

## APPELLATE CIVIL.

*Before Mr. Justice West and Mr. Justice Birdwood.*

RUPCHAND KHEMCHAND AND ANOTHER, (ORIGINAL DEFENDANTS), APPLICANTS, *v.* BALVANT NA'RA'YAN AND OTHERS, (ORIGINAL PLAINTIFFS), OPPOSENTS.\*

1887.  
March 2.

*Valuation of a suit for redemption—Dekkhan Agriculturists' Relief Act (XVII of 1879), Chap. II—Consent given to the application of Chapter II to a suit—Withdrawal of such consent—Necessity of notice to all parties in inquiries on review by the Special Judge.*

1. The valuation of a suit for redemption for purposes of jurisdiction is the amount remaining due on the mortgage, or claimed on it by the mortgagee. It is that amount, and the right connected with it, which is the usual subject of contention in a mortgage suit.

*Per BIRDWOOD, J.*—The rules laid down in the Court Fees' Act (VII of 1870) are not to be taken as necessarily a guide in determining the value of the subject-matter of a suit for purposes of jurisdiction.

2. If a party or his pleader gives consent under clause 3 of section 3 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) to the disposal of a suit according to the provisions of Chapter II of the Act, the consent so given cannot be withdrawn after the hearing has begun and the suit has proceeded on the footing of such consent.

3. It is illegal on the part of the Special Judge, appointed under Act XVII of 1879, to reverse the decree of a Subordinate Judge on review without giving a proper and sufficient notice to the party in whose favour the decree was passed.

APPLICATION under section 622 of the Civil Procedure Code (Act XIV of 1882).

The plaintiffs filed a suit in the Court of the Second Class Subordinate Judge at Malsiras to redeem certain land which was mortgaged to the first defendant for Rs. 110. He denied the mortgage, alleged that he had bought the land in 1872 at a Court sale in execution of a decree which he had obtained against the plaintiff's father, and that he had subsequently sold the land to defendant No. 2. Defendant No. 2 supported the contention of the first defendant. The suit was brought under the Dekkhan Agriculturists' Relief Act (XVII of 1879). At the first hearing, the pleader, who appeared for the first defendant, gave his consent in writing to the disposal of the suit, under the provisions of Chapter II of the Act. After several hearings he applied to

\* Application, No. 99 of 1886.

1887.

RUPCHAND  
KHEMCHAND  
v.  
BALVANT  
NARAYAN.

the Court for leave to withdraw the consent he had given. But this application was rejected, and the suit was proceeded with.

The Subordinate Judge found, on the evidence, that the mortgage set up by the plaintiffs was not proved. He, therefore, dismissed the suit.

The plaintiffs thereupon applied to the Special Judge for a revision of the proceedings. The Acting Assistant Judge, on examining the record of the case, made a report upholding the decision of the Subordinate Judge. Thereupon the Acting Special Judge issued a notice to the defendants to attend his Court at Sângola on the 19th February, 1886. The defendants went to Sângola on that day, but found the Court closed. They did not receive any further notice of the day to which the hearing was adjourned.

The plaintiffs were heard on review, but the defendants were not. On the 31st March, 1886, the Acting Special Judge reversed the decree of the Subordinate Judge. He held that the mortgage was proved, and that the plaintiffs were entitled to redeem on payment of the amount that might be found due on taking the account. He, therefore, remanded the case to the Subordinate Judge.

Against this decision, the defendants applied to the High Court, under its extraordinary jurisdiction, on the following (among other) grounds:—

“1. That as the subject-matter of the suit exceeded Rs. 500, the provisions of Chapter II of Act XVII of 1879 could not apply, even with the consent of the parties to the suit.

“2. That the consent given by the defendants' pleader was given under a mistake, and was withdrawn as soon as the mistake was discovered, and, therefore, the provisions of Chapter II of the Act did not apply.

“3. That there was no proper and sufficient notice given to the defendants of the inquiry before the Acting Special Judge, and that the order passed by him without hearing them was illegal and unjust.”

Upon these grounds a rule *nisi* having been granted,

1887.

RUPCHAND  
KHEMCHAND  
v.  
BALVANT  
NARAYAN.

