PRIVY COUNCIL.*

HARI RA'VJI CHIPLUNKAR, (PLAINTIFF), *v.* SHA'PURJI HORMASJI SHET AND ANOTHER, (DEFENDANTS).

1886. *March* 31.

On appeal from the High Court of Bombay.

Mortgage—Redemption—Merger of right of suit upon a mortgage in a subsequent decree thereon—Questions as to execution between parties to a suit—Act XXIII of 1861, *Sec.* 11.

Upon a mortgage of land made little less than sixty years before the present suit, a decree followed in 1825 to the effect that an account having been taken of what was due on the mortgage, the mortgagor might at any time make a tender of such mortgage money with interest up to date, and require that the land should be restored.

The plaintiff, representing the interest of the original mortgagor, sued for redemption of the mortgage, treating the above decree as regulating the rights of the parties from the time when it was made.

Held, that the right of the plaintiff was a right to execute the above decree, subject to the law of limitation, and not a right to obtain a decree for redemption and possession; the law also providing that questions between the parties to a suit relating to execution of decree, must be determined by the order of the Court executing it(1).

Held, also, that the plaintiff not having sought by his plaint to redeem the mortgage, or alleged that there had been acknowledgment, could not in the present appeal fall back on a right to redeem such mortgage, although the latter might be within limitation, as that would be to make a case different from the one tried and decided in the Courts below. Accordingly, the suit had been properly dismissed.

APPEAL from a decree (2nd August, 1882) of the High Court, affirming a decree (15th April, 1880) of the Subordinate Judge of Poona.

The suit out of which this appeal arose was in the form of one to redeem a mortgage of one and a half *rukhás* of land, forming a portion of the Poona Mahárki land; the plaintiff, as executor of Bholágir Mángir, deceased, representing the interest of the original mortgagors; and the defendants having succeeded to the rights of the mortgagees.

* *Present*:—LORD BLACKBURN, LORD HALSBURY, LORD HOBHOUSE and SIR R. COUCH.

(1) Section 11 of Act XXIII of 1861 was substituted for section 283 in the first Code of Civil Procedure (Act VIII of 1859). In Act X of 1877, section 244, sub-section *c*, corresponds with so much of section 11 as relates to this point, and is followed in Act XIV of 1882.

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In 1806 three *rukhás* of cultivated land at Poona were mortgaged by the Mahárs, who had a common interest in it, to two persons, named Narsoji and Nágoji. The same land was in the following year mortgaged by Narsoji to another mortgagee, whose sureties, Zánoji and Bhavánji, having paid off the debt, obtained possession.

On the 29th November, 1823, Bhavánji and Zánoji brought a suit, in the Court of the Amín of Poona, against Yashvantráv and Bába, the sons of Narsoji and Nágoji, respectively, to recover the whole amount due to them on the above transaction. On the 8th September, 1825, a decree, in accordance with the award of arbitrators, was made by the Court, to the effect that the defendants were to pay, in all, Rs. 2,396 to the plaintiffs, on a date which would be fixed, redeeming the mortgaged land, which till payment was to remain in the possession of the plaintiffs. This was the decree to which the principal question now raised referred, *viz.*, whether a suit would lie upon the mortgage with which that decree dealt.

The possession of the land not having been changed it was mortgaged in 1833 to Rámgir and another, whose interest Rámgir obtained by succession. One *rukhá* and a half, however, passed in 1837 into the possession of Yashvantráj, son of Narsoji, as the result of a suit brought by him against Vithoji, son of Bhavánji. The other half, to which alone the present suit related, remained in the possession of Rámgir. The interest of Rámgir was afterwards purchased by Bholágir Mángir, now represented by the appellant. The same purchaser bought, in 1859, a perpetual lease of the same one and a half *rukhá* from the Mahárs, the original owners. He also bought the interest of Abu, grandson of Nágoji, then deceased.

