(1933) 08 BOM CK 0032

Bombay High Court

Case No: Second Appeal No. 875 of 1929

Vishram Surba Savant		APPELLANT
	Vs	
Amrat Dhaku Savant		RESPONDENT

Date of Decision: Aug. 4, 1933

Acts Referred:

- Dekkhan Agriculturists Relief Act, 1879 - Section 15D

Citation: (1937) 39 BOMLR 559

Hon'ble Judges: Tyabji, J

Bench: Single Bench

Judgement

Tyabji J.

1. This appeal arises out of a suit for an account u/s 15D of the Dekkhan Agriculturists'' Relief Act (to which I will refer as the Act). The suit has reference to a sixteen pies share in certain property. The defendants in their written statement alleged that two pies out of the sixteen pies had been sold at auction and purchased by the defendants'' predecessors-in-title.

2. The plaintiff in his evidence denied that the said two pies had been sold to the defendants.

3. The learned District Judge dismissed the suit holding that it was not maintainable u/s 15D of the Act.

4. u/s 15D any agriculturist whose property is mortgaged may sue for an account. The plaintiff is an agriculturist. No dispute arises on that head. The decision under appeal is however supported before me on the ground that the Court cannot in this suit proceed on the basis that the plaintiff''s property is mortgaged, unless some preliminary questions are determined, or perhaps unless the plaintiff is granted some ancillary relief : and that a suit involving such preliminary questions or ancillary reliefs does not lie u/s 15D. The decisions in Mt. Bachi v. Bikhchand (1910)

13 Bom. L.R. 56 Chandabhai Janubhai Vs. Ganpati Patilboa, and Krishnaji Sonji Gawade Vs. Sadanand Mahadev Thakur, are relied upon.

5. For considering the questions that really arise, it is necessary for me to cast a glance over the scheme of the Act. The Act displaces portions of the ordinary law relating to procedure, evidence, contracts and transfers of property (particularly mortgages) and insolvency.

6. First, as regards the procedure to be followed at the trial of certain classes of suits. Certain sections refer to the jurisdiction conferred on the Judges (as Sections 3, 4 and 11); or to the powers of Judges as Small Causes Court Judges (Sections 5 and 6). Others refer to the mode of trial : such as disposal at the first hearing (Section 7); examination of the plaintiff and the defendant. (Section 12); absence of appeal (Section 10); village-munsifs (Sections 34-37); conciliation (Sections 38 to 48); supervision and control by the District Judge or the Special Judge (Sections 50-54); legal practitioners (Sections 68 and 69). Then there are provisions relating to execution, such as provisions for instalments (Section 17); deposit (Section 18); absence of arrest (Section 21),; attachment (Section 22); attachment of agricultural produce reserving property for support (Section 73A); and setting aside an execution-sale (Section 22A).

7. Secondly, there are provisions in regard to evidentiary law : as in Sections 10A which displaces Section 92 of the Indian Evidence Act to the extent referred to; as regards receipts of money and pass books (Sections 64-67); evidence in regard to mortgages, liens and charges (Section 70).

8. Under the third head and closely connected with the questions of evidence, Sections 56-63 relate to registration.

9. The fourth head falls under the general law of contract or the transfer of property and includes such provisions, as Section 13 referring to compound interest and the method of taking accounts; Section 13A in regard to the mortgagee in. possession; and Section 15D in regard to redemption and foreclosure. Then there is the fifth head, which refers to insolvency (Sections 24 to 33).

10. This being the general scheme, Section 74 provides that "except in so far as it is inconsistent with this Act, the CPC shall apply in all suits and proceedings before Subordinate Judges under this Act." This is hardly necessary since (as is obvious from its general terms) the Act does not purport to deal exhaustively with the matters referred to under the five heads, but provides specific rules to displace particular rules of law, which would otherwise be applicable in regard to certain specified matters; provided that the conditions laid down for displacement are fulfilled : one condition seems to be almost always necessary, that the party concerned is an agriculturist.

11. The existence of Section 74, however, makes it incontestable that the Act operates conjointly with the provisions of the general law : except in so far as any specific provision of the Act displaces the general law, the general law is to apply.

