

SA 386 | 1936

In His Majesty's High Court of Judicature,
Appellate Side, Bombay

(CIVIL JURISDICTION)



Appeal ~~Civil Revision Application~~ No. 386 of 1936 from ~~Original~~ Appellate Decree

Krishna Vitvak Mahar;
and others.

Appellant ☒
~~Applicant~~

(Original ~~Pleffs~~ Defts: 5-

versus

Shankar Krishna Gandhi
and others

Respondent ☒
~~Opponent~~

(Original Defts: 164

Claim Rs.

„ for Advocate's fee.

Advocate for ~~Appellant~~ ☒ Mr. B. G. Modak.

Advocate for ~~Respondent~~ ☒ Mr. M. G. Chitale.

In His Majesty's High Court of Judicature,
Appellate Side, Bombay

S. APPEAL No. 386 of 193 6
CIVIL REVISION APPLICATION

District

Ratnagiri

No. of paper.

Particulars.

I. Papers to be preserved.

- 1 Copy of the Judgment of the lower appellate Court if printed.
- 2 Copy of the Judgment of the original Court (if printed).
- 3 Interlocutory Judgment of the High Court (if any).
- 4 Findings.
- 5 Judgment (Final) of the High Court.
- 6 Decree of the High Court.
- 7 Judgment in Review Petition.
- 8 Judgment of the High Court in the matter of leave to appeal to the Privy Council.
- 9 Judgment, decree and order of the Privy Council.
- 10 Printed copy of the Privy Council record.
- 11 ~~Memo. of appeal in appeals or applications summarily dismissed.~~

II. Papers to be destroyed under the Rules.

- 1 Memo. of appeal (in admitted cases).
- 2 Manuscript copy of the Judgment of appellate Court.
- 3 Manuscript copy of the decree of appellate Court.
- 4 Manuscript copy of the Judgment of original Court.
- 5 Manuscript copy of the decree of original Court.
- 5A ~~Application for return of the above copies.~~
- 6 Vakalatnama of Mr. *B. G. Malak* for the appellant.
- 7 Civil application for delay being excused with affidavit.
- 8 Application for copies.
- 9 Application for search.
- 10 Letter intimating dismissal where the order is of dismissal.
- 11 Notice.
- 12 Letter transmitting notice with District Judge's endorsement thereon, etc.
- 13 R. and P. writ.
- 14 Application No. _____ of 193 _____ for substitution of heirs.
fresh notice.

No. of paper.

Particulars.

- 15 Fresh Notice (to heir).
- 16 Letter transmitting notice with District Judge's endorsement thereon, etc.
- 17 Vakalatnama of Mr. *H. G. Chitale* for the respondent.
- 18 Memo. of cross-objections.
- 19 Application for copies.
- 20 Application for search.
- 21 Writ sending down issues when there is a separate Judgment.
- 22 Notice of receipt of findings.
- 23 Objections to findings.
- 24 Writ communicating final decree or order to the lower Court.
- 25 Receipt of R. and P. by the District Judge.
- 26 Review Petition.
- 27 Affidavit in support of do. if any.
- 28 Vakalatnama if any.
- 28A Application for a certificate to appeal under the Letters Patent.
- 29 Application for leave to appeal to His Majesty's Privy Council.
- 30 Notice in do.
- 31 Writ for R. and P. in do.
- 32 Certificate granting leave to appeal.
- 33 Writ or letter of intimation in cases where rule is discharged.
- 34 Receipt of papers.

J. L. Lib...
Clerk.

S. S. D. D. D.
Assistant Sheristedar.

26/8/39

IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

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193 .

APPEAL No. 386 OF 1936 FROM APPELLATE DECREE.

1 Krishna Vitnak Mahar ; 2 Ramji Vitnak Mahar ; 3 Jiva Vitnak Mahar } *Appellants.*
 (Original Plaintiffs and Defendant No. 5)

versus

1 Shankar Krishna Gandhi ; 2 Dattatraya Krishna Gandhi ;
 3 Narayan Krishna Gandhi ; 4 Chandulal Krishna Gandhi ;
 Nos. 3 and 4 minors by their guardian *ad litem* Shankar Krishna Gandhi } *Respondents.*
 (Original Defendants Nos. 1 to 4)

Claim—Rs. 5 for both purposes.

The Plaintiffs sued for an account from Defendants Nos. 1 to 4 of the original mortgage under section 15-D of the Deccan Agriculturists' Relief Act.

The Original Suit No. 34 of 1933 was decided by the Second Class Subordinate Judge of Dapoli, who declared that nothing was due under the suit mortgage on accounts being taken under the Deccan Agriculturists' Relief Act and ordered the parties to bear their own costs.

The Appeal No. 150 of 1934 of the District File was decided by the District Judge of Ratnagiri, who allowed the appeal and reversed the decree of the Court of first instance and dismissed the Plaintiffs' suit with costs throughout.

An appeal has been admitted in the High Court from the decision of the lower Court. Notice was ordered to issue by the Honourable Mr. Justice Broomfield on the 2nd day of October 1936.

The grounds of objection to the decision appealed against are :—

1. The lower Appellate Court erred in law in holding that a suit for an account under section 15-D of the Deccan Agriculturists' Relief Act cannot lie under the circumstances of the case.
2. The decision of the lower Appellate Court is against the weight of decided cases.
3. It is an error to hold that the Plaintiffs' suit was not maintainable in its present form unless exhibit 21/2 was set aside.
4. The rulings in 13 Bom. L. R. page 6 and other cases have been misinterpreted and misapplied.
5. The rulings in 35 Bom. L. R. 604 and 1023 should have been held to be applicable to the facts of the present case.
6. Pleadings in the case have been misread and misconstrued.
7. It is an error to hold that Devnak conveyed the whole of the interest of the Plaintiffs' branch by exhibit 21/2.
8. Presumptions made in favour of the Respondents are unwarranted and illegal.