On the other hand, the respondent Shápurji Hormusji obtained, in 1869, from the son and grandson of Bhavánji their interests in the same land, a suit being instituted in the same year to establish the right of the vendors to redeem as against the descendants of Rámgir. This suit was dismissed in the Original and Appellate Courts at Poona in 1870 and 1873, but decreed by the High Court (Kemball and Nánábhái Haridás, JJ.) on the 1st Septem-

ber, 1875. In the judgment of the High Court it was said: "It may be—though we abstain from expressing any opinion on the subject—that defendant, in virtue of his purchase or purchases, is entitled to redeem the property in dispute on certain conditions, and it may also be that that right of redemption has been lost by lapse of time; but what those conditions are, and whether or no such a suit would be now maintainable, are questions which must be left for further determination. The mortgage to defendant's assignor being proved, plaintiff's right to have a reconveyance of their property is not affected by the fact of defendant's having purchased an equity, which is not shown to be capable of enforcement."

Bholágir Mángir having died, the present appellant, as his executor, brought the present suit in 1877, referring thus in his plaint to the decree of 1825, *viz.*: "The transactions of both the mortgages merged in the said decree." He also referred to the decree of 1st September, 1875.

The Subordinate Judge, Ráv Bahádur C. S. Chitnis, held that the mortgage had entirely merged in the decree, of which, however, execution was barred under the law of limitation, Act XIV of 1859; and, further, that the appellant's suit was not maintainable in regard to section 11 of Act XXIII of 1861.

On appeal, the High Court (Sargent and Melvill, JJ.) gave judgment as follows:—"We think that, having regard to the special nature of the proceedings in the suit, No. 1925 of 1823, in the Court of the Amín of Poona, the decree of 8th September, 1825, must be regarded as having been made for the benefit of all parties to the suit, and that the rights of the parties under the mortgages of 1806 and 1807 became merged in that decree. It is so stated in the plaint itself, which relies on the decree as constituting the cause of action. Now, the decree was one in execution of which the then defendants could have obtained exactly the same relief which the present plaintiff, who can stand in no better position than Nágoji from whom he claims, now seeks. The execution of the decree is now barred, and a suit will not lie, having regard to section 11 of Act XXIII of 1861. This is the view

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taken by the Subordinate Judge, and seems to us to be correct The decree must, therefore, be confirmed, with costs."

On this appeal Mr. *A. R. Scoble, Q. C.*, and Mr. *C. W. Arathoon* appeared for the appellant.

The respondents did not appear.

For the appellant it was argued that the judgment of the High Court was incorrect, the mortgages of 1806 and 1807 not having been by merger in the decree of 1825 rendered incapable of enforcement. By the terms of the mortgage, and equally by the terms of the decree, the mortgagor could redeem whenever the debt should be paid. Redemption was not barred by time when this suit was brought; and the decree of 1825, by its express terms, directed that the mortgagees were to remain in possession until redemption should take place. This did not prevent recourse to the mortgage. If the appellant could fall back on the mortgage, and it was submitted that he could, he could not be precluded from suing by the application of the law (introduced many years after the recognition of his rights by the decree), subsequently enacted in section 11 of Act XXIII of 1861. The execution of the decree might have become impossible by lapse of time, as a process of execution without suit; but the relation of mortgagor and mortgagee had not been extinguished, the law allowing sixty years. There was also evidence on the record showing recognition of the position of those through whom the claim was made.

Reference was made to *Rávji Shivrám Joshi* v. *Káluram*[1], as showing that an application to the Court, passing a decree for possession in favour of the heirs of a mortgagee, for further execution by taking an account, is not the proper mode for the mortgagor to adopt when he seeks redemption, but that an independent suit should be brought. That case, as a Full-Bench decision, was followed by *Rámchandra Ballál* v. *Bábá Esgondá*[2]. There was also the authority of a Madras case for a redemption suit brought on the mortgage, where there had been a decree upon it, passed by consent—*Periandi* v. *Angáppá*[3].