12. Secondly, another principle applicable to such enactments as the Act appears in view of the scheme underlying it. It creates in some cases a special jurisdiction. In other cases it confers powers of a nature different from those ordinarily exercised by the Courts. In regard to such enactments it is the general maxim:"Cui jurisdictio data est, ea quoque concessa esse vi-dentur, sine quibus jurisdictio explicari non potuit" (Dig. II, 1, 2): When a special jurisdiction is conferred, those powers would seem to be conceded without which that jurisdiction cannot be exercised; Maxwell on Interpretation of Statutes, 7th edition, c. 12, Section II, p. 304.

13. In particular where jurisdiction depends upon the existence or non-existence of a fact (e.g., that the property is mortgaged) the question whether there is jurisdiction cannot be determined without first determining whether that fact exists. In case one party alleges that it exists, and the other that it does not, the Court cannot say whether it has or has not jurisdiction, without determining whether that crucial fact exists. Allegations by the parties do not take the place of proof : least of all in regard to a question on which the Court''s jurisdiction depends : otherwise the jurisdiction of the Court would be in the hands of the parties not of the Court or the legislature,: the jurisdiction would then rest on the allegations of either of the parties and not on the existence of the fact.

14. It is no new remark that "the clearer a thing is, the more difficult it is to find any express authority or any dictum exactly to the point" : Keighley, Maxsted & Co. v. Durant (1901) A.C. 240 But on this matter, there is the authority of so great a Judge as Sir Barnes Peacock C.J. in Hurree Persad Make v. Kdonjo Behary Shaha (1862) 1 Mar (Ind.) 99 The Chief Justice was then sitting with two other Judges, including Kemp J, "one of the most eminent Judges of the Calcutta High Court," (43 Indian Appeals, 151 at p. 163). The views expressed by Sir Barnes Peacock on behalf of himself and his colleagues may be taken as a commentary on the maxim (Dig. II, 1, 2) that I have cited. He said:

The pleadings showed, on the one part, an allegation of the relation of landlord and tenant; and, on the other, a denial of that relation. Until the first Court had judicially determined the fact of the existence or non-existence of the relation of landlord and tenant, it could not determine whether it had jurisdiction or not.

If the case was, on judicial investigation, shown to be one between a landlord and tenant, the Revenue Court had jurisdiction, and was bound to go on with the case; if not, then, and not before, the Revenue Court could say it had no jurisdiction. For this purpose, these allegations in the pleadings would not be enough, because allegations are nothing until they be proved; and to have them proved requires the Revenue Court to inquire and to decide. It may or it may not involve the solution of

complicated questions in order to ascertain whether the relation of landlord and tenant exists or not; but the law does not say that, therefore, such questions will not be gone into by the Revenue Courts. If this were'' the case, the jurisdiction of the Revenue Courts would be in the hands of the parties, not of the Court; for, in this view, it would depend on the part of the ryot alleging any other title or not, however falsely, whether the Revenue Court could exercise jurisdiction; and every case might be excluded from these Courts if each ryot were to make groundless allegations of the non-existence of the relation of landlord and tenant" : Hurree Persad Make v. Koonjo Behary Shaha.

15. What, in view of these considerations and; principles, is the duty of the Court when the questions arise whether any particular provision of the Act, must be brought into operation, and whether the Court may or must (as the case may be) act, not in accordance with the general law, but in accordance with the Act?

16. Certain provisions of the Act throw the duty on the Court itself to exercise its authority in a particular way, irrespective of any action taken by the parties. The benefit of other provisions must be claimed by the plaintiff or the defendant, in regard to the particular question before the Court. In one of these two ways the Court becomes cognisant of the provisions bearing on the decision of any particular matter arising before it. That matter may refer to substantive law or adjective law. The duty of the Court will then be to consider whether, in regard to the particular question awaiting its decision, it must guide itself by the rule of law laid down with respect to that particular matter in the Act, or by the general law. The rule of law in question may affect the very jurisdiction of the Court. It may affect a particular relief prayed for. It may merely refer to the manner in which a particular issue (ancillary in its nature) has to be determined. It may be that the particular rule of law or jurisdiction sought to be introduced is such that the attention of the Court must be drawn to it at the very earliest moment in the pleadings : as where the rule refers to the very authority of the Court to adjudicate upon the controversy between the parties. It may be that it need not be brought to the attention of the Court till after the whole, of the suit has been tried and the proceedings are at the stage of execution. Some provisions allow reliefs in the alternative, and certain reliefs cannot be combined in one suit.

17. In every case the Court may have to ascertain some preliminary question before it can determine which rule of law is applicable to the transaction. By necessary implication (unless that implication is otherwise excluded) the power is given to the Court and the duty cast upon it to ascertain that preliminary question.

