

APPELLATE CIVIL.

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

HIRACHAND KHEMCHAND GUJAR AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS v. ABA LALA PATIL AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS

1921.

December 21.

Civil Procedure Code (Act V of 1908), section 48—Dekkhan Agriculturists' Relief Act (XVII of 1879)—Decree nisi on mortgage—Execution proceedings—Limitation.

In 1900, the defendants obtained a decree *nisi* on a mortgage under the provisions of the Dekkhan Agriculturists' Relief Act. The amount of the mortgage was made repayable in ten equal annual instalments, and if default occurred in payment of any one instalment, the decree-holder was to wait for the period of one year, after which he was at liberty to have the mortgaged property sold through the Court for the whole amount then due. The first instalment became due in March 1901 and remained unpaid. On the defendants' application to the Court, the decree was made absolute on the 7th January 1904. The defendants having presented Darkhasts in 1906, 1909 and 1912, finally applied in 1915 to execute the decree. The plaintiffs objected that the execution of the decree was barred under section 48 of the Civil Procedure Code :—

Held, upholding the objection and dismissing the application, that since it was not necessary to have the decree made absolute under the Dekkhan Agriculturists' Relief Act, the order of 1904, which was merely an order in execution and not a fresh decree could not give a fresh starting point to the period of limitation.

SECOND appeal from the decision of N. S. Lokur, Assistant Judge of Satara, confirming the order passed by G. R. Gupte, Subordinate Judge at Islampur.

Execution proceedings.

The defendants obtained a redemption decree against the plaintiffs on the 11th September 1900, under the provisions of the Dekkhan Agriculturists' Relief Act, for Rs. 1,800, which was made payable in ten equal

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annual instalments. It was also provided that if there was default in payment of any instalment, the decree-holders were to wait for the period of one year, and if the instalment still continued unpaid, the amount then due was to be recovered by sale of the mortgaged property.

The first instalment which became due in March 1901 was not paid.

On the 15th December 1903, the defendants applied to the Court for decree absolute, and the Court passed the order on the 7th January 1904.

The defendants first applied to execute the decree on the 7th August 1906 and applied again in 1909 and 1912. On the 7th June 1915, they filed the present application.

The lower Courts were of opinion that the application having been filed more than twelve years after the date of the decree, viz., 1900, was barred under the provisions of the Civil Procedure Code. The application was, therefore, dismissed.

The defendants appealed to the High Court.

Coyajee, with *P. B. Shingne*, for the appellants.

Desai, with *Ratanlal Ranchhoddas*, for *K. N. Coyajee*, for respondents Nos. 1, 2, 3 and 5.

MACLEOD, C. J. :—This is an appeal from the decision of the Assistant Judge of Satara, dismissing an appeal from an order made by the Second Class Subordinate Judge in the matter of a Darkhast taken out by the plaintiffs in execution of a decree which was passed on the 11th September 1900. That was a consent decree whereby it was declared that there was a balance of Rs. 1,800 due to the defendants; that it should be paid off by ten yearly instalments from the end of Falgun,

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1831 Shake, which would correspond with March 1901 ; that in case of failure of payment of an instalment the defendant was to wait for one year, and that if during that time the plaintiff did not pay to the defendants the amount of the instalment, in respect of which there was failure of payment, together with interest, then the defendants were to recover the whole of the amount through the Court by selling the mortgaged lands. Default was made in paying the first instalment, nor was it paid within a year from the date of the default. Therefore, by the terms of the decree, the defendants were entitled to apply in March 1902 for execution of the decree by selling the mortgaged lands. On the 1st December 1903, they applied to the Court to have the decree made absolute, and, on the 7th January 1904, an order was made by the Subordinate Judge making the decree absolute.

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. The defendants should have applied for execution at once, and the application to have the decree made absolute would at the best be considered as a step-in-aid of execution, so that the order of the Subordinate Judge cannot be treated as a decree which would form a first starting point for the period of twelve years allowed by section 48 of the Civil Procedure Code. The defendants issued a Darkhast on the 7th August 1906, another in 1909, and another in 1912. The present Darkhast was filed on the 7th June 1915. That was clearly more than twelve years after March 1902 when the decree could have been executed by sale of the mortgaged property in consequence of the plaintiffs' default. It is admitted that unless the defendants can succeed in getting the Court

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to hold that the order of the 7th January 1904 was a decree which has now to be executed, the present Darkhast is out of time. For the reasons already given, I think that the order of the 7th January 1904 was merely an order in execution, and not a fresh decree. The decision, therefore, of the learned Assistant Judge was right and the appeal must be dismissed with costs.

Appeal dismissed.

R. R.

APPELLATE CIVIL.

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

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December 21.

VITHALDAS BHAGWANDAS (ORIGINAL PLAINTIFF), APPELLANT
v. MURTAJA HUSHEIN SYED AND OTHERS (ORIGINAL DEFENDANTS)—
RESPONDENTS*.

*Dekkhan Agriculturists' Relief Act (XVII of 1879), section 12—Accounts—
Amount due under bond—Larger amount awarded as result of accounts—
Proper relief.*

The defendants executed in 1892 a mortgage-deed for Rs. 15,000, agreeing to pay off the amount in annual instalments of Rs. 500 each. The instalments were duly paid up to the year 1903; after which there was default in payment. The plaintiff sued in 1916 to recover the amount of twelve instalments that had accrued due. The defendants pleaded that they were agriculturists; and a Commissioner was appointed to take accounts under the provisions of the Dekkhan Agriculturists' Relief Act. The Commissioner found that the sum of Rs. 6,231-10-0 was due for principal and allowed a like amount for interest. The trial Judge, however, was of opinion that only Rs. 3,200 were due for principal and passed a decree for Rs. 6,400 inclusive of interest. The plaintiff having appealed:—

Held, that although on the report of the Commissioner there appeared payable, for principal and interest, the sum of Rs. 12,463-4 0, yet, inasmuch as there remained only Rs. 9,500 due on the bond itself, a decree for that amount only should be passed.

* First Appeal No. 346 of 1920.