

that of *Parry & Co. v. Appasami Pillai*⁽¹⁾, relied on in the lower Courts, for there was not preliminary decision of the question of jurisdiction on the protest of the defendant and no circumstance of pressure such as the Madras Court thought existed in *Parry & Co.'s* case⁽¹⁾.

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We set aside the decree of the lower appellate Court and return the darkhast for execution of the Baroda Court's decree in the Court of the Second Class Subordinate Judge of Surat.

The respondent must pay the costs of his opposition to the darkhast up to date.

Decree set aside.

G. B. R.

⁽¹⁾ (1880) 2 Mad. 407.

APPELLATE CIVIL.

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

RAMA VALAD TULSA MAHAR (ORIGINAL PLAINTIFF), APPELLANT,
v. BHAGCHAND MOTIRAM AND OTHERS (ORIGINAL DEFENDANTS),
RESPONDENTS.*

1914.
July 31.

Civil Procedure Code (Act V of 1908), sections 11 and 47—Mortgage debt—Suit for recovery by sale of mortgaged property—Decree for payment within six months and in default sale—No further action taken under the decree—Continuance of the relation of mortgagor and mortgagee—Suit by mortgagor for redemption—No bar of sections 11 and 47 of the Civil Procedure Code (Act V of 1908).

The defendant in a suit for sale under a mortgage-decree, who is given six months' time to pay the decretal debt and in default the plaintiff to recover the decretal debt by sale of the mortgaged property, is not in a position of a decree-holder who has a decree to execute. His right of payment within six months is a right which he has in mitigation of his liabilities under the decree. If he does not pay within six months and the mortgagee does not apply for decree absolute, the latter does not get rid of the relationship of mortgagor and

* Second appeal No. 261 of 1913.

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mortgagee and there is nothing to prevent the mortgagor or his representative from filing a suit for redemption but he cannot go behind the decree in the mortgagee's suit in so far as it settled the amount of the mortgage debt up to the date of that decree.

Such a suit for redemption is not barred either under section 11 or section 47 of the Civil Procedure Code (Act V of 1908).

SECOND appeal against the decision of G. R. Datar, Additional First Class Subordinate Judge of Nasik with appellate powers, confirming the decree of C. G. Khar-kar, Joint Subordinate Judge of Nasik.

Suit to redeem and recover possession.

The property in suit belonged to Chima Bhika Mahar. He mortgaged it to Bhagchand Motiram for Rs. 300 on the 17th June 1890. On the 2nd April 1902 Chima assigned the equity of redemption to Rama *valad* Tulsa Mahar. One Parashram Ramlal obtained a money-decree against Chima in suit No. 229 of 1902 and in execution of that decree the mortgaged property was sold in July 1906. At the auction sale the property was purchased for the mortgagee Bhagchand Motiram by one Shivram Ramlal. Subsequently the mortgagee Bhagchand Motiram brought a suit on the mortgage, No. 44 of 1905, against the mortgagor Chima and Tulsa, father of Rama, the assignee of the equity of redemption and obtained a decree, dated the 25th September 1905, which gave the defendants six months' time to pay the money due under the mortgage and in default the plaintiff was to recover the amount decreed by sale by applying for decree absolute. No further action was taken under the decree.

On the 22nd August 1911, Rama Tulsa Mahar, the assignee of the equity of redemption, brought the present suit under the provisions of the Dekkhan Agriculturists' Relief Act for redemption and recovery of possession or in the alternative for recovery of possession.

Defendant 1, Bhagchand Motiram, the mortgagee, answered that Shivram Ramlal purchased the property for the defendant at the auction sale in execution of the money-decree, No. 229 of 1902, and that the plaintiff had no right to sue.

Defendants 2 and 3, the legal representatives of the deceased auction purchaser, Shivram Ramlal, raised the same defence.