18. I must now consider how (if at all) the views expressed by me as being based on general principles must be modified because either of the terms of Section 15D, or of authorities binding upon me. Are the duties of the Court with reference to the operation of Section 15D different from those I have derived?

19. The terms of Section 15D are general. There is no exclusion of the general implication. Two preliminary facts are needed for the jurisdiction arising under it the plaintiff must be an agriculturist, and his property must be mortgaged. The existence or non-existence of these two facts must be determined before the Court can determine whether it has jurisdiction under the section.

20. The first case to which my attention has been drawn is the decision of the Privy Council in Ml. Bachi v. Bikhchand (1910) 13 Bom. L.R. 56 There three persons (the plaintiff''s predecessors-in-title) had in 1892 mortgaged 500 acres of land to the predecessors-in-title of the defendant. Later, two of the three original mortgagors purported to sell 122 acres out of the 500 acres to the mortgagees, the defendant''s predecessors-in-title, and in consideration of this sale it was agreed that the mortgage be extinguished. The questions before the Court were : (1) whether the sale of 122 acres was binding upon the plaintiff, or (2) whether the plaintiff could proceed on the footing that, notwithstanding the sale and agreement,�both of them being void as against the plaintiff,�the mortgage of the 500 acres was still subsisting. The District Court held that the sale was not binding and the mortgage was subsisting. But in appeal it was held that the deed of sale was a regular and businesslike document, binding on the parties: that it extinguished the mortgage: that no mortgage existed at the date of the suit: and there could be no right of, and no suit for, redemption. The special provisions of the Act in regard to the redemption of mortgages were thus irrelevant to the litigation, inasmuch as on investigation there appeared to be no mortgage that could be redeemed. Nor could the suit lie for redemption under the general law. Lord Macnaghten''s judgment states that the "Act gives extraordinary relief in certain cases," secondly, that "the cases are specified in the Act," thirdly, that "the list includes a suit for redemption"; and then he said : "The only question is this suit one in which special relief can be granted? In their Lordships'' opinion it is not. In form it is a suit for redemption. In reality it is nothing of the kind. It is a suit to recover property of which the rightful owner has been deprived by fraud." Lord Macnaghten did not say that the suit being brought for obtaining a special relief granted by the Act, it could not have prayed for the decision of, and that the Court ought not to have considered, any preliminary questions. On the contrary, both the Courts in India had determined the preliminary question whether the sale was valid. The Judicial Commissioners held that the sale was valid, that therefore there was nothing to redeem,�no mortgage existing that could be redeemed. The Privy Council did not in the least indicate that the Courts had considered questions that ought, not to have been considered,�questions that could not have been raised in a suit under the Act. They did not say that the suit should have been dismissed (on an examination of the pleadings or of the issues) as not being maintainable. They merely said that no special relief under the Act could be claimed in a suit to recover property of which the owner had, it was alleged, been deprived by fraud: since the cases specified in the Act for special relief do not include the decision of this question; for the determination of this question which

actually arose, the provisions of the Act could not be distorted into service. It was not said that when the plaintiff brings such a suit, it should be thrown out at the threshold, or that the Courts ought not to have considered (as they did consider) the truth of his allegation that he was as a matter of fact or law entitled to redeem. On the contrary, the Privy Council impliedly approved of the course followed, accepted the findings of the Judicial Commissioners and held that, on those findings, no relief could be granted : it held that in regard to the preliminary enquiry the Act was inapplicable; and the suit itself could not survive the result of the preliminary enquiry: the result being that there was no subsisting mortgage.

21. The second case is Vinayakrao Balasaheb Inamdar Vs. Shamrao Vithal Kalkundri, . This was in several respects parallel with the case decided by the Privy Council. Here, too, there was an obstacle that had to be removed before the plaintiff could claim that there was a mortgage in respect of which relief could be obtained u/s 13. But the distinction between Vinayakrao''s case and the case before the Privy Council was, that in Vinayakrao''s case the lower Courts held that the obstacles which the plaintiff sought to remove were removeable, inasmuch as the decree, by reason of which the mortgage was said to be extinguished, had been obtained by fraud, coercion, and misrepresentation. But Batchelor Ag. C.J. observed (p. 710):

If reference be made to Sections 3, 12 and 13 of that Act, it will be seen that the suit can only be brought within the statute if it is a suit for the redemption of mortgaged property within the meaning of Clause 3 of Section 3. It is, in my opinion, clearly not within this clause, the words of which contemplate a mortgage suit either simplicities or primarily and substantially. This, however, is something far more than that, arid very different from that. It is a suit to set aside a sale-deed and a Court''s decree, and, when those things are done, to recover the property of which, according to the plaint, the plaintiffs have been fraudulently deprived. This seems to me to be the description of the suit, and, if that is so, it falls, I think, within the authority of the Privy Council decision in Mt. Bachi v. Bikhchand.

