otherwise arise when he attempts to execute his decree, but there is nothing in the Bombay Rent Act which gives persons in possession through the tenants a better right to obstruct the execution of the decree than they had apart from the Act.

The summons must be made absolute with costs.

Counsel certified.

Solicitors for the plaintiff: Messrs. *Chitnis, Kanga & Manbhoy.*

Solicitors for the defendant: Messrs. *Thakordas & Co.*

Summons made absolute.

G. G. N.

APPELLATE CIVIL.

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

MOTILAL HIRABHAI AND OTHERS (ORIGINAL OPPONENTS NOS. 1 to 5), APPELLANTS *v.* BAI MANI WIFE OF SANKALCHAND HIMATLAL AND DAUGHTER OF GIRDHARLAL DALPATRAM (ORIGINAL APPLICANT), RESPONDENT*.

1921. *September 6.*

Mortgage—Shares—Issue of fresh capital—Accretion.

Question considered whether an accretion to mortgaged shares by the issue of fresh capital can be treated as belonging to the corpus.

FIRST Appeal against the decision of K. T. Desai, First Class Subordinate Judge at Ahmedabad.

The facts of this case appear sufficiently set forth in the judgment of the learned Chief Justice, the material portions of which are printed below.

* First Appeal No. 254 of 1918.

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MOTILAL HIRABHAI v. BAI MANI.

Coyajee, with *G. N. Thakor* and *H. V. Divatia*, for the appellants.

Bahadurji, Acting Advocate General, with *N. K. Mehta*, for the respondents.

MACLEOD, C. J. :—This is an appeal by some of the defendants in Suit No. 673 of 1918 in the First Class Subordinate Judge's Court at Ahmedabad against an order passed by the Subordinate Judge in Darkhast No. 96 of 1918 issued by the successful plaintiff in execution of his decree. That decree provides as follows : "The plaintiff do pay Rs. 11,939-15-0 to defendants Nos. 1 to 5 and redeem from them the mortgaged shares, together with the issues mentioned in the suit and the defendants Nos. 1 to 5 do on receiving the above sum get the said shares transferred to the name of the plaintiff in the books of the defendant No. 6 Company." This decree was confirmed on appeal to the High Court.

In order to understand the questions which are at issue in this appeal it will be necessary to set out the facts relating to the mortgage which was sought to be redeemed in that suit. The plaintiff was Mani, the daughter of one Girdharlal Dalpatram, who had a dispute with one Achratal regarding the ownership of forty-eight shares in the Ahmedabad Ginning and Manufacturing Company. That dispute was settled by arbitration. As a result twenty-four shares were transferred by Girdharlal to Achratlal, the remaining twenty-four were to remain in the name of Girdharlal but he was only to retain Rs. 1,100 out of the dividends, the balance being payable to Achratlal and Gulab his mistress. In 1883 Girdharlal in consideration for Rs. 7,500 borrowed from Achratlal transferred to the latter five out of the twenty-four shares retained by him, Girdharlal, under the arrangement of 1883.

Achratlal died in 1885 and thereafter Girdharlal not having paid the excess dividends over Rs. 1,100 to Gulab borrowed Rs. 4,439-15-0 from the trustees of Achratlal on the same security. Thereafter the trustees continued to receive the dividends on the shares. Gulab is now dead and Girdharlal is entitled to the shares and all dividends declared thereon on redemption of the mortgage. The principal issue in the suit was on what terms the plaintiff should be allowed to redeem. The defendants claimed to retain the dividends without an account being taken and also to be entitled to interest on the principal debt.

The trial Court held that the plaintiff should be allowed to redeem on payment of the principal debt without any account being taken of interest or dividends. It is important to note that throughout the judgment the Subordinate Judge refers to the mortgaged property as consisting of five shares which were numbered in the plaint 266 to 270. The original face value was Rs. 1,000 for each share. It is admitted, however, that before 1883 for each original share a sub-share of Rs. 500 had been issued, although Beaman J. in his judgment refers to the face value of the five shares as amounting to Rs. 7,500, as if in some way or other the sub-shares were considered as increasing the face value of the original shares. These sub-shares presumably were transferred to Achratlal although they are nowhere referred to in the judgment, but the decree allows redemption of the mortgaged shares together with the issues mentioned in the suit. It is these last words which have formed the foundation for the present dispute. The five shares numbered 266 to 270 with their five sub-shares existing at the date of the mortgage of 1883 constituted the mortgaged property, as stated in para. 4 of the plaint. But in the prayer of the plaint the plaintiff asked for an account to be

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taken and for a direction that on payment being made the five shares in dispute as also the issues thereof that there might be *at present* should be transferred to the plaintiff's name. There was no averment that any fresh issues had come into existence after the mortgage.

Now in 1886 certain special resolutions were passed by the Company, to the effect that—

(1) The capital of the Company should be increased by Rs. 5,25,000 to be called B capital divided into 350 whole shares of Rs. 1,000 and 350 half shares of Rs. 500. To those of the present share-holders who had a whole share of Rs. 1,000 one whole share of B capital was to be given and to those who had a present half share of Rs. 500 one half share of Rs. 500 of the B capital was to be given.