Appeal filed on 15th June 1934.

Appeal decided on 29th January 1936.

Duration of the Appeal—One year, seven months and fourteen days.

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EXHIBIT 17.

In the District Court of Ratnagiri, at Ratnagiri.

APPEAL No. 150 OF 1934 FROM DECREE IN REGULAR CIVIL SUIT No. 34
OF 1933 OF THE COURT OF THE SUBORDINATE JUDGE
(MR. G. V. VAIDYA) OF DAPOLI.

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- (1) Shankar Krishna Gandhi, 26 ; (2) Dattatraya Krishna Gandhi, 19 ; (3) Narayan Krishna Gandhi, 15 ; (4) Chandulal Krishna Gandhi, 12 ; all Gujar by caste. Nos. 1 and 2 trade; Nos. 3 and 4 minors by their guardian *ad litem* Appellant No. 1 Shankar Krishna Gandhi; all at Palvani, taluka Dapoli (original Defendants Nos. 1 to 4) .. APPELLANTS ;
(Pleader—Mr. G. B. Chitale)

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against

- (1) Krishna Vitnak Mahar, 46 ; (2) Ramji Vitnak Mahar, 31 ; (3) Jiwa Vitnak Mahar, 36 ; all Mahar by caste, agriculturists, at Shedvai, taluka Dapoli (original Plaintiffs and Defendant No. 5) .. RESPONDENTS.
(Pleader—Mr. P. S. Ranade for Respondent No. 1; rest absent)

CLAIM—Rs. 5.

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This appeal arises out of a suit which the first two Respondents brought under section 15-D of the Deccan Agriculturists' Relief Act to take an account of a possessory mortgage of 1885. The Appellant contended that the mortgage was no longer subsisting, they having bought the whole of the equity of redemption from different members of the Respondents' family. They added that a suit for an account under the special provisions of the Deccan Agriculturists' Relief Act was not competent having regard to their purchase of the equity.

2. Mr. G. V. Vaidya, Subordinate Judge, Dapoli, held that the Respondents' equity had not been extinguished by the alleged sale-deed, and that a suit for an account under section 15-D of the Deccan Agriculturists' Relief Act was in order.

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3. The only point for determination in appeal is :—

Issue.

Whether a suit for an account under section 15-D of the Deccan Agriculturists' Relief Act can lie ?

Finding.

4. My answer is in the negative.

Reasons.

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5. A few material and undisputed facts to which no reference is found in the lower Court's judgment will have to be narrated in order to help to understand the contest in this case. The possessory mortgage in question was given in favour of the Appellants' grandfather by four Hindu brothers one of whom was Yesnak. He left three sons, Devnak, Vitnak and Ratannak. At the material time the two

latter had died. The Respondents in this appeal are the sons of Vitnak, and one Gourya, who is not a party to these proceedings, is the son of Ratannak. Thus Yesnak's branch of the family consisted of Devnak and his four nephews. On 2nd July 1901, Devnak sold one-fourth interest in the equity of redemption, i.e., the whole interest which his branch of the family held, to the Appellant's father by the sale-deed, exhibit 47, for a consideration of Rs. 250. There were similar sales by other branches of the family of their respective interests. But they are not material.

6. Ignoring their uncle's sale, the Respondents brought the present suit to take an account of the mortgage under section 15-D of the Deccan Agriculturists' Relief Act. The Appellants adduced the sale-deed, exhibit 47, contending that the Respondents' equity of redemption had been extinguished, and that, at any rate, a suit for an account would not lie, unless the sale-deed was set aside.

7. The question, therefore, is whether a suit such as the one in this case can lie in face of the deed, exhibit 47. On behalf of the Appellants their learned Vakil cited the Privy Council case in 13 Bom. L. R. 56, as well as three others, namely, 18 Bom. L. R. 763, 26 Bom. L. R. 341, and 30 Bom. L. R. 1099. On the other hand, the Respondents relied upon Savant Yellappa v. Bharmappa, 35 Bom. L. R. 604, and also Ganesh v. Rajaram reported in the same volume at page 1123, and contended that the first set of cases had been overruled by these later decisions. But it seems to me that these two sets govern two altogether different classes of cases. In the first set of which Krishnaji v. Sadanand, 26 Bom. L. R. 341, is a type there was an alienation of the equity of redemption subsequent to the mortgage, and had apparently the effect of extinguishing the equity. It was held that unless the suing Plaintiffs could set aside the alienation a suit for an account under the special provisions of the Deccan Agriculturists' Relief Act would not lie. In Savant v. Bharmappa, 35 Bom. L. R. 604, there was no such sale of the equity, and what the Court was asked to do was to construe as a mortgage a transaction which was couched in the form of an absolute sale. In the other case of Ganesh v. Rajaram the mortgagee was claiming a full title by adverse possession. The principle underlying these two decisions was that a suit under the special provisions of the Deccan Agriculturists' Relief Act to take an account of the mortgage was competent, although it involved preliminary questions such as those just alluded to. That was the distinction which Beaumont C. J. pointed out in Savant v. Bharmappa. With the greatest deference to their Lordships who decided the two later cases, I fail to see the distinction which, in my opinion, is without a difference. For, to my mind, the question whether the equity of redemption is extinguished by a subsequent sale-deed is equally a preliminary question in relation to the existence of a mortgage of which an account is sought. And speaking for myself, there appears small justification to make a distinction between one preliminary question and another so as to affect a suit of this kind. But bound as I am by the distinction so made I accept it with alacrity. One thing, however, is clear that the two later decisions in 35 Bom. L. R. have not the effect of overruling the earlier set cited above. And bearing in mind that distinction, it remains to see whether the present case falls in line with the first or the second class of cases.

