he granted a license to the defendant Company to use the former Company's land for the purpose of putting up these buildings, probably with the intention of later adjusting matters between the two Companies—an intention which he unfortunately never carried out.

I think that on these facts we may, under section 54 of the Indian Easements Act, imply a license, which in this case, since it was to erect buildings of a permanent character, would fall within the terms of section 60 (*b*) of the Act, and could not be revoked.

For these reasons I believe that the original Court's decree in favour of the plaintiff Company, except as to possession of the tank and building, is correct, and that it should be confirmed as proposed in my Lord the Chief Justice's judgment.

[The further portion of the judgment is not material for the purposes of this report.]

*Appeal dismissed.*

J. G. R.

## ORIGINAL CIVIL.

*Before Mr. Justice Rangnekar.*

GULAMHUSSEIN LALJI SAJAN *v.* CLARA D'SOUZA.*

1928
October 11.

*Dekkhan Agriculturists' Relief Act (XVII of 1879), section 3, clauses (w), (x), section 11—Pledge—Suit by pledgee to recover money by sale of property pledged—Jurisdiction—High Court—Pledgee's right to recover money.*

A suit to recover money due under a promissory note and to enforce a charge on the moveable property pledged by an "agriculturist" defendant does not fall within the description of suits referred to in clause (*w*) of section 3 of the Dekkhan Agriculturists' Relief Act, 1879, but falls under clause (*x*) of that section. Such a suit can be tried on the Original Side of the Bombay High Court, if the cause of action has arisen within its jurisdiction.

The scheme of section 3 of the Dekkhan Agriculturists' Relief Act, is that clause (*w*) refers to those pecuniary claims in respect of which a decree for the payment of money only can be passed; clause (*x*) refers to claims in which, in addition to a decree for payment of money, some other relief, e.g., sale or declaration, may be granted; and clauses (*y*) and (*z*) refer to claims arising under mortgages of immoveable property.

*O. C. J. Suit No. 1526 of 1928.

1928

GULAM-HUSSEIN v. CLARA D'SOHZA

In the case of a pledge, hypothecation or mortgage of movable property, the creditor has two remedies open to him and they are concurrent; (1) he can proceed against the debtor personally; or (2) he can proceed against the property pledged.

*Nim Chand Baboo* v. *Jagabundhu Ghose*[1] and *Mahalinga Nadar* v. *Ganapathi Subbien*,[2] applied.

In questions of jurisdiction the presumption is in favour of giving jurisdiction to the Highest Court.

*Amanat Begam* v. *Bhajan Lal*,[3] applied.

The usual rule of interpretation of statutes is that a statute encroaching on the ordinary jurisdiction of a Court must be construed strictly.

SUIT to recover money due under a promissory note and to enforce a charge on a motor car pledged to the plaintiff and in respect of which the defendant had agreed to execute a deed of mortgage.

The facts are sufficiently set forth in the judgment.

*Manekshaw*, for the plaintiff.

*M. J. Mehta*, for the defendant.

RANGNEKAR, J. :—The plaintiff is the holder in due course of a promissory note dated September 1, 1927, executed by the defendant in favour of one Laduck. It appears that there were monetary dealings between Laduck and the defendant, an account in respect of which was made up on September 1, 1927, and a sum of Rs. 1,784 was found due by the defendant to Laduck. The defendant is the owner of Buick Car No. Bom. Z 6391, and at the time of the first loan to her she agreed to mortgage the said car and execute a regular indenture of mortgage in favour of Laduck to whom she handed over the car also at the same time as security for the loan. At the time the promissory note in suit was executed Laduck handed back the said car to the defendant, to ply the same as his agent till repayment of the amount for which the car had been handed over to him as security. The defendant at that time acknowledged in writing that the car continued to be mortgaged

[1] (1894) 22 Cal. 21. [2] (1902) 27 Mad. 528.
[3] (1886) 8 All. 433 F. B.

to Laduck and also agreed to execute a formal mortgage deed in respect thereof, and to keep and ply the car in Bombay and transfer the same to Laduck whenever called upon by him to do so. She further agreed not to sell or assign the car before paying off the debt. Since the assignment of the promissory note to the plaintiff, the plaintiff has paid Rs. 216 on March 16, 1928, as premium for the renewal of the insurance of the car.

The first defence to the suit is that the defendant is an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act and that this Court has no jurisdiction to try the suit.