Defendants 4 and 5 answered *inter alia* that they were *bonâ fide* purchasers of part of the property and had spent a good deal on the improvements of the land, that they had no knowledge of the mortgage and the assignment to plaintiff, that the notices sent to them of the auction sale were not legal and sufficient, that the mortgage was not subsisting and the plaintiff had no right to sue and that the Court had no jurisdiction to try the suit.

The Subordinate Judge found that the mortgage was not subsisting, that the suit was barred by sections 11 and 47 of the Civil Procedure Code and that the plaintiff had no right to redeem. He, therefore, dismissed the suit relying on *Vinayak v. Dattabraya*⁽¹⁾, *Sita Ram v. Madho Lal*⁽²⁾, *Vedapuratti v. Vallabha Valiya Raja*⁽³⁾ and Gour on Transfer of Property Act, Volume II, paragraph 1983, 3rd Edition.

On appeal by the plaintiff the appellate Court confirmed the decree for the following reasons :—

It is not disputed that the defendant No. 1 had, for recovering the debt due under the mortgage for the redemption of which this suit is, brought suit No. 44 of 1905. In this suit the plaintiff's father himself was a party. A decree was passed in this suit by which the defendants, including the plaintiff's father, were allowed six months' time to pay the money due under the mortgage and in the event of default the plaintiff, *i. e.*, the defendant No. 1 in this suit, was ordered to recover the amount decreed by sale of the mortgaged

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(1) (1902) 26 Bom. 661.

(2) (1901) 24 All. 44.

(3) (1901) 25 Mad. 300.

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property by applying for making the decree absolute [*vide* exhibits 5 and 30 (a)]. The questions of redeeming the mortgage and of realizing the mortgage debt were thus finally determined in that suit, and they therefore cannot be again tried by a separate suit. The remedy of the plaintiff, if any, for redeeming the mortgage was by paying the decretal debt and thus redeeming the mortgage by satisfying the decree obtained by defendant No. 1. The question of the satisfaction of that mortgage was therefore a question of the satisfaction of that decree, and that could be determined only by the Court executing the decree and not by a separate suit. This suit is therefore barred both under section 11 and section 47 of the Civil Procedure Code. The appellant's pleader relies upon the ruling 24 All. 44, but I think the ruling has no application, because in the present case the decree the effect of which we have to consider expressly directed that if the property was not redeemed as directed, the mortgagee, defendant No. 1, was to recover the debt by sale of the mortgaged property.

The present suit cannot be treated as an application for execution, because the time of six months allowed by the decree for making the payment had long expired before the institution of the present suit and there was no authority given by Rule 5 of Order XXXIV of the Code of Civil Procedure to extend the time. The fact that the defendant No. 1 had never applied to make the decree absolute cannot avail the plaintiff as his only remedy for redeeming the mortgage is not now available for him. His right to redeem the property has thus become practically extinct (13 Bom. 567).

The plaintiff preferred a second appeal.

K. N. Koyaji for the appellant (plaintiff):—The respondent-mortgagee never applied to have the decree nisi for sale made absolute, therefore, the relations of mortgagor and mortgagee have continued up to the present day and there can be no bar to the present suit for redemption. "The estate does not lose the quality of a mortgage until the final order for foreclosure": *Thompson v. Grant*⁽¹⁾; Fisher's Law of Mortgage, 6th Edition, paragraph 1385, page 711.

The present suit is not barred by *res judicata* as we do not seek to go behind the former decree and set up any claim contrary to it.

The suit is also not barred by section 47 of the Civil Procedure Code as the plaintiff was a defendant in the

⁽¹⁾ (1819) 4 Madd. 438.

former suit and was not in the position of a decree-holder who could apply for execution. This is not the case of the plaintiff suing a second time for redemption.

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[Scott, C. J., referred to *Hansard v. Hardy*⁽¹⁾.]

W. B. Pradhan for the respondents (defendants):—The mortgagee having taken possession under the auction sale of 1906, it was not necessary for him to apply for a decree absolute. The present plaintiff was a defendant in the former suit the decree in which operated partially in his favour. He could have executed that decree by paying the mortgage amount within six months. Not having done so, he is barred by section 47 of the Civil Procedure Code. In the former suit redemption was decreed, therefore, the plaintiff is barred by section 11 of the Code and he cannot bring a fresh suit.

