

of Rs. 2,463 was paid by the plaintiff. It is clear that, in spite of the previous purchase by defendant No. 2 at a Court sale of the two survey numbers, the equity of redemption in the other property mortgaged to Atmaram was vested in defendant No. 1 at the time. The mortgage decree in favour of Atmaram was against him and was being executed against him at the time. He was, therefore, clearly interested in satisfying Atmaram's decretal claim. He could keep the charge on the mortgaged property alive in his favour by satisfying the mortgage claim, if it was to his interest to do so; and the plaintiff could claim the same benefit in virtue of his having paid the whole amount due under the mortgage decree to Atmaram at the instance of defendant No. 1.

Decree reversed.

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*Before Sir Stanley Batchelor, Kt, Ag. Chief Justice
and Mr. Justice Shah.*

VINAYAKRAO BALASAHEB INAMDAR AND OTHERS (ORIGINAL PLAINTIFFS) APPELLANTS v. SHAMRAO VITHAL KALKUNDRI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Dekkhani Agriculturists' Relief Act (XVII of 1879), sections 3 (w), 12 and 13—Suit for redemption—Mortgage superseded by consent decree—Allegation of fraud—Form and reality of the suit.

The plaintiffs' father executed a mortgage in 1894. In 1899 the mortgagee sued the mortgagor for the recovery of the mortgage debt and for sale of the property. In 1900 there was a consent decree by which a new sum was taken as capitalized principal and provision was made for payment of money by instalments. The security under this arrangement differed in some particulars from the security of the earlier mortgage. On the same day as this consent-decree

* First Appeal No. 192 of 1913.

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was obtained, Survey No. 50, which was included in the older mortgage but was excluded from the purview of the consent-decree, was sold by the mortgagor to the mortgagee. In 1903 the mortgagee obtained possession of the property and since then remained in possession. In 1911 the plaintiffs brought a suit to redeem the mortgage of 1894 by setting aside the consent-decree and the sale deed alleging that they were obtained by fraud, coercion and misrepresentation.

Held, that the suit though in form a redemption suit was in reality a suit to set aside a sale deed and a Court's decree and then to recover property of which the plaintiffs had been fraudulently deprived. Such a suit is outside the provisions of the Dekkhan Agriculturists' Relief Act, 1879.

Musanmat Bachi v. Bikhchand⁽¹⁾ applied.

Section 3, clause (v) of the Dekkhan Agriculturists' Relief Act, 1879, contemplates either *simpliciter* or primarily and substantially a mortgage suit.

FIRST appeal against the decision of S. R. Koppikar, First Class Subordinate Judge at Belgaum in Civil Suit No. 445 of 1911.

Suit for redemption.

The property in suit was, by a deed dated the 24th May 1894, mortgaged by Balaji Bhavanrao, the father of plaintiffs and defendant No. 2, to Vithal Ramchandra, the father of defendant No. 1, for Rs. 5,000.

In 1899 the mortgagee sued the mortgagor for recovery of the mortgage debt and for sale of the property.

On the 9th March 1900 there was a consent-decree the terms of which were:—

“The debt including interest was found to have amounted to Rs. 9,650..... As security for the sum, the property originally mortgaged, except Survey No. 50 of Nerli and the additional property specified in para. (f) of the plaint, were to stand as security. The principal was made payable in 10 years..... At the end of 10 years the mortgagee was given the option of enjoying the profits in lieu of interest or recovering the debt by sale of the mortgaged property. The mortgagor was at liberty to pay the principal before the fixed date in amounts not lower than Rs. 1,000.”

On the date of the decree Survey No. 50, which was included in the earlier mortgage but was excluded

⁽¹⁾ (1910) 13 Bom. L. R. 56.

from the purview of the consent-decree, was sold by the mortgagor to the mortgagee for a sum of Rs. 1,000.

In 1903 the mortgagee on his application for execution of the consent-decree obtained possession of the property.

In 1911 the plaintiffs sued as agriculturists to redeem the property, which was the subject of the consent-decree as well as Survey No. 50, alleging that both the decree and the sale deed relating to Survey No. 50 were fraudulent and asked for an account on the footing of the original mortgage under the Dekkhan Agriculturists' Relief Act, 1879.

Defendant No. 1 contended that the claim for redemption did not lie, as the original mortgage of 24th May 1894 was superseded by the decree of 9th March 1900; that the allegation of fraud, &c., was false; that the suit was untenable unless the consent-decree was first set aside by a separate suit.

Defendant No. 2 admitted the claim.

