

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

DINU BIN YESU DESAI (ORIGINAL PLAINTIFF), APPELLANT v. SHRIPAD
BIN BAJI VITHAL GARWARE AND OTHERS (ORIGINAL DEFENDANTS),
RESPONDENTS.*

1919.

February 4.

Mortgage—Decree for redemption—Decree passed under the provisions of the Delekhan Agriculturists' Relief Act (XVII of 1879)—Decree not governed by Transfer of Property Act (IV of 1882)—Decree not executed—Second suit to redeem the mortgage, not maintainable—Civil Procedure Code (Act V of 1908), section 47.

The plaintiff obtained in 1888 a redemption decree, under the provisions of the Dekkhan Agriculturists' Relief Act, 1879, which provided that on plaintiff's default to pay the decretal amount by the end of March 1893 his right to redeem should be for ever barred. The decree was not executed. In 1913, the plaintiff filed a second suit for redemption of the same mortgage :—

Held, that no fresh suit could lie under the provisions of section 47 of the Civil Procedure Code, 1908, inasmuch as the decree of 1888, to which the provisions of the Transfer of Property Act, 1882, did not apply, was capable of execution and its execution was time-barred long before the date of the second suit.

Ramji v. Pandharinath⁽¹⁾, distinguished.

Ladu Chimaji v Babaji Khanduji⁽²⁾, followed.

SECOND appeal from the decision of W. Baker, District Judge of Satara, reversing the decree passed by V. R. Guttikar, Subordinate Judge at Karad.

Suit to redeem a mortgage.

In 1863, the plaintiff's grandfather mortgaged certain property with the predecessor-in-title of defendant No. 1. The mortgage was usufructuary.

The plaintiff sued in 1885 to redeem the mortgage and obtained a decree, on the 20th February 1888, which ran as follows :—

"It is decreed that the plaintiff do redeem on payment to defendants Nos. 1 and 2 the sum of Rs. 518-11-6 and costs in both the Courts by six equal

* Second Appeal No. 1181 of 1916.

(1) (1918) 43 Bom. 334

(2) (1883) 7 Bom. 532,

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instalments each of which to be payable at the close of March in the years 1888-1893. On plaintiff's default to pay the whole sum by the end of March 1893, his right to redeem shall be for ever barred.

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This decree was passed under the provisions of the Dekkhan Agriculturists' Relief Act, 1879. It remained unexecuted; and the property remained in the possession of the defendants.

In 1913, the plaintiff brought a second suit to redeem the mortgage of 1863.

The Court of first instance passed the usual redemption decree.

On appeal, the lower appellate Court was of opinion that the redemption decree of 1888, which was not governed by the provisions of the Transfer of Property Act, 1882, was capable of execution, and barred the second suit. The decree appealed from was, therefore, reversed and the suit dismissed.

The plaintiff appealed to the High Court.

S. S. Patkar and *R. A. Randive* and *W. K. Mankar*, for the appellant.

B. G. Rao for *G. S. Rao*, for respondent No. 1.

K. N. Koyajee, for respondents No. 2.

SHAH, J. :—This appeal arises out of a suit brought by the plaintiff to redeem a mortgage of 1863. The defendants pleaded that the present suit was not maintainable in consequence of the decree in an earlier suit for redemption. In 1885, the plaintiff's predecessor-in-title had filed Suit No. 985 of 1885 for redemption, and obtained a decree on the 20th February 1888 in these terms: "It is decreed that the plaintiff do redeem on payment to defendants Nos. 1 and 2 the sum of Rs. 518-11-6 and costs in both the Courts by six equal instalments each of which is to be payable at the close of March in the years 1888-1893. On plaintiff's default

to pay the whole sum by the end of March 1893, his right to redeem shall be forever barred." The trial Court disallowed the defendants' contention and passed a decree in favour of the plaintiff for redemption. The lower appellate Court reversed that decree and dismissed the plaintiff's suit on the ground that the decree in the previous suit of 1885 was a bar to the present suit.

