

## APPELLATE CIVIL.

*Before Mr. Justice Batchelor and Mr. Justice Shah.*

1916.

February 28.

KASHINATH VINAYAK BARVE (ORIGINAL PLAINTIFF), APPLICANT *v.*  
RAMA DAJI KALE (ORIGINAL DEFENDANT), OPPONENT.\*

*Dekkhan Agriculturists' Relief Act (XVII of 1879), section 15B†—Payment by instalments—Default in payment—Order for sale of necessary portion of property under section 15 B (2)—Application to make the decree final under Order XXXIV, Rule 5 (2) of the Civil Procedure Code, not necessary.*

\* Civil Reference No. 1 of 1916.

† 15 B. (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 (y) 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.

(2) If a sum payable under any such direction is not paid when due, the Court shall, except for reasons to be recorded by it in writing, instead of making an order for the sale of the entire property mortgaged or for foreclosure, order the sale of such portion only of the property as it may think necessary for the realization of that sum.

(3) In passing a decree for redemption or foreclosure in any such suit as aforesaid, the Court may direct that the amount payable by the mortgagor shall be discharged by continuing the mortgagee in possession for such further period as will enable him to recover his principal with reasonable interest, and that on the expiry of such period the property mortgaged shall be restored to the mortgagor.

(4) When the amount payable to a mortgagee in possession has been determined in any such suit as aforesaid, the Court may in its discretion, instead of making an order for payment thereof, direct that the mortgagee be continued in possession for such period (to be specified by the Court) as will in the opinion of the Court be sufficient to enable him to recover from the profits the amount payable by the mortgagor together with reasonable interest, and that on the expiry of such period the property mortgaged shall be restored to the mortgagor.

A decree-holder for sale upon a mortgage, in default of payment of instalments ordered under section 15 B (1) of the Dekkhan Agriculturists' Relief Act (XVII of 1879), need not apply under Order XXXIV, Rule 5 (2) of the Civil Procedure Code to make the decree final before he can apply for sale of the necessary portion of the property under section 15 B (2) of the Act.

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THIS was a reference made by G. D. Madgavkar, District Judge of Ahmednagar, under Order XLVI, Rule 1 of the Civil Procedure Code (Act V of 1908).

The reference was in the following terms :—

The plaintiff-mortgagee in suit No. 1660 of 1910 upon his mortgage obtained a decree in terms of the compromise in Court against the defendant-mortgagor, agriculturist, declaring the amount due and ordering its payment by instalments. The decree went on : " In default of payment of any instalment, the plaintiff is at liberty to apply under section 15B of the Dekkhan Agriculturists' Relief Act to recover the amount by sale of the property."

Two instalments were unpaid. The decree-holder applied to recover the amount by sale of the property. The Court held that No order for sale had been obtained beforehand as enjoined by the decree and dismissed the *darkhast*, an order against which the decree-holder applies in revision to this Court. The matter has been argued by the Government Pleader for the appellant and by Mr. Saptrishi, *amicus curiæ* on the other side, the opponent being absent.

The order in question is somewhat brief : but I gather from the arguments that the learned Subordinate Judge held that the decree-holder should have applied to make the decree in question final as in the case of ordinary decrees for sale under the provisions of Order XXXIV, Rule 5 of the Code of Civil Procedure. The present decree very nearly, though not quite, follows the wording of the decree of the High Court in *Pandharinath v. Shankar* (1903, 8 Bom. L. R. 488), which has been closely followed since, as to its wording by the Courts in the Presidency in decrees for redemption, foreclosure and sale, in suits of the description mentioned in section 3, clause (y) or (z) of the Dekkhan Agriculturists' Relief Act.

The question briefly is, therefore : whether a decree-holder for sale upon a mortgage in default of payment of instalments ordered under section 15 B (1) of the Dekkhan Agriculturists' Relief Act must apply under Order XXXIV, Rule 5 (2) to make the decree final before he can apply for sale of the necessary portion of the property under section 15B (2) of the Dekkhan Agriculturists' Relief Act.

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As pointed out by Parsons, Ag. C. J., in *Bhagwan v. Ganu* (1899, I. L. R. 23 Bom., 644 at p. 651): "There is no particular magic in the word 'absolute,' " but the question derives its importance, legal and practical, from the final opportunity provided to the mortgagor to redeem and to avoid a sale. The answer depends, in my opinion, upon how far, if at all, the procedure and the provisions of Order XXXIV, Rules 4 and 5 of the Code of Civil Procedure are inconsistent, within the meaning of section 74 of the Dekkhan Agriculturists' Relief Act, with the provisions of section 15B of the Dekkhan Agriculturists' Relief Act.