The defence on the merits is that the plaintiff is not a holder in due course. The defendant admits the dealings between herself and Laduck, and admits that she agreed to hypothecate the car to Laduck to secure the money due to him. She alleges that when she handed over the car to Laduck the latter agreed to pay her Rs. 4 every day and agreed to credit the balance of the net income in her account with him. She further alleges that Laduck failed to carry out the agreement and pressed for payment, and therefore, as a result of great pressure brought on her by Laduck and as a result of representations made to her by Laduck's agent, she passed the promissory note in suit on September 1, 1927, in favour of Laduck. She alleges that she passed the said promissory note only on the condition that a statement of accounts in detail would be given to her, and that Laduck and plaintiff have failed and neglected to give an account of the income of and disbursements on the car in spite of repeated demands made by her. She further alleges that the car was in good condition when she handed it over to Laduck, and when Laduck returned it to her, she found the car to be damaged and had to take it to a garage for repairs, and she, therefore, charges Laduck with negligence, and reserves her

1928

GULAM-HUSSEIN v. CLARA D'SOUZA

*Rangnekar J.*

right to sue him for damages. She does not deny that the car was insured, but states that the plaintiff was not entitled to insure the car. Finally, she states that on proper accounts being taken a much smaller sum, if at all, would be found due by the defendant to the plaintiff, and she prays for accounts being taken of the transactions between herself and Laduck, and states that she is ready and willing to pay any sum that may be found lawfully due by her as the result of taking such accounts.

The suit came on before me as a short cause. In answer to the defendant's plea of being an agriculturist, the learned counsel who then appeared on behalf of the plaintiff contended that even if the defendant was an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act, the suit can lie in this Court as admittedly the cause of action has arisen within the jurisdiction. This contention was based on section 3 of the Dekkhan Agriculturists' Relief Act, and it was argued that the suit fell under clause (*n*) of that section. On behalf of the defendant it was argued that the suit fell under clause (*w*) of section 3 of the Dekkhan Agriculturists' Relief Act. I adjourned the suit for further arguments as the point raised was not free from doubt. It was agreed that the point should be treated as a preliminary point. At the adjourned hearing I had the benefit of a further argument from the learned counsel appearing for the parties.

The precise question which I have to decide is not covered by authority.

The following facts appear from the pleadings. The plaintiff's claim is in respect of moneys under a promissory note passed by the defendant, and to enforce his charge on the car pledged to Laduck. He prays for a declaration that there is a valid charge in his favour

on the car to the extent of the amount due to him. The plaintiff further prays for the appointment of a receiver, and that the car may be sold by and under the directions of the Court, and the sale proceeds applied towards the payment of the plaintiff's claim. In paragraph 4 of the written statement the defendant admits what she calls an agreement of hypothecation in favour of Laduck but in paragraph 5 she admits that the car was hypothecated to him. In her writing of September 1, she states the car continued to be mortgaged to Laduck. It seems to me on the correspondence, the promissory note and the pleadings that the transaction between the plaintiff and the defendant was one of pledge. If then the plaintiff is a holder in due course, he is undoubtedly entitled to a charge on the said car and to enforce the same against the defendant. Under section 8 of the Transfer of Property Act, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof. Such incidents include *inter alia*, where the property is a debt or other actionable claim, the securities therefor but not arrears of interest accrued before the transfer. Therefore, the suit in substance is to recover moneys due under a promissory note and to enforce the charge which undoubtedly the plaintiff has, if his allegations are true, on the car by sale thereof.

The difficulties of a logical construction of some of the provisions of the Dekkhan Agriculturists' Relief Act have now almost become proverbial, added to which the point I have to decide is not specifically covered by authority. The precise question which arises for determination is, whether the suit falls within the descriptions of suits referred to in clause (*w*) or clause (*x*) of section 3 of the Dekkhan Agriculturists' Relief Act.

1929

GULAM-HUSSEIN v. CLARA D'SOUZA

*Rangnekar J.*

The descriptions of suits referred to in clause (*w*) are the following :—

" suits for the recovery of money alleged to be due to the plaintiff—

(*a*) on account of money lent or advanced to, or paid for, the defendant, or

(*b*) as the price of goods sold, or

(*c*) on an account stated between the plaintiff and defendant, or

(*d*) on a written or unwritten engagement for the payment of money not hereinbefore provided for."

Then comes clause (*x*) which runs as follows :—

" suits for recovery of money due on contracts *other than the above* and suits for rent or for movable property, or for the value of such property, or for damages . . ."

Section 11 of the Dekkhan Agriculturists' Relief Act states that every suit of the description mentioned in section 3, clause (*w*), may, if the defendant, or when there are several defendants, one only of such defendants is an agriculturist, be instituted and tried in a Court within the local limits of whose jurisdiction such defendant resides, and not elsewhere.

But for the provisions of the Dekkhan Agriculturists' Relief Act, there can be no doubt that this Court has jurisdiction to try the suit. In questions of jurisdiction the presumption is in favour of giving jurisdiction to the Highest Court—see *Amanat Begam* v. *Bhajan Lal*.[1] In *Tulsidas Dhunjee* v. *Virbussapa*[2] West J. observed (p. 629) : " The jurisdiction of a superior Court cannot be taken away, except by express words or necessary implication." In *Brohmo Dutt* v. *Dharmo Das Ghose*[3] Sir Francis W. Maclean C. J. observed (p. 388) :—

" We must read the language of the Legislature if we can, so as to make it harmonize, and not conflict, with the general law, though remembering at the same time that the office of the Legislature by its legislative Acts is to define, and even alter, the law."

