APPELLATE CIVIL.

Before Mr. Justice Fawcett and Mr. Justice Madgavkar.

1925. *June* 26.

NARAYAN KESHAV VAGLE (ORIGINAL PLAINTIFF), APPELLANT *v.* KAJI GULAM MOHIDIN AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS*.

Right to sue—Benamidar—Mortgagee—Dekkhan Agriculturists' Relief Act (XVII of 1879), section 12.

There is nothing in section 12 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) prohibiting a suit on a mortgage by a benamidar for the mortgagee. The general principle, therefore, that, so far as a benami transaction does not contravene the provisions of any law, effect must be given to it, applies.

Gur Narayan v. *Sheolal Singh*[1], followed.

In such a suit, however, the provisions of section 12 must be observed by the Court just as much as in a suit by the real creditor.

SECOND appeal from the decision of Mr. H. Vakil, First Class Subordinate Judge, A. P., at Ratnagiri, confirming the decree passed by S. K. Patkar, Second Class Subordinate Judge at Dapoli.

Suit on mortgage.

The defendants, one of whom was an agriculturist, were indebted to a Marwadi named Shamdin on a balance of accounts and under a promissory note.

In 1910, the defendants executed a mortgage of their property in favour of the plaintiff and paid off Shamdin.

In 1922, the plaintiff sued to recover the money due on the mortgage, when the defendants contended that the plaintiff was a benamidar for Shamdin, that the moneys owed to Shamdin were mostly paid off, and that the bond was passed in order to avoid accounts being taken under the Dekkhan Agriculturists' Relief Act.

* Second Appeal No. 539 of 1924.

(1) (1918) 46 Cal. 566: L. R. 46 I. A. 1.

1925.

NARAYAN KESHAV v. KAJI GULAM MOHIDIN.

The lower Courts held that the mortgage was passed to plaintiff as benamidar for Shamdin, and that therefore, the plaintiff had no right to sue on the mortgage in his own name. The suit was accordingly dismissed.

The plaintiff appealed to the High Court.

P. V. Kane, for the appellant.

P. B. Shingne, for respondent No. 1.

FAWCETT, J. :—The plaintiff has sued the defendant to recover a certain sum of money as due on a simple mortgage bond, passed in 1910 by defendant No. 1 and his father, whose other legal representatives have been joined as defendants. Defendant No. 1 opposed the suit contending that he was an agriculturist, that he and his father had no dealings prior to this bond with the plaintiff, and that the latter was a benamidar for one Shamdin Jagannath Marwadi, who had got the bond executed in favour of the plaintiff with the object of avoiding his liability to account under the Dekkhan Agriculturists' Relief Act in regard to the previous transactions between him and the defendant. He also pleaded that the Marwadi's dues were mostly paid off, and that no fresh consideration was paid when the bond in suit was passed. The trial Court, on a consideration of the evidence, held that the defendant was an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act and that the plaintiff was a benamidar for this Marwadi, the bond being passed in the plaintiff's name as a mere cloak to avoid liability to render an account under the Dekkhan Agriculturists' Relief Act in respect of the previous dealings which the mortgagors had with the Marwadi. He accordingly dismissed the suit and ordered the parties to bear their respective costs.

The First Class Subordinate Judge, on appeal by the plaintiff, took the same view and dismissed the appeal with costs.

1925.

NARAYAN KESHAV v. KADI GULAM MOHIDIN.

A second appeal has been admitted and the contention put before us is that there was an error of law in the decrees of the lower Courts for the following reasons. It has been ruled by the Privy Council in *Gur Narayan* v. *Sheolal Singh*[1] and in various other cases, such as *Ravji* v. *Mahadev*[2] and *Ramchandra Vithal* v. *Gajanan Narayan*[3], that a benamidar can maintain a suit on a mortgage, so that, when a mortgage is executed ostensibly in favour of A, though really B is the mortgagee, A may sue the mortgagor on the mortgage, and the real mortgagee will be bound by the decree as *res judicata* against him. Their Lordships of the Privy Council in *Gur Narayan's case*[1] at page 574 said:—"So long, therefore, as a benami transaction does not contravene the provisions of the law the Courts are bound to give it effect". So that there is a qualification to this general principle, viz., that a benami transaction must not contravene the provisions of any law. Thus in the case of *Ramchandra Vithal* v. *Gajanan Narayan*[3], it was contended that the principle in question did not apply to that particular case, because the provisions of section 294, Civil Procedure Code of 1882, had been contravened in so far as the decree-holder had not obtained leave to bid or to purchase the property in question at a Court sale. It was, however, held that there was no such bar to the principle being applied to the facts of that case. Mr. Shingne for the respondent has admitted the general principle laid down in these rulings, but contends that the provisions of the Dekkhan Agriculturists' Relief Act do not permit of a suit by a benamidar where the object of the suit is to prevent the application of the provisions of that Act in regard to taking an account from the commencement of the transactions between the parties. He points out