The Subordinate Judge dismissed the plaintiffs' suit on the following grounds :—

“ Plaintiffs seek to set aside the consent-decree passed against their father and the sale effected by him on the ground of fraud and at the same time ask for special relief as agriculturists. The decision of the Privy Council appearing at page 56 of the Bombay Law Reporter, Vol. 13, seems to me to be against this claim. It shows that specific relief under the Dekkhan Agriculturists' Relief Act cannot be claimed in a suit, which is in form a suit for redemption, but in reality is a suit to recover property of which the rightful owner has been deprived by fraud. The claim as regards No. 50 of Nerli is clearly covered by this authority. The principle must be equally applicable to the claim relating to the property which came to defendant No. 1 under the consent-decree. These are not the only difficulties in the way of plaintiffs.

The consent-decree of 1900 superseded the original mortgage, and a suit to obtain redemption on the footing of that mortgage cannot lie. The decision of the High Court in appeal No. 15 of 1912 seems to be clear authority upon the point (Exhibit 117). The relation between the parties is not that of

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mortgagor and mortgagee, but that of judgment debtor and decree holder, and their respective rights and liabilities must be determined by the terms of the decree. I. L. R. 8 Bom. 303 and 16 Bom. 656 may also be quoted against plaintiffs. The only remedy seems to be an application for execution.

The cases quoted on the other side are not in point and are clearly distinguishable. The decision at page 30 of 13 Bombay Law Reporter relates to a decree which merely carried out the terms of the original contract of mortgage, and which did not therefore supersede that mortgage. The decree in the present case introduced a new relation between the parties. The property encumbered in the original mortgage was only a part of the property given as security for the decretal debt. The amounts secured by the mortgage and the decree were different. One of the lands included in the mortgage was transferred by an independent sale to the mortgagee. Above all, the decree in this case gave defendant No. 1 the option of enjoying the profits in lieu of interest or of bringing the property to sale, on default of payment by the mortgagor. In the case quoted the decree merely empowered the mortgagee to remain in possession until payment and did not give him the right of sale. There is nothing in the present case to show that a future suit for redemption was contemplated. 10 Bom. 21 is an instance of Hindu brothers who were insufficiently represented in a previous suit for redemption and whose right of redemption was therefore held to have remained. The Allahabad cases cited (32 All. 215, 24 All. 44) are instances of decrees which conferred no right of sale on default of payment, and it was therefore held that a second suit for redemption was not barred. 13 Bom. Law Reporter 1009 is the case of a mortgage passed in satisfaction of a decretal debt. We are now dealing with the reverse case of a decree obtained in supersession of an antecedent mortgage."

The plaintiffs appealed to the High Court.

Jayakar with *S. S. Patkar* for the appellants:—We submit the consent-decree is nothing more than a new mortgage. The test is does the relationship of mortgagor and mortgagee still subsist? The lower Court holds that the consent-decree wipes out the position of mortgagor and mortgagee and there is no basis of the suit. We submit the consent-decree is no more than a contract with the additional affirmation of the Court and the Court has as much power to look into it on the ground of fraud, &c., as into an ordinary contract. It does not differ from the contract of parties: see

Krishnabai v. Hari Govind⁽¹⁾; *Radhabai v. Ramchandra Vishnu*⁽²⁾; *Kisandas v. Ramchardra*⁽³⁾; *Rama v. Bhagchand*.⁽⁴⁾

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We submit, therefore, the suit for redemption of the mortgage of 1894 does lie and the consent-decree being a transaction within the meaning of section 13 of the Dekkhan Agriculturists' Relief Act, the Court ought to have inquired into the history of the transaction under sections 12 and 13 of the Act, from 1894 up to the date of the suit. These sections are introduced to relieve the transactions between the creditor and debtor under Dekkhan Agriculturists' Relief Act, 1879.

Coyajee with G. S. Mulgaonkar and T. R. Desai for respondent No. 1 :—We submit the present suit is outside the provisions of the Dekkhan Agriculturists' Relief Act. Section 3, clause (w), indicates the class of suits to which the Act is applicable. This is not one of the suits contemplated by that section. Before the mortgage of 1894 can be inquired into, the plaintiffs have got to set aside the consent-decree and the sale deed which may be fraudulent but which were accepted from time to time by the Court. This is, therefore, in form a suit for redemption but the substantial relief claimed is getting over the two transactions. Special relief under the Dekkhan Agriculturists' Relief Act could not be granted in such a suit: see *Musammat Bachi v. Bikhchand*; ⁽⁵⁾ *Lachiram v. Jana Yesu*.⁽⁶⁾

As regards sections 12 and 13 of the Dekkhan Agriculturists' Relief Act, we submit the initial difficulty in the way of the appellant is that in order to have the application of those sections, the suit must fall under section 3, clause (w). Once a decree is passed on a

(1) (1906) 31 Bom. 15.

(4) (1914) 39 Bom. 41.

(2) (1910) 35 Bom. 204.

(5) (1910) 13 Bom. L. R. 56.

(3) (1911) 13 Bom. L. R. 1009.

(6) (1914) 16 Bom. L. R. 668.

