand Hirachand and Panachand Hirachand for Rs. 1,000; and on 16th July 1894 he mortgaged his interest in certain immoveable property at Naigaum to Kashinath Vishvanath for Rs. 2,000, with a further charge at a later date for Rs. 1,000. In 1895 the above mortgagees assigned their respective interests under the mortgages and further charge to one Girdhardas Ghanshamdas who acted as the nominee of Vithaldas Ramdas. By a deed of 28th June 1897, Vithaldas Ramdas mortgaged his interests in the properties above mentioned and also another immoveable property, of which he was absolute owner, to B. S. Chothia to secure the payment of Rs. 1,30,000 balance due on certain transactions between the parties. On 26th April 1900 he executed a further charge in favour of Chothia for Rs. 32,500. Between 28th June 1897 and 26th April 1900 Vithaldas Ramdas

* Suit No. 802 of 1905.

† "..... and nothing in the second chapter of this Act shall be deemed to affect any rule of Hindu, Muhammadan or Buddhist Law."

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made further mortgages of his own property above mentioned and of his interest in the property at Naigaum first to J. N. Tata and then to H. A. Wadia. Finally, on 6th October 1901, Pandu Powshia created a further charge on his interest in the Naigaum and Dadar properties in favour of Messrs. Dikshit and Dhanjishaw, Solicitors, to secure Rs. 5,000 due for costs incurred in certain suits.

In October 1905 Chothia filed this suit to enforce payment of the money due under the mortgages, and for foreclosure in default of payment. On Chothia's death his widow Jeewanbai was substituted in his place, and when the suit came to trial, there were in all 8 defendants. The first 3 were the legal representatives of Vithaldas Ramdas (the original 1st defendant), the 4th and 5th (original 2nd and 3rd) were the legal representatives of J. N. Tata, and the 6th (original 4th) was H. A. Wadia. Messrs. Dikshit and Dhanjishaw (original 5th) were the 7th defendants, and Pandu Powshia (original 6th) was the 8th defendant. None of the first 6 defendants filed a written statement; and no objection was made by the 4th, 5th or 6th defendant to the plaintiff's tacking his further charge of 26th April 1900 on to his original mortgage-debt of 28th June 1897. The 7th and 8th defendants, however, were both contentious. It was contended by them that the rule of *damdupat* applied and that thus the plaintiff could not recover in the way of interest a sum greater than the principal. The 8th defendant further pleaded that the mortgages had been obtained by fraud and misrepresentation.

Jardine, acting Advocate-General, with *Jinnah* and *Bhandarkar*, for the plaintiff.

Desai, with *Thakore*, for 2nd defendant.

Bahadurji, with *Tarachand*, for 7th defendant.

Shortt, with him *Setalwad*, for the 8th defendant.

MACLEOD, J. :—On the 29th May 1890 the 8th defendant mortgaged his interest in certain property at Dadar to Manekchand Hirachand and Panachand Hirachand to secure the repayment of Rs. 1,000 and interest.

On the 16th July 1894 the 8th defendant mortgaged his interest in certain property at Naigaum to Kashinath Vishvanath to secure the repayment of Rs. 2,000 and interest.

On 17th February 1895 a further charge for Rs. 1,000 was endorsed on the last-mentioned mortgage.

On the 20th July 1895 Manekchand Hirachand and Panachand Hirachand assigned their interest in the mortgage of the Dadar property to Girdhardas Ghanshamdas.

On the 25th October 1895 Kashinath Vishvanath also assigned his interest in the mortgage and further charge on the Naigaum property to Girdhardas Ghanshamdas.

In these assignments Girdhardas acted as the nominee of Vithaldas Ramdas.

On the 28th June 1897 Vithaldas Ramdas mortgaged his interests in the abovementioned mortgages and further charge together with his rights in certain other properties to Bomanji Shapurji Chothia to secure the repayment of Rs. 1,30,000 and interest, and on the 26th April 1900 Vithaldas executed in favour of Chothia a further charge for Rs. 32,500.

The original 5th defendants are second mortgagees of the 8th defendant's interest in the Dadar and Naigaum properties.

