

Dhananjayrao Gadgil Library



GIPE-PUNE-112447

THE
Dekkhan Agriculturists'
Relief Act
(Act XVII of 1879)

As amended up-to-date

WITH

An Exhaustive Commentary, Explanatory and Critical
Notes, up-to-date Case-law, Notifications, Rules,
High Court Circulars, etc., etc.

BY

D. B. Godbole, M. A., LL. M.,
Professor, Law College, Poona;
Pleader, Poona

With a Foreword by
The Hon'ble Mr. Justice **H. V. Divatia, M. A., LL. B.**
High Court, Bombay

1935]

[Rs. 5.

X9(J):6:(Z 231)

9 G5

~~10443~~

112447

inted by Lakshman Narayan Chapekar at the Āryasam̐skṛ
Press, 198(17) Sadashiv Peth, Tilak Road, Poona City
and Published by Prof. D. B. Godbole, M. A., LL. M.,
99 Shukrawar Peth, Poona 2.

PREFACE

In preparing this work, an attempt has been made to present to the legal profession and the judiciary an exhaustive and a reliable commentary on the Dekkhan Agriculturists' Relief Act. With this view, I have included in this book, all cases on the subject reported in the official and unofficial journals. The principles underlying the various sections have been clearly explained and stated in the words of the deciding Judges wherever necessary. In citing the authorities the original reports have been always consulted. But at the same time I have refrained from unnecessarily cramming the book with lengthy, unconnected and undigested extracts from the judgments. Sind view has been specially noted and discussed wherever it differs from the Bombay view.

The commentary under each section is arranged under suitable headings, and for the purpose of easy reference the synopsis of commentary has also been given. The object, scope and history of each section have been explained, and for that purpose the Proceedings in the Legislature, Report of the Deccan Riots Commission 1875, Reports of the Commissions appointed to enquire into the working of the Dekkhan Agriculturists' Relief Act, in 1891 and 1911, the annual reports issued by the Special Judges, etc. etc., have been freely used. Wherever the sections have been amended, the old law has been stated and the effects of the amendment have been discussed. The facts of all important cases have been stated concisely and in a manner so as to bring forth the point under discussion.

Where the decisions seem to be faulty, I have respectfully criticised them and tried to state the correct view on the subject. I have discussed certain points that are likely to occur in practice but which are not yet judicially noticed.

In order to make the book complete and self-contained, I have added numerous Appendices at the end of the book. In referring to the various cases, I have given parallel references wherever possible, and I have taken particular care to make the General Index very exhaustive.

I am deeply obliged to Messrs. A. G. Wagholikar, LL. B.; D. H. Chaudhary, LL. B.; K. D. Dikshit LL. B. and R. H. Bhalunkar, LL. B. for having gone through portions of the manuscript and making suggestions for its improvement. Mr. K. D. Dikshit, LL. B. is responsible for the General Index, and Mr. A. S. Deshpande, LL. B. for the Index of Cases, and I am very much indebted to both of them for their kind labours.

I express with pleasure my deep debt of gratitude to the Hon'ble Mr. Justice H. V. Divatia, M. A., LL. B., of the Bombay High Court, for taking a kindly interest in my book, and for sparing time to write a learned 'Foreword' to it.

Lastly, in offering this book to the lawyers and judges, I have to say that I shall consider my labours sufficiently compensated, if it is of some help to them.

99 Shukrawar Peth,
POONA,
1st Sept. 1934. }

D. B. Godbole.

FOREWORD

(*By the Hon'ble Mr. Justice H. V. Divatia, M. A., LLB.,
High Court, Bombay.*)

The prosperity of a predominantly agricultural country like India depends on the well-being of those millions who depend for their livelihood on cultivation of the soil and agricultural labour. Generally speaking, in this country they are an illiterate and unsophisticated class of people and partly because of the vagaries of the monsoon, partly because of the avarice of the money-lenders and landlords, but mostly because of their own improvidence, their more or less extreme poverty has remained a formidable obstacle to the general progress of the country. Any legislation, therefore, which aims at the amelioration of the conditions of agriculturists and the protection of peasants must be zealously guarded and administered so that its provisions are not ignored or abused. The Land Revenue Acts and Tenancy Acts in the various provinces of India have more or less succeeded in giving security and safety to this class of people. In our Presidency, we have in force for the last half a century, the Dekkhan Agriculturists' Relief Act with the object of relieving agricultural classes from indebtedness. Though the whole Act is confined in its operation to only four districts in the Deccan, some of its important provisions have been extended to the rest of the Presidency and it has now become a familiar enactment with lawyers as well as laymen.

