

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

1890.
February 13.

TATAYYA AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

PICHAYYA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, s. 375—Transfer of Property Act—Act II of 1882, s. 83.

A sum of money having been deposited in Court under Transfer of Property Act, s. 83, by a vendee of the mortgagor, the mortgagee refused to accept it in discharge of his mortgage except on the terms that the depositor should convey to him part of the mortgage premises, which he consented to do. This agreement was not communicated to the Court and the depositor refused to carry it out when the mortgagee had withdrawn the money as above :

Held, that the mortgagee was entitled to a decree for specific performance of the agreement to convey.

SECOND APPEAL against the decree of G. T. Mackenzie, Acting District Judge of Kistna, in appeal suit No. 362 of 1888, reversing the decree of M. Ramayya, District Munsif of Bapatla, in original suit No. 6 of 1888.

Suit for possession of certain land (acres 3·67), and for the execution of a conveyance thereof by the defendants to the plaintiffs.

Akkayya (deceased), the father of the plaintiffs, obtained a mortgage with possession of certain land to secure an advance of Rs. 4,000 on 16th February 1878. On 10th and 11th April 1882 the mortgagor sold 40 acres, part of the mortgaged land, to a third party for Rs. 3,000 under two sale deeds, which provided that the vendee should pay the purchase money to the mortgagee towards the mortgage debt on 30th June 1886, and that the mortgagor should pay the balance then due, if any, and deliver possession to the vendee. On 30th June 1886 the vendee, who had in the interval sold his interest in the land to the defendants tendered the sum of Rs. 3,000 to the mortgagee and, on his refusal to accept it, paid Rs. 3,400 into the District Court under Transfer of Property Act, s. 83, and notices were issued to the mortgagor and mortgagee. The latter raised certain objections to the applica-

* Second Appeal No. 327 of 1889.

tion under section 83; but a compromise was arrived at to the effect that these objections should be withdrawn and that the defendants should pay Rs. 400 to the mortgagor and should convey the land in question in the present suit to the mortgagee in consideration of which he should surrender his mortgage lien.

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Petitions were accordingly, on 25th February 1887, presented to the District Court praying that the money deposited be paid out of Court to the mortgagee. But the petitions were rejected as the money had been attached on the previous day in execution of a decree against the depositor who, however, raised a similar sum elsewhere and paid it to the mortgagee. The present suit was brought by the sons of the mortgagee (since deceased) to enforce the terms of the compromise.

The District Munsif passed a decree as prayed. But his decree was reversed on appeal by the District Judge, who (after stating the facts summarized above) said:—

“The question then arises whether this is a contract which the Courts will enforce. No mention of this contract was made in the petitions (exhibits III and IV) presented to the District Court under section 83 of the Transfer of Property Act. The petition of Vemulapalli Akkayya under that section must be verified as a plaint and the decision of the District Court under that section resembles the decision of a suit. Does not the spirit and intention of section 375 of the Code of Civil Procedure apply here?”

“In argument on this point at the hearing of the appeal the plaintiffs cited the following decisions:—*Ruttonsey Lalji v. Pooribai*(1), *Karuppan v. Ramasami*(2), and *Appusami v. Manikam*(3).

“The point decided in these cases was that, if the parties to a suit come to an agreement and afterwards disagree, the Court may, nevertheless, pass a decision under section 375 in accordance with the agreement. This does not affect the point now in question. Section 375 directs that the decision given in accordance with an agreement shall be final, so that, if there is any portion of the agreement kept back from the knowledge of the Court and not included in the decision, that portion of the agreement cannot afterwards be enforced. I consider that

(1) I.L.R., 7 Bom., 304.

(2) I.L.R., 8 Mad., 482.

(3) I.L.R., 9 Mad., 108.

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“the same rule applies to proceedings under section 83 of the
 “Transfer of Property Act Vemulapalli Akkayya
 “accepted this tender. I consider that his heirs cannot now
 “contend that there was a further tender of four acres which was
 “kept from the knowledge of the Court. Upon this ground I
 “reverse the decision of the District Munsif and dismiss the
 “plaintiffs’ suit with costs throughout.”

The plaintiffs preferred this second appeal.

Bhashyam Ayyangar for appellants.

Sundaram Sastryar for respondents.

JUDGMENT.—The Judge finds there was an agreement to sell three acres of land and that there was consideration to support it. This being so the appellants were clearly entitled to a decree for its specific performance. We do not consider that the omission to refer to the agreement is fatal to the claim. There is nothing on the record to show that the District Court in which the money was deposited ordered it to be paid to the appellants’ father. On the other hand the money in deposit was attached and Rs. 3,400 were borrowed elsewhere and paid to Akkayya. On referring to section 83 of Act IV of 1882, we find that it simply provides a mode whereby a mortgage may be satisfied through the Court, and we do not think that the petition filed under that section and the order made upon it can be treated as proceedings in a regular suit. In the case before us the appellants’ father did not draw the money in deposit, and his petition proved infructuous. The direction that the petition be verified in the manner prescribed by law for verification of plaints does not warrant the inference that the order made upon it has the force of a decree in a regular suit.

We are also unable to concur in the opinion of the Judge that section 375, Civil Procedure Code, can be extended by analogy to proceedings held under section 83 of Act IV of 1882, and that if extended it would invalidate the agreement on which this suit was brought. We set aside the decree of the Lower Appellate Court and restore that of the District Munsif. The respondents will pay the appellants’ costs both in this Court and in the Lower Appellate Court.