

and consistently for what he deems to be his right. There is nothing in the nature of negligence or carelessness on his part, and to deprive him of his property by the application of a principle (or a rule as I prefer to call it) relating to a purchaser for value without notice would to my mind be a very great injustice.

That is all I wish to say for myself in this case. I concur in the orders proposed.

Decree accordingly.

J. G. R.

APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and
Mr. Justice Heaton.*

DALUCHAND BALARAM MARWADI (ORIGINAL PLAINTIFF), APPELLANT
v. APPI KOM KHEMA SASTE AND ANOTHER^c.

1920.

March 2.

Civil Procedure Code (Act V of 1908), Order II, Rule 2—Dekkhan Agriculturists' Relief Act (XVII of 1879), Sections 12 and 13—Cause of action—Splitting up of—Two mortgages—Suit on one mortgage—Sale in execution of decree free from any incumbrance—Sale proceeds applied in paying off the mortgage in suit—Balance of sale proceeds—Second suit on another mortgage—Attachment of balance of sale proceeds.

The defendant executed three mortgages as part of the same transaction over the same property. The mortgagee sued to recover money due on one of the mortgages only, under the provisions of the Dekkhan Agriculturists' Relief Act, 1879. He obtained a decree in execution of which the mortgaged property was sold free from any incumbrances. The sale proceeds were applied in paying off the decretal amount and there remained a balance. The mortgagee brought a second suit on the remaining two mortgages and prayed for a decree against the balance:—

Held, that the mortgagee having omitted to sue on the remaining two mortgages when he sued on the first mortgage bond, he was barred, by Order II, Rule 2, of the Civil Procedure Code coupled with the provisions of sections 12 and 13 of the Dekkhan Agriculturists' Relief Act, 1879, from asking the Court to pass a decree on the two mortgage bonds so as to be

^c Second Appeal No. 281 of 1919.

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able to execute that decree against the balance of the sale proceeds of the property which was sold in execution of the first decree.

SECOND appeal from the decision of P. E. Percival, confirming the decree passed by D. L. Mehta, Subordinate Judge at Baramati.

Suit on mortgage.

The husband of defendant No. 1 passed three mortgages in 1900 in favour of plaintiff for Rs. 99 each. The consideration for the mortgages was the balance of Rs. 274 due on previous account and Rs. 23 paid in cash.

In 1911, the plaintiff sued on one of the mortgages under the provisions of the Dekkhan Agriculturists' Relief Act, 1879 and obtained a decree. In execution of the decree the mortgaged property was sold for Rs. 305 to defendant No. 2, free of any incumbrances. Rs. 160-6-5 were paid out of it to meet the decretal amount.

In 1916, the plaintiff filed the present suit on the remaining two mortgages and attached the balance of the sale proceeds.

The lower Courts were of opinion that the second suit was barred under Order II, Rule 2, of the Civil Procedure Code read with sections 12 and 13 of the Dekkhan Agriculturists' Relief Act, 1879.

The plaintiff appealed to the High Court.

V. B. Virkar, for the appellant.

No appearance for the respondents.

MACLEOD, C. J.:—The plaintiff took three mortgage bonds on the 6th July 1900 for Rs. 99 over the same property from the 1st defendant, the consideration being the balance of Rs. 274 due on the previous account, and Rs. 23 paid in cash. He sued on one of the bonds in 1911 and obtained a decree thereon. He did mention in his plaint that he held two other mortgages over the property, and that he would take separate steps on

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them. The property was sold in execution of the decree on the one bond, but was not sold subject to the other mortgage charges. It was sold free of any incumbrances, and realised more than the amount due on the bond in that suit. The plaintiff has now filed this suit on the remaining two mortgage bonds. He cannot ask for sale of the mortgaged property. That has already been sold free of the mortgages in the previous suit. But he does ask for a decree for the amount due on the remaining two mortgage bonds, which he contends will be effective as regards the balance of the sale proceeds of the mortgaged property.

Both Courts have dismissed his suit on the ground that it was barred by Order II, Rule 2, of the Civil Procedure Code, and sections 12 and 13 of the Dekkhan Agriculturists' Relief Act. The case of *Dhondu Ramchandra v. Bhikaji*⁽¹⁾ was referred to. There a person holding two different mortgages on the same property from the same persons sued on the second mortgage without impleading the first mortgage, and obtained a decree. He then sued on the first mortgage, and it was held that the second suit was barred by reason of the decree in the first suit on the subsequent mortgage as *res judicata* under section 11, Explanation IV of the Civil Procedure Code. Mr. Justice Hayward in his judgment expressed an opinion that "if it had been found as a matter of fact that the transactions were transactions 'out of which the suit had arisen', then they would have constituted the same cause of action, and the subsequent suit would have been barred under Order II, Rule 2, by reason of the special provisions of section 13 of the Dekkhan Agriculturists' Relief Act".

