FULL BENCH.

APPELLATE CIVIL.

1907. *August* 8.

Before Mr. Justice Russell, Chief Justice (Acting), Mr. Justice Chandavarkar, Mr. Justice Heaton and Mr. Justice Knight.

FATMABIBI AYAL BADRUDIN AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* GANESH BAILAL JOGLEKAR (ORIGINAL PLAINTIFF), RESPONDENT.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), sections 12, 13 and 71A†—Application of the sections to a suit instituted before the Act came into force in a particular District—Retrospective effect—Taking an account between parties.

* First Appeal No. 76 of 1906.

† Sections 12, 13 and 71A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) are as follows:—

12. *History of transactions with agriculturist-debtors to be investigated.*—In any suit of the description mentioned in section 3, clause (*w*), in which the defendant or any one of the defendants is an agriculturist,

and in any suit of the descriptions mentioned in section 3, clause (*y*) or clause (*z*),

the court, if the amount of the creditor's claim is disputed, shall examine both the plaintiff and the defendant as witnesses, unless, for reasons to be recorded by it in writing, it deems it unnecessary so to do, and shall enquire into the history and merits of the case, from the commencement of the transactions between the parties and the persons (if any) through whom they claim, out of which the suit has arisen, first with a view to ascertaining whether there is any defence to the suit on the ground of fraud, mistake, accident, undue influence or otherwise, and, secondly, with a view to taking an account between such parties in manner hereinafter provided.

When the amount of the claim is admitted and the Court, for reasons to be recorded by it in writing, believes that such admission is true and is made by the debtor with a full knowledge of his legal rights as against the creditor, the Court shall not be bound so to enquire, but may do so if it thinks fit.

In other cases in which the amount of the claim is admitted the Court shall be bound to enquire as aforesaid.

Section 9, clause first, of Bombay Regulation V of 1827, is repealed so far as regards any suit to which this section applies.

Nothing herein contained shall affect the rights of the parties to require that any matter in difference between them be referred to arbitration.

13. *Mode of taking account.*—When the Court enquires into the history and merits of a case under section 12, it shall—

Notwithstanding any agreement between the parties or the persons (if any) through whom they claim, as to allowing compound interest or setting off the profits of the

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Sections 13 and 71A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) have no retrospective effect. Section 12 of the Act is retrospective only so far as it regulates procedure. That part of the section which relates to taking an account between the parties is not retrospective.

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mortgaged property without an account in lieu of interest, or otherwise determining the manner of taking the account,

and notwithstanding any statement or settlement of account, or any contract purporting to close previous dealings and create a new obligation,

open the accounts between the parties from the commencement of the transactions and take that account according to the following rules (that is to say) :—

(*a*) separate accounts of principal and interest shall be taken :

(*b*) in the account of principal there shall be debited to the debtor such money as may from time to time have been actually received by him or on his account from the creditor, and the price of goods, if any, sold to him by the creditor as part of the transactions :

(*c*) in the account of principal there shall not be debited to the debtor any money which he may have agreed to pay in contravention of section 257A of the Code of Civil Procedure :

(*d*) in the account of principal there shall not be debited to the debtor any accumulated interest which has been converted into principal at any statement or settlement of account or by any contract made in the course of the transactions, unless the Court, for reasons to be recorded by it in writing, deems such debit to be reasonable :

(*e*) in the account of interest there shall be debited to the debtor, monthly, simple interest on the balance of principal for the time being outstanding at the rate allowed by the Court as hereinafter provided :

(*f*) all money paid by or on account of the debtor to the creditor or on his account, and all profits, service or other advantages of every description, received by the creditor in the course of the transactions [estimated, if necessary, at such money value as the Court in its discretion, or with the aid of arbitrators appointed by it, may determine], shall be credited first in the account of interest; and, when any payment is more than sufficient to discharge the balance of interest due at the time it is made, the residue of such payment shall be credited to the debtor in the account of principal :

(*g*) the accounts of principal and interest shall be made up to the date of instituting the suit, and the aggregate of the balances (if any) appearing due on both such accounts against the debtor on that date shall be deemed to be the amount due at that date, except when the balance appearing due on interest account exceeds that appearing due on the principal account, in which case double the latter balance shall be deemed to be the amount then due.

