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NAVLU v. RA'GHU.

"The Subordinate Judge (Mr. Dabir) held that, as defendant had obtained possession under a mortgage decree for Rs. 40, he was not bound to account to plaintiff for the profits of the land, and plaintiff was ordered to pay the sum of Rs. 40 within one year on pain of foreclosure.

"The Special Subordinate Judge for Poona and Sátára (Mr. M. G. Ránadé) referred the case to me, with his own remarks, under section 53 of the Dekkhan Agriculturists' Relief Act, and I, concurring in his opinion, reversed the decree of the lower Court, and remanded the suit, with directions that an account of the profits should be taken, and a new decree passed in accordance with the result of such account.

"The Subordinate Judge (Mr. Ganu) on the strength of a recent High Court decision reported in I. L. R., 7 Bom., 330, declined to carry out my instructions; and, holding that the plaintiff was bound to pay the full amount found due by the previous decree, passed a decision similar to that made by his predecessor. * * * *

"The terms of the former decree are as follows:—'That the defendant (present plaintiff) do pay the sum of Rs. 40 with costs; if default be made, that the plaintiff (present defendant) do take possession of the land, and have *vahivat* (*i.e.*, possession or enjoyment or management) of the same until the said sum of money be paid.'

"I concur in the opinion expressed by Mr. Ránadé, and regard this decree, which is silent as to profits, as being simply a decree for possession of the land until liquidation of the mortgage-debt. It seems to me perfectly immaterial whether that debt is liquidated by a money payment made by the mortgagor or by the surplus profits realized from the land by the mortgagee. According to section 13 of the Relief Act, any private agreement of the parties must be set aside, and in this case the former decree neither confirms any private agreement of the parties, nor imposes any conditions with respect to the appropriation of the profits.

"The ruling quoted by the lower Court seems, however, to be opposed to my view. I, therefore, beg to refer for the decision

of the High Court the question whether the said ruling governs the present case or not; in other words, whether, under the circumstances stated above, the defendant in this case is or is not liable to account for the profits."

There was no appearance of parties in the High Court.

The following is the judgment of the Court delivered by

WEST, J.—The position of a mortgagee resting merely on his mortgage as the ground of his relation to the mortgagor is widely different in its practical effects from that of the mortgagee who has obtained a decree. In the former case the contract is subject to revision on equitable principles, and the greater part of the law of mortgage in England has arisen from the modifications imposed by the Court of Chancery on the contracts of the parties. In the latter case there is no temptation to overreaching and imposition on the part of a Court as there is in the case of the individual creditor, nor can it be stated as a principle that a second judgment by the same Court, or a Court of the same kind, will be an improvement on the first. The public interest is concerned in the finality of litigation, and, as was said by Lord Macclesfield in *Peachey* v. *D. of Somerset*[1]: "You can never say that the law has determined hardly, but you may that the party has made a hard bargain." The same distinction between the stipulation of a party and the adjudication of the law is drawn by Lord Manners in *Keating* v. *Sparrow*[2]; and it is quite obvious that if a judgment or decree is to be subject to modification like a contract, the modifying judgment must, on principle, be again subject to amendment, and that every litigation may thus become interminable. The true principle is, as noticed by Lord Selborne, that the decree supersedes the contractual relation by a command which is the voice of the sovereign in the concrete case, just as a statute is the same voice in a general rule. Thus a relation constituted by a decree stands on the same footing as the firmest ownership. The Legislature may upset the one or the other; but an intention to forfeit established rights cannot be presumed, nor can any statute having such an effect be carried by construction beyond the purpose plainly indicated.

(1) 2 Wh. & Tud. at p. 987. (2) 1 B. & B., 367.

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In the present case the decree, in the event which happened of the mortgagor making default, ordered *that the mortgagee should take possession, and retain it with the attendant benefits* until the mortgagor should pay a definite sum. The sum has never been paid, and the decree having been made in 1874, a question may be possible of whether execution or further execution of it is not now barred by limitation. It may also be contended, not without reason, that the relation constituted by the decree was not one of mortgage, seeing there was an entire want of mutuality of remedy. It might be thought rather a case of foreclosure and consequent ownership subject only to a special condition of defeasance. Yet as the decree was still open to execution in the mortgagor's favour without a fresh suit, we incline to think that the decree did constitute a relation, though a new one, by way of mortgage between the parties. But, supposing execution by way of redemption still possible, the Court, to which the mortgagor applies under the decree, may so far modify the decree from that time forth that it may direct payment by instalments under section 15*B* of the Dekkhan Agriculturists' Relief Act. It may also make such orders as it thinks fit as to the appropriation of future profits and the accounting for them by the mortgagee who is in possession. But this process cannot be made retroactive. The possession and enjoyment of the mortgagee under the decree are held under a complete right of record, and the decree is a title-deed of the highest kind down to the moment when it may be partially set aside in execution. The terms giving authority to the executing Court are quite satisfied by this construction without making them retrospectively confiscatory, and every principle of judicial construction forbids their extension.

The reference is to be answered accordingly.