

*Judgement of the Lords of the Judicial Committee
of the Privy Council on the Appeal of Hari
Ravji Chiplunkar v. Shápurji Hormusji and
others from the High Court of Judicature at
Bombay; delivered March 31st. 1886.*

Present :

LORD BLACKBURN.

LORD HALSBURY.

LORD HOBHOUSE.

SIR RICHARD COUCH.

THIS is an appeal from a decision of the High Court of Bombay confirming a decree of the Subordinate Judge, who held that the suit was barred by the operation of section 11 of Act XXIII. of 1861.

The suit was in form to redeem a mortgage, and the facts out of which it arose were that on the 25th of May 1806 two persons, named Narsoji and Nagoji, mortgaged to two others, named Bhavánji and Zánoji, a quantity of land described as three rukas, each ruka containing about six acres, to secure an advance then made to the former. In fact Narsoji and Nagoji were themselves the mortgagees of the land from persons described in the proceedings as the Mahars; but that is not material now, because their title under the Mahars does not come into question, and for the purposes of this suit they may be treated as the owners of the land. A further advance was made in 1807 to Narsoji of Rs. 500, the result being that the mortgage by Narsoji for the debt due by him exceeded the amount of the mortgage for which Nagoji's share was liable. In November 1823 a suit was brought by Bhavánji and Zánoji against

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the heirs of the mortgagors, and a decree was made in that suit which it is necessary to notice particularly. The decree, which is dated 8th September 1825, set out the mortgage of 1806, and the accounts which had been taken, the suit being brought to enforce the mortgage, and ordered the Defendants to pay in all Rs. 2,396 4a. 9p. to the Plaintiffs—treating the mortgage as a joint mortgage, and the whole sum as being due by both mortgagors—by the date fixed, and they were to redeem their Maharki field which they had mortgaged to the Plaintiffs. Then it says:—

“ Until the Defendants clear off the money the Plaintiffs should use and enjoy the field according to [the terms of] the agreement. On the day on which the Defendants will pay the money, the Plaintiffs should compute the interest on rupees, two thousand three hundred and ninety-six and a quarter, at the rate of one per cent. [per mensem] from the date [that will be] fixed; should deduct therefrom the amount of produce from the fixed date onwards; should receive the remaining amount, together with the interest, and should restore the field to the Defendants.” Although this decree speaks about a date which will be fixed, no date was fixed by it, and the operation of the decree appears to have been that an account having been taken of what was due on the mortgage, the mortgagors might at any time make a tender of the amount due, with the interest up to that time, and require that the land should be restored to them.

Some time in 1837—the precise date is not very material—an application was made for the execution of this decree, and it resulted in Yashwantrav, the son and heir of Narsoji, one of the mortgagors, paying his share of the money due on the mortgage, whereupon, so far as regards the one-half of the land

mortgaged in 1806 that belonged to Narsoji, the mortgage became redeemed; and the question in this suit relates to the other half, namely, that which was the property of Nagoji. Some other proceedings took place, the result of being that the present Plaintiff represents the interest of the original mortgagors, and would be, if the suit were not barred by the operation of law, entitled to redeem the property, and the Defendants may be taken to represent the mortgagees.

The plaint in the present suit, which was filed on the 13th September 1877, begins by stating that the claim is a claim for redeeming from mortgage the under-mentioned land. It states the mortgage of 1806, and then sets out the proceedings in the suit in 1823, and the decree which was made in 1826, and after that it says:—"The cause of action accrued when
 " in the decree mentioned above in the third
 " paragraph the previous transaction 'merged,'
 " [and] an order was made 'on the new basis'
 " as to the way in which the mortgagees should
 " carry on the management, &c.; that is to say,
 " [it accrued] on the 8th of September 1825." Then it proceeds to state that there were certain acknowledgments in writing of the mortgage made by the mortgagee.

The suit as framed, then, apparently treats this decree as in the nature of a fresh mortgage, and as regulating the rights of the parties from that time; and the reason for this appears to be that the law of limitation gave 60 years for a suit for redemption of a mortgage from the date of the mortgage, and this suit was brought in 1877, not many years short of the 60 years.

When the suit came before the Subordinate Judge, he gave a very long judgement, going into all the facts of the case, the result being that he was of opinion that the decree in 1826

must be regarded as a decree, and not as a mortgage, and that under the Act XXIII. of 1861, section 11, which provides that questions arising between the parties to the suit and relating to the execution of the decree must be determined by order of the Court executing the decree, and not by a separate suit, the parties ought, if they wished to redeem the property, to have applied to the Court to execute the decree by putting them into possession of the property after paying the money due on the mortgage; and inasmuch as the time limited by law for the execution of the decree had long since elapsed, and had indeed elapsed at the time when the Plaintiff had become the purchaser of the equity of redemption in right of which he brought the suit, there was no cause of action existing and the suit was barred.

The High Court took the same view of the matter, and held that the suit was barred by the Act XXIII. of 1861, and therefore the Plaintiff could not sue to redeem in the manner in which he claimed. Their Lordships are of opinion that this view which was taken by the lower Courts is the right one; and that the right of the mortgagors must be treated in this suit as a right to execute the decree, and not a right to sue as for the redemption of a mortgage.

It was contended by the learned counsel for the Appellant that he could fall back upon the right to redeem the mortgage of 1806, the law of limitation, by Act XIV. of 1859, providing that there should be 60 years for a suit to redeem from the time of the mortgage, or from the date of an acknowledgment made in writing signed by the mortgagee, or some person claiming under him. The difficulty in the way of the Appellant availing himself of that is, that it is a different case from that which he made in the plaint. In the plaint he did not seek to redeem the mort-

gage of 1806, or allege that there had been an acknowledgment of that mortgage. If he had, the question whether there had been such an acknowledgment made would have been inquired into in the lower Courts; but he treated the decree as the mortgage which he sought to redeem; and supposing that he could, according to the decision of the High Court of Madras, which was cited, fall back upon the mortgage of 1806, in their Lordships' opinion he is not at liberty to do that upon the present appeal. It would be making a different case from that which he made in the lower Courts, and on which the case has been tried and decided.

Their Lordships will therefore humbly advise Her Majesty to affirm the decree of the High Court and to dismiss this appeal.

