

... reasoning based  
The Subordinate Judge has arrived at the  
... it must be held that the judgment of the High  
Court decides more than is above set out, but when an appellate  
Court dismisses a suit on the ground of its being barred by the  
law of limitation it must be taken that the merits of the suit are  
not dealt with even though the decree of the lower Court is  
formally confirmed.

It is objected that the relief sought in this suit is not within  
the provision of section 539. It is not necessary to consider  
that objection at present. Portion of the relief sought is clearly  
within the section upon the most limited view of its scope.

We reverse the decree of the District Judge and remit the  
case for retrial on the merits. Costs, costs in cause.

*Decree reversed and case remitted.*

## APPELLATE CIVIL.

*Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Fulton.*

RAMCHANDRA RAGHUNATH KULKARNI (ORIGINAL DEFENDANT AND  
OPPONENT), APPELLANT, v. KONDAJI (ORIGINAL PLAINTIFF AND APPLI-  
CANT), RESPONDENT.\*

1896.

April 15.

*Dekkhan Agriculturists' Relief Act (Act XVII of 1879), Secs. 15 (B) and 20(1)*  
*—Redemption suit—Instalment decree—Mortgagee in possession under the decree*  
*for a specified time—Mortgagor cannot redeem before the specified time.*

Where under a decree passed in a redemption suit brought under the provisions  
of the Dekkhan Agriculturists' Relief Act (Act XVII of 1879) a mortgagee  
is continued in possession of the mortgaged property for a definite time, he is

\* Second Appeal, No. 4 of 1896.

(1) Sections 15 (B) and 20 of the Dekkhan Agriculturists' Relief Act:—

15 (B) (1). The Court may in its discretion, in passing a decree for redemption,  
foreclosure or sale in any suit of the descriptions mentioned in section three, clause  
(y) or clause (z) or in the course of any proceedings under a decree for redemption,  
foreclosure or sale passed in any such suit, whether before or after this Act comes  
into force, direct that any amount payable by the mortgagor under that decree shall  
be payable in such instalments, on such dates and on such terms as to the payment of  
interest, and, where the mortgagee is in possession, as to the appropriation of the  
profits and accounting therefor, as it thinks fit.

entitled to retain possession and is not liable to be redeemed before then at the will of the mortgagor.

SECOND appeal from the decision of W. N. Judge of Poona, confirming the order of Ráo Sáheb MOHESVAR N. Ovalekar, Subordinate Judge of Khed, in an execution proceeding.

The plaintiff filed a redemption suit against the defendant and obtained a consent decree on the 1st December, 1884. The decree directed the plaintiff to pay Rs. 375 to the defendant by instalments of rupees twenty-five a year, and that the defendant should take the income of the mortgaged property in lieu of interest.

The instalments as they became due were paid by the plaintiff. In 1895, however, he paid the whole of the balance that remained due, and he then applied to recover possession of the mortgaged property.

The defendant objected and contended that under the terms of the decree the last instalment would not become due until Magh, Shaka 1821 (1898-99 A.D.), and that until then he was entitled to remain in possession of the property and to take the produce in lieu of interest; that if the plaintiff were allowed to recover possession before that time, he (defendant) would be a loser; that he had let the land in dispute to a tenant for a period of five years, and that the Court had no power to alter the terms of a consent decree.

The Subordinate Judge granted the plaintiff's application, permitting him to pay off the remaining instalments at once and to recover possession of the land.

(2) \*If a sum payable under any such direction is not paid when due, the Court shall, except for reasons to be recorded by it in writing, instead of making an order for the sale of the entire property mortgaged or for foreclosure, order the sale of such portion only of the property as it may think necessary for the realization of that sum.

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20. The Court may at any time direct that the amount of any decree passed, whether before or after this Act comes into force, against an agriculturist, or the portion of the same which it directs under section nineteen to be paid, shall be paid by instalments with or without interest.

On appeal by the defendant the Judge confirmed the order.

The defendant preferred a second appeal.

*Purshotam P. Khare*, for the appellant (defendant):—The consent decree was, no doubt, passed under the provisions of the Dekkhan Agriculturists' Relief Act; still even under that Act it is not open to the Court to alter the terms of a decree after it has been passed—*Balkrishna v. Abaji*<sup>(1)</sup>. A Court executing a decree must execute it according to its terms—*Mahant Ishwargar v. Chudasama Manabhai*<sup>(2)</sup>; *Lakshman v. Shekh Abdulla*<sup>(3)</sup>. The defendant has suffered loss by possession being given to the plaintiff earlier than at the due date. He has lost interest on his money for which he should be recouped. Further, relying on the decree he has already let the land, and the period of tenancy is yet to run. If the tenant be evicted, he will sue the defendant for damages.

*Trimbal R. Kotwal*, for the respondent (plaintiff):—The order for the payment of the decretal debt by instalments was in the interest of the plaintiff, who is an agriculturist, and not for the benefit of the defendant. The defendant has, therefore, no right to refuse to receive the balance of the debt at once. The decree does not prevent the plaintiff from paying the debt at once if he can. It is not open to the defendant to say that because he has leased the land for a period which has not expired, the plaintiff is not entitled to recover possession.