8. I have pointed out before that the alienating member Devnak was the uncle of the Respondents, and was admittedly the only adult male member of the family in 1901. The learned trial Judge remarked that there was nothing to show that the Respondents were joint with Devnak. But it seems to me that the learned Judge rolled the presumption the other way about. The presumption of Hindu Law lay in favour of the family being joint. The first Respondent admitted in course of his deposition, exhibit 43, that his father and uncle were undivided. Presumably, therefore, Devnak being the adult uncle was the Manager of the family. The learned trial Judge laid greatest stress upon the circumstance that in the sale-deed, exhibit 47, Devnak described himself as a guardian of Gourya, son of Ratannak, without expressly assuming such a character in regard to the Respondents who were also minors at that time. But that fact alone will not be much helpful in deciding the particular point, if otherwise, that is to say, from the language of the sale-deed itself, it could be held that Devnak conveyed the whole of the interest held by his branch of the family as Manager. It is impossible to mistake the rest of the recitals of the sale-deed. Devnak expressly conveyed one-fourth share of the property, that is to say, the whole share of his branch, for a consideration of Rs. 250

which was made up of his branch's proportionate liability of the mortgage debt, as well as several other antecedent debts which are evidenced by exhibits 51, 52 and 53. I am clear in saying that the language of the deed leaves no room for doubt that Devnak passed the sale-deed on behalf of the whole family. How far the deed is binding upon the interests of the Respondents is not to the present purpose, for that question can be considered only in a properly constituted suit for setting aside the alienation. As Macleod C. J. remarked in *Krishnaji v. Sadanand*, 26 Bom. L. R. 341, the point is whether the Respondents can, in this suit, entirely disregard their uncle's sale. They could do so only if it was a void transaction. In the present case it is an alienation which the Respondents, if permitted by law to do so at this distance of time, must set aside before they can revive the original mortgage of 1885. In this view the present case falls in line with the earlier set of cases, and the result is that a suit under section 15-D of the Deccan Agriculturists' Relief Act for an account of the mortgage which has been apparently extinguished cannot lie.

Order.

- 20 9. For these reasons I must allow the appeal, reverse the decree of the lower Court and dismiss the Respondents' suit with costs throughout.

29th January 1936.

(Signed) N. R. GUNDIL,
District Judge.

[True copy]

(Illegible)

Clerk of the Court,
District Court, Ratnagiri.

S.—411/36

APPEAL No. 386 OF 1936 FROM APPELLATE DECREE.

APPEAL No. 150 OF 1934.

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Grounds of Appeal.

1. The lower Court has erred in holding that the suit in its present form is maintainable.

2. It should have been held that the ruling in 35 Bom. L. R. page 604 is not applicable to the facts of the present case.

3. The lower Court ought to have held that the present suit is not maintainable.

20 4. The lower Court has erred in holding that the equity of redemption of Vitnak's sons was not extinguished by exhibit 21/2.

5. It was wrong to hold that by exhibit 21/2 Devnak sold away only the interest of himself and Gourya.

6. The lower Court ought to have held that by exhibit 21/2, Devnak sold away the whole 1/4th share, including in it the share of present Plaintiffs and Defendant No. 5.

30 7. It should have been held that Plaintiffs and Defendant No. 5 could not maintain the present suit, as they took no steps to get exhibit 21/2 set aside, as regards their share in time.

8. The lower Court has erred in holding that the property would yield Rs. 43-8-0 per year. The estimate as regards yield per year is highly excessive.

9. The lower Court has erred in allowing interest at 10 per cent. per year only.

10. Proper accounts on right basis have not been taken by the lower Court.

11. Proper opportunity was not given to Defendants-Appellants to adduce their evidence.

40 12. Presumptions made in favour of Plaintiffs and inferences drawn against Defendants-Appellants are improper and unjust.

13. The lower Court has not properly appreciated the evidence in the case and has approached the case from a wrong standpoint of view.

14. Plaintiffs are not entitled to any relief claimed and their suit should have been dismissed with costs.

15. The decree of the lower Court is contrary to law and against the weight of evidence.

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Ratnagiri, 20th April 1934.

[True copy]

(Illegible)

Clerk of the Court,
District Court, Ratnagiri.

S.—411/36

APPEAL No. 386 OF 1936 FROM APPELLATE DECREE.

Suit filed on 9th February 1933.

Suit decided on 28th March 1934.

Duration of the suit—One year, one month and nineteen days.

EXHIBIT 60.

IN THE COURT OF THE SECOND CLASS SUBORDINATE JUDGE
AT DAPOLI.

REGULAR CIVIL SUIT No. 34 OF 1933.