In the appeal before us it has been contended on behalf of the plaintiff that a second suit is competent, and in support thereof the recent decision of the Full Bench in the case of *Ramji v. Pandharinath*⁽¹⁾ is relied upon. After a consideration of the arguments urged on behalf of the appellant I am of opinion that the *ratio decidendi* in *Ramji's case*⁽¹⁾ has no application to the facts of this case. The decree in the suit of 1885, which was decided under the Dekkhan Agriculturists' Relief Act, was passed in February 1888; and though the last instalment payable under the decree fell due in March 1893, i. e., after the Transfer of Property Act came into force in this Presidency, it is clear that the provisions of the Transfer of Property Act could not apply to that decree. The provisions of section 2 of the Act are clear and the decision in *Chennaya v. Malkapa*⁽²⁾ is to the same effect. Therefore there was no scope for any order absolute in respect of this decree as provided by the Transfer of Property Act, nor for any final decree as contemplated by the Code of 1908. The decree of 1888 was capable of execution, and it provided in terms that if there was a default in the payment of the sum due thereunder, the right to redeem was to be forever barred. Admittedly the execution of this decree is time-barred long since, and under the provisions of section 47 of the Code corresponding to section 244 of the old Code no fresh suit can lie.

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(1) (1918) 43 Bom. 334,

(2) (1895) 20 Bom. 279,

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This case is governed by the decisions of this Court prior to the Transfer of Property Act of which *Ladu Chimaji v. Babaji Khanduji*^(a) is a type. In these cases the subsequent suit has been held to be not maintainable. The *ratio decidendi* of these cases would still govern a case in which the earlier decree provided in terms that the right to redeem would be barred in case the amount provided by the decree was not paid within the time fixed under the decree. It is not necessary to refer to the recent cases which deal either with decrees to which the provisions of the Transfer of Property Act or the corresponding provisions of the Code of 1908 might be applicable. The learned pleader for the appellant has not been able to cite a single case in which, in spite of the earlier decree containing such a provision as we have in the decree of 1888 in this case, a fresh suit for redemption is held to be maintainable.

I am not sure that even if the Transfer of Property Act applied and if the earlier decree contained the provision such as we have in this case, a second suit for redemption would be maintainable. But that is a point which need not be considered in this case.

I would, therefore, confirm the decree of the lower appellate Court and dismiss the appeal with costs.

HEATON, J.:—I agree. At the time when the earlier decree in the suit of 1885 was made, the only method known to our law in this Presidency by which it could be given effect to was by execution proceedings and therefore, as provided by section 241 of the old Code, a second suit would not lie. The only possible way in which this difficulty could be overcome, would be by showing that the declaration in the decree that on failure to pay the debt the right to redeem shall be for ever barred, did not operate of itself, but could only

^(a)(1883) 7 Bom. 532.

be made operative by an order absolute or a final decree. But at the time this decree was made, there was no provision in this Presidency either for an order absolute or for a final decree. Everything was done in execution proceedings. The Code of 1908 which provides for a final decree in mortgage suits obviously could not apply to a decree made sometime in the eighties of the last century. The Transfer of Property Act could not apply, because it only came into operation in this Presidency in the year 1893. Therefore it is impossible, as I think, to get away from the effect of the pronouncement in the decree itself. It follows from this that the right to redeem has long been barred and no suit to redeem therefore can succeed.

Decree confirmed.

R. R.

APPELLATE CIVIL.

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

BHIKABHAI MULJIBHAI PATEL (ORIGINAL PLAINTIFF) APPELLANT *v.*
 PANACHAND ALIAS CHHAGANLAL ODHAVJI PATEL (ORIGINAL
 DEFENDANT) RESPONDENT.*

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Transfer of Property Act (IV of 1882), section 53—Transfer made with intent to defeat or delay the creditors—Whether the transfer void in toto or void in so far as there is no consideration.

One J mortgaged his property with the plaintiff for Rs. 4,000 in 1911. In the same year, the defendant, a creditor of J, brought a suit against him and obtained a decree in execution of which the properties mortgaged to the plaintiff were attached. The plaintiff having failed to raise the attachment, sued for a declaration that the defendant was not entitled to attach the properties. Both the lower Courts found that out of the consideration of Rs. 4,000 the only sum for which the plaintiff was a creditor of J at the time of the mortgage transaction, was Rs. 1,000 and dismissed the plaintiff's suit on the

*Second Appeal No. 1105 of 1916.