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mortgage and the amount due is determined, the Court cannot in a subsequent suit re-open the accounts: see *Tatya Vithoji v. Babu Balaji*^(a).

Nilkanth Atmaram for respondent No. 2.

BACHELOR, Ag. C. J.:—The appellants, who were the plaintiffs in the lower Court, brought this suit as a suit for redemption under the Dekkhan Agriculturists' Relief Act. The mortgage to be redeemed was said to be that executed by the plaintiffs' father in 1894. In 1899, the mortgagee sued the mortgagor for recovery of the mortgage debt and for sale of the property. In March 1900, there was a consent-decree by which a new sum was taken as the capitalized principal, interest was allowed at $7\frac{1}{2}$ per cent., and provision was made for payment of the money by certain instalments. The security under this arrangement differed in some particulars from the security of the earlier mortgage, and notably Survey No. 50, which was included in the older mortgage, was excluded from the purview of the consent-decree. On the same day as this consent-decree was obtained, Survey No. 50 was sold by the mortgagor to the mortgagee for Rs. 1,000. In 1903, the mortgagee, on his application for execution of the consent-decree, obtained possession of the property and has since remained in possession. Therefore, in 1911, the plaintiffs brought the present suit. In their plaint they set out the facts which I have summarised, and they claim to set aside the consent-decree as having been obtained by fraud, coercion and misrepresentation. In the same way they seek to set aside the sale deed of Survey No. 50 on the ground that it was nominal and fraudulent and procured by coercion.

Mr. Coyaji contends, and I think rightly, that such a suit is outside the Dekkhan Agriculturists' Relief Act.

^(a) (1883) 7 Bom. 330.

If reference be made to sections 3, 12 and 13 of that Act, it will be seen that the suit can only be brought within the statute if it is a suit for the redemption of mortgaged property within the meaning of the clause (*w*) of section 3. It is, in my opinion, clearly not within this clause, the words of which contemplate a mortgage suit either *simpliciter* or primarily and substantially. This, however, is something far more than that, and very different from that. It is a suit to set aside a sale deed and a Court's decree, and, when those things are done, to recover the property of which, according to the plaint, the plaintiffs have been fraudulently deprived. This seems to me to be the description of the suit, and, if that is so, it falls, I think, within the authority of the Privy Council decision in *Musammatt Bachi v. Bikhchand*⁽¹⁾, where Lord Macnaghten said, in language which appears to me perfectly applicable to the present suit: "In form it is a suit for redemption. In reality it is nothing of the kind. It is a suit to recover property of which the rightful owner has been deprived by fraud. That settles the case." In the case before their Lordships of the Judicial Committee the obstacles which stood in the way of the immediate redemption were certain private sales made by the mortgagors to the mortgagees. Here also the obstacle is in part the same. For in part it consists of the private sale of Survey No. 50 made by the mortgagor to the mortgagee in 1900. For the rest the impediment consists of the decree of a Court, which is not the less a decree because it was obtained by consent of parties. I may add that on similar facts this Court took the view which I am now expressing in *Shamrao Vithal Kalkundri v. Nilkanth Ramchandra Kulkarni*⁽²⁾. On these grounds it appears to me that the suit as brought is not main-

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⁽¹⁾ (1910) 13 Bom. L. R. 56. ⁽²⁾ (1912) 18 Bom. L. R. 711, *f. n.* (2).

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tainable. That being so, we express no opinion as to the merits of the case on any other point of controversy between the parties. The appeal must be dismissed with costs, the lower Court's decree being affirmed. Respondent No. 1 alone will have the costs.

SHAH, J.:—I agree.

Decree affirmed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

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August 7.

MOTA HOLIAPPA AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS *v.*
VITHAL GOPAL HABBU (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), section 11—Res judicata—Decision embodied in decree operates as res judicata.

In 1900 the defendants obtained a *mulgeni* (permanent) lease of certain lands from the then manager of the temple. In 1910, the plaintiff, the new manager, sued the defendants in ejectment praying that the *mulgeni* lease was not binding on him and that the defendants being annual tenants should be evicted. The Court held in favour of the plaintiff on the first ground, but for want of notice held that he was not entitled at that stage to evict the defendants. Then after due notice given, the plaintiff again sued to eject the defendants. They again pleaded the *mulgeni* lease. The Court held that that defence was not open to them, as it was barred by *res judicata*. On appeal,

Held, that the defence was barred by *res judicata*; for the decision of the Court in the earlier suit in favour of the plaintiff upon the first part of his prayer found a place in the decretal order and was as much decreed as the other part of the prayer which in the second part of that decretal order was rejected.

SECOND appeal from the decision of C. V. Vernon, District Judge of Kanara, confirming the decree passed by V. V. Wagh, First Class Subordinate Judge at Karwar.

* Second Appeal No, 587 of 1915.