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distinct cause of action, and the Subordinate Judge has rightly held that any such claim can only be made in a properly framed suit. It is obviously not a case that can be dealt with under section 47, Civil Procedure Code, for the claim will not be one relating to the execution, discharge or satisfaction, of the decree but will arise from a right different from applicant's rights under the decree. The appeal is, therefore, summarily dismissed.

Appeal dismissed.

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APPELLATE CIVIL.

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

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August 9.

KUSHABA RAMJI THOKE AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS v. BUDHAJI SAKHARAM THORAT AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS^a.

Civil Procedure Code (Act V of 1908), sections 11, 47, Order XXXIV, Rules 7 and 8—Mortgage—First decree for redemption of mortgage—Provision in the decree that if the mortgage was not redeemed the mortgagor was debarred from all rights to redeem—Mortgage not redeemed—Second suit for redemption does not lie.

In 1897, the plaintiffs obtained a redemption decree which provided that if the mortgagors failed to pay the mortgage money within the time provided by the decree, they should be finally debarred from all rights to redeem. The mortgage was not redeemed. The plaintiffs sued again in 1917 to redeem the mortgage :—

Held, that the second suit for redemption did not lie.

Ramji v. Pandharinath⁽¹⁾, explained.

PER MACLEOD, C. J. :—“There is a certain amount of inconsistency between Rules 7 and 8 of Order XXXIV of the Civil Procedure Code.”

“A preliminary decree” in a redemption suit, “ought not to direct more than this, that if the plaintiff makes a default then the mortgagee should have a

^a Appeal from Order No. 65 of 1920.

(1) (1918) 21 Bom. L. R. 56.

right to ask for a final decree either for foreclosure or sale as is provided for by Rule 8" of Order XXXIV of the Civil Procedure Code of 1908.

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APPEAL from an order passed by H. V. Kane, First Class Subordinate Judge at Nasik, reversing the decree passed by, and remanding the suit to, B. D. Subnis, Subordinate Judge at Pimpalgaon.

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Suit to redeem a mortgage.

The plaintiffs sued in 1895 to redeem a mortgage, dated 1872, and obtained in 1897 a redemption decree which provided that "in case of default the plaintiff be debarred of all rights to redeem." The decree was not executed.

In 1917, the plaintiffs again sued to redeem the mortgage.

The trial Court held that the second suit was barred by the redemption decree in the first suit.

This decree was, on appeal, reversed by the lower appellate Court, who held, following the Full Bench case reported in 21 Bom. L. R. 56, that the second suit was not barred by the first decree. The suit was therefore remanded to the first Court for trial on merits.

The defendants appealed to the High Court.

D. C. Virkar, for the appellants:—The decree for redemption in the first suit of 1897 directed that the plaintiff should pay Rs. 8,000 to the defendants within six months and recover possession of the mortgaged property and that in case of default he would be debarred of all rights to redeem. The defendants were already in possession. Plaintiff did not pay the amount and the defendants did not execute the decree. The question is whether a second suit for redemption is maintainable. We submit that no second suit is maintainable. Sections 11 and 47 of the Civil Procedure Code bar such a suit. The ruling in the Full