- (1) Krishna Vinayak Mahar, age about 45 years ; (2) Ramji Vithnak Mahar, age about 30 years ; caste of all Mahar, occupation agriculturist, residing at Shedvai, taluka Dapoli. PLAINTIFFS ;
(Pleader—Mr. R. A. Modak)

against

- (1) Shankar Krishna Gandhi, age about 25 years ; (2) Dattatraya Krishna Gandhi, age about 16 years ; (3) Narayan Krishna Gandhi, age about 14 years ; (4) Chandulal Krishna Gandhi, age about 11 years ; Nos. 2, 3 and 4 minors by their guardian *ad litem* their brother Defendant No. 1 ; (5) Jiva Vithnak Mahar, age about 35 years, caste of Defendants Nos. 1 to 4 Gujar, occupation trader, residing at Palvani, caste of Defendant No. 5 Mahar, occupation agriculturist, residing at Shedvai, taluka Dapoli. . . DEFENDANTS.
(Pleaders—Mr. R. V. Kane for Defendants Nos. 1 to 4 ; Mr. Mandlik for Defendant No. 5) . .

CLAIM—Rs. 5-0-0 for Court fees.

Rs. 300-0-0 for process.

The Plaintiffs sue for an account from Defendants Nos. 1 to 4 of the original mortgage, alleging that Yesnak, grandfather of Plaintiffs, and Defendant No. 5 mortgaged suit property to Defendants' (Nos. 1 to 4's) ancestors by a mortgage deed, dated 11th May 1865, for a consideration of Rs. 300, that the period for redemption was 20 years, that interest was not agreed upon as the mortgage was with possession, that Plaintiffs are agriculturists, that Plaintiffs believe that Defendants' mortgage has been satisfied, and hence the suit.

Defendant by his written statement, exhibit 16, admits the mortgage, dated 11th May 1865, by Yesnak and his three brothers Hirnak, Lakhnak and Jannak and the consideration but contends, *inter alia*, that subsequently the shares of Yesnak, Hirnak and Lakhnak were purchased by the father of Defendants Nos. 1 to 4, that the one-fourth share of Jannak has been in Defendants' *vahiwat* under a sale-deed dated 11th April 1927, that Plaintiffs and Defendants are from Yesnak's *kut*, that they have therefore no interest in suit property ; that Devnak for himself and as Manager of the family and as guardian of Gourya Ratannak Mahar sold away for a family necessity the share of Yesnak's *kut* also, that thus Plaintiffs' right in suit property has been extinguished, that the suit for mere account does not lie and that it may be dismissed with costs.

For Defendant No. 2 a *purshis* (exhibit 17) was filed to the effect that his defence was like that of Defendant No. 1.

Defendant No. 5 supports Plaintiffs' claim by his *purshis* (exhibit 12).

Issues (exhibit 27).

- (1) Whether the suit for mere accounts in its present form lies ?
- (2) If so, do Defendants prove that by the alleged sales to them Plaintiffs' equity of redemption has been extinguished ?
- (3) If not, what is due on taking an account of the mortgage under the Deccan Agriculturists' Relief Act ?
- (4) What order should be passed ?

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Findings.

- (1) Yes.
- (2) No.
- (3) *Nil.*
- (4) As per final order.

Reasons.

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1. The first issue involves an important point of law. The learned pleader for the Defendants has referred me to several cases, namely, 13 Bom. L. R. 56, 18 Bom. L. R. 763, 26 Bom. L. R. 341 and 30 Bom. L. R. 1099 in support of his contention that a suit for mere account does not lie. For the Plaintiffs, however, reliance is placed on a much later case 35 Bom. L. R. 604, in which His Lordship the present Chief Justice has held that under section 15-D of the Deccan Agriculturists' Relief Act, 1879, an agriculturist-mortgagor can sue for account although the suit may involve a preliminary inquiry whether the transaction in suit is a mortgage or a sale. Following this ruling I find issue no. 1 in the affirmative.

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2. Now let us see whether the contention of Defendants Nos. 1 to 4 that Plaintiffs' equity of redemption has been extinguished. Defendants Nos. 1 to 4 rely in support of this contention of theirs on the sale-deed exhibits 21/1, 2 and 3. Of these exhibit 21/3 was passed by Sadnak and exhibit 21/1 by Malnak. That passed by Devnak and with which we are more particularly concerned is exhibit 21. It purports to have been passed by Devnak Yesnak both for himself, and as guardian of the minor Gourya Ratannak. The signature of execution is also similarly made. In the endorsement made by Devnak in exhibit 21/2 in token of execution before the Sub-Registrar, he stated that he, i.e. Devnak, admits having executed the document both for himself and as guardian of the minor Gourya Ratannak. There is nothing to show that Vitnak's sons like Ratannak's son Gourya were joint with Devnak and that Devnak was the Manager. Had he been so, their names would certainly have been mentioned in exhibit 21/2. There was no reason why, if Devnak expressly wrote in his signature that he was signing on behalf of the minor Gourya also, he should not have written that he was signing for Vitnak's sons also as their guardian. Exhibit 40 has no personal knowledge of their jointness. The evidence of his witness, exhibit 42, on this point is worthless and unreliable. The reason given by Defendant No. 1 as to why it was not written in exhibit 21/2 that Devnak was signing it also as guardian of Vitnak's sons Krishna, Ramji and Jiwa, is absurd. I find that by the sale-deed, exhibit 21/2, Devnak sold away only the interest of himself and Gourya and that the interest of Vitnak's sons was not sold. The property had been previously mortgaged with Dayal Motiram by Jannak, Yesnak, Harnak and Laknak for a total consideration of Rs. 300 by a mortgage-deed (exhibit 50) dated 13th May 1865. This is the mortgage-deed in suit. The equity of redemption of Vitnak's sons created by this mortgage deed was therefore not extinguished by exhibit 21/2. I therefore find issue no. 2 in the negative.

