APPELLATE CIVIL.

Before Mr. Justice Russell and Mr. Justice Chandavarkar.

GOPAL GHELA (ORIGINAL DEFENDANT), APPELLANT, *v.* RAJARAM AMTHA AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS. *

1911. *September* 21.

Dekkhan Agriculturists' Relief Act (XVII of 1879), section 10A[1]*—Written instrument—Oral evidence to vary the terms—Enactment relating to procedure—Retrospective effect—Pending proceedings—Suit—Appeal.*

The law embodied in section 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) is one of procedure, and being retrospective in effect applies to pending proceedings whether in a suit or an appeal.

SECOND appeal from the decision of Vadilal T. Parekh, First Class Subordinate Judge with appellate powers, at Broach, confirming the decree passed by C. M. Jhaveri, Subordinate Judge at Vagra.

This was a suit to redeem a mortgage dated 1869. The deed was in form an out-and-out sale. The plaintiffs alleged that there was a contemporaneous oral agreement between the parties to treat the sale-deed as a deed of mortgage. The

* Second Appeal No. 809 of 1910.

[1] The section runs as follows :—

Section 10A.—Whenever it is alleged at any stage of any suit or proceeding to which an agriculturist is a party that any transaction in issue entered into by such agriculturist or the person, if any, through whom he claims was a transaction of such a nature that the rights and liabilities of the parties thereunder are triable wholly or in part under this chapter, the Court shall, notwithstanding anything contained in section 92 of the Indian Evidence Act, 1872, or in any other law for the time being in force, have power to inquire into and determine the real nature of such transaction and decide such suit or proceeding in accordance with such determination and shall be at liberty, notwithstanding anything contained in any law as aforesaid, to admit evidence of any oral agreement or statement with a view to such determination and decision :

provided that such agriculturist or the person, if any, through whom he claims was an agriculturist at the time of such transaction :

provided further that nothing in this section shall be deemed to apply to any suit to which a *bonâ fide* transferee for value without notice of the real nature of such transaction or his representative is a party where such transferee or representative holds under a registered deed executed more than twelve years before the institution of such suit.

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defendant contended *inter alia* that the deed in question was what it was meant to be a sale-deed.

The Subordinate Judge allowed the oral agreement to be proved and held that the transaction was a mortgage. He took accounts under the provisions of the Dekkhan Agriculturists' Relief Act, 1879; and finding that the debt was satisfied, ordered the defendant to hand over the property to the plaintiffs. This decree was confirmed on appeal.

The defendant appealed to the High Court.

Whilst the appeal was pending in the High Court, the provisions of section 10A of the Dekkhan Agriculturists' Relief Act, 1879, were made applicable to the Broach District.

G. N. Thakore, for the appellant.

L. A. Shah, for the respondents.

CHANDAVARKAR, J.:—Both the lower Courts have misunderstood the decisions of this Court on the question whether and when oral evidence is admissible to prove that what purports to be a deed of sale represents, according to the true intention of the parties, a transaction of mortgage. The effect of those decisions is that, where section 10A of the Dekkhan Agriculturists' Relief Act does not apply, such evidence is admissible, under proviso 1 to section 92 of the Indian Evidence Act, only when the element of fraud or other similar element mentioned in the proviso exists to invalidate the deed. The Subordinate Judge, First Class, who decided this case on appeal, has relied in support of his view on some *dicta* in one of the judgments in *Sangira Malappa* v. *Ramappa*[1] without carefully noticing their context; and the result of the Subordinate Judge's decision is that he has treated the deed of sale as one of mortgage on the evidence of a contemporaneous agreement between the parties contradicting the terms of the deed. That is not the law laid down in *Sangira Malappa* v. *Ramappa*[1].

The decree, therefore, would have to be reversed and the suit for redemption brought by the respondent dismissed, unless we allowed the contention of his pleader that he was at this stage entitled to rely on and invoke the aid of section 10A of the Dekkhan Agriculturists' Relief Act. That section was not in

(1) (1909) 34 Bom. 59.

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force in the district, from which this case comes, either when the suit was filed or when the appeal to the District Court was heard and decided. It has been applied to the district since the disposal of the appeal; and we are asked to confirm the decree on the ground of the section.

The question is whether in second appeal we have jurisdiction to give effect to the section, which is now part of the law of the district but which was not the law when the case was pending in either of the Courts below.

The section provides that the Court shall have power to admit evidence of the kind mentioned in it "whenever it is alleged at any stage of any suit or proceeding to which an agriculturist is a party" that any transaction in issue is in reality other than what it is ostensibly. Is an appeal or a second appeal a stage of a suit or proceeding within the meaning of the section?

In *Chinto Joshi* v. *Krishnaji Narayan* [1], followed by Sargent, C. J., and Nanabhai Haridas, J., in *Rustomji Burjorji* v. *Kessowji Naik* [2], West, J., said (at p. 215) :—

"When judicial inquiry has reached its intended close in an adjudication, requiring thenceforward in theory only a ministerial or coercive exercise of authority to give it practical effect, the party who strives by an appeal to unsettle again the legal relation, which in itself has by the act of the Court become settled, may fairly be regarded as instituting a new proceeding. Such has been the view of some eminent authorities. But even on that point there have been opinions to the contrary, which are supported by the consideration that the legal pursuit of a remedy, suit, appeal, and second appeal, are really but steps in a series of proceedings connected by an intrinsic unity."

This latter view has the sanction of some of the latest decisions of the Courts in England. In *Hood Barrs* v. *Heriot* [3], explained by Ridley, J., in *Nunn & Co.* v. *Tyson* [4], the House of Lords held that "an appeal was nothing but a step in an action or proceeding already instituted, and was not the institution of fresh proceedings." And Davey, L. J., in his judgment in the former case in the Court of Appeal explained that "an appeal is in reality in the nature of a defence by the

(1) (1879) 3 Bom. 214.

(2) (1884) 8 Bom. 287 at p. 293.

(3) [1897] A. C. 177.

(4) [1901] 2 K. B. 487.

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person against whom an order has been made." See *Hood Barrs* v. *Cathcart*(1).

Whichever view we adopt, whether an appeal or second appeal is regarded as a fresh proceeding, not a continuation of the suit, or whether we treat it as a step in or stage of the suit itself, the result is the same for the purposes of section 10A of the Dekkhan Agriculturists' Relief Act. It is either a stage of a suit or it is a fresh proceeding; and if the section is in force when the appeal or second appeal is pending, the Court has power to act upon its terms in deciding the appeal. The law embodied in the section is one of procedure, and, being retrospective in effect, applies to pending proceedings.

On these grounds, accepting the finding of fact of the Court below that the transaction in dispute, ostensibly a sale, represented a mortgage according to the true intention of the parties, we must confirm the decree with costs.

Decree confirmed.

R. R.

(1) [1894] 3 Ch. 376 at p. 380.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1911. *October 3.*

ISMAILMIYA BIN BANNEMIYA (ORIGINAL PLAINTIFF), APPELLANT, *v.* WAHADANI BEGAM, A MINOR, BY HER GUARDIAN FATHER KUDBUDIN AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Mahomedan Law—Religious institution—Khanga attached to Darga—Right of management—Exclusion of females—Prevailing usage—Usage as indication of the direction of the founder.

The right of management of religious institutions such as Khangas attached to Dargas is to be decided according to the prevailing usage, that usage being taken as indication of the direction of the founder. Even in cases where appointments have been regularly made by the last holders an inquiry into the usage governing such appointments has been considered relevant.

* Second Appeal No. 247 of 1905.