(1) 12 Bom. H. C. Rep., 160. (2) 12 Bom. H. C. Rep., 163.
(3) I. L. R., 7 Mad., 423.

Reference was also made to Act XIV of 1859, sect. 1, cl. 15. Shepherd on Limitation, Chap. IV., para. 23; Thomson on Limitation, p. 207.

Their Lordships' judgment was delivered by Sir Richard Couch.

SIR R. COUCH:—This is an appeal from a decision of the High Court of Bombay confirming a decree of the Subordinate Judge, who held that the suit was barred by the operation of section 11 of Act XXIII of 1861.

The suit was in form to redeem a mortgage, and the facts out of which it arose were that on the 25th of May, 1806, two persons, named Narsoji and Nágoji, mortgaged to two others, named Bhaváṅji and Záṅoji, a quantity of land described as three *rukhás*, each *rukhá* containing about six acres, to secure an advance then made to the former. In fact, Narsoji and Nágoji were themselves the mortgagees of the land from persons described in the proceedings as the Mahárs; but that is not material now, because their title under the Mahárs does not come into question, and for the purposes of this suit they may be treated as the owners of the land. A further advance was made in 1807 to Narsoji of Rs. 500, the result being that the mortgage by Narsoji for the debt due by him exceeded the amount of the mortgage for which Nágoji's share was liable. In November, 1823, a suit was brought by Bhaváṅji and Záṅoji against the heirs of the mortgagors, and a decree was made in that suit which it is necessary to notice particularly. The decree, which is dated 8th September, 1825, set out the mortgage of 1806, and the accounts which had been taken, the suit being brought to enforce the mortgage, and ordered the defendants to pay, in all, Rs. 2,396-4-9 to the plaintiffs—treating the mortgage as a joint mortgage, and the whole sum as being due by both mortgagors—by the date fixed, and they were to redeem their Mahárki field which they had mortgaged to the plaintiffs. Then it says: "Until the defendants clear off the money the plaintiffs should use and enjoy the field according to [the terms of] the agreement. On the day on which the defendants will pay the money, the plaintiffs should compute the interest on rupees two thousand three hundred and ninety-six and

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a quarter, at the rate of one per cent. [per mensem] from the date [that will be] fixed; should deduct therefrom the amount of produce from the fixed date onwards; should receive the remaining amount, together with the interest, and should restore the field to the defendants." Although this decree speaks about a date which will be fixed, no date was fixed by it, and the operation of the decree appears to have been that an account having been taken of what was due on the mortgage, the mortgagors might at any time make a tender of the amount due, with the interest up to that time, and require that the land should be restored to them.

Some time in 1837—the precise date is not very material—an application was made for the execution of this decree, and it resulted in Yashvantráv, the son and heir of Narsoji, one of the mortgagors, paying his share of the money due on the mortgage, whereupon, so far as regards the one-half of the land mortgaged in 1806 that belonged to Narsoji, the mortgage became redeemed; and the question in this suit relates to the other half, namely, that which was the property of Nágoji. Some other proceedings took place, the result being that the present plaintiff represents the interest of the original mortgagors, and would be, if the suit were not barred by the operation of law, entitled to redeem the property, and the defendants may be taken to represent the mortgagees.

The plaint in the present suit, which was filed on the 13th September, 1877, begins by stating that the claim is a claim for redeeming from mortgage the under-mentioned land. It states the mortgage of 1806, and then sets out the proceedings in the suit in 1823, and the decree which was made in 1826, and after that it says: "The cause of action accrued when in the decree mentioned above in the third paragraph the previous transaction 'merged,' [and] an order was made 'on the new basis' as to the way in which the mortgagees should carry on the management, &c.; that is to say [it accrued] on the 8th of September, 1825." Then it proceeds to state that there were certain acknowledgments, in writing, of the mortgage made by the mortgagee.

The suit as framed, then, apparently treats this decree as in the nature of a fresh mortgage, and as regulating the rights of the

parties from that time; and the reason for this appears to be that the law of limitation gave sixty years for a suit for redemption of a mortgage from the date of the mortgage, and this suit was brought in 1877, not many years short of the sixty years.