However, how far the Act has succeeded in its object has still remained a matter for controversy. The definition of the term 'agriculturist' is not at all satisfactory and considerable difficulty has arisen in applying that definition. One might well doubt whether it was the intention of the framers of the Act to include within that term large landholders and Zemindars with an income of thousands of rupees per year. Under this definition even such persons have been held to be agriculturists and as such entitled to avail themselves of all the benefits of the Act which might fairly be supposed to be intended for saving ordinary and illiterate agriculturists from greedy money-lenders. The general drafting of

the Act also lacks precision and lucidity and has presented difficulties to the Courts in properly interpreting its provisions. Mr. Justice Crump has, in a recent Full Bench decision, given expression to a note of dissatisfaction as well as a hint to the Legislature which, I feel certain, agrees with the opinion of many judges who have to deal with this Act. He says:—

“ There is a cynical saying that speech is given to us to conceal thought. The author of the saying is unknown, but it might plausibly be conjectured that he was a lawyer embittered by a perusal of the Dekkhan Agriculturists' Relief Act. It is notoriously a badly drafted statute. It is extremely difficult to construe it as a logical whole; and parts of it are so obscure as almost to baffle enquiry. If any one says that I exaggerate, let him read and endeavour to understand Ss. 2 and 3. The arrangement of the subject-matter is faulty; there is for instance no clear distinction between those provisions which apply to the trial of suits, and those which apply to proceedings in execution. The result has been to cause much uncertainty, and much waste of time, and the construction of any section is liable to lead to anomalous results. These difficulties have been further increased by partial extension of the Act which has destroyed any coherence which the Act may possess as a whole. The multitude of notifications makes it a matter of uncertainty whether any section does or does not apply in any district. In these circumstances, it is difficult to interpret any one section in the light of any other, or to regard a decision upon any one section as being in any sense a guide to the meaning of another. Since the enactment of the Usurious Loans Act X of 1918, much of the Dekkhan Agriculturists' Relief Act is out of date. But until the Legislature can find time or inclination to deal with the existing chaos, the Courts must make the best of it and this in my judgment can only be done by confining attention to each section as it falls to be interpreted.”¹

The Courts are no doubt valiently trying to make the best of this chaos and have to be very vigilant so that neither bona-fide

1, *Matekhal v. Mahipatsam*, (1927) 29 Bom. L. R. 1109.

agriculturists nor bona-fide creditors might suffer on account of the defects in the Act. Indeed, cases are not rare when an honest creditor has to be protected against a dishonest pseudo-agriculturist who, taking advantage of some of the lax and obscure provisions of the Act, succeeds in considerably delaying and sometimes even defeating the just claims of his creditor even after a decree is passed against him. The right of an agriculturist to plead his status for the first time in execution proceedings in order to prevent his arrest as also his right to plead that status in spite of his having contracted himself out of it have been recognized. That would show that the Courts are interpreting the provisions of the Act in consonance with its object to protect the agriculturist. If, however, the Act has still resulted in putting a premium on dishonesty and has fomented unnecessary litigation instead of checking it, it would be a matter for serious consideration as to whether it should not be materially amended or even ended.

But as long as the Act remains on the Statute Book, it has to be enforced and a well-annotated text book of the Act would be a great help to the Bar as well as to the Bench. Mr. D. B. Godbole has done his best to provide such a text book and judging from the proofs of the book I have seen, the annotations have the merit of being lucid as well as exhaustive without being unduly prolix. I am sure it will prove useful to the profession as well as to the public.

Bombay, }
6-8-1934. }

H. V. Divatia

CONTENTS OF THE BOOK.

	Pages
Preface	i-ii
Foreword ...	iii-v.
Index of cases	1-15
Addenda	16-18
Contents of the Act	19-24
The Text with Commentary	1-335
Preamble	1-9
Chap. I Preliminary	9-52
" II Hearing of certain suits by Sub- Judges	53-82
" III Suits and other Proceedings	82-243
" IV Of Insolvency	244-259
" V Of Village-Munsifs	260-265
" VI Of Conciliation	266-273
" VII Superintendence and Revision	274-289
" VIII Registration by Village-Registrars...	290-304
" VIIIA Registration of instruments	304-312
" IX Of Receipts and Statements of Account	313-316
" X Legal Practitioners	317-319
" XI Miscellaneous	319-335
Appendix A Directions to the Court trying suits under the D. A. R. Act	336-338
" B Execution by the Collector	338-350
" C Execution of Decree by the Col- lector in the Province of Sind	351-354
" D Procedure before Village-munsifs	354-360

VIII	THE DEKKHAN AGRICULTURISTS' RELIEF ACT.		
„	E Village-registration rules	... 360-365	
„	F Registration under section 63-A, D. A. R. Act	... 365-366	
„	G Reductions and remissions of stamp duty 366-367	
„	H (i) Remission of Court fees „	
	(ii) Cancellation of exemption of Court fees	... „	
„	I Process Fee not leviable	... „	
	General Index	... 368-393	

INDEX OF CASES.