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3. The consideration of Rs. 300 is not disputed. In fact it is so old that it is not possible to expect direct evidence regarding the same. Exhibit 50 recites that Rs. 80 were received in cash and that Rs. 220 was an amount due on a previous mortgage. These recitals being in a document which is merely seventy years old, deserve great weight. Under the circumstances I find that Rs. 300 were the consideration for exhibit 50. The giving of 21 maunds of paddy per year is not disputed. The share of Plaintiff and Defendant No. 5 as being 1/12th is also not

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disputed. The rates of paddy have varied during all these years from 1865 to the present day. I adopt a flat rate of Rs. 43-8-0 for 21 maunds. I award interest at the reasonable rate of 10 per cent. The interest on Rs. 300 would come to Rs. 30. The *dust* of the property is Rs. 10-12-3 after 1927 and before that it was Rs. 8-4-0. Thus $30 + 10-12-3 = 40-12-3$ is the total amount Plaintiff is entitled to per year. Deducting this from 43-8-0, Rs. 2-11-9 go in satisfaction per year. On taking an account the commissioner Amrute finds that nothing is due. The
 10 commissioner's statement is filed in this suit.

Mr. Modak for Plaintiff, by his *purshis*, admits Plaintiffs' and Defendant No. 5's share as being $1/12$ th.

Order.

It is hereby declared that nothing is due under the suit mortgage on taking an account under the Deccan Agriculturists' Relief Act. Under the circumstances I order parties to bear their own costs.

20 28th March 1934.

(Signed) G. V. VAIDYA,
 Subordinate Judge.

[True copy]

(Illegible)

Clerk of the Court,
 District Court, Ratnagiri.

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APPEAL No. 386 OF 1936 FROM APPELLATE DECREE.

Krishna Vitnak Mahar; and others. (Original Plaintiffs } Appellants.
and Defendant No. 5)

versus

Shankar Krishna Gandhi; and others. (Original Defend- } Respondents.
ants Nos. 1 to 4)

Second Appeal against the decision of N. R. Gundil, Esquire, District Judge at Ratnagiri, in Appeal No. 150 of 1934.

Counsel Dr. Ambedkar with Mr. B. G. Modak for the Appellants.

Mr. M. G. Chitale for the Respondents.

28th February 1939.

(Coram :—Lokur, J.)

Oral Judgment.—The only question arising in this appeal is whether the plaintiffs' suit for an account of a mortgage under section 15-D of the Dekkhan Agriculturists' Relief Act is maintainable. The plaintiffs' grandfather Yesnak and his three brothers mortgaged their joint family property for a period of twenty years on the 11th May 1865, each of the four brothers having a one-fourth share in the property. The plaintiffs' grandfather Yesnak had three sons, Devnak, Vitnak and Ratannak. The plaintiffs and the defendant No. 5 Jiva, are the sons of Vitnak, and Gourya is the son of Ratannak. On the 2nd July 1901 Devnak, on his own behalf and as guardian of Gourya, passed a sale-deed in favour of the mortgagee, purporting to convey the one-fourth share of Yesnak in the equity of redemption. The plaintiffs and the defendant No. 5 were then minors, but their names were not mentioned in the sale-deed (exhibit 47). The plaintiffs, therefore, brought this suit for an account of the mortgage so far as their 1/12th share in the property mortgaged was concerned. The trial Court held that the suit was maintainable, and on taking an account, it declared that nothing was due under the suit mortgage. In appeal the learned District Judge, following the principle laid down by the Privy Council in *Musammat Bachi v. Bickchand* (1910) 13 Bom.L.R. 56, held that such a suit which required the setting aside of the sale of the equity of redemption was not maintainable under section 15-D of the Dekkhan Agriculturists' Relief Act.

In *Musammat Bachi v. Bickchand* their Lordships of the Privy Council observed that the Dekkhan Agriculturists' Relief Act gave extraordinary reliefs in certain cases specified under the Act, and that although a suit may in form be a suit for redemption, if in reality was a suit to recover property of which the rightful owner had been deprived by fraud, a suit under the Dekkhan Agriculturists' Relief Act was not maintainable. In that case a mortgage was executed by three persons named Saindino, Mitho and Sachedino in favour of two of the respondents, viz., Bikhchand and Dipchand, mortgaging 500 acres of land for a sum of Rs. 1,700. Subsequently one of the mortgagors Mitho and his brother Mirzan sold 122 acres out of the 500 acres to the mortgagees in satisfaction of the entire mortgage and thereby redeemed the remaining 378 acres of land. Bikhchand and Dipchand had thus become the full owners of 122 acres of land, and they sold them to one Kherajmal and gave them into his possession. Sachedino and Saindino, who had not joined Mitho in the sale-deed, having died, their heirs filed a suit against the original mortgagees and their transferor Kherajmal to redeem the mortgage under the provisions of the Dekkhan

