

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

1917. BAPUJI RAMCHANDRA KULKARNI (ORIGINAL PLAINTIFF), APPELLANT
 December 4. v. GUJA MALU DHANGAR AND OTHERS (ORIGINAL DEFENDANTS),
 RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sections 11 and 47—First suit for redemption—Decree for redemption not executed—Second suit for redemption—Bar of res judicata—Remedy by execution and not by fresh suit.

On the 8th April 1899, a mortgagor obtained a decree for redemption of a mortgage of 1859, under the provisions of the Dekkhan Agriculturists' Relief Act, 1879. This decree was not executed. The property mortgaged continued to remain in the possession of the mortgagee. The mortgagor again mortgaged the property to the plaintiff on the 26th May 1899. In 1912, the plaintiff sued to enforce his mortgage against the original mortgagor and mortgagee. The mortgagee contended that the decree of 1899 was a bar to the suit:—

Held, that the suit was barred by the decree of 1899, for if it was treated as a suit for redemption of the mortgage of 1859 it would be barred under section 11 of the Civil Procedure Code (Act V of 1908), and if it was treated as based on the decree of 1899 taken along with the subsequent conduct of the parties in not executing the decree and in allowing the possession to remain with the mortgagee as before it would be barred under section 47 of the Code.

SECOND appeal from the decision of G. B. Laghate, First Class Subordinate Judge, A. P., at Ahmednagar, confirming the decree passed by V. V. Pataskar, Second Class Subordinate Judge at Rahuri.

Suit for redemption.

The property in dispute was first mortgaged in 1859 by the predecessor of defendants Nos. 1 and 2 with possession to the predecessor of defendant No. 3.

In 1897, Dhondibai, the mother of defendants Nos. 1 and 2, sued to redeem the mortgage from defendant

* Second Appeal No. 161 of 1915.

No. 3, and obtained a decree under the provisions of the Dekkhan Agriculturists' Relief Act, which provided as follows :—

"Plaintiff do pay to the defendant Rs. 99 in payment of the mortgage-debt in respect of the land referred to in the plaint. Defendant do forthwith give possession of the land in dispute to the plaintiff. Plaintiff do pay Rs. 99 to the defendant by annual payments of Rs. 25 each. First instalment should be paid on the 15th April 1900 ; and subsequently (one) instalment should be paid each year.....If any three instalments remain unpaid, defendant should recover the amount remaining due by sale of the mortgaged property or a sufficient portion thereof."

The above decree was not executed ; and the property remained in the possession of defendant No. 3 as before.

Dhondibai mortgaged the property to the plaintiff on the 26th May 1899.

On the 19th June 1912, the plaintiff filed the present suit to redeem the mortgage of 1859.

It was held by the Court of first instance that the suit for redemption was not maintainable ; but held that the plaintiff was entitled to recover Rs. 400 from defendants Nos. 1 and 2, the sons of Dhondibai.

This decree was, on appeal, confirmed by the lower appellate Court.

The plaintiff appealed to the High Court.

N. V. Gokhale, for the appellant.—The present case is governed by the Transfer of Property Act, 1882, under which after a decree *nisi* is passed an order absolute is required to extinguish the mortgagee's title. The decree of 1899, in the form in which it was passed, did not put an end to the relationship of mortgagor and mortgagee. It empowered both parties to do certain things ; and as neither of them applied for execution of the decree, the relationship of mortgagor and mortgagee continued. A second suit for redemption on the basis

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of that decree was not barred : see *Sita Ram v. Madho Lal*⁽¹⁾ and *Rama v. Bhagchand*⁽²⁾.

Further, the Dekkhan Agriculturists' Relief Act, 1879, which was passed for the protection of agriculturists debtors would be frustrated in its object if the mortgagee were allowed, by simply remaining inactive in executing a decree, to reap the benefit of a foreclosure decree and become absolute owner. The cases of *Gan Savant Bal Savant v. Narayan Dhond Savant*⁽³⁾ and *Maloji v. Sagji*⁽⁴⁾ are distinguishable, as they were not governed by the Transfer of Property Act, 1882 : see also *Ramuni v. Brahma Dattan*⁽⁵⁾; Fisher on Mortgage, 6th Edn., p. 711 and *Thompson v. Grant*⁽⁶⁾.

