

APPELLATE CIVIL.

Before Sir Lallubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Crump.

1923.
August 23.
SUKLYA VALAD JAIRAM PATIL (ORIGINAL DEFENDANT No. 1), APPELLANT
v. SUKLAL MOTICHAND HUMBAD VANI (ORIGINAL PLAINTIFF),
RESPONDENT^o.

Dekkhan Agriculturists' Relief Act (XVII of 1879), section 15B—Decree nisi—Application to make the decree final, not necessary—Civil Procedure Code (Act V of 1908), Order XXXIV, Rule 5.

A mortgage decree passed under the provisions of section 15B of the Dekkhan Agriculturists' Relief Act, 1879, is not a decree *nisi* which requires to be made final.

*Kashinath Vinayak v. Rama Daji*¹, followed.

APPEAL against the order passed by J. D. Dikshit, District Judge of Khandesh, reversing the decree passed by G. M. Pandit, First Class Subordinate Judge at Dhulia.

Proceedings in execution.

In 1897, the property in suit was mortgaged by Jairam, father of defendant No. 1 and another to plaintiff Suklal for Rs. 125.

In 1910, Suklal sued to recover Rs. 250 on his mortgage. On March 27, 1911, a decree was passed in favour of Suklal in the following terms:—

"Defendants to pay Rs. 182 and costs to plaintiff within six months from this date, and in default plaintiff to apply to the Court for an order for sale of defendant's interest in the mortgaged property under section 15B of the Dekkhan Agriculturists' Relief Act."

The time allowed for payment expired on September 27, 1911. Thereafter, applications for execution of the decree were made in 1914, 1916 and 1918. The last

^oAppeal from Order No. 67 of 1922.

application was disposed of on the ground that execution could not proceed as the decree was not made final. On April 22, 1920, the plaintiff applied specifically to make the decree final.

The Subordinate Judge held that it was necessary to apply to make the decree final under Order XXXIV, Rule 5, Civil Procedure Code, 1908 ; that the application being presented three years after the date of the decree, was time-barred.

On appeal, the District Judge, Khandesh, reversed the decree holding that no application was necessary for making the decree final. He treated the previous applications as steps-in-aid of execution of the decree and held that the Darkhast was in time and allowed execution to proceed according to law.

The defendant No. 1 appealed to the High Court.

P. V. Kane, for the appellant.

B. G. Rao, for the respondent.

CRUMP, J. :—The point for our decision in the present case is substantially this, whether a decree made under the provisions of section 15B of the Dekkhan Agriculturists' Relief Act is a decree *nisi* requiring to be made final. The matter arises in this way. In 1897 the father of the first defendant and another mortgaged certain property for Rs. 125 to the plaintiff. In 1910 the plaintiff sued to recover Rs. 250 upon this mortgage. On the 27th March 1911, a decree was passed in plaintiff's favour in the following terms :—

" Defendants to pay Rs. 182 and costs to plaintiff within six months from this date, and in default plaintiff to apply to the Court for an order for sale of defendant's interest in the mortgaged property under section 15B of the Dekkhan Agriculturists' Relief Act."

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The time allowed for payment expired on the 27th September 1911, and from that date onwards at intervals of three years various applications were made by the plaintiff to the Court for the purpose of the execution of the decree.

It is unnecessary to go into the details of those applications. It is sufficient to say that the view was taken that as the decree had not been made final, no order for execution could be made. Finally on the 22nd April 1920, the plaintiff applied specifically to make the decree final, and was met by a plea of limitation. The Judge of the lower appellate Court holding that no application was necessary to make the decree final, treated this application as an application under section 15B, and regarding the previous applications as steps-in-aid of execution, held that the Darkhast was in time, and should be proceeded with according to law.

The question is whether that is the correct view. Some distinction has been suggested between a decree under section 15B which provides for payment by instalments and a decree such as is made in the present case. But it appears to me impossible to hold that clause (1) of section 15B is confined to decree in which the amount is payable by instalments. Rather I should hold that it applies to all decrees for redemption, foreclosure or sale in any of the suits specified in that section, and it follows that nothing turns upon any distinction of that nature. It is clear that the decree in this case purported to be made under section 15B, and its terms are strictly in accordance with that section.

Now the general question as to whether the provisions of the Civil Procedure Code requiring that there should be in the first instance a decree *nisi*, then an

application to make that decree final, can be held to apply to decrees under section 15B of the Dekkhan Agriculturists' Relief Act, was discussed by this Court in *Kashinath Vinayak v. Rama Daji*⁽¹⁾. The view there expressed, ¶ I may say so with all respect, is the view which I have always held as to the correct scope of those sections of the Dekkhan Agriculturists' Relief Act, including section 15B, which deal with the subject of mortgage decrees, and that being so, I have no hesitation whatever in following that decision. It is true that some doubt has been cast upon the correctness of the law as there stated by the decision in *Ramji v. Pandharinath*⁽²⁾. But speaking for myself, I am none the less of opinion that the decision in *Kashinath Vinayak v. Rama Daji*⁽¹⁾ is correct in point of law, and ought to be followed by us in the present case. I am fortified in that conclusion by the judgment of the learned Chief Justice in *Hirachand Khemchand v. Aba Lala*.⁽³⁾ At p. 763 of the Report is the following passage:—"Now, when a decree is passed under the provisions of the Dekkhan Agriculturists' Relief Act, there is no necessity to apply to the Court to have the decree made absolute." That is a general statement applicable to all decrees under the provisions of the special Legislation, and as I have already said, there is no doubt that we have such a decree before us here.

Upon these grounds, therefore, I am clearly of opinion that there was no necessity in the present case to move the Court to make the decree final, and that an application could have been made for sale of such portion of the mortgaged property as was necessary to pay the decretal amount. That being so, it follows, as held by the Judge of the lower appellate Court, that the previous applications being regarded as steps-in-aid

⁽¹⁾ (1916) 40 Bom. 492.

⁽²⁾ (1918) 43 Bom. 334, 477.

⁽³⁾ (1921) 46 Bom. 761.

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of execution, the present application can be held to be an application to execute the decree, and as such must be taken to be in time.

On these grounds, I would confirm the order of the lower appellate Court and dismiss the appeal with costs.

SHAH, AG. C. J.:—I concur. I only desire to add that I am conscious of the weight to be attached to the observations in *Ramji v. Pandharinath*⁽¹⁾. But the observations in *Hirachand Khemchand v. Aba Lala*⁽²⁾ support the view taken in *Kashinath Vinayak v. Rama Daji*⁽³⁾; and my learned brother is distinctly of opinion that the view taken in *Kashinath Vinayak v. Rama Daji*⁽³⁾ is correct. Under the circumstances I do not see any need to refer this matter to a Full Bench.

Decree confirmed.

J. G. R.

⁽¹⁾ (1918) 43 Bom. 334, 477.

⁽²⁾ (1921) 46 Bom. 761.

⁽³⁾ (1916) 40 Bom. 492.

ORIGINAL CIVIL.

Before Mr. Justice Mulla.

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September 5.

SAREMAL PUNAMCHAND, PLAINTIFF v. KAPURCHAND PUNAMCHAND AND ANOTHER, DEFENDANTS².

Indian Contract Act (IX of 1872), section 251—Trading firm—One partner borrowing money for purposes of the firm—Liability of partners.

In March 1920, defendants Nos. 1 and 2 entered into a partnership for carrying on the "business of buying and selling copper and brass utensils". On May 23, 1920, defendant No. 1 borrowed Rs. 6,000 from the plaintiff on