

that he has not discharged the powers conferred upon him as intended by the Legislature, and we, therefore, hold that the suit has not been filed in conformity with the provisions of section 92, and that the learned District Judge was right in dismissing it on that ground.

We are not, however, satisfied that the Judge was justified in awarding two sets of costs to the defendants who had one and the same defence, and his award of costs has not been seriously defended by the learned counsel who appears for the respondents. We affirm the decree and dismiss the appeal with costs. There must be only one set of costs against the plaintiffs throughout.

*Decree confirmed.*

J. G. B.

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APPELLATE CIVIL.

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*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Shah.*

1915.

RAMACHANDRA VENKAJI NAIK (ORIGINAL DEFENDANT 7, APPELLANT,  
v. KALLO DEVJI DESHPANDE AND OTHERS (ORIGINAL PLAINTIFF AND  
DEFENDANTS 1 TO 6 AND 8 TO 11) RESPONDENTS.\*

June 21.

*Dekkhan Agriculturists' Relief Act (XVII of 1879), section 13—Mortgage by  
Vatandar—Suit for account and redemption—Adverse possession by mort-  
gagee—Hereditary Offices Act (Bom. Act III of 1874), section 5—Mesne  
profits from the date of suit.*

One Madhavrao, grandfather of the plaintiff, by a deed dated the 15th July 1867 mortgaged with possession certain Vatan Inam lands to Babaji Anant, an ancestor of the defendants. Madhavrao died, 1873, and in 1909 plaintiff sued to redeem the mortgage under the provisions of the Dekkhan Agriculturists' Relief Act, 1879. The defendants contended that by reason of the provisions of section 5 of the Vatan Act, the mortgage became void on the death of

\* Second Appeal No. 167 of 1914.

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Madhavrao and that they had been in possession adversely since that date. The Court of first instance disallowed the contention on the ground that the mortgagee claimed to hold the property as such and not as owner, and after taking accounts passed a decree in favour of the plaintiff awarding mesne profits from the date of suit till possession at rupees four hundred a year. This decree was confirmed by the lower appellate Court.

On appeal to the High Court,

*Held*, that the mortgagee remained a mortgagee for the purpose of the redemption suit, even assuming that he had been in possession for more than twelve years since the death of the original mortgagor. Unless there was some definite indication on the part of the person in possession that he would from a certain date claim as absolute owner, and not as mortgagee, he could only acquire by adverse possession the limited interest to which he was entitled at the mortgagor's death namely that of a mortgagee.

*Held* further, that mesne profits from the date of suit could not be awarded as the enforcement of the provisions of section 13 of the Dekkhan Agriculturists' Relief Act, 1879, placed the mortgagor in a much more favourable position than he would be in, if he relied upon the terms of the contract, and no presumption could arise that the mortgagee was, apart from the provisions of the Act, not entitled to retain possession after the date of the institution of the suit.

*Janoji v. Janoji* (1) applied.

SECOND appeal against the decision of L. C. Crump, District Judge of Belgaum, confirming the decree of S. R. Koppikar, Subordinate Judge of Gokak.

Suit to redeem.

Plaintiff sued as an agriculturist to redeem and to recover possession of the plaint lands. He alleged that by a deed dated the 15th July 1867 the said lands were mortgaged with possession by deceased Madhavrao Devji Deshpande, the grandfather of the plaintiff and defendants 9 to 11, to deceased Babaji Anant Walvekar, the great-grandfather of defendants 1 to 8 for Rs. 2,366. The defendants 1 to 8 pleaded that the mortgage lands were Deshpandegiri Vatan Inam and the Vatandar-mortgagor Madhavrao having died in 1873, the mort-

(1) (1882) 7 Bom. 185.

gage became void on his death by reason of the provisions of section 5 of the Hereditary Offices Act; that they had been in possession adversely since that date and had become owners by limitation.