In *Shivram Udaram* v. *Kondiba Muktaji*[4] West J. observed as follows (p. 346) :—

" In construing Act I of 1868 (General Clauses Act), and Act XXII of 1882 (an Act to amend the Dekkhan Agriculturists' Relief Act) together with the

(1) (1886) 8 All. 438, F. B.
(2) (1880) 4 Bom. 624.
(3) (1898) 26 Cal. 381.
(4) (1884) 8 Bom. 340.

Code of Civil Procedure we must ascribe to the Legislature, as far as possible, the congruity of thought necessary for making its enactments work harmoniously together as a system."

It is clear that the usual rule of interpretation of statutes is that a statute encroaching on the ordinary jurisdiction of a Court must be construed strictly.

Now a careful consideration of the apparent scheme of the Act would show that suits mentioned in clause (*w*) are of a pecuniary character arising out of contracts whether written or unwritten. Then clause (*x*) refers to certain other suits, and thereafter suits with regard to mortgages of immovable property and redemption, etc., are mentioned in clauses (*y*) and (*z*). The scheme seems to me to be, first, pecuniary claims in respect of which a decree for the payment of money only can be passed (clause *w*); secondly, claims in which, in addition to a decree for payment of money, some other relief, e.g., sale or declaration, may be granted (clause *x*); and, thirdly, claims arising under mortgages of immovable property (clauses *y* and *z*).

It will be observed that suits mentioned in clause (*x*) are suits for the recovery of money due on contracts *other than the above*, that is to say, other than those mentioned in clause (*w*). These words " other than the above " are to my mind very important.

Looking to the frame of the plaint in this case, in my opinion, it is not within clause (*w*), the words of which contemplate a suit for money either *simpliciter* or primarily and substantially. The present suit is something far more than that and very different from it. It is a suit not only to recover money but to enforce a charge on property pledged or hypothecated and in respect of which the defendant agreed to execute a regular deed of mortgage. I am led to this conclusion by the scheme to be found from the provisions of section 3 and by the expression " contracts other than

1923

GULAM HUSSEIN v. CLARA D'SOUZA

*Rangnekar J.*

the above " to be found in clause (*x*). In Chapter III in which section 11 occurs there is some indication as to the intention of the Legislature on this question. Section 16 runs as follows :—

" Any agriculturist may sue for an account of money lent or advanced to or paid for him by a creditor, or due by him to the creditor as the price of goods sold, or on a written or unwritten engagement for the payment of money, and of money paid by him to the creditor, and for a decree declaring the amount, if any, still payable by him to the creditor . . . ."

Section 17 says :—

" A decree passed under section 16 may, besides declaring the amount due, direct that such amount shall be paid by instalments, with or without interest; and, when any such decree so directs, the plaintiff may pay the amount of such decree, or the amount of each instalment fixed by such decree, as it falls due, into Court, in default whereof execution of the decree may be enforced by the defendant in the same manner as if he had obtained a decree, in a suit to recover the debt."

It is clear that the transactions mentioned in these sections are the same as those mentioned in section 3, clause (*w*). A comparison of the words in section 16 with those in clause (*w*) shows clearly that the debts in respect of which an account may be sued for are those not secured by mortgage, and it is only in respect of such debts that section 17 authorizes an order for payment by instalments. In *Shankarapa* v. *Danapa*[1] the question arose whether in the case of a mortgage decree instalments could be granted under section 20 of the Dekkhan Agriculturists' Relief Act. The Court observed as follows (p. 607) :—

" Comparing the words of section 16 with the words of section 3, clause (*w*), it is clear that the debts in respect of which an account may be sued for, are debts *not secured by mortgage*, and that it is only in respect of such debts that section 17 authorizes an order for payment by instalments." " The words ' decree passed against an agriculturist ' in section 20 of Act XVII of 1879 mean a decree passed against an agriculturist *personally*, and do not include a decree for the recovery of money by the sale of mortgaged property."

Reference was made to the provisions of section 210 of the old Code of Civil Procedure corresponding to Order XX, rule 11, of the present Code, the words being " decree for the payment of money."

[1] (1881) 5 Bom. 604.

It seems to me that suits falling within clause (*w*) are suits where decrees for payment of money or what are ordinarily known as money decrees only can be passed, and not suits in which one of the reliefs would be by sale of property. If it had been intended that in cases of pledge or hypothecation or mortgage of movable property an agriculturist should have the benefit of instalments or an account, it may reasonably be supposed that sections 16 and 17 would have been made applicable to suits under clause (*x*) but the wording of section 16 shows it is not so. This distinction is pointed out by Melvill J. in the case I have referred to.