P. V. Kane, for the respondent.—The decree of 1899 is not a decree *nisi* under the Transfer of Property Act, but a decree passed under section 15B of the Dekkhan Agriculturists' Relief Act, 1879. If the present suit aims at redeeming the mortgage of 1859 it is barred by *res judicata*. See *Vedapuratti v. Vallabha Valiya Raja*.⁽⁷⁾ If it rests on the decree of 1899, it is barred by the provisions of section 47 of the Civil Procedure Code of 1908 : see *Gan Savant Bal Savant v. Narayan Dhond Savant*⁽³⁾ and *Maloji v. Sagaji*.⁽⁴⁾ The cases of *Rama v. Bhagchand*⁽²⁾ and *Sita Ram v. Madho Lal*⁽¹⁾ are distinguishable. The ruling in *Rama v. Bhagchand*⁽²⁾ is opposed to the decision of the Privy Council in *Hari Ravji Chiplunkar v. Shapurji Hormasji Shet*⁽⁸⁾.

N. V. Gokhale, in reply.

C. A. V.

(1) (1901) 24 All. 44.

(2) (1914) 39 Bom. 41.

(3) (1883) 7 Bom. 467.

(4) (1888) 13 Bom. 567.

(5) (1892) 15 Mad. 366.

(6) (1819) 4 Madd. 438.

(7) (1901) 25 Mad. 300.

(8) (1886) 10 Bom. 461.

SHAH, J. :—The facts, which have given rise to this second appeal are briefly these: one Dhondibai on behalf of her minor sons sued in 1897 to redeem a mortgage of the year 1859 in respect of the land in dispute. In that litigation a decree was passed by the Special Judge under the Dekkhan Agriculturists' Relief Act on the 8th April 1899 the material portion of which is as follows :—“I set aside the decree of the lower Court and order that plaintiff do pay to the defendant Rs. 99 in payment of the mortgage-debt in respect of the land referred to in the plaint. Defendant do forthwith give possession of the land in dispute to the plaintiff. Plaintiff do pay Rs. 99 to the defendant by annual instalments of Rs. 25 each..... Plaintiff should pay the assessment of the land and take the profit. If any three instalments remain unpaid, defendant should recover the amount remaining due by sale (after obtaining the Court's permission for sale) of the mortgaged property or a sufficient portion thereof.” This decree was not executed either by Dhondibai or by the defendant in that case. The possession remained with the defendant, who did not take any steps to have the property sold. On the 26th May 1899 Dhondibai mortgaged the property to the present plaintiff Bapuji Ramchandra Kulkarni. Though it purported to be a mortgage with possession, the mortgagee never obtained possession of the mortgaged property. The present suit was filed on the 19th June 1912 by Bapuji Kulkarni against the sons and heirs of Dhondibai to enforce this mortgage. The defendant, Jivraj Motiram, in Dhondibai's suit was joined in the present suit as defendant No. 3 as a party in possession. Though the suit in form was to enforce the mortgage, it was in substance a suit to redeem against defendant No. 3 on the footing of his being a mortgagee at the date of the suit, and was so treated by the trial Court. The defendant No. 3 pleaded the decree

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of 1899 as a bar to the suit. It is not necessary to refer to defendants Nos. 4 and 5 for the purposes of this appeal.

The trial Court dismissed the suit as against defendants Nos. 3 to 5 and the lower appellate Court confirmed the decree of the trial Court. We are now concerned only with this part of the decree.

It is urged on behalf of the plaintiff, who has appealed to this Court, that his claim to redeem the mortgage is not barred. It is contended that as the decree of 1899 remained unexecuted, the original mortgagee (i.e., the present defendant No. 3) must be deemed to have continued in possession as a mortgagee, that the amount ascertained to be due to him under the decree of 1899 might be accepted as being payable to him and that his position would be for all practical purposes that of a mortgagee with possession after that decree. In support of the maintainability of the present suit Mr. Gokhale has relied upon *Rama v. Bhagchand*⁽¹⁾ and *Sita Ram v. Madho Lal*⁽²⁾. On behalf of defendant No. 3 it is argued in reply that the present suit is barred by section 47, Civil Procedure Code, so far as it is based upon the decree of 1899, that the present plaintiff is not in any better position than his mortgagor, and that as Dhondibai could not have maintained a second suit to redeem her mortgagee after the decree, the plaintiff cannot maintain it. It is contended that the present case is governed by the ruling in *Hari Ravji Chiplunkar v. Shapurji Hormasji Shet*⁽³⁾. Mr. Kane has also relied upon *Vedapuratti v. Vallabha Valiya Raja*⁽⁴⁾; *Ranga Ayyangar v. Narayana Chariar*⁽⁵⁾; *Gan Savant Bal Savant v. Narayan Dhond Savant*⁽⁶⁾ and *Maloji v. Sagaji*⁽⁷⁾. His argument is that the case of *Rama v. Bhagchand*⁽¹⁾ is

(1) (1914) 39 Bom. 41.

(4) (1901) 25 Mad. 300.