SCOTT, C. J. :—The plaintiff claims to be the assignee of the equity of redemption of a certain mortgagor, named Chima, Chima's mortgage having been created on the 17th of June 1890 in favour of the first defendant. The assignment of the plaintiff is dated the 2nd of April 1902. Subsequent to that assignment the Court under a money-decree obtained against Chima in suit No. 229 of 1902 at a Court-sale held in July 1906 put up to sale the right, title and interest of Chima in this property which was attached by the decree-holder in that suit, and at that sale the defendant-mortgagee was declared to be the purchaser.

Prior to that purchase the defendant No. 1 had brought a suit upon Chima's mortgage for sale of the mortgaged property in 1905, and the plaintiff's father, who was Chima's assignee, was joined as a party to that suit. A decree was passed by which the defendants, including

(1) (1812) 18 Ves. 455 at p. 460.

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the plaintiff's father, were allowed six months' time to pay the money due under the mortgage, and in default the plaintiff was to recover the amount decreed by sale by applying for decree absolute. He never applied for sale, but rested content with the title that he was supposed to have acquired as purchaser at the Court-sale held under the decree in the money-suit of 1902.

The plaintiff now brings this suit for redemption of the mortgaged property, but the learned Judge has dismissed his claim on the ground that the time of six months allowed by the decree for making payment of the mortgage claim had long expired, and that this was an application in execution which should have been brought under section 47 of the Civil Procedure Code and that a separate redemption suit could not lie. We are of opinion that the defendant in a suit for sale under a mortgage who is given six months' time to pay the decretal debt is not in the position of a decree-holder who has a decree to execute. His right of payment within six months is a right which he has in mitigation of his liabilities under the decree. The contention of the defendant would result in this anomalous position that having the right to apply for sale and for decree absolute he abstains from exercising that right, yet nevertheless, after three years have elapsed though he can no longer enforce the decree, he is put in the position of the absolute owner of the property by reason of the defendant in the suit not having elected to pay off the mortgage. We think that if he does not apply for decree absolute he does not get rid of the relationship of mortgagor and mortgagee, and there is nothing to prevent the mortgagor or his representative from filing a suit for redemption. It has been held in England in *Hansard v. Hardy*⁽¹⁾ that a dismissal for want of prosecution of a mortgagor's

⁽¹⁾ (1812) 18 Ves. 455 at p. 460.

action for redemption does not prevent him from bringing a fresh suit for redemption. *A fortiori* we think that his failure to pay the amount of the decretal debt within the six months allowed to him cannot, so long as the relationship of mortgagor and mortgagee subsists, prevent him from filing a fresh suit for redemption, subject however to this that he cannot go behind the decree in the mortgagee's suit in so far as it settles the amount of the mortgage-debt up to the date of that decree. But it is not contended by the plaintiff in this suit that the mortgage-debt at that time was less than it is found to be by the Court, and therefore, in permitting the present suit, there would be no violation of the provisions of section 11 of the Civil Procedure Code. We reverse the decree and remand the case for disposal on the merits. The plaintiff must have the costs of the two appeals against the opposing defendants.

Decree reversed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

TULSIDAS LALLUBHAI (ORIGINAL PETITIONER), APPELLANT, v. THE BHARAT KHAND COTTON MILL COMPANY, LIMITED (ORIGINAL OPONENT), RESPONDENT.*

1914.

August 12.

Indian Companies Act (VI of 1882), sections 128, 129—Company—Compulsory winding up—Creditor's petition—Company's inability to pay its debts.

The petitioner, who was an assignee of certain debts due by the defendant Company to its late Secretary and Manager, demanded payment from the Company. The Company refused to pay on the ground that the demand was in respect of a claim which the Company honestly believed to be a fraudulent claim and unsustainable at law. The petitioner thereupon applied to the

* First Appeal No. 31 of 1912.