Under section 176 of the Indian Contract Act the pledgee has a right to bring a suit against the pledgor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pledgor reasonable notice of the sale.

It is clear under the law applicable to cases of a pledge that the creditor has two rights which are concurrent, and the right to proceed against the property pledged is not merely accessory to the right to proceed against the debtor personally. For the pledgee may have a right to sue for sale of the property even in the absence of a right to sue for a personal decree.

The same principles would apply to the case of hypothecation or mortgages of movable property.

In *Nim Chand Baboo* v. *Jagabundhu Ghose*[1] the same principles were laid down. This was a suit on a pledge of certain movable property made in respect of a loan of money on February 10, 1887. The suit was instituted on December 14, 1891. The plaintiff prayed for a decree for the money lent against the defendant personally and also that the charge might be enforced against the article pledged. It was held that so far as the

[1] (1894) 22 Cal. 21.

1928

GULAM-HUSSEIN v. CLARA D'SOUZA

*Rangnekar J.*

prayer for a personal decree was concerned the suit was governed by Article 57 of Schedule II of the Indian Limitation Act and was barred, but so far as the plaintiff sought to enforce his charge against the property pledged the suit fell not within that Article but within Article 120 of the same Schedule and was therefore not barred. In the judgment the following observations occur (p. 23):—

"There can be no doubt that when movable property is pledged to a person for money lent, he acquires a special property therein: he has a charge upon it for the satisfaction of the loan advanced, and he is entitled, under section 176 of the Contract Act, either to bring a suit against the owner upon the debt or promise, retaining the goods pledged as collateral security, or he may sell the things pledged upon giving reasonable notice of the sale. And when he brings a suit for the purpose of a declaration of his right to sell the article pledged for the satisfaction of his claim, the suit is one to enforce his charge upon the said articles."

The same principles were laid down, and the Calcutta case followed, in *Mahalinga Nadar* v. *Ganapathi Subbien*.[1] It was further pointed out in this case that in the case of hypothecation or mortgage of movable property the same principles would apply.

Therefore, the claim of a pawnee to recover moneys advanced by him by sale of property pledged is a claim to enforce his charge upon the property.

In *Kashiram Mulchand* v. *Hiranand Suratram*[2] it was held by Mr. Justice Birdwood that a suit for redemption of a chattel is one falling under clause (*x*) of section 3 of the Dekkhan Agriculturists' Relief Act. If then a suit for redemption of a chattel does not fall under clause (*w*) of section 3, but falls under clause (*x*), it is difficult to see why in the converse case where the mortgagee or pledgee files a suit to enforce his charge upon the property mortgaged or pledged it should not fall under the same clause.

I think, therefore, the suit does not fall within clause (*w*) of section 3 of the Dekkhan Agriculturists'

[1] (1902) 27 Mad. 528.

[2] (1890) 15 Bom. 30.

1928

GULAM-HUSSEIN v. CLARA D'SOUZA

*Rangnekar J.*

Relief Act, but falls within the description of suits mentioned in clause (*x*) of that section, and even if the defendant is an agriculturist this Court has jurisdiction to try the suit. I am led to this conclusion by the apparent scheme to be inferred from the provisions of the section and particularly by the expression " contracts other than the above " to be found in clause (*x*).

As pointed out by Lord Macnaghten in *Mt. Bachi* v. *Bikhchand*[1] the Dekkhan Agriculturists' Relief Act gives extraordinary reliefs in certain particular cases specified in the Act, and there is no reason for extending the same.

Attorneys for plaintiff : Messrs. *Shamrao, Minochehr* and *Hiralal.*

Attorneys for defendant : Messrs. *Ghulam Ali & Co.*

*Issue found in the affirmative.*

B. K. D.

[1] (1910) 13 Bom. L. R. 56.

## ORIGINAL CIVIL.

*Before Mr. Justice Rangnekar.*

VENIDAS NEMCHAND *v.* BAI CHAMPAVATI.*

1928
*November 27.*

*Petition for probate—Bombay High Court Rules (Original Side), Rules 602 and 609—Indian Succession Act (XXXIX of 1925), section 295—Will—Caveator setting up another will—Such will should be propounded in another petition—Practice.*

If on a petition for probate, the caveator sets up another will of the testator, it is obligatory upon him to file a separate petition to propound the will set up by him. The result in such a case is, that there are two separate suits which may either be heard together or be consolidated.

THIS was a petition for probate of the last will and testament of one Vanmali Virji. According to the plaintiff the deceased made his last will on April 14, 1925. To this petition a caveat was filed by the widow of the deceased alleging that the will annexed to the

*T. & I. J. Suit No. 16 of 1927.