22. With all respect, the Privy Council did not say that if the decision of the preliminary questions brings about the result that there is a subsisting mortgage which is sought to be redeemed, the suit does not lie. They said the converse. Though the decision in Vinayakrao''s case purported to go no further than Lord Macnaghten''s judgment it really decided quite a different question. Lord Macnaghten stated that no special relief in regard to redemption could be granted in a suit in which on a decision of preliminary questions it appeared that there was no subsisting mortgage. In Vinayakrao''s case, it was held that even if it appeared that there was a subsisting mortgage, the relief could not be granted because another relief was also sought in the same suit,�that a voidable sale and decree be set aside.

23. Does this involve also the decision of the larger question that in the same suit reliefs under the Act and under the general law cannot be claimed conjointly? Does

this also involve that the existence of the other preliminary fact implied in Section 15D of that the plaintiff is an agriculturist of cannot be determined (if disputed) without detriment to the suit being simpliciter or primarily a mortgage suit?

24. To consider these last questions for a moment u/s 74 of the Act : Order II, Rule 2, of the Civil Procedure Code, presumably applies to suits tried under the Act. The suit must, therefore, include the whole of the claim, which the plaintiff is entitled to make in respect of one cause of action. Part of such claim may consist of relief of s under the Act, and part of relief of s that, are not subject to the Act. Must such a suit be dismissed on the ground that all the questions it involves cannot be brought entirely within the Act? I have put the case in regard to the relief sought. But the decision in Vinayakrao''s case has been sought in arguments to be carried to this length, that issues may not be raised in a suit, some of which are to be determined by a law not contained within the four corners of the Act and some in accordance with the Act. Restricting the argument to the present case, it: is to the effect that because Section 15D of the Act provides for a suit for accounts in a mortgage, no suit may be brought in which any other issues arise conjointly with such issues as can be determined u/s 15D. The argument did not make it clear whether in such a case two suits must be brought or whether one of the relief of s, either under the Act or under the general law, is altogether lost.

25. But I must refer to another case, Shamrao Vithal Kalkundri v. Nilkanth Ramchandra Kulkami (1912) 18 Bom. L.R. 711 (2).I have sent for the record and looked into it and I supplement the report. That decision has been cited to me as being in agreement with the decision in Vinayakrao''s case. In Shamrao''s case it was ultimately held that the award decree in question superseded the original mortgage. The High Court did not say that that question ought not to have been considered in the suit. On the contrary, it accepted the finding, that "the award decree of 1884 superseded the original mortgage, and the rights of the mortgagee must now be determined by the terms of that decree, which was passed in his favour." On this basis two questions arose, first, whether a suit to obtain redemption on the footing of the original! mortgage would lie : and that question was answered in the negative by both Courts. The second question was, whether the award decree was a decree in a suit u/s 3U) of the Act, within the meaning of Section 15B. That question was answered in the affirmative in the lower Court, but in the negative in appeal. On coming to this finding the High Court said it was difficult to see how the suit could be supported. The Judges did not decline to consider what they should find in respect of the second question. In the result they made a decree in accordance with the appellant''s counsel''s offer which they considered a very good offer having regard to the rights of the mortgagee under the award decree. From one aspect this is similiar to the decision of the Privy Council in Mt. Bachi v. Bikhchand. The High Court did not hold that those questions could not be raised or considered in a suit in which relief was sought u/s 15B, nor that the raising of those questions rendered the suit un maintainable. On the contrary it considered and

dealt with those questions, and based its decision on the determination thus arrived at. The distinction between Shamrao''s case and the Privy Council case is this : in the Privy Council case there was no mortgage subsisting at all, so that the suit had to be dismissed. In Shamrao''s case the Subordinate Judge held that there was a mortgage subsisting,�a mortgage of such a nature that relief could be obtained under the Act. The High Court agreed that the mortgage was subsisting but differed as to the applicability of the Act. The relief was therefore altered from the special relief under the Act to the ordinary relief under the general law.