Agriculturists' Relief Act, alleging that they were not bound by the sale-deed of Mitho and his brother Mirzan. The Privy Council then held that the special relief under the Dekkhan Agriculturists' Relief Act could not be granted in a suit which, though not in form, was in reality a suit to set aside the alienation by two of the mortgagors. This ruling was followed in several cases *Chandabhai v. Ganpati* (1916) 18 Bom.L.R. 763, *Krishnaji v. Sadaanand* (1924) 26 Bom.L.R. 341, *Vishvanathbhat v. Mallappa* (1925) 27 Bom.L.R. 1103 and *Chandikaprasad v. Shivappa* (1928) 30 Bom.L.R. 1099. In the last case the suit was filed for the redemption of a mortgage under the special provisions of the Dekkhan Agriculturists' Relief Act, and although it was held on the principle laid down by the Privy Council in *Musammatt Bachi v. Bickchand* (1910) 13 Bom.L.R. 56, that it was not competent to the plaintiffs to resort to the special provisions of the Dekkhan Agriculturists' Relief Act, still the suit could be treated as one brought in the ordinary way for setting aside the sale by one of the mortgagors and for redeeming the mortgage if the sale be set aside. Such a relief cannot be granted in the present suit since no redemption is claimed, but merely an account of the mortgage is asked for under the provisions of section 15-D of the Dekkhan Agriculturists' Relief Act. Such accounts cannot be claimed in an ordinary suit, but they are a special privilege given to an agriculturist by the provisions of section 15-D of the Dekkhan Agriculturists' Relief Act which enables an agriculturist to file a suit valuing his claim even at Rs. 5 only. All the cases above referred to have been summarised by Shingne, J. in *Ganesh v. Rajaram* (1933) 35 Bom.L.R. 1123. In that case the mortgage was admitted, but it was alleged that the mortgage had been extinguished by adverse possession, and Shingne, J. held that it was permissible to bring a suit for redemption of the mortgage under the provisions of the Dekkhan Agriculturists' Relief Act, although in deciding it the Court had to determine whether the plaintiff's share in the mortgage property was lost by adverse possession or to determine the extent of his share. In coming to that conclusion he distinguished the *ratio decidendi* adopted in the previous cases. He observed:

"In all these cases there were subsequent transfers of the mortgaged property—or rather of the equity of redemption. They were impediments in the way of redemption and unless they were got rid of, the way to redemption was not clear, but was blocked."

In the present case also the sale-deed executed by Devnak is an impediment in the way of redemption, and unless that sale is got rid of, the way to redemption is not clear, but is blocked. This view was taken both in *Chandabhai v. Ganpati* (1916) 18 Bom.L.R. 763 and *Krishnaji v. Sadaanand* (1924) 26 Bom.L.R. 341. In *Savant v. Bharmappa* (1933) 35 Bom.L.R. 604, the learned Chief Justice held that an agriculturist mortgagor could sue for an account under section 15-D of the Dekkhan Agriculturists' Relief Act, although the suit might involve a preliminary inquiry whether the transaction in suit was a mortgage or a sale. In that case after the property was mortgaged the equity of redemption had not been extinguished, but the mortgage was evidenced by a sale-deed, and the question was whether the transaction represented by that sale-deed was really a mortgage or an absolute sale. If the transaction was held to be a mortgage, then there was no impediment in the way of its redemption. Thus the cases which the learned Chief Justice and Shingne, J. had to consider in the two rulings reported in 35 Bom.L.R. stand on a different footing. The present case is more analogous to the other cases referred to by me where a suit for redemption under section 15-D of the Dekkhan Agriculturists' Relief Act was held to be not maintainable. I, therefore, agree with the view taken by the learned District Judge and dismiss the appeal with costs.

By order of the Court,

Exd. by: - M. A.

M. A. Rao
for Registrar.

Appeal No.386 of 1936 from Appellate Decree.

Krishna Vitnak Mahar; and others.
(Original Plaintiffs and Defendant No.5)
... Appellants.

Vs.

Shankar Krishna Gandhi; and others.
(Original Defendants Nos.1 to 4). Respondents

Second Appeal Against the decision
of N.R.Gundil, Esquire, District Judge at Ratna-
giri, ~~Esquire, District Judge at Ratnagiri~~ in
Appeal No.150 of 1934.

Counsel ~~Dr.~~ Dr. Ambedkar with Mr. B.G.
Modak for the Appellants.

Mr. M.G. Chitale for the Respondents.

28th February 1939.

(Coram: Lokur J.)

Oral Judgment :- x x x x

By order of the Court,

BVB.

Registrar.

828

Appeal No. 386 of 1936 from ~~Original~~
Appellate Decree.

Date of decision 28th February 1939

For approval and signature

~~The Hon'ble Justice~~

The Hon'ble Mr. Justice Lokur *nk*

Whether Reporters of Local Papers may be allowed to see the judgment? *ls*

To be referred to the Reporter or not? *322*

Whether ^{His} Their Lordships wish to see the fair copy of the judgment? *no*

99

SECOND APPEAL NO. 386 OF 1936.

Counsel Dr. B. R. Ambedkar with Mr. B. G. Modak for the
Appellants.

Mr. M. G. Chitale for the Respondents.

Coram: LOKUR, J.

28th February 1939.

Oral Judgment

The only question arising in this appeal is whether the plaintiffs' suit for an account of a mortgage under section 15-D of the Dekkhan Agriculturists' Relief Act is maintainable. The plaintiffs' grandfather Yesnak and his three brothers mortgaged ^{their} the joint family property for a period of twenty years on the 11th May 1865, each of the four brothers having a one-fourth share in the property. The plaintiffs' grandfather Yesnak had three sons, Devnak, Vitnak and Ratannak. The plaintiffs and the defendant No.5 Jiva are the sons of Vitnak, and Gourya is the son of Ratannak. On the 2nd July 1901 Devanak, on his own behalf and as guardian of Gourya, passed a sale deed in favour of the mortgagee purporting to convey the ~~one-fourth~~ one-fourth share of Yesnak in the equity of redemption.