Now there can be no doubt that these three mortgages were really part of the same transaction, whereby the plaintiff got security for the balance due on the old

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account together with the fresh cash advance, and when the first suit was filed, the Court was bound to inquire 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 claimed, out of which this suit had arisen. The Court which decreed the first suit, having notice of the two mortgages executed at the same time as the suit mortgage, should have inquired into the history of those mortgages. However it did not do so. But it is quite clear that this is exactly the case to which Mr. Justice Hayward referred in his remarks which I have just quoted, which in that case may have been *obiter*. One can imagine that it might easily lead to fraud, and also to evasion of the objects of the Dekkhan Agriculturists' Relief Act, if a party in the position of the plaintiff in this suit could sue on one mortgage, leaving aside other mortgages of the same date, which together with the first mortgage really made up one transaction. He could thus avoid an account being taken of the whole transaction between the parties, and then at a future time file a suit on the remaining causes of action, which as a matter of fact really made up one entire cause of action. I think, then, that the plaintiff having omitted to sue on these two mortgage bonds when he sued on the first mortgage bond, he cannot now ask the Court to pass a decree on those two mortgage bonds so as to be able to execute that decree against the balance of the sale proceeds of the property, which was sold in execution of the first decree. He is barred, in my opinion, under Order II, Rule 2 of the Civil Procedure Code, coupled with the provisions of sections 12 and 13 of the Dekkhan Agriculturists' Relief Act. The appeal, therefore, I think, must be dismissed.

HEATON, J.—It is well understood now, and for many years has been, that when a Court takes an account

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as provided by section 13 of the Dekkhan Agriculturists' Relief Act, it does not start the account with the particular bond or mortgage deed, or whatever it may be, which is pleaded as the basis of the suit. The account is taken of the transactions between the parties to the suit, and if those transactions began at an earlier date than a particular bond, whether a money bond or a mortgage bond, and if the transactions led up to that particular bond then the account is taken from the earliest of the preceding transactions and is continued right up to the date of the suit. That is now too well understood to need further comment. We have in this case an instance of conscious or unconscious evasion of that principle of the Dekkhan Agriculturists' Relief Act.

The plaintiff was a mortgagee who had had before these mortgages other transactions with the defendant. A balance was made up apparently, or at any rate it was asserted that there was a balance remaining payable by the defendant to the plaintiff. The plaintiff made a small further advance, and to secure the total debt took three separate mortgage bonds from the same mortgagor, in each case relating to the same property. He brought a suit on one of the mortgage bonds and obtained a decree. When that suit was brought, of course accounts had to be taken under section 13 of the Dekkhan Agriculturists' Relief Act, and ought to have been taken in the way I have described. The account ought to have gone back to the earlier transaction, and ought to have arrived at the balance due when the three mortgage deeds were made, and have proceeded to embrace all the three mortgages. The account, however, did nothing of the kind. It was limited to the one mortgage deed on which the plaintiff then sued.

In so permitting the account to be taken, the plaintiff was in grievous error. For there is another matter

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which is perfectly well understood, and has been for years, and which has repeatedly been pointed out; it is that the Court often finds itself powerless to take an account as contemplated by section 13 without the conscientious assistance of the creditor; so it is the duty of the creditor to furnish the Court with what he asserts to be a true statement of the account; and where a creditor does, as this creditor did, in that earlier mortgage suit, deliberately refrain from presenting a complete account, and limits the account he presents to one transaction, when it ought to have embraced all, he is putting at naught the intention of the provisions of the Dekkhan Agriculturists' Relief Act.

Applying then the words of Rule 2, Order II, of the Civil Procedure Code to that particular condition of affairs which arises under the Dekkhan Agriculturists' Relief Act, we find that when a plaintiff brings a suit, he is usually bound to sue for the total debt due under all his transactions with the creditor. There may be exceptions, but that is a general rule where the Dekkhan Agriculturists' Relief Act applies. There certainly was no need to make any exception in this case. Here, therefore, we have circumstances which supply one of the simplest instances of the application of Rule 2, Order II, to the state of affairs contemplated by the Dekkhan Agriculturists' Relief Act. The suit should have included the whole of the claim. It did not do so. It included only a part of the claim, and a decree was obtained on that basis, and the only thing consistently with the law which we can do, is to take it that the plaintiff relinquished the rest of his claim. That being taken, this suit must of necessity be dismissed, and I think the appeal should be dismissed.

Appeal dismissed.

R. R.