[1] (1918) 46 Cal. 566: L. R. 46 I. A. 1. [2] (1897) 22 Bom. 672.
[3] (1919) 44 Bom. 352.

the provisions of section 12 of the Act which requires the Court, if the amount of the creditor's claim is disputed, to examine both the plaintiff and the defendant as witnesses, unless, for reasons to be recorded by it in writing, it deems it unnecessary so to do, and 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 claim, out of which the suit has arisen. It was suggested that this implies that the plaintiff should be the original creditor, and that the section does not, therefore, contemplate a benamidar being the plaintiff. Against this view, however, is the fact that the section cannot be supposed to prevent the plaintiff being an assignee of the original creditor. Such a case, I think, is clearly contemplated by the words "persons if any through whom they (i.e., the parties) claim". That expression suffices to cover not merely the legal representative of a deceased creditor but an assignee who has bought, or otherwise acquired the right, title and interest of either the original creditor or the original debtor; and such a construction was in fact given to these words in *Annaji Waghuji* v. *Bapuchand Jethiram*[1], which was a case of an assignee from an agriculturist. Therefore the suggestion that section 12 must be taken to prohibit a suit on mortgage by a benamidar cannot, I think, be accepted; but, on the other hand, the provisions of that section have to be observed by the Court in a suit by a benamidar just as much as in a suit by the real creditor. It is quite possible for the Court to carry out these provisions in such a case, because the actual creditor can be examined and called upon to produce his accounts as a witness, just as well as if he was a party. If the benamidar in any way obstructs such an inquiry, then of course other considerations

[1] (1883) 7 Bom. 520.

1925.

NARAYAN KESHAV v. KAJI GULAM MOHIDIN.

may arise. But in the present case there is no reason to anticipate any such obstruction, as the Marwadi creditor was in fact examined in the lower Court and produced certain accounts. There should, therefore, be nothing to prevent the Court from continuing the inquiry required by section 12 by further examination of the Marwadi and his accounts from the commencement of the transactions between him and the mortgagor. Accordingly there is, in my opinion, no sufficient ground for saying that the Dekkhan Agriculturists' Relief Act itself prevents the application of the general principle laid down by the Privy Council.

It was further contended by Mr. Shingne that the agreement being made with the object of preventing the full inquiry contemplated by section 12 of the Act, it was one in fraud of the law, and so void under section 23 of the Indian Contract Act. That section no doubt covers the case of an agreement the consideration or object of which is of such a nature that, if permitted, it would defeat the provisions of any law. But in this particular case for the reasons which I have already given, although an attempt was made to defeat the provisions of section 12 of the Dekkhan Agriculturists' Relief Act, yet that attempt will not be successful, if the Court carries out our order. Furthermore the agreement, which really had that object, is an agreement between the benamidar and the Marwadi and not the agreement contained in the mortgage bond, which is the transaction with which the Court has to do. Therefore I do not think that there is any force in that particular contention.

I would, therefore, hold that there has been an error on the part of the lower Courts in dismissing this suit and not following the particular principle which I have mentioned. At the same time, although the point was

apparently taken in ground No. 3 to the memorandum of the appeal to the lower appellate Court, these particular rulings cannot have been brought to the notice of that Court, otherwise the First Class Subordinate Judge would surely have dealt with the question that arose. Consequently it is virtually a point taken for the first time in second appeal, and this affects the question of costs. I think, therefore, that the decree of the lower appellate Court must be reversed and the suit remanded to the Second Class Subordinate Judge at Dapoli for considering issues Nos. 3, 4 and 5, with this addition that the "amount due" must cover the amount due on taking the account as between the Marwadi Shamdin and the original mortgagors in the manner provided by section 12 of the Dekkhan Agriculturists' Relief Act.

The appellant must bear all the respondents' costs except the costs of this appeal, which the respondent No. 1 should bear.