26. The third case is Chandabhai Janubhai Vs. Ganpati Patilboa, . There again, there was a sale-deed alleged to be fraudulent. The findings were the converse to those in the Privy Council case. The lower Court held that there was a subsisting mortgage capable of redemption, and that the law in regard to the redemption of mortgages laid down in the Act had to be given effect to. (The lower Court''s decision agreed with the trial Court''s decision in Shamrao''s case.) The High Court reversed the decision with the remark, (p. 764):�

It is ''manifest, therefore, that on the plaintiffs'' own showing this was not a mere suit to redeem, but was a suit primarily for the setting aside of a fraudulent deed of sale, and, that being done, for the redemption of certain properties, including those thus released from the fraudulent sale.

27. Finally in Krishnaji v. Sadanand, Macleod C.J. observed that it was impossible for the plaintiff to succeed until he could satisfy the Court that the alienation was bad as far as his share in the equity of redemption was concerned; that, therefore, the suit could not lie u/s 15D of the Act and had to be dismissed. This is opposed to Shamrao''s case in which instead of dismissing the suit the relief was altered from relief under the Act to relief under the general law.

28. In a case that was not cited to me in argument, the lower Court had held that certain proceedings were a fetter upon redemption and dismissed the suit. this Court held that the proceedings did not cause any fetter and the case was in the result remanded for decision under the Act : Bala bin Dhondi Bhandwalkar v. Balaji Martand Kulkarni (1897) P.J. 264

29. The decision of Sir Barnes Peacock in Hurree Persad Malee v. Koonjo Behary Shaha, the scheme of the Act in the Privy Council decision in Mt. Bachi''s case and Shamrao''s and Bala bin Dhondi''s cases all support the view that until the Court judicially determines the fact of the existence or non-existence of the relation of mortgagor and mortgagee it cannot determine whether it can exercise its special jurisdiction under the Act. The issue whether a deed of sale alleged to be fraudulent ought to be set aside (when it is raised) has to be determined by the general law, in order that the Court may be able to decide whether the relief under the Act is available. If the answer to that preliminary issue is in the affirmative, the sale will be set aside, and the relation between the parties will be that of mortgagor and

mortgagee and the further questions will be whether the mortgage can be redeemed, and if so, on what terms. The provisions of the Act may or may not be applied to the decision of the question of redemption. This would depend upon the terms of the particular provisions of the Act of which the plaintiff seeks to take advantage as illustrated by Bala bin Dhondi''s and Shamrao''s cases.

30. The decisions in Vinayakrao''s, Chandabhai''s and Krishnaji''s cases are, however, binding on me and I must follow them. Krishnaji''s case was recently interpreted by Beaumont C.J. as not applicable to a case where the plaintiff did not seek substantive relief : Savant Yellappa Shahapure Vs. Bharmappa Nogappa Lengade, Shingne J. in Ganesh v. Rajaram (1933) Sec App No. 396 of 1930 decided by shingne J..., on july 18, 1933(unrep). (sine reported in Ganesh Raghunath Deshpande Vs. Rajaram Laxman Deshpande, Eds gave a similar decision : though the Court had to determine whether the plaintiff was entitled to redeem and if so what was the extent of his share, this was held not to be sufficient to prevent the plaintiff from suing u/s 15D.

31. In the present case, the plaintiffs did not pray that any sale be set aside. Their suit was on the sole allegation that there was a mortgage existing on the sixteen pies share in certain property. Its purpose"simpliciter primarily and substantially"was redemption. It was the defendants who raised the contention that as regards a two pies share of the property, there was a valid sale in their favour. I will assume (as was argued) that Vina-yakrao''s, Chandabhai''s and Krishnaji''s cases lay down that if the plaintiff comes to Court on allegations, necessitating the preliminary investigation of some facts as a step leading to the Court exercising powers under the Act, his suit must be dismissed,though, as I have respectfully submitted, this seems to me to be opposed to principle and to the proceedings in the Privy Council case, to Shamrao''s case, to Bala bin Dhondi''s case and the numerous decisions on the preliminary fact involved in Section 15D, viz., whether the plaintiff is an agriculturist. But there is nothing in the three first named cases either that the defendants will not be allowed to raise the defence that there are certain objections to the plaintiff''s suit under the Act, or that, if the defence is raised, the Court must dismiss the plaintiff''s suit without considering whether the defendants'' allegations are well-founded. The last sentence cited from Sir Barnes Peacock''s judgment in Hurree Persad Malee v. Koonjo Behary Shaha is directly applicable to the present case. See also Savant''s and Ganesh''s cases.