71A. *Rate of interest allowable on taking an account.*—In taking an account under section 13 or in any suit under this Act where interest is chargeable such interest shall be awarded at the following rates :—

(*a*) the rate, if any, agreed upon between the parties or the persons (if any) through whom they claim, unless such rate is deemed by the Court to be unreasonable ; or

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FIRST appeal from the decision of Gulabdas Laldas, First Class Subordinate Judge of Thána in original suit No. 115 of 1904.

The plaintiff instituted the present suit on the 23rd April 1904 in the Court of the First Class Subordinate Judge of Thána for the recovery of Rs. 5,577-5-6 including compound interest due under a registered mortgage bond dated the 27th October 1892. After the suit was filed the Government of Bombay, on the 15th August 1905, made sections 7, 11—21, 23, Chapters V, VI, VII and section 71A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) applicable to the District of Thána.[1]

Originally the suit was filed against two defendants, and one of them having died before the service of the summons, his legal representatives were brought on the record and thereupon all the defendants filed their written statement on the 13th September 1905 contending *inter alia* that the history of past dealings between the parties should be inquired into on the lines laid down in section 13 of the Dekkhan Agriculturists' Relief Act, that the rate of interest should be fixed as provided in that section and that the amount that might be found due to the plaintiff be made payable by annual instalments of Rs. 250 each.

The Subordinate Judge held that the defendants were not entitled to the benefit of the provisions of sections 12 and 13 of the Dekkhan Agriculturists' Relief Act even though the suit was instituted prior to and was pending on the date of the extension of the sections to the Thána District and that he was not competent to disturb the rate of interest and the mode of calculating it stipulated for between the parties. He therefore made the amount claimed payable in eight equal instalments. His reasons were as follows :—

While it is contended on defendants' behalf on the ground that the defence was filed while the provisions of the Dekkhan Agriculturists' Relief Act were in operation, that the defendants are competent to claim the beneficent provisions

(*h*) if such rate is deemed by the Court to be unreasonable, or if no rate was agreed upon, or, when any agreement between the parties or the persons (if any) through whom they claim, to set off profits against interest and assessment and similar charges without an account, has been set aside by the Court, such rate as the Court may deem reasonable.

(1) Notification No. 4144, *Bombay Government Gazette*, Part I, page 1038.

of sections 13 and 15, it is urged on behalf of the plaintiff that the suit having been commenced prior to the introduction of the special rules, he is entitled to have a decision on it according to the law in force on the date of its institution.

The general rule is that a repealed statute cannot be acted on after it is repealed, but as provided in section 6 of the General Clauses Act, 1868, all matters that have taken place under it before its repeal remain valid.

But a new order of a Court, not ancillary or provisional but directing a further substantive step in the execution of a decree, is a new proceeding which should be governed by the law in force when the order is made and not by the law which it repeals (8 Bom., 340, *Shivram* v. *Kondiba*).

This ruling is relied on by the learned pleader for the defendants, but a careful perusal of the whole decision and a study of the circumstances on which the ruling was given, show that what is laid down in it is that a proceeding having been begun under one state of law should be governed throughout by the law then in force ordinarily, and that as to a matter of procedure a new statute may be applied to the stages of a litigation subsequent to its coming into force. No doubt legislature may give a retroactive operation even to a law affecting substantive rights and rights of action, but the intention to exercise such an extraordinary prerogative has of necessity to be expressed in unambiguous and unequivocal language.

There is nothing in sections 12 and 13 or in the Government notification extending their operation to Thána to show that they or any of the other sections applied should have retrospective effect or apply to pending suits, and the suit of the plaintiff having been begun prior to the 17th of August 1905, he had, so to say, a right vested in him to have it decided according to the law in force then, except perhaps on matters on which any of the extended provisions had been inherently given retroactive force.

This seems to have been the principle adopted by the Bombay High Court in *Suryaji* v. *Tukaram*, I. L. R. 4 Bom., 358, in which it is held that "the provisions of sections 11 and 12 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) are applicable to suits instituted upon and after the 1st November 1879," and remarked in the judgment "that sections 12 and 13 of Act XVII of 1879 are applicable only to suits instituted upon or after the 1st November 1879" as it is not probable that in suits instituted before that time in those parts of the Dekkhan in which Act XVII of 1879 is in force one mode of trial should be adopted in Courts within whose jurisdiction the defendants reside....."