*K. T. Telang*, (with him *Mahádev B. Chaubal*) showed cause:—The subject-matter of a redemption suit is the amount due on the mortgage. It is this amount that determines the valuation of such a suit—*Kondíji Bagáji v. Anáru*<sup>(1)</sup> and *Bahádur v. Nawáb Ján*<sup>(2)</sup>. In the present case the amount of the mortgage is Rs. 110; the case, therefore, falls under section 3, clause 3, of Act XVII of 1879. The defendants' pleader consented to the disposal of the suit under Chapter II of the Act. This consent was withdrawn several months afterwards. The assent once given, could not be withdrawn. The Subordinate Judge had, therefore, jurisdiction to decide this suit.

As to the notice to the applicants on review, section 53 of Act XVII of 1879 does not provide for notice, and it need not be given.

*Inverarity* (with him *G. R. Kirloskar*), *contra* :—The Special Judge was wrong in hearing one party alone on review, without giving the other an opportunity of being heard. The applicants' pleader gave his consent under a mistake. He was justified in withdrawing it when he discovered the mistake. It was not withdrawn at a late stage of the case. The consent, therefore, is not binding on the applicant.

In the case of a mortgage with possession, the subject-matter of a redemption suit is the land which the mortgagor seeks to recover. The value of the land determines the jurisdiction of the Court—*Lakshman Bhátkar v. Bábáji Bhátkar*<sup>(3)</sup>; *Kallán Dás v. Nawal Singh*<sup>(4)</sup>; *Gobind Singh v. Kallu*<sup>(5)</sup>. The valuation of a suit for court fees has no application to jurisdiction.

West, J.:—We think that the consent given by the defendants' pleader to the disposal of this cause, under the provisions of Chapter II of Act XVII of 1879, could not be withdrawn after the hearing had begun and proceeded to a certain stage on the footing of that consent.

The valuation of the suit or of the subject-matter of the suit must, we think, be taken as the amount of the mortgage or the

(1) I. L. R., 7 Bom., 448.

(3) I. L. R., 8 Bom., 31.

(2) I. L. R., 3 All., 822.

(4) I. L. R., 1 All., 620.

(5) I. L. R., 2 All., 778.

1887.

RUPCHAND  
KHEMCHAND  
v.  
BALVANT  
NARAYAN.

alleged mortgage which the plaintiffs sought to redeem. That amount and the rights connected with it form the usual subject of contention in a mortgage suit. The decisions seem to have varied greatly, owing to the ambiguity of the term "subject-matter"—see *Kondáji Bagáji v. Anúú*<sup>(1)</sup>; *Lakshman Bhátkar v. Bábáji Bhátkar*<sup>(2)</sup>; *Kollán Dás v. Nawal Singh*<sup>(3)</sup>; *Gobind Singh v. Kállu*<sup>(4)</sup>; *Bahádur v. Nawáb Ján*<sup>(5)</sup>—and there is room for much argument on the subject, but the view previously taken here is not obviously wrong, and must be adhered to. A mortgagor may thus, no doubt, be enabled to sue in a Court of low jurisdiction to recover a valuable property on redemption of a mortgage of petty amount, but the appeal in such a case will lie to the same Court as if the amount were large. There is an exception, of course, under the Dekkhan Agriculturists' Relief Act, but the provisions of that law are generally anomalous.

The Acting Special Judge issued a notice to the defendants to attend his Court at Sángola on the 18th or 19th February, 1886. This was served on the evening of the 18th, and on the 19th the defendants went twenty-four miles to attend the Special Judge's Court. The *roznáma* (or diary of proceedings) says they did attend it, but this is plainly wrong, and is contradicted by the judgment. The Court was closed when the defendants arrived on the 19th, and the Acting Special Judge went away the next morning. He ordered the Subordinate Judge to get extracts from the first defendant's books. These were sent, but no new notice was sent to the defendants. The plaintiffs were heard on the review, but the defendants were not. It cannot, we think, be said that they failed to attend the Court through any neglect, and the Acting Special Judge ought to have given them a hearing before he, on the 31st March, 1886, reversed the decision of the Subordinate Judge in their favour—a decision with which his own Assistant agreed. Justice required that, when the plaintiffs were heard against the judgment of the Subordinate Judge, approved by the Assistant Special Judge, the defendants should be heard in support of it, unless there was a default of attendance on their part.

(1) I. L. R., 7 Bom., 448.

(3) I. L. R., 1 All., 620.

(2) I. L. R., 8 Bom., 31.

(4) I. L. R., 2 All., 778.

(5) I. L. R., 3 All., 822.