When the suit came before the Subordinate Judge, he gave a very long judgment, going into all the facts of the case, the result being that he was of opinion that the decree in 1826 must be regarded as a decree, and not as a mortgage, and that under the Act XXIII of 1861, sec. 11, which provides that questions arising between the parties to the suit and relating to the execution of the decree must be determined by order of the Court executing the decree, and not by a separate suit, the parties ought, if they wished to redeem the property, to have applied to the Court to execute the decree by putting them into possession of the property after paying the money due on the mortgage; and inasmuch as the time limited by law for the execution of the decree had long since elapsed, and had indeed elapsed at the time when the plaintiff had become the purchaser of the equity of redemption in right of which he brought the suit, there was no cause of action existing, and the suit was barred.

The High Court took the same view of the matter, and held that the suit was barred by the Act XXIII of 1861, and, therefore, the plaintiff could not sue to redeem in the manner in which he claimed. Their Lordships are of opinion that this view, which was taken by the lower Courts, is the right one; and that the right of the mortgagors must be treated in this suit as a right to execute the decree, and not a right to sue as for the redemption of a mortgage.

It was contended by the learned counsel for the appellant that he could fall back upon the right to redeem the mortgage of 1806, the law of limitation, by Act XIV of 1859, providing that there should be sixty years for a suit to redeem from the time of the mortgage, or from the date of an acknowledgment made in writing signed by the mortgagee, or some person claiming under him. The difficulty in the way of the appellant availing himself of that is, that it is a different case from that which he made in the plaint. In the plaint he did not seek to redeem the mortgage of 1806, or allege that there had been an acknowledgment of that mortgage. If he had, the

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question whether there had been such an acknowledgment made would have been inquired into in the lower Courts; but he treated the decree as the mortgage which he sought to redeem; and supposing that he could, according to the decision of the High Court of Madras, which was cited, fall back upon the mortgage of 1806, in their Lordships' opinion he is not at liberty to do that upon the present appeal. It would be making a different case from that which he made in the lower Courts, and on which the case has been tried and decided.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the decree of the High Court and to dismiss this appeal.

Solicitors for the appellant:—Messrs. *T. L. Wilson & Co.*

ORIGINAL CIVIL.

Before Mr. Justice Jardine.

1886. *May* 3, 7.

MATHURA'DA'S LOWJI AND FIVE OTHERS, (PLAINTIFFS), *v.* GOCULDA'S MA'DHOWJI, DORA'BJI FRA'MJI PANDAY AND PESTONJI CA'VASJI, (DEFENDANTS).*

Probate—Executors—Executors alienating property of their testator's estate before obtaining probate—Title of alienees to such property—Where holder of such property obtained from executors is entitled to vote at election, is his qualification as a voter complete before probate granted—Trustee—Trustee elected by debenture-holders—Meeting of debenture-holders to elect a trustee—Exclusion from meeting of holders of debentures obtained from executors before probate—Validity of election of trustee elected at meeting from which such debenture-holders were excluded.

In order to secure certain money which it had borrowed by the issue of debentures the D. Company on the 23rd November, 1883, conveyed certain lands, &c., to three trustees, K., G. and D., by way of mortgage. With regard to the appointment of new trustees in case any trustee should die, &c., the indenture of mortgage provided that, in certain events, the surviving or continuing trustees might convene a meeting of the debenture-holders for the purpose of nominating a new trustee; and that at such meeting the election of such new trustee should be decided by a majority of votes of the debenture-holders present in person, each party having only one vote, and in case of an equality of votes then the chairman of the meeting should have a casting vote. K., one of the trustees appointed under the deed, died on the 9th February, 1886, leaving a will whereby he appointed three executors. At the time of his death, K. was the holder of one moiety of the debentures, *viz.*, 1,400 debentures, of the value of Rs. 7,00,000.

* Suit No. 70 of 1886.