A change in the law does not generally affect any proceeding begun when it comes into force, I. L. R. 11 Bom., 469. It is provided by Act I of 1868 that a change in the law shall not generally affect any proceeding begun when it comes into force and this principle was applied in the case of *Ratansi Kalianji*, 2 Bom. 148; a change of status or legal capacity generally operates at once when it either extinguishes, enlarges, diminishes or varies the extent

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to which a party may claim the aid or protection of a Court (see *ibid*). It is obvious that there has been no change of status in any of the parties since the commencement of the litigation, and as the provisions of sections 12 and 13 of the extended Act are not those of procedure, pure and simple, but are evidently prejudicial to the substantive rights and vested competency to claim principal and interest according to the terms of the agreement between him and his debtors, I cannot bring the litigation under their operation.

It is for the same reasons that I think that I am not competent to reduce or modify the stipulation as to the rate of interest and the mode of its calculation on the principle of annual rests.

The foregoing considerations do not, however, prohibit my applying the provisions of Article 15B of the Act to the suit and exercising the discretion vested in the Court by it to make the amount payable in instalments inasmuch as the section is expressly given a retrospective force and lays down that "the Court may in its discretion, in passing a decree for redemption, foreclosure or sale in any suit of the descriptions mentioned in section 3, 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....." Ordinarily it is not competent to a Court in a suit on the foot of a deed of mortgage to decree payment in instalments and the section contains nothing regarding the Court's power in regard to suits instituted prior to the introduction of the Act but not converted into decrees till after the Act has become a statutory law of the land. It would, however, be anomalous to construe the section as excluding pending suits because the Legislature have made its provisions expressly retrospective and given discretion to the Court in regard to decrees in mortgage suits passed even before the coming into force of the Act, and it does not stand to reason to say that a Court cannot decree instalments in a case at the time of giving a decree but can do so on the very next day after it has been passed. I am therefore of opinion that the defendants are within their rights to pray for and obtain the facility of making payment in reasonable instalments.

The defendants having appealed the appeal was heard by Chandavarkar and Heaton, JJ., who, on the 15th July 1907, referred the question involved in the appeal for the consideration of a Full Bench in the following terms:—

CHANDAVARKAR, J.:—Having regard to the apparent conflict between the decisions of this Court in *Pannalal* v. *Kalu*[1], and the decision in *Suryaji* v. *Tukaram*[2], and the general importance

(1) (1906) 8 Bom. L. R. 798. (2) (1880) 4 Bom. 358.

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of the question arising, we think that the following question ought to be referred to the Full Bench :—

Whether sections 12, 13 and 71A of the Dekkhan Agriculturists' Relief Act apply to suits instituted before that Act came into force in the particular district in which that suit was instituted.

The question was argued before the Full Bench composed of Russell, C. J. (Acting), Chandavarkar, Heaton and Knight, JJ.

B. V. Vidwans, for the appellants (defendants) :—The reference to the Full Bench was made owing to the apparent conflict between *Suryaji* v. *Tukaram*[1] and *Pannalal* v. *Kalu*[2]. Therefore it is important to note in what respect they agree. In the latter case it was held that section 12 of the Dekkhan Agriculturists' Relief Act, so far as it makes it obligatory on the Court to make an inquiry into the history and merits of the past dealings between the parties, was purely a matter of procedure. In the former case also it was recognized that sections 12 and 13 deal with the "mode of trial" or procedure. It is a general principle of law that alterations in procedure are always retrospective unless there is some indication to the contrary.

In *Suryaji* v. *Tukaram*[1] it was held that there was such a reason and so sections 12 and 13 were held to be not applicable to pending suits. It was said that a defendant could only claim the benefit of section 12 when he was sued in a Court within the limits of whose jurisdiction he resided, and as before the introduction of the Act an agriculturist could be sued in cases of money claims in the Court within the limits of whose jurisdiction the cause of action arose, he could not there get the advantage of the new procedure. This it was thought would be an anomaly and so the provisions were held to be not applicable to pending suits. We submit that this was not a good reason. In the first place suits for redemption by an agriculturist must necessarily be brought where the mortgaged property is situated, that is, generally where the agriculturist resides. So even assuming the reasoning to be correct, it was only a few agriculturists that would get the relief, but that certainly was no

(1) (1886) 4 Bom. 258. (2) (1906) 8 Bom. L. R. 798.