32. I think, however broadly I interpret the principles laid down in the three cases relied upon for the respondent, the present case cannot be considered to fall within those principles. It was not the plaint but the defence that raised the obnoxious questions. The defendant was entitled to have his defence considered, whether there was a valid sale in regard to the two pies share in his favour. The defence is of precisely the same nature as was considered and upheld in the Privy Council case, and very similar to that in Shamrao v. Nitkanth. In the Privy Council case, the sale

wiped out the mortgage in its entirety : here the plaintiffs'' right to redeem is questioned in regard to a two pies share. The learned District Judge has not considered this question raised by the defence.

33. The decision that the suit is not maintainable was for the reasons I have stated erroneous, and must be set aside. Dealing with the maintainability of the suit the learned Judge states that the plaint ought to have admitted the defendant''s right to the two pies share. I do not see how the existence or absence of such an admission can affect the maintainability of the suit. On the contrary, in view of the decisions in Vinayakrao''s case, and those following it, any reference to a sale might jeopardise the suit. In view of those decisions, it is desirable that the plaint should contain no allegations except those barely necessary for bringing the suit under the Act (Section 15D, or 3(2) as the case may be). Where the plaint contains such allegations, the Court, in order that the ends of justice may not be defeated, may well offer to the defendant that those allegations should be struck off from the plaint. But in such a case the Court will of course allow the defendant to raise (if necessary by additions to the written statement) any defence that may be required for determining whether any obstacle exists to the relief claimed by the plaintiff being granted. Issues should in any case be framed on those preliminary objections and obstacles. These issues should be really deemed to be at the instance of the defendant, though the burden of proof may not be on him. It is the defendant who objects to any relief being granted, and it would perhaps help to clarify the issues if the defendant were allowed to state his own contentions in his own terms. As I have already stated, there are no allegations in the plaint before me which (even on the broadest view of Krishnaji''s case) need be struck off; and the contentions of the defendant have been stated by him in his written statement. Therefore no amendment of the pleadings is needed.

34. The learned Judge must consider the alternative whether, if the special relief under the Act cannot be obtained, relief ought to be granted under the general law as was done in Shamrao''s case and in Chandikaprasad Deviprasad Agnihotri Vs. Shivappa Shiddappa Davalanavar, .

35. The case must go back to the District Court. It must be determined whether the defendants became entitled by a valid purchase to the two pies share, and in view of that finding the case will, unless there is any valid objection to that course, be dealt with in accordance with the provisions of Section 15D of the Act, and it will be found whether any and if so- what amount is due on the mortgage in accordance with the provisions of Sections 12 and 13. As accounts have already been taken under those sections by the trial Court, the learned District Judge will consider whether there is any valid objection to them, and whether they are to be interfered with in appeal by him. Subject to his findings on these questions he will permit the plaintiffs to redeem the property on payment of the amount due on the mortgage. If for any reason the learned Judge comes to the conclusion that: the plaintiff is not entitled to

the special relief under the Act, he will consider whether relief cannot be granted under the general law. In any case the suit must not be dismissed unless it is determined that no relief ought to be granted to the plaintiff—neither in accordance with the Act, nor under the general law.

36. The learned Judge has said :

If the plaintiffs are given a declaration that a particular sum under the special benefit of the Act is due by them to the defendants, then under paragraph 3 of Section 15D, they will be entitled to a decree immediately for redemption on payment of the amount found due on account of all the 16 pies taxim whereby the defendants are bound to lose the benefit of the two pies taxim acquired by them.

In stating this, he is under some error. The plaintiffs will, on the authority of Mora Joshi v. Rctmchandra Dinkar Joshi ILR (1890) Bom. 24 and Chaudhri v. Seth Raghubar have to pay the whole of the mortgage amount due on the whole sixteen pies share of the property : but whether they will be entitled to get back the whole of the sixteen pies will depend upon the question whether the defendants can prove the valid sale of the two pies in their favour. If that sale is valid then the plaintiff will be entitled to get back only a fourteen pies share.

37. The costs of the appeal will be costs in the appeal in the lower Court, and they will be in the discretion of the learned District Judge.