MADGAVKAR, J.:—The question in this appeal is whether the plaintiff-appellant benamidar is entitled to a mortgage decree against the respondent No. 1 mortgagor agriculturist. Both the lower Courts have held that the appellant is a benamidar for the mortgagee, one Shamdin Jagannath Marwadi, and that the latter has assigned his right to the appellant in order to avoid liability to give accounts under the Dekkhan Agriculturists' Relief Act and on this ground have dismissed the suit.

It is argued for the appellant that a benamidar can sue and obtain a decree. For the respondents it is contended that an assignment preventing the application of the Dekkhan Agriculturists' Relief Act is in asense a fraud on the law and therefore the suit rightly failed.

It is now well established that unless the assignment is in contravention of the law, a benamidar is entitled

1925.

NARAYAN KESHAV v. KAJI GULAM MOHIDIN.

to succeed: *Gur Narayan* v. *Sheolal Singh*[1]. And in so far as the benamidar's transaction does not contravene the provisions of the law, the Courts are bound to give it effect. It is, therefore, for the respondent to show what law, if any, the transaction has contravened. In the absence of any express prohibition of assignments of claims against an agriculturist, the view of the lower Courts is difficult to accept in its entirety. It has been held by this Court that even a mortgagee purchaser in execution of a Court sale without the leave of the Court claiming through a benamidar for possession need not fail: *Ramchandra Vithal* v. *Gajanan Narayan*[2]. On the other hand, an agriculturist assignee is held to be entitled to the benefit of sections 12, 13, and 14 of the Dekkhan Agriculturists' Relief Act: *Annaji Waghuji* v. *Bapuchand Jethiram*[3]. It has also been held by this Court that a benamidar can maintain a suit in his own name as the real plaintiff: *Ravji* v. *Mahadev*[4]. *A fortiori* a mortgagor agriculturist who has a right under section 12, Dekkhan Agriculturists' Relief Act, to ask the Court to go into the entire account and ascertain the actual amount due under the account, cannot lose that right by the simple process on the mortgagee's part of an assignment, as in the present instance; and if the benamidar assignee is unable or unwilling to furnish such account, the suit might fail. But that is not the case in the present instance. Shamdin, the original mortgagee, is a witness in this suit, and it was the duty of the Court, as laid down by section 12 of the Dekkhan Agriculturists' Relief Act, to examine Shamdin and his account and ascertain the amount due. The agreement as between the appellant, the assignee, and Shamdin, is not in contravention of the provisions of any Act. Subject to the taking of

(1) (1918) 46 Cal. 566; L. R. 46 I. A. 1.
(2) (1919) 44 Bom. 352.
(3) (1883) 7 Bom. 520.
(4) (1897) 22 Bom. 672.

account under section 12 from Shamdin, the appellant is entitled to a decree for such amount, if any, actually found due. I agree, therefore, with the order proposed by my learned brother.

Appeal allowed.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

MAHADEO GOVIND WADKAR (HEIR OF ORIGINAL DEFENDANT No. 7), APPLICANT *v.* LAKSHMINARAYAN RAMRATAN MARWADI (ORIGINAL PLAINTIFF), OPPONENT*.

1925. *June* 26.

Civil Procedure Code (Act V of 1908), Order IX, Rules 8, 9; Order XLVII, Rule 1—Suit—Dismissal for default—Application for restoring the suit to file—Delay in making application—Excuse of delay—Revision application—Grounds for review.

When a suit has been dismissed for default under Order IX, Rule 8, of the Civil Procedure Code, the only remedy open to the plaintiff is to apply under Rule 9 in order to set aside the order of dismissal. It is not permissible to him to apply for a review of the order under Order XLVII, Rule 1, of the Code.

Chhajju Ram v. *Neki*[1], followed.

THIS was an application under the civil extraordinary jurisdiction of the High Court against an order passed by A. R. Gupte, Subordinate Judge at Mahad.

The plaintiff had filed a suit in the Court of the Subordinate Judge at Mahad; but it was dismissed for default on October 30, 1922.

On November 30, 1922, the plaintiff applied to the Court for restoration of the suit to the file. The opponents contended that the application was made one day too late and that the delay could not be excused.

* Civil Extraordinary Application No. 229 of 1924.

(1) (1922) L. R. 49 I. A. 144 : 3 Lah. 127.