The plaintiffs and the defendant No.5 were then minors, but their names were not mentioned in the sale deed (Ex. 47). The plaintiffs, therefore, brought this suit for an account of the mortgage so far as their 1/12th share in the property mortgaged was concerned. The trial Court held that the suit was maintainable, and on taking an account, it declared that nothing was due under the suit mortgage. In appeal the learned District Judge, following the principle laid down by the Privy Council in Musammat Bachi v. Bickchand, 13 Bombay Law Reporter 56, held that such a suit which required the setting aside of the sale of the equity of redemption was not maintainable under section 15-D of the Dekkhan Agriculturists' Relief Act.

In Musammat Bachi v. Bickchand their Lordships of the Privy Council observed that the Dekkhan Agriculturists' Relief Act gave extraordinary reliefs in certain cases specified under the Act, and that although a suit may in form be a suit for redemption, ^{it} ~~but~~ in reality was a suit to recover property of which the rightful owner had been deprived by fraud, a suit under the Dekkhan Agriculturists' Relief Act

was not maintainable. In that case a mortgage was executed by three persons named Saindino, Mitho and Sachedino in favour of two of the respondents, viz., Bikhchand and Dipchand, mortgaging 500 acres of land for a sum of Rs.1700/-. Subsequently one of the mortgagors Mitho and his brother ~~one~~ Mirzan sold 122 acres out of the 500 acres to the mortgagees in satisfaction of the entire mortgage and thereby redeemed the ^{remaining} 378 acres of land. Bikhchand and Dipchand had thus become the full owners of 122 acres of land, and they sold them to one Kherajmal and gave them into his possession. Sachedino and Saindino, who had ^{not} joined Mitho in the sale deed, having died, their heirs filed a suit against the original mortgagees and their transferor Kherajmal to redeem the mortgage under the provisions of the Dekkhan Agriculturists' Relief Act, alleging that they were not bound by the sale deed of Mitho and his brother Mirzan. The Privy Council then held that the special relief under the Dekkhan Agriculturists' Relief Act could not be granted in a suit which, though ^{not} in form, was in reality a suit to ^{set aside} ~~get out~~ the alienation by two of the

mortgagors. This ruling was followed in several cases —
Chandabhai v. Ganpati, 18 Bombay Law Reporter 763, Krishnaji
v. Sadanand, 26 Bombay Law Reporter 341, Vishvanathbhat v.
Mallappa, 27 Bombay Law Reporter 1103 and Chandikaprasad v.
Shivappa, 30 Bombay Law Reporter 1099. In the last case
the suit was filed for the redemption of ^athe mortgage under
the special provisions of the Dekkhan Agriculturists' Relief
Act, and although it was held on the principle laid down by
the Privy Council in Musammat Bachi v. Bickchand, 13 Bombay
Law Reporter 56, that it was not competent to the plaintiffs
to resort to the special provisions of the Dekkhan Agricul-
turists' Relief Act, still the suit could be treated as one
brought in the ordinary way for setting aside the sale deed
by one of the mortgagors and for redeeming the mortgage if
the sale deed be set aside. Such a relief cannot be granted
in the present suit since no redemption is claimed, but merely
^{is asked for}
an account of the mortgage under the provisions of section 15-D
of the Dekkhan Agriculturists' Relief Act. Such accounts
cannot be claimed in an ordinary suit, but they are ~~given~~ ^{given} a
special privilege to an agriculturist by the provisions of

section 15-D of the Dekkhan Agriculturists' Relief Act which enables an agriculturist to file a suit valuing his claim even at Rs.5/- only. All the cases above referred to have been summarised by Shingne, J. in Ganesh v. Rajaram, 35 Bombay Law Reporter 1123. In that case the mortgage was admitted, but it was alleged that the mortgage had been extinguished by adverse possession, and Shingne, J. held that it was permissible to bring a suit for redemption of mortgage under the provisions of the Dekkhan Agriculturists Relief Act, although in deciding it the Court had to determine whether the plaintiff's share in the mortgaged property was lost by adverse possession or to determine the extent of his share. In coming to that conclusion he distinguished the ratio decidendi adopted in the previous cases. He observed :—

"In all these cases there were subsequent transfers of the mortgaged property — or rather of the equity of redemption. They were impediments in the way of redemption and unless they were got rid off, the way to redemption was not clear, but was blocked."

In the present case also the sale deed executed by Devanak is an impediment in the way of redemption, and unless that sale is got rid of, the way to redemption is not clear, but

is blocked. This view was taken both in Chandabhai v. Ganpati, 18 Bombay Law Reporter 763, and Krishnaji v. Sadanand, 26 Bombay Law Reporter 341. In Savant v. Bharmappa, 35 Bombay Law Reporter 604, the learned Chief Justice held that an agriculturist mortgagor could sue for ^{an} account under section 15-D of the Dekkhan Agriculturists' Relief Act, although the suit might involve a preliminary inquiry whether the transaction in suit was a mortgage or a sale. In that case after the ^{property was} ~~execution of the mortgage~~ the equity of redemption had not been extinguished, but the mortgage was evidenced by a sale deed, and the question was whether the transaction represented by that sale deed was really a mortgage or an absolute sale. If the transaction was held to be a mortgage, then there was no impediment in the way of its redemption. Thus the cases which the learned Chief Justice and Shingne, J. had to consider in the two ^{earlier} cases reported in 35 Bombay Law Reporter stand on a different footing. The present case is more analogous to the other cases referred to by me where a suit for redemption under section 15-D of the Dekkhan Agriculturists' Relief Act was held to be not maintainable.

I, therefore, agree with the view taken by the learned
District Judge and dismiss the appeal with costs.

I, therefore, agree with the view taken by the learned

District Judge and dismiss the appeal with costs.

(122) SA386/36
28-2-59

18 copies

1 B.G.R.

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

Tues- day the 28th day of February 1939.