The Subordinate Judge held that the possession of the defendants as mortgagee was adverse only to the qualified interest claimed by them and, therefore, the right of the plaintiff to redeem was not barred. His reasons were as follows :—

“ It is contended that the mortgage effected by Madhavrao became void on his death, and that the mortgagee's possession became adverse thereafter. The argument would apply only to the Vatan Lands \* \* \*. There is no doubt that had plaintiff or his father chosen to treat the mortgagee as a trespasser on the death of Madhavrao, he could have done so and got back the property free from incumbrance (I. L. R. 5 Bom., 435 and 437). Not having done so plaintiff's right of disputing the mortgage is barred. But his right of redeeming the mortgage cannot be barred unless it is shown that the mortgagee claimed to hold the property as owner more than 12 years before suit. The evidence on the record shows that the mortgagee has always claimed to hold the property as such and not as owner. \* \* \* \* \*. The mortgagee's possession was adverse only to the extent of the qualified interest claimed by them (4 Bomby Law Reporter 465, 5 B. L. R. 186; I. L. R. 18 Bom. 22). As remarked in the case reported in 5 B. L. R. at page 189, there can be no acquisition by adverse possession of an absolute title when it is found that nothing but a limited interest has been asserted. I hold that plaintiff's right of claiming the lands in spite of the mortgage is barred, but that his right of redemption is not barred.

He, therefore, passed a decree in favour of the plaintiff and allowed mesne profits from the date of suit till possession at Rs. 400 a year.

The District Judge confirmed the decree in appeal. The order as to the award of mesne profits was upheld, on the following grounds :—

“ The lower Court has awarded mesne profits at Rs. 400 per annum from the date of suit until the date of possession. This order is challenged on the authority of the rulings, viz., (1) *Janoji v. Janoji*, I. L. R. 7 Bom., p. 185, (2) *Mugappa v. Mahamadsaheb*, I. L. R. 34 Bom., page 260.

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These cases are plainly not in point. The principle on which they depend is that the debtor gets a special advantage by the manner in which accounts are taken under the Act and therefore cannot claim also a refund of any surplus due to that system. There is no question here of allowing a refund. The account up to the date of suit shows that the debt is discharged. Probably it has been overpaid. What is thus then to entitle the mortgagee to remain in possession after that date without accounting for profits : Section 13 of the Act lays down how the account is to be taken up to the date of suit and what shall be deemed to be the amount due at that date, *vide* clause 9. It is silent as to profits after that date under the Act : The Code of Civil Procedure applies (section 74). The principle embodied in order XXXIV, rule 9, seems to be applicable. There is no question of refunding money which has come into the mortgagee's hands under the contract. To hold that mesne profits cannot be allowed in such a case leads to a grave hardship. Either the mortgagor is kept out of possession until he can execute this decree and loses the profits unless he files a separate suit, or he is deprived altogether of that to which he is justly entitled. It is further relevant to point out that had the plaintiff sued for redemption under the ordinary law he would plainly have been entitled to the decree which has been passed. Practically he has obtained no benefit from the provisions of the special legislation. He is not bound to avail himself of remedial legislation introduced for his own benefit."

The defendant 7 preferred a second appeal to the High Court.

*Nilkant Atmaram and J. G. Rele* for the appellants:—We urge two points : first, adverse possession. The property being Vatan, our possession became adverse since the death of Madhavrao, Vatandar-mortgagor, in the year 1873, under section 5 of The Hereditary Offices Act (Bom. Act III of 1874). Since then we continued as trespassers on the property and the mortgagors not having brought a suit to redeem within twelve years from 1873 their right was barred : see *Kalu Narayan Kulkarni v. Hanmapa bin Bhimapa*<sup>(1)</sup>.

As regards the second point, we contend that the lower Courts erred in passing a decree for 'mesne-profits' from the date of the suit. At the most the Court could grant 'mesne-profits' from the date of the

(1) (1879) 5 Bom. 435.

decree. 'Mesne-profits,' according to the definition of the term in section 2, clause 11 of the Civil Procedure Code (Act V of 1908), can be allowed when the party is wrongfully in possession of the property until the decree for redemption is passed after taking accounts between the mortgagor and mortgagee. Under the Dekkhan Agriculturists' Relief Act, the duty of taking accounts is cast on the Court according to section 13 of the Act and until that is done the relationship of mortgagor and mortgagee continues to exist. It is determined only when the Court passes the decree: see *Mugappa v. Mahamadsaheb*<sup>(1)</sup> and *Rangbodha v. Ramchandra*<sup>(2)</sup>.