We, therefore, set aside the decree of the Acting Special Judge, and direct him to re-hear the review, giving an opportunity to both sides to be heard. Costs of this application to be borne by the opponents.

1887.

RUPCHAND  
KHEMOHAND  
" "  
BALVANT  
NARAYAN,

BIRDWOOD, J. :—I concur in the judgment; and would only observe, as regards the question of valuation, that, no doubt, when property is mortgaged, the mortgagee's interest is represented by the amount of the mortgage-debt, and, as a consequence, the value of the mortgagor's interest must be the difference between the value of the property and the debt, as was said in *Balvantrav Lakshman Thakur v. Malhore* <sup>(1)</sup>. But, in a redemption suit, the whole of the mortgagor's interest is not, except in rare instances, in litigation. The measure of the value of the subject-matter in contention is the sum which must be paid for the recovery of possession of the property. Under the Court Fees' Act, the valuation of such a suit is estimated according to the principal money expressed to be secured by the instrument of mortgage; but the rules contained in that Act are not to be taken as necessarily a guide in determining the value of the subject-matter of a suit for any purposes for which the Act does not provide; as, for example, for purposes of jurisdiction: see *Bai Mahkor v. Bulakhi Chaku* <sup>(2)</sup>. And where a mortgage-debt is partly paid off from time to time, it is clear that the value of the matter in contention, for the purposes of a redemption suit, would vary from time to time, and would be less after a payment has been made than before. But if the difference between the value of the property and the amount of the debt were to be taken to be the true measure of valuation, the valuation of a redemption suit would increase, and not decrease, as the debt was paid off. No such measure can, therefore, be correct; and we are left to adopt the rule, relied on in *Kondaji Bagaji v. Anan* <sup>(3)</sup>, as laid down in *Cotterell v. Stratton* <sup>(4)</sup>, that the proper valuation of a suit for redemption is the amount remaining due on the mortgage, or claimed on it by the mortgagee. In the present case, the amount of the mortgage claim is not alleged to have

(1) Printed Judgments for 1885, p. 222.

(3) I. L. R., 7 Bom., 448.

(2) I. L. R., 1 Bom., 538.

(4) L. R., 17 Eq. C., 543 at p. 545.

1887.

RUPCHAND  
KHEMOHAND  
v.  
BALVANT  
NARAYAN.

exceeded Rs. 110. The suit was, therefore, one in which consent could be given by the parties to the application to it of the special procedure provided by Act XVII of 1879.

*Order reversed and case remanded.*

## APPELLATE CIVIL.

*Before Mr. Justice West and Mr. Justice Birdwood.*

1887.  
March 7.

BA'BA'JI DHONDSHET, (ORIGINAL PLAINTIFF), APPELLANT, v. THE COLLECTOR OF SALT REVENUE, (ORIGINAL DEFENDANT), RESPONDENT.\*

*Civil Procedure Code (Act XIV of 1882), Sec. 544—Appeal by one of several plaintiffs claiming under a joint right—Decree in such appeal binds other plaintiffs, although not parties to the appeal—Practice—Procedure.*

A. and B. brought a suit against C., and obtained a decree awarding a part of their claim. B. appealed, and the Appellate Court reversed the decree and rejected the plaintiff's claim altogether. Subsequently A., who had not joined in the appeal, applied for execution of the original decree.

*Held*, that although A. had not been a party to the appeal, he was bound by the decision of the Appellate Court, and was not entitled to take out execution.

THIS was an appeal from the decision of E. T. Candy, District Judge of Ratnágiri, in *darkhást* No. 4 of 1881.

The plaintiffs, Bábáji and his father Dhondu, sued the Collector of Salt Revenue to recover possession of two salt-pans and for mesne profits. On the 29th July, 1881, the District Judge passed a decree awarding their claim in respect of one salt-pan only. Against this decree Dhondu alone appealed to the High Court. The Collector filed cross-objections against the decree, under section 561 of the Civil Procedure Code (Act XIV of 1882). The High Court rejected the plaintiffs' claim *in toto*, and reversed the decree of the Court below.

Subsequently Bábáji, who had not joined in Dhondu's appeal, but who was aware of it, applied for execution of the original decree, contending that, as he had not been a party to the appeal, he was not bound by the decision of the Appellate Court. His application was rejected, and he now appealed against the order of rejection.

\* Appeal, No. 104 of 1884.