(2) At the time of declaring a dividend the share-holders should be paid a dividend at the rate of 6 per cent. in cash and the rest should be credited in the certificate for call.

We have been given to understand that the B capital has been fully paid up out of dividends declared in excess of 6 per cent. but there is nothing on the record of the suit or of the Darkhast to show by what instalments the B capital became fully paid up.

Considering that it was perfectly well known that the trustees of Achratlal, by reason of the five shares 266 to 270 and their five sub-shares, representing A capital, standing in their name, had become the holders of five whole shares and five sub-shares of B capital, it is almost incredible that the question whether the B shares should also be transferred on payment of the principal debt should have passed unnoticed. Even the five sub-shares of A capital are nowhere specifically

referred to. It was eminently a question to be decided in the suit and not in execution proceedings. The execution Court can only give effect to the decree as it stands. The defendants have to transfer to the plaintiff the mortgaged shares with the issues mentioned in the suit, but there is no mention of B shares throughout the proceedings except in Exhibit 14 referred to by the learned Judge below. If they had been referred to in the course of the suit then it might be said that the execution Court might order all shares and sub-shares issued after the mortgage to be transferred after ascertaining what shares had been so issued. But the mere fact that the plaintiff prayed that all subsequent issues should be transferred does not give the execution Court power to deal with subsequent issues if there was no evidence before the trial Court of subsequent issues and it could not be said that they were mentioned in the suit.

We do not even know whether the sub-shares of A capital which are mentioned in the special resolution of 1886 as half shares bore the same numbers of the corresponding whole shares or were given fresh numbers. But as far as we can gather from the meagre information on the record the calls on the B capital were paid by means of dividends which would otherwise have been paid to the holders of the A capital, their dividends in the meanwhile being restricted to 6 per cent. Eventually, therefore, the mortgagee instead of getting Rs. 7,500 in cash as dividend in excess of the 6 per cent. actually paid on the A capital mortgaged became the owner of fully paid shares of B capital. In any event, it might be argued that the mortgagor would not be entitled to have these shares transferred to him without an account being taken of the amount of dividend which was utilised in paying the calls on the shares instead of being paid in cash to

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the mortgagee. But this Court has decided that the mortgagor is not entitled to an account of the dividends as he was not liable to pay interest on the loan. It would seem, therefore, that if the question had been considered at all in the suit proceedings the mortgagor would at the least have been directed to pay Rs. 7,500 before he would get back the B shares, but obviously that is not an order which can be made in execution. It has been contended that a mortgagee of shares is in the same position as a life tenant, and that any accretion to the mortgaged shares by the issue of fresh capital must be treated as belonging to the corpus but as pointed out by Lord Herschell in *Bouch* v. *Sproule*,[1] that depends on whether accumulated profits are distributed as dividend or converted into capital. If, as in that case, a sum which is entered in the balance-sheet to the credit of the Reserve Fund is transferred from the Reserve Fund to the Capital Account and new shares issued to the existing share-holders, it may be said that there is a distribution of capital and the life-tenant can only get the interest on the new shares, but if the share-holders prefer that instead of getting dividends paid to them in cash, the amount to the credit of profit and loss account available for payment of dividends in a particular year should be transferred to the capital account and new shares issued in respect thereof, clearly there is a distribution of dividends, and the life-tenant would be entitled to retain the new shares. But we have to endeavour to ascertain what was actually decided by the Court which passed the decree.

[After a consideration of the evidence on the record his Lordship eventually came to the conclusion that the shares of B capital had been treated by the parties as an accretion to the mortgage security and that the

[1] (1887) 12 App. Cas. 385.

Court which passed the decree had also so treated them.

The appeal was therefore dismissed with costs,—a result in which Shah J. concurred in a separate judgment.]

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

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

BAI KEVAL, DAUGHTER OF HEMCHAND KALYANCHAND AND OTHERS (ORIGINAL DEFENDANTS NOS. 1 TO 5), APPELLANTS *v.* MADHU KALA AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANT NO. 6), RESPONDENTS*.

Indian Limitation Act (IX of 1908), section 7—Redemption suit by two plaintiffs—Disability—Power to give discharge.

The plaintiffs sued to redeem the plaint property mortgaged by their father. The suit was brought more than three years after the first plaintiff came of age, but within three years after the second plaintiff attained majority. It was contended that the suit was barred by limitation under section 7 of the Limitation Act, as a valid discharge could have been given by the first plaintiff without the concurrence of the second and therefore time ran against both the plaintiffs from the date the first attained majority.

Held, that the suit was in time with reference to both the plaintiffs under section 7 of the Limitation Act, for there was nothing to show that the first plaintiff who was a major could have given a discharge without the concurrence of the second plaintiff who was a minor.

Bapu Tatya v. *Bala Rarji*[1], distinguished.

SECOND Appeal against the decision of M. J. Kadri, Assistant Judge of Surat, varying the decree passed by S. J. Yajnik, Subordinate Judge at Olpad.

Suit for redemption.

* Second Appeal No. 399 of 1920.

(1) (1920) 45 Bom. 446.