FARRAN, C. J.—The decree in this case provides that its amount (Rs. 375) shall be paid by the plaintiff by annual instalments of Rs. 25 each and that until the decree is paid off in Shake 1821 the defendant is to remain in possession of the mortgaged property and to receive the produce in lieu of interest, he paying the assessment. The suit in which the decree was passed was for redemption and was brought under the provisions of the Dekkhan Agriculturists' Relief Act. The decree was the result of a compromise and was passed by consent, but presumably after the Judge had satisfied himself that the mutual obligations of the parties had been equitably determined. Section 15 (B) of

(1) I. L. R., 12 Bom., 326.

(2) I. L. R., 13 Bom., 106.

(3) P. J., 1890, p. 154.

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the Act enabled the Court in its discretion to pass the decree in the above form.

The plaintiff has paid several instalments in pursuance of its terms. The question is whether he is now entitled at once to pay the residue of what is due under the decree and redeem the property. The matter is of importance, as section 15 (B) enables the Court in its discretion to continue the mortgagee in possession of the mortgaged property for a fixed period as a means of liquidating the debt, and the question is likely often to recur.

The general rule is that when the mutual rights and obligations of the plaintiff and defendant have been determined by a decree, the decree affords the measure of those rights and obligations, and a Court executing the decree can only execute it in accordance with its terms—*Lakshman v. Shekh Abdulla*<sup>(1)</sup>; *Mahant Ishwargar v. Chudasama Manabhai*<sup>(2)</sup> and *Balkrishna v. Abaji*<sup>(3)</sup>. In the last mentioned case it was held that when a decree was made payable by instalments, the whole becoming due in default of payment of an instalment, the Court had no power, even under the Dekkhan Agriculturists' Relief Act, to make a further order for the payment of the decree by instalments. Section 20 of the Act now confers that power upon the Court, but no general power to vary the terms of a decree once passed is thereby given.

The decree in the present case determines the mode in which the plaintiff is entitled to redeem and the defendant is liable to be redeemed, and we think that, in the absence of consent, the executing Court cannot compel the defendant to allow himself to be redeemed except in accordance with the mode provided by the decree. To allow the plaintiff to redeem now would be a hardship on the defendant. As each instalment is paid to the defendant, the stipulation as to interest contained in the decree becomes more and more favourable to him. When half the debt is paid, he receives as much interest on the unpaid half as he originally obtained on the whole, and so, as each instalment is paid, he gets an increasingly high rate of interest on the unpaid balance. This must be presumed to have been in

(1) F. J., 1890, 154.

(2) I. L. R., 13 Bom., 106.

(3) I. L. R., 12 Bom., 326.

the mind of the Judge when he passed the decree, and he must have struck, or the parties must have done so with his approval, a fair average rate for the whole period. The defendant moreover, alleges that on the strength of the terms of the decree he has let the land to tenants and thus incurred obligations towards them. It would be manifestly unfair to expose him to risk at the suit of such tenants. We think that when a mortgagee is, under a decree, continued in possession of the mortgaged property for a definite time he is entitled to retain that possession until the expiration of the specified period and is not liable to be redeemed before then at the wish of the plaintiff. His position otherwise would be most anomalous.

We reverse the orders of the Courts below and dismiss the Darkhast No. 377 of 1895 with costs throughout.

*Order reversed.*

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## APPELLATE CIVIL.

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*Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Fullon.*

MALUJI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, v. FAKIR-  
CHAND AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.\*

1896.

April 16.

*Limitation Act (XV of 1877), Sch. II, Art. 134—Purchaser for value—Mortgage—Mortgage in 1842—Subsequent mortgage in 1872 by mortgagee representing himself to be owner—Decree on second mortgage—Sale in execution—Purchaser at auction sale—Right of original mortgagor in 1892 to redeem mortgaged property.*

In 1842 Andoji, the grandfather of the plaintiff, mortgaged the land in question to one Manekchand with possession. On 9th May, 1872, Manekchand's son Lakhmichand, who was then still in possession, representing himself to be the owner mortgaged the property with possession to Tuljaram (defendant No. 2) and Sarupchand, the grandfather of Lakhmichand Gulabchand (defendant No. 3). These defendants sued upon their mortgage of May, 1872, and obtained a decree and sold the property in 1881 in execution, purchasing it themselves. Defendant No. 3 subsequently sold his share to one Fulchand (defendant No. 4). In 1892 the plaintiff, (who was the grandson of Andoji, the original mortgagor in 1842,) sued the first defendant (the grandson of the original mortgagee Manekchand under the mortgage of 1842) for redemption, making Tuljaram and Lakhmichand and Fulchand (defendants Nos. 2, 3 and 4) party-defendants.

\* Second Appeal, No. 340 of 1894.