A. E. Smith, 1924 Mad. 389	4
Aba v. Babya, 1893 P. J. 145	198, 282
Abaji v. Ganu, 1889 P. J. 77	166
Abaji v. Laxman, (1906) 30 Bom. 426=8 Bom. L. R. 553	85
Abdulla v. Khatijabi, (1931) 33 Bom. L. R. 13 = 55 Bom. 536	103
Abdur Rahim v. Abu Mahomed (1927) 30 Bom. L. R. 774	3
Abu Jafar v. Babu Rajendra Partab, (1926) Oudh 113.	154
Achyut v. Ramchandra, (1925) 27 Bom. L. R. 492	152
Administrator General v. Premlal, (1895) 22 Cal. 788 (P. C.)	5
Agarchand v. Gandaya, 1894 P. J. 50	115
Ali Mohamed v. Bombay Municipality, 27 Bom. L. R. 581	3
Ali Mohamed v. Shamsuddin, (1927) 30 Bom. L. R. 131	45
Amarchand v. Laxman, 1890 P. J. 220	122
Ambanna v. Kalappa, 28 Bom. L. R. 567 = 50 Bom. 239 = 1926 Bom. 327	217, 220
Amichand v. Devchand, 1884 P. J. 203	7
Amichand v. Kanhu, 1884 P. J. 203	6, 7, 40, 59, 113, 114
Amruta v. Naru, 13 Bom. 489=1888 P. J. 265	59, 64, 80, 82
Ananda v. Mahadu, 1880 P. J. 274	236
Anant v. Tukaram, (1929) 31 Bom. L. R. 442=53 Bom. 463=119 I. C. 179	229
Annaji v. Bapuchand, 7 Bom. 520 = 1883 P. J. 274 40, 64, 112, 113, 132	
Annabhat v. Shivappa, 30 Bom. L. R. 539 = 110 I. C. 269 = 1928 Bom. 232	126, 152
Annie Besant v. Government of Madras, (1916) 37 I. C. 525	4
Appa v. Bapu, 1885 P. J. 255	122, 126
Appa v. Gopala, 1889 P. J. 157	142, 152
Appaji v. Atmaram, 1882 P. J. 125	129, 131
Apu Budgavda v. Narhari (1879) 3 Bom. 21	39
Atmaram v. Doma 11 C. P. L. R. 87	39
Azizkhan v. Chote Lal, 1928 All. 241	3
Babaji v. Babaji, 15 Bom. 650 = 1891 P. J. 14	281, 285, 333
Babaji v. Hari, 16 Bom. 351 = 1891 P. J. 243	195

Babaji v. Lakshman, 1887 P. J. 83	167, 186
Babaji v. Maniram, 1894 P. J. 37	128, 162, 163
Babaji v. Vithu, 6 Bom. 784 = 1882 P. J. 327	160, 162
Baburao v. Vishnu, 1885 P. J. 81	151
Badaricharya v. Ramchandra, 19 Bom. 113 = 1893 P. J. 35	281, 285, 333
Badruddin v. Sitaram, 32 Bom. L. R. 933	185
Bai Diwali v. Patel Girdhar, 32 Bom. 391 = 10 Bom. L. R. 577	211, 214
Bai Diwali v. Vishnu, 11 Bom. L. R. 1326	45
Bal v. Maneklal, (1931) 34 Bom. L. R. 55	173, 175
Bala v. Balaji, 22 Bom. 285	164
Bala v. Shiva, 1897 P. J. 450	296, 315
Balaji v. Datto, 9 Bom. L. R. 1026	170, 181
Balaram v. Mangaldas, 34 Cal. 941	121
Balchand v. Chunilal, 15 Bom. L. R. 387 = 37 Bom. 486	49, 212, 214
Balkrishna v. Abaji, 12 Bom. 326 = 1887 P. J. 184	172, 210
Balkrishna v. Dnyanoba, 1889 P. J. 25	212
Balkrishna v. Mahadeo, 22 Bom. 520 = 1896 P. J. 652	127, 129, 264, 281, 282
Balkrishna v. Sarupchand, 28 Bom. L. R. 656 = 1926 Bom. 389	213, 217, 227
Balkrishnadas v. W. F. Legga, (1899) 22 All. 149. (P. C.)	63, 161
Balrajkuwar v. Jagatpal Sing, (1904) 26 All. 393 = 11 Bom. L. R. 516	4
Balshet v. Dhondo