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Bench case of *Ramji v. Pandharinath*⁽¹⁾ does not govern the present case. The first decree in that case was one for sale. But the question referred to the Full Bench is whether a mortgagor who has brought a suit for redemption and obtained a decree-*nisi* which neither the mortgagor nor the mortgagee has applied to be made absolute can, after the execution of that decree is time-barred, bring a fresh suit for redemption. The reply of the Full Bench was a qualified one. Scott, C. J., at p. 52 makes a reservation in the case of decrees under the Dekkhan Agriculturists' Relief Act. Shah J. restricts the consideration of the question in reference to the terms of the decree in that case. The decree in the present case is one of foreclosure and is complete in itself and executable: *Abdul Majid v. Jawahir Lal*⁽²⁾; *Batuk Nath v. Munni Dei*⁽³⁾ and *Munna Lal Paruck v. Sarat Chunder Mukerji*⁽⁴⁾. In *Ramasami v. Sami*⁽⁵⁾, the terms of the first decree were similar. It was held that no subsequent suit for redemption could be maintained. In *Sita Ram v. Madho Lal*⁽⁶⁾, the wording of the decree was peculiar but Banerji J., at p. 52 and Aikman J., at p. 61 considered the wording of the decree in *Ramasami's case*⁽⁵⁾ and conceded that if the wording of the decree-*nisi* provided for foreclosure in the event of non-payment without any further order under section 93 of the Transfer of Property Act, the second redemption suit would be barred. In *Lachman Singh v. Madsudan*⁽⁷⁾, the terms of the decree were exactly the same as in the present case and the Court held that the second suit was barred. The Full Bench of the Madras High Court in *Vedapuratti v. Vallabha Valiya Raja*⁽⁸⁾ definitely

(1) (1918) 21 Bom. L. R. 56, p. n.

(2) (1914) 36 All. 350.

(3) (1914) L. R. 41 I. A. 104.

(4) (1914) L. R. 42 I. A. 88.

(5) (1893) 17 Mad. 96.

(6) (1902) 24 All. 44.

(7) (1907) 29 All. 481.

(8) (1902) 25 Mad. 300.

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held that a second suit for redemption is barred by sections 13 and 244 of the Civil Procedure Code of 1882. To the same effect is the case of *Ranga Ayyangar v Narayana Chariar*⁽¹⁾. Even in Bombay the law prior to the Transfer of Property Act did not permit a second suit: *Ladu Chimaji v. Babaji Khanduji*⁽²⁾ and *Maloji v. Sagaji*⁽³⁾.

P. B. Shingne, for the respondent:—The ruling in the Full Bench case of *Ramji v Pandharinath*⁽⁴⁾, governs the present case. The order of reference does not make any reservation and the majority of the Full Bench considered the question in that light. The reply leaves no ground to suppose that the consideration was limited to the wording of the decree in that case. It is not now permissible to the appellants to challenge that decision.

C. A. V.

MACLEOD, C. J.:—The plaintiffs are the successors-in-title to the equity of redemption, which once existed in one Abaji Haibatrao, through one Hazarimal Birdichand who had purchased the equity of redemption at a Court-auction. He had sued for redemption in Suit No. 1138 of 1895, and a decree for redemption was passed with this condition that if the mortgagor failed to pay the mortgage money within the time provided by the decree he should be finally debarred from all rights to redeem. The mortgage was not redeemed and the execution of that decree is now barred by limitation.

The question in this suit was whether a second suit for redemption would lie. The trial Court rejected the claim. But the lower appellate Court relying on

(1) (1915) 39 Mad. 896.

(3) (1888) 13 Bom. 567.

(2) (1883) 7 Bom. 532.

(4) (1918) 21 Bom. L. R. 56 F. B.

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the decision in *Ramji v. Pandharinath*⁽¹⁾, reversed the decree of the lower Court and remanded the suit for trial. That decision was justified at any rate by the head-note in the case referred to, which, I think, although it followed the question which was referred to the Full Bench, is worded somewhat too widely, as the terms of the decree in that case were to this effect, that if the plaintiff failed to redeem the property within the decretal period, then the mortgagee should recover the amount by sale of the property. The lower appellate Court in passing the order of remand now under appeal did not consider the terms in which the decree was passed in Suit No. 1138 of 1895. In *Sita Ram v. Madho Lal*⁽²⁾, which was the case upon which the Chief Justice and myself relied for the opinion we gave on the question propounded, the learned Judges expressed the opinion that, if the decree in the first suit provided in distinct terms that in case of default in payment the mortgagor would be debarred from redeeming the mortgaged property afterwards, a second suit would be clearly barred under the rule of *res judicata*.