APPEAL No. 386 OF 1936 FROM APPELLATE DECREE.

1 Krishna Vitnak Mahar ; 2 Ramji Vitnak Mahar ; 3 Jiva Vitnak Mahar } Appellants.
(Original Plaintiffs and Defendant No. 5)

versus

1 Shankar Krishna Gandhi ; 2 Dattatraya Krishna Gandhi ;
3 Narayan Krishna Gandhi ; 4 Chandulal Krishna Gandhi ;
Nos. 3 and 4 minors by their guardian *ad litem* Shankar Krishna Gandhi } Respondents.
(Original Defendants Nos. 1 to 4)

Claim—Rs. 5 for both purposes.

The Plaintiffs sued for an account from Defendants Nos. 1 to 4 of the original mortgage under section 15-D of the Deccan Agriculturists' Relief Act.

The Original Suit No. 34 of 1933 was decided by the Second Class Subordinate Judge of Dapoli, who declared that nothing was due under the suit mortgage on accounts being taken under the Deccan Agriculturists' Relief Act and ordered the parties to bear their own costs.

The Appeal No. 150 of 1934 of the District File was decided by the District Judge of Ratnagiri, who allowed the appeal and reversed the decree of the Court of first instance and dismissed the Plaintiffs' suit with costs throughout.

An appeal has been admitted in the High Court from the decision of the lower Court. Notice was ordered to issue by the Honourable Mr. Justice Broomfield on the 2nd day of October 1936.

The grounds of objection to the decision appealed against are :—

1. The lower Appellate Court erred in law in holding that a suit for an account under section 15-D of the Deccan Agriculturists' Relief Act cannot lie under the circumstances of the case.

2. The decision of the lower Appellate Court is against the weight of decided cases.

3. It is an error to hold that the Plaintiffs' suit was not maintainable in its present form unless exhibit 21/2 was set aside.

4. The rulings in 13 Bom. L. R. page 6 and other cases have been misinterpreted and misapplied.

5. The rulings in 35 Bom. L. R. 604 and 1023 should have been held to be applicable to the facts of the present case.

6. Pleadings in the case have been misread and misconstrued.

7. It is an error to hold that Devnak conveyed the whole of the interest of the Plaintiffs' branch by exhibit 21/2.

8. Presumptions made in favour of the Respondents are unwarranted and illegal.

(Coram; Lokur J.)

For the reasons stated in the accompanying Judgment, the Court confirms the decree of the lower appellate Court and dismisses the appeal with costs.

MO-II Bk J 948—c

28th February 1939.
BVB.

Registrar.

CIVIL APPLICATION No.

OF 193

IN APPEAL No. 386

OF 193 6

FROM ~~ORIGINAL~~
APPELLATE DECREE

Bill of Costs in the High Court.

	By the Appellant or Applicant	By the Respondent or Opponent	By the Respondent or Opponent
	Rs. a. p.	Rs. a. p.	Rs. a. p.
Stamps for Memorandum of <u>Appeal</u> <u>Application</u> ...	6-6-0 ✓		
Stamps for Copies of Decrees and Judgments or Orders ...	2-4-0 ✓ 1-12-0 ✓	8-0-0 ✓	
Stamps for Vakalatnama 5 ...	2-0-0 ✓	4-0-0 ✓	
Stamps for applications to enter the names of the heirs of the deceased ...			
Stamp for application for calling for additional papers ...			
Bhatta for Process ...	1-0-0 ✓		
Sectioner's Fee ...	10-13-2 ✓		
Advocate's Fee ...	30-0-0 ✓	30-0-0 ✓	
Printing Charges ...	8-0-0 ✓		
Copying Charges for preparing paper-books ...			
Stamp for affidavit ...			
Search Fee ...			
Stamp for Memorandum of Cross-objections ...			
Advocate's Fee in the matter of Cross- objections ...			
Costs at the trial of issue sent down ...			
Translation Fee ...			
Copying Fee under Rule 82 or 111 of the High Court, Appellate Side Rules, 1936 ...	54-7-2 ✓		
Total ...	53-15-2	34-0-0	

Taxing Officer.

17-4-36

Deputy Registrar.

The 28 day of February 1936

388

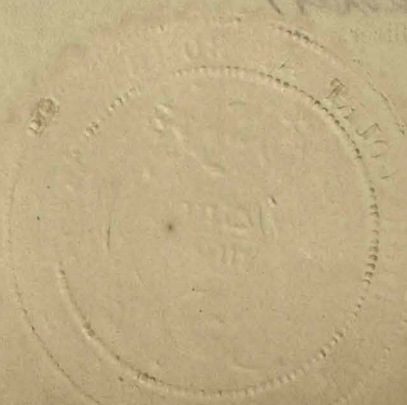
R. S. Mordak

M. E. Chittale

10-13-5
30-00-0
8-00-0

23-12-5 34-00-0

131



February 9

CIVIL DEPARTMENT.

INWARD No.

3499
OF 1939

The District Judge of

Ratnagiri.

No. 1432 dated 22-6-1939

Certifies full execution of the High Court's

Writ No. 3140 dated 31-5-1939,

forwarding copy of the decree ~~or order~~ in

Appeal No. 386 of 1936 from Appellate
Original

Decree.

Record.

21/8/2016
Assistant Registrar.

Received on the 26-6-1939

Sent to the Record-keeper with all papers

complete on the 26th August 1939.

Assistant Sheristedar.

Received and entered in Catalogue of
Appeals.

Placed on the Shelf,

Record Keeper.