The original 2nd, 3rd and 4th defendants represented subsequent mortgagees by Vithaldas Ramdas and were interested in redeeming the plaintiff. After suit filed the plaintiff died, and his widow and executrix was substituted in his place. Vithaldas Ramdas also died, and the present defendants 1, 2 and 3 were placed on the record as his heirs and legal representatives.

The plaintiff prayed that the then 5th and 6th defendants should pay him Rs. 17,397-9-0 due on the mortgage and further charge on the Dadar and Naigaum properties and that the first 4 defendants should pay him the Rs. 2,20,395-3-9 due on the mortgage and further charge of the 28th June 1897 and 26th April 1900, and in default for foreclosure or sale. The plaintiff has come to terms with those who now represent the first 4 defendants. The 8th defendant filed a highly contentious written statement pleading *inter alia* that the mortgages and

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further charge of the Dadar and Naigaum properties had been obtained in fraud of him. When, however, the time came for the 8th defendant's counsel to address the Court on the issues raised by him, counsel was no longer in evidence and, after waiting some time, I had to finish the hearing of the case without him. In any event it was clear that any claim that the 8th defendant might have had to set aside these deeds on the ground alleged was time-barred. As regards the contention that there had been a misjoinder of causes of action and parties and that the suit was embarrassing against the 8th defendant, it is difficult to see how the plaintiff could have sued on the mortgage of 1897 and further charge of 1900 without making the original mortgagor of the Dadar and Naigaum properties a defendant. It must be said that he has not been in any way prejudiced or embarrassed.

Then the only important question remaining was the one raised by the now 7th defendant who was second mortgagee of the Dadar and Naigaum properties and so interested in redeeming them from the plaintiff, namely, whether the rule of damdupat should be applied in calculating the amount due on the second mortgagees and further charge above mentioned. It clearly applied to the mortgage of the 29th May 1890, and the fact that the person entitled to sue on it happened by assignment to be a Parsee could not affect the mortgagor's right to claim the advantage of the rule, which certainly existed when the mortgage was entered into.

As regards the mortgage of July 1894 and further charge of February 1895, it has been argued for the plaintiff that they were executed after the Transfer of Property Act had been extended to this Presidency, and that therefore the rule of damdupat can no longer prevent a mortgagee from availing himself of his right to recover his principal and interest from a Hindu mortgagor who has bound himself to repay the same.

By section 2 of the Act in the territories to which the Act extends for the time being the enactments in the schedule to the Act are repealed to the extent therein mentioned and by sub-clause (d) nothing in the second chapter of the Act which

refers to transfers of property by act of parties shall be deemed to affect any rule of Hindu, Mahomedan or Buddhist Law.

From this it is contended that the provisions of Chapter IV relating to mortgages of immoveable property and charges and of section 65 in particular do affect the rule of damdupat. The point does not seem to have arisen in any reported case. It was certainly decided in *Sundarabai v. Jayawant Bhikaji*⁽¹⁾ that the rule of damdupat applied in all cases of mortgages as between Hindu debtors and creditors except where a mortgagee in possession is accountable for profits; but the mortgage then before the Court was executed in 1864 before the Transfer of Property Act was passed, and there is nothing in the report to indicate that any suggestion was made that the extension of the Act to Bombay might affect the application of the rule. Sitting as a Court of first instance, I do not think I should be justified in holding that because it has been expressly enacted that nothing in Chapter II of the Act shall be deemed to affect any rule of Hindu Law it must be deduced therefrom that the Legislature has deprived a Hindu mortgagor of the protection afforded to him by the rule of damdupat before the Act was extended to Bombay. A perusal of the provisions of Chapter II of the Act will show how necessary it was to expressly enact that they should not affect any rule of Hindu Law, but the right of a mortgagee to sue for his principal and interest is a right arising from a contract and must be taken to be made subject to the usages and customs of the contracting parties.

I am therefore of opinion that the plaintiff cannot recover in the way of interest on the mortgage and further charge of the Naigaum property a larger sum than the principal amount due on the said mortgage and further charge.

Plaintiff's counsel stated in the course of the argument that he had come to terms with the defendants 1 to 6 other than defendant 3 who is dead, and certain terms of consent were handed into the Court.

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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.

1910.
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.