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reason for denying it to the majority. As a matter of fact there really could be no anomaly. For under sections 22 to 25 of the Civil Procedure Code an agriculturist could get a suit transferred to the Court within whose jurisdiction he resided.

The Dekkhan Agriculturists' Relief Act never aimed at introducing uniformity of procedure. By the amendment of 1895 power was given to the Local Government to extend the Act wholly or partially to any district or part of a district and thereby it was made clear that the relief of indebted agriculturists was the object of the Act and not the introduction of uniformity of procedure as regards all agriculturists.

[CHANDAVARKAR, J. :—The sections in question do not merely affect procedure: they affect rights, therefore they cannot have retrospective effect. *Javanmal Jitmal* v. *Muktabai*[1]. *In the matter of the petition of Ratansi Kalianji*[2].]

The direction to make an inquiry into the history and merits of the past dealings is at any rate a matter of procedure. Such inquiry is to be made, first, with a view to ascertain whether there is any defence to the suit on the ground of fraud, etc., and, secondly, with a view to take an account.

[KNIGHT, J.—The taking of accounts may be a matter of procedure, but the enforcing of accounts is not procedure.]

On making the inquiry if the Court finds that the transaction is unconscionable, then it can exercise its inherent equitable jurisdiction to give relief. Sections 13 and 71A of the Act merely prescribe the mode in which that relief should be granted. They indicate how the amount of the principal and interest should be calculated.

The purpose for which the Act was passed will have to be taken into consideration in determining the question whether these sections apply to pending suits or not. The Act was passed after the agrarian riots in the Dekkhan and it aims at giving relief to indebted agriculturists. It is not that every degree of indebtedness requires relief, but sometimes the indebtedness may rise to such an extent that there may be a feeling of helplessness

(1) (1890) 14 Bom. 516. (1877) 2 Bom. 143 at p. 196.

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and despair and it is in such cases that the Act was meant to afford relief.

D. A. Khare, for the respondent (plaintiff) :—Section 12 of the Dekkhan Agriculturists' Relief Act directs inquiry into the history and merits of a case with a two-fold object: first, to ascertain whether there is any defence to the suit on the ground of fraud, mistake, accident, undue influence or otherwise, and secondly, with a view to take an account between the parties. It thus deals with mixed questions of procedure and rights. therefore it should not be given retrospective effect. The section mixes procedure and rights so inextricably that it is not possible to separate the one from the other and to give retrospective effect to it.

If retrospective effect is given to the first part of the section, then it will become obligatory upon the Court to inquire into the history of the case from the commencement even in those cases where neither fraud, etc., is alleged or pleaded. The Judge may ascertain on the pleadings that there is nothing suspicious in the transaction, and yet if the section is given a retrospective effect such conclusion will not save him from going into the history of the transactions from the very beginning and thus entering upon a search bound to be fruitless.

Under the principle enunciated in *Jivanmal Jitmal* v. *Muktabai*[1], retrospective effect should not be given to sections 12, 13 and 71A of the Act.

Wherever the Act meant that a particular provision of it should have retrospective effect, it has said so in distinct terms: see sections 20, 22 and 50.

PER CURIAM.—The question submitted for our decision is whether sections 12, 13, and 71A of the Dekkhan Agriculturists' Relief Act apply to suits instituted before that Act came into force in the particular district in which the suits are instituted.

We are of opinion that sections 13 and 71A have no such application, and that section 12 must be allowed retrospective effect only in so far as it regulates the procedure of the Court.

(1) (1890) 14 Bom. 536.

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To obviate the possibility of misunderstanding, we add that in this view of the law it appears to us advisable to specify the last sixteen words of the main paragraph of the section, "and, secondly, with a view to taking an account between such parties in manner hereinafter provided," as the particular passage to which retrospective effect must be denied.

In this connection we invite attention to the recent ruling of a Division Bench of this Court in *Pannalal* v. *Kalu*[1] which we read as indicating a similar construction of the law.

Order accordingly.

G. B. R.

(1) (1906) 8 Bom. L. R. 708.