The question has not, as far as I am aware, formed the subject of judicial decision by the High Court, though in the case of *Bhagwan v. Ganu* (1899, I. L. R. 23 Bom. 644, 652), it was held that agreements filed under section 44 of the Dekkhan Agriculturists' Relief Act, if relating to sale of mortgaged property were subject to the provisions of section 89 of the Transfer of Property Act (IV of 1882), which has been now replaced by Order XXXIV, Rule 5 of the Code of Civil Procedure, 1908. Ranade, J. observed in *Bhagwan v. Ganu* (1899, I.L.R. 23 Bom. 644, 652): "Of course, where, as in sections 15A and 15B...the Dekkhan Agriculturists' Relief Act contains provisions directly inconsistent with those of the Transfer of Property Act, they are saved by section 2(a) of Act IV of 1882." This latter observation has been referred to with approval in *Mancherji v. Thakordas* (1907, I. L. R. 31 Bom. 120, 124), by Russell, Ag. C. J., who held that the term 'decree' in section 15B of the Dekkhan Agriculturists' Relief Act refers to 'decree nisi' as well as to 'decree absolute' or to adopt the altered phraseology 'preliminary' as well as 'final' decrees for sale.

There does not appear in the wording of section 15B, clause (2), any necessary and complete inconsistency with Order XXXIV, Rule 5, clause (2). On the contrary, the consideration set forth by Beaman, J. in the last case, *Mancherji v. Thakordas* (1907, I. L. R. 31 Bom. 120, 124), favour, if anything, a construction that the legislature, in the absence of express words to that effect in section 15B (2) of the Dekkhan Agriculturists' Relief Act, can hardly be taken to have intended to take away, with the one hand, from agriculturist-mortgagee-judgment-debtors the final opportunity the ordinary law allows under Order XXXIV, Rule 5 (2) to non-agriculturist-mortgagor-judgment-debtors, of finding the decretal amount, and preventing the sale, even of a portion of the property, merely because, it has, with the other hand, granted to the former the benefit of instalments under section 15, clause (1).

Reading the sections together, and upon a consideration of the decisions above and after giving due weight to the *dictum*, perhaps an *obiter dictum*, of Ranade, J. cited above, the answer to the question propounded would, in my opinion, be in the affirmative, viz., that before the Court orders the sale of

a portion of the property under section 15B (2) of the Dekkhan Agriculturists' Relief Act, it must, under Order XXXIV, Rule 5 (2) of the Code of Civil Procedure, on application made in that behalf by the plaintiff, pass a final decree for sale. The Code, however, contemplates but one such application by the plaintiff, and one such final opportunity to the defendant and the law need not be strained to require second and further applications upon second and further default of instalments. With this proviso, the order of the learned First Class Subordinate Judge appears to me to be in law correct.

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The reference was heard.

*W. B. Pradhan (amicus curiæ)*, for the plaintiff:— Ordinarily, the creditor need not apply under section 15B of the Dekkhan Agriculturists' Relief Act, in default of payment of instalments. Under the old law relating to mortgage decrees, there was no distinction between a preliminary and a final decree. The step taken next after the passing of a decree was termed "order absolute." But under the Civil Procedure Code, Order XXXIV, Rule 5, this process is described as "passing a decree." There is no corresponding change in the wording of section 15B. of the Dekkhan Agriculturists' Relief Act. The section has been held to apply to decrees, a construction which the Legislature is presumed to know: see *Jogendra Chandra Roy v. Shyam Das*.<sup>(1)</sup>

The decree in the present case is in terms of a compromise between the parties. The rights and liabilities of the parties are determined by the terms of the compromise: see *Shivayagappa v. Govindappa*.<sup>(2)</sup>

*A. G. Desai (amicus curiæ)*, for the defendants:— Order XXXIV, Rule 5, clause 2, is not inconsistent with section 15 B, clause 2 of the Dekkhan Agriculturists' Relief Act: Reading them together, it is clear that a judgment-debtor must first apply to get his decree

<sup>(1)</sup> (1909) 36 Cal. 543.

<sup>(2)</sup> (1913) 37 Bom. 614.

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made absolute before he can apply under section 15B, clause 2. The word "decree" in section 15B means a decree *nisi*.

BATCHELOR, J. :—We are obliged to the learned pleaders who, as *amici curiæ*, have assisted us with their arguments in this case.