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*S. R. Bakhle* for the respondent:—The Dekkhan Agriculturists' Relief Act comes into force so far the accounts are to be made, but it would not alter the ordinary relationship of parties. It merely provides for the way in which accounts are to be taken and these accounts, as in the case of an ordinary mortgage, have to be made up to the date of the suit. If on taking accounts, it is found that the relationship of mortgagor and mortgagee has already come to an end the provisions of the ordinary law in rule 9, order XXI of the Civil Procedure Code would apply. *Janoji v. Janoji*<sup>(3)</sup> and *Mugappa v. Mahamadsaheb*<sup>(1)</sup> are not opposed to this view.

SCOTT, C. J.:—Two points have been argued in this appeal; first, that the mortgagee who is sued for redemption under the Dekkhan Agriculturists' Relief Act in respect of certain Vatan property must be taken to have been in adverse possession, and to have acquired an absolute title by reason of the provisions of section 5 of the Vatan Act which render the mortgage invalid

(1) (1909) 34 Bom. 260.

(2) S. A. 297 of 1912 (Un. Rep.)

(3) (1882) 7 Bom. 185.

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after the death of the original Vatandar-mortgagor. But the Indian Limitation Act cannot be invoked to enforce any such conclusion, for the presumption is that unless there is some definite indication on the part of the person in possession that he will, from a certain date, claim as absolute owner and not as mortgagee, he can only acquire by adverse possession the limited interest to which he was entitled at the mortgagor's death, namely, that of a mortgagee. He, therefore, remains a mortgagee for the purpose of the redemption suit, even assuming that he has been in possession for more than twelve years since the death of the original mortgagor.

The second point is that the learned Judge has decreed mesne profits, that is the net receipts, from the property as from the date of suit against the mortgagee. It is to be observed in the first place that no such claim has, so far as the industry of the pleaders has been able to discover, ever been allowed since the passing of the Dekkhan Agriculturists' Relief Act in 1879. If allowed it must be based on the assumption that the mortgagee has, from the date of suit, been in possession of property which he is not entitled to retain in his possession under the contract between the parties, for the Dekkhan Agriculturists' Relief Act itself makes no provision with reference to profits after the date of the institution of the suit. But the plaintiff, by filing a suit under the Dekkhan Agriculturists' Relief Act, and claiming an account on the footing of section 13, which gives the go-by to the provisions of the mortgage contract, renders those provisions irrelevant, and it is, therefore, impossible for the Court to discover whether the mortgagee would, if the contractual relations were preserved, be entitled to remain in possession between the date of suit and the date of the decree. Speaking generally, the enforcement of the pro-

visions of section 13 places the mortgagor in a much more favourable position than he would be in, if he relied upon the terms of the contract, and no presumption arises that the mortgagee is, apart from the provisions of the Dekkhan Agriculturists' Relief Act, not entitled to retain possession after the date of the institution of the suit. It appears to us that this is a case in which we ought to apply the principle laid down by Sir Charles Sargent in *Janoji v. Janoji*<sup>(1)</sup>, in which he says:—

“Remembering that the Act encroaches on existing legal rights, it should, on general principle, not be construed to extend beyond the particular object which the Legislature had in view in passing the Act, and which in the preamble is said in express terms to be to relieve the agriculturist in the Deccan from indebtedness. That object is effected when the agriculturist is enabled to discharge his debt and recover his land on far easier terms than those which he has contracted for.”

We, therefore, vary the decree of lower appellate Court by deleting the provisions with regard to the payment of mesne profits. The appellant has partly succeeded and partly failed; therefore, each party must bear his own costs in this Court and in the lower appellate Court.

*Decree varied.*

J. G. R.

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### APPELLATE CIVIL.

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*Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Shah.*

PARVATIBAI BHRATAR SHANKAR PANDHARINATH BAGAT (ORIGINAL DEFENDANT), APPELLANT, v. BHAGWANT VISHWANATH PATHAK (ORIGINAL PLAINTIFF), RESPONDENT.\*

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\* Second Appeal No. 111 of 1914.

(1) (1882) 7 Bom. 185 at pp. 187-188.

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