The difficulty arises really from the fact that the decree in Suit No. 1138 of 1895 was passed under the Transfer of Property Act which did not provide for a decree absolute, so that it was not strictly accurate to apply the term "decree-nisi" to a redemption decree under the Act. Only one decree was passed, it being left to the parties in execution to determine what effect should be given to that decree. I think very probably my own opinion as expressed in my judgment in *Ramji v. Pandharinath*⁽¹⁾ was that a decree passed under the Transfer of Property Act, in whatever form, was in effect a decree nisi, and would not of itself put an end to

⁽¹⁾ (1918) 21 Bom. L. R. 56.⁽²⁾ (1901) 24 All. 44.

the mortgage while it remained unexecuted. But considering the dissenting judgment by my brother Shah in that case and the particular terms of the decree with which the Full Bench was then dealing, I am not prepared now to say that the decree in the form in which it was drawn up in this case comes within that decision. The result must be, therefore, that the appeal must be allowed and the decree of the trial Court restored with costs throughout.

I would like to take this opportunity of pointing out that there is a certain amount of inconsistency between Rules 7 and 8 of Order XXXIV. Rule 7 is identical with repealed section 92 of the Transfer of Property Act, and contains a provision that if the payment directed is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage is simple or usufructuary) be debarred from all right to redeem or (unless the mortgage is by conditional sale) that the mortgaged property be sold. That is not consistent with the provisions of Rule 8, which is new, which provides for a final decree in a redemption suit, and directs what should happen, first, if the payment is made, in which case the Court passes a decree ordering the mortgagee to deliver up the documents, and if so required, retransfer the mortgaged property; secondly, where the payment directed is not made, in which case it provides for the various forms of final decrees which may be passed on the application of the mortgagee. Evidently, therefore, a preliminary decree ought not to direct more than this, that if the plaintiff makes a default, then the mortgagee should have a right to ask for a final decree either for foreclosure or sale as is provided for by Rule 8, and that is the form of preliminary decrees which I used to pass in redemption suits when sitting on the Original Side.

SHAH, J.:—The facts in this case are few and simple. One Abaji mortgaged the property now in dispute in

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1872 to Kushaba and others. The equity of redemption was purchased by Hajarimal at a Court-sale in 1874 in execution of a decree against Abaji. Hajarimal sued for redemption in 1895, and obtained a decree against the mortgagees in 1897, directing that he should pay Rs. 8,000 to the mortgagees within six months and recover possession of the mortgaged property and that in case of default he would be debarred of all rights to redeem. Nothing further was done under the decree; and no further order was passed under section 93 of the Transfer of Property Act. It remained unexecuted and the mortgagees remained in possession. Hajarimal sold his interest in the property to the present plaintiffs in 1915. They filed the present suit in April 1917 on the same mortgage for redemption and accounts and claimed to have the benefit of the Dekkhan Agriculturists' Relief Act. The question is whether the suit is maintainable in view of the provisions of sections 11 and 47 of the Code of Civil Procedure.

In considering this question, I accept the proposition that the decision of the majority of the Full Bench in *Ramji v Pandharinath*⁽¹⁾, so far as it goes, is binding upon us. The decree in the first suit in that case provided that in default the defendant was to recover the amount by sale of the property. The question referred to the Full Bench was no doubt in a general form; but the reply of the Full Bench was neither categorical nor unqualified. For instance in that case Scott C. J. expressed the opinion at the end of his judgment that the second suit would not be maintainable in case the decree was passed under the Dekkhan Agriculturists' Relief Act. In that case the decree in the first suit was passed under that Act. The Division Bench which ultimately decided that case did

⁽¹⁾ (1918) 43 Bom. 334.