(2) (1901) 24 All. 44.

(5) (1915) 39 Mad. 896.

(3) (1886) 10 Bom. 461.

(6) (1883) 7 Bom. 467.

(7) (1888) 13 Bom. 567.

distinguishable on its facts, and that in any case having regard to the decisions referred to by him it should not be accepted as a binding authority.

It is true that the decree of 1899 was passed under the Dekkhan Agriculturists' Relief Act, and the provisions of section 93 of the Transfer of Property Act or the corresponding provisions of Order XXXIV of the Code of Civil Procedure would not apply to such a decree (see *Kashinath Vinayak v. Rama Daji*)⁽¹⁾. It may be that until an application is made under section 15B of the Dekkhan Agriculturists' Relief Act for the sale of the property the mortgagee's position may continue to be the same with reference to the mortgagor. But this circumstance would not make any difference in the result in this case. Here we have to deal with the effect of a decree the execution of which was admittedly time-barred at the date of the suit.

On the facts of this case it seems to me clear that the plaintiff can maintain the present suit only if it could be shown that his mortgagor could have maintained a second suit for redemption. The plaintiff's mortgage was effected after the decree of 1899. Though the mortgagor's right to execute the decree was not barred at the date of the mortgage, I do not think that he can be in any better position than his mortgagor.

The question is whether the mortgagor could have maintained a second suit for redemption. It seems to me clear that she could not have done so. Whether the second suit be treated as one for the redemption of the mortgage of the year 1859 or whether it be treated as based on the decree taken along with the subsequent conduct of the parties in not executing the decree and in allowing the possession to remain with the mortgagee as before, it would be barred by the decree of 1899. In so far as the suit is based on the decree and

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⁽¹⁾ (1916) 40 Bom. 492

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the subsequent conduct of the parties, the judgment of their Lordships of the Privy Council in *Hari Ravji Chiplunkar's* case⁽¹⁾ affords a complete answer. The decision is not the less applicable to the present case simply because the plaintiff here acquired an interest in the equity of redemption before the execution of the decree was barred, and not after it was barred as in the case before the Privy Council. Thus section 47 of the Code of Civil Procedure bars the present suit.

Even if the present suit be treated as a suit for redemption of the mortgage of 1859, it seems to me that the suit would be barred under section 11 of the Code of Civil Procedure. The first suit was tried and decided on the merits, and the second suit by the mortgagor would be clearly barred by the terms of section 11 of the Code. In the case of *Rama v. Bhagchand*⁽²⁾ relied upon by the appellant, the mortgagor had not sued to redeem and had not obtained a decree in the first instance. I am not prepared to extend the *ratio decidendi* of that case to a case where the mortgagor has filed a suit for redemption and obtained a decree in that suit and has subsequently filed another suit to redeem the same mortgage. I do not see how the second suit for the redemption of the same mortgage could be entertained, when the first suit was heard and decided on the merits in respect of the same matter, in view of the provisions of section 11 of the Code of Civil Procedure.

It is not necessary to consider the further arguments addressed to us with reference to the case of *Rama v. Bhagchand*⁽²⁾.

It is also not necessary to consider the question whether a mortgage effected by Dhondibai could give the plaintiff any interest in the equity of redemption

(1) (1886) 10 Bom. 461.

(2) (1914) 39 Bom. 41.

which belonged to her sons, the present defendants Nos. 1 and 2.

The result is that the decree of the lower appellate Court is affirmed and the appeal dismissed with costs.

HEATON, J. :—I agree.

In my opinion the mortgage of 1859 was put an end to by the decree of 1899 and thereafter the relations between those who had formerly been mortgagor and mortgagee were determined by that decree. The plaintiffs in this case became possessed by assignment in the form of a mortgage of whatever rights under that decree the mortgagors of 1859 or their successors possessed. He obtained no other rights as against the present defendant No. 3. He could not, in my opinion, bring a suit to redeem a mortgage, for there was no mortgage to redeem, there was only a decree to execute. He had rights under that decree and those rights he could have exercised in the way permitted by the law, that is, by an application to execute the decree. This he failed to do, and he has failed so continuously that it has now become impossible for him to make any effective application to execute that decree. He has, therefore, it seems to me, lost whatever rights he once possessed in regard to that decree. This conclusion, although I have stated it in the form which appeals to my particular view of the case, is, I think, the decision that would necessarily be reached by applying the principles which are enunciated in the Privy Council case of *Hari Ravji Chiplunkar v. Shapurji Hormasji Shet*⁽¹⁾ referred to by my learned brother.

Decree affirmed.

R. R.

⁽¹⁾ (1886) 10 Bom. 461.