This is a reference under Order XLVI, Rule 1, from the learned District Judge of Ahmednagar, and the question, which is propounded to this Court, is in the learned Judge's words this, whether a decree-holder for sale upon a mortgage, in default of payment of instalments ordered under section 15B (1) of the Dekkhan Agriculturists' Relief Act, must apply under Order XXXIV, Rule 5 (2) of the Civil Procedure Code to make the decree final before he can apply for sale of the necessary portion of the property under section 15B (2) of the Dekkhan Agriculturists' Relief Act.

In my opinion the answer should be in the negative.

It is true that by section 74 of the Dekkhan Agriculturists' Relief Act it is provided that, except in so far as the Civil Procedure Code is inconsistent with that Act, the Code shall apply in all suits and proceedings before Subordinate Judges under that Act. But, as it seems to me, the kinds of procedure laid down by the Civil Procedure Code and the Dekkhan Agriculturists' Relief Act respectively, in the matter of sales in mortgage suits are inconsistent one with the other. By Rules 4 and 5 of Order XXXIV of the Code a plaintiff-mortgagee must obtain both a preliminary decree for sale and upon his separate application a final decree for sale before the mortgaged property or sufficient part thereof can be sold. But sub-sections 1 and 2 of section 15B of the Dekkhan Agriculturists' Relief Act, which provide for the sale of mortgaged property under that Act, contain, as I read them,

materially different provisions. Sub-section 1 of the section empowers the Court in its discretion in making a decree for sale, to direct that the amount payable by the mortgagor under the decree shall be payable in instalments, and sub-section 2, which is the important provision, is in these words :

“ If a sum payable under any such direction is not paid when due, the Court shall, except for reasons to be recorded by it in writing...order the sale of such portion only of the property as it may think necessary for the realization of that sum.”

It is necessary to contend on behalf of the judgment-debtor, and accordingly it has been contended, that the words which I have read mean no more than that the Court shall make a decree directing that in default of payment of the instalment the mortgaged property or a sufficient part thereof shall be sold. But the words which I have cited do not say that : they say a great deal more than that, and, as I think, must be taken to mean what they say, that is, that the Court shall make an out-and-out order for sale ; nor is there anything in the Dekkhan Agriculturists' Relief Act to suggest that anything more than this order is required for the purpose of bringing the property to actual sale.

Although, as Mr. Desai has urged, the general scheme of the Dekkhan Agriculturists' Relief Act is to assist or favour the indebted defendant, I can see nothing repugnant in the construction which I have put upon the words of section 15B. For, the scheme of this section, making special allowance for instalments and requiring that only a portion of the mortgaged property shall be sold, seems to me to differ entirely from the general scheme of Order XXXIV of the Civil Procedure Code. Under the Dekkhan Agriculturists' Relief Act the mortgagor is favoured in these two respects, that he is enabled to make easy payments and that only a sufficient portion of his property is sold on

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the failure to pay any instalments. I see no difficulty in holding that that is the limit of the concessions which the Legislature was making in his behalf, and in my view neither the principle of those concessions nor the words of the Statute suggest that the intention was that, on the failure to pay each particular instalment, the mortgagee would not only have to obtain a definite order under sub-section 2 of section 15B, but would also have to follow it up at some later period by making a fresh application in each case and obtaining from the Court a fresh order. I am of opinion that the order made by the Court under sub-section 2 is the order contemplated by the Legislature as effecting without more the sale of the requisite portion of the property.

SHAH, J. :—I agree.

*Answer accordingly.*

R. R.

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### APPELLATE CIVIL.

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*March 15.*

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

GANGARAM VALAD GANPATI BHOPALE (ORIGINAL DEFENDANT),  
APPELLANT v. LAXMAN GANOBA SHET CHANDOLE (ORIGINAL  
PLAINTIFF), RESPONDENT.\*

*Transfer of Property Act (IV of 1882), section 40—Specific Relief Act (I of 1877), section 3—Indian Trusts Act (II of 1882), section 91—Suit for declaration and possession—Sale—Prior agreement of purchase—Notice—Subsequent purchaser, a trustee.*

Plaintiff sued for a declaration of title to and for possession of immovable property from the defendant. He based his title upon a registered sale deed dated the 5th December 1911 from one N. Prior to this date the plaintiff had notice of the execution of a contract of sale of the same property by N to the defendant. The defendant relied upon his possession under the contract of

\* Second Appeal No. 151 of 1915.