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not follow that opinion. I refer to this point only for the purpose of showing a limitation which the learned Chief Justice had in mind. The case was argued and considered with reference to the facts of the case; and I feel a doubt as to whether the Chief Justice intended to go so far as to lay down that the second suit would be maintainable even if the decree provided that in case of default the mortgagor was to be debarred of all rights to redeem. It may be that logic and consistency require that the answer should be the same whether the decree in the first suit is in the form as in the Full Bench case or as in the present case. But the case is an authority for what it decides and not necessarily for all that logically follows from it. It is also clear from other cases that some Judges at any rate have based their conclusions upon the terms of the decree. For instance in *Sita Ram v. Madho Lal*⁽¹⁾, which has been referred to with approval by the majority of the Full Bench in *Ramji v. Pandharinath*⁽²⁾. Banerji and Aikman J J. distinctly observed in their judgments that if the decree had provided that in default of payment within the time fixed the right to redeem would be barred, the second suit would necessarily fail; and this view is acted upon by that High Court in *Lachman Singh v. Madsudon*⁽³⁾. I refer to these views only for the purpose of pointing out that while adopting the view that a second suit is maintainable when the decree is in one form, it is reasonably possible to take a different view when the decree is in a different form.

There is a practical difference between a decree directing a sale of the property in case of default and a decree directing that in case of default the right to

(1) (1901) 24 All. 44.

(2) (1918) 43 Bom. 334.

(3) (1907) 29 All. 481.

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redeem would be barred. In the former case the mortgagee has to proceed by way of execution to get the property sold: and the consequence that arises is directly attributable to his omission to do anything under the decree. In the other case the mortgagor has to proceed in execution and the consequences are attributable to his inaction, if he fails to execute the decree. It is possible that such considerations may appeal to some minds as justifying a differential treatment of the two decrees. For these reasons I feel that the point as to whether a second suit could be maintained when the decree such as we have in this case remains unexecuted for over three years and when no order under section 93 of the Transfer of Property Act has been made is not necessarily answered by the majority of the Full Bench in *Ramji v. Pandharinath*⁽¹⁾. My own opinion as to whether a second suit is maintainable is expressed in that case: and I have no desire to repeat what I have said there. I have approached the consideration of this case with a desire to see if I can accept the opinion of the majority in that case as settling the question now before us. But for the reasons above stated I am unable to go so far.

I may add that prior to the Transfer of Property Act the decrees used to be passed in this form on mortgages in this Presidency, and no second suit was allowed: *see *Ladu Chimaji v. Babaji Khanduji*⁽²⁾ and *Maloji v. Sagaji*⁽³⁾.

Even after the Transfer of Property Act came to be applied to this Presidency decrees in redemption suits were passed in that form; and the view that all further proceedings with reference to the decree were to be taken in execution thereof has received the sanction of the Privy Council. Any view that is now taken as to

⁽¹⁾ (1918) 43 Bom. 334.

⁽²⁾ (1883) 7 Bom. 532.

⁽³⁾ (1888) 13 Bom. 567.

the right of the mortgagor to file a second suit, when he has allowed the execution of the first decree for redemption to be time-barred, will have the effect of unsettling the titles acquired under several redemption decrees passed in that form from 1893 to 1908, in which the parties have allowed the execution to be time-barred without obtaining any order under section 93 of the Transfer of Property Act.

In consequence of the transposition of the provisions of the Transfer of Property Act to the Code of Civil Procedure and of the change in the provisions requiring a final decree after the preliminary decree instead of an order after the decree under the Transfer of Property Act, similar questions with reference to the decrees passed under the Code of 1908 possibly may not arise.

As the decisions stand at present, so far as I am aware a second redemption suit, when the decree is passed under the Transfer of Property Act in the form such as we have in the present case, would not be allowed by the Madras and Allahabad High Courts and probably not by the Calcutta High Court. In the absence of any clearly binding authority to the contrary I am free to decide this appeal in accordance with my own view of the matter, which is that the second suit is barred by sections 11 and 47 of the Code of Civil Procedure.

I therefore concur in the order proposed by my Lord the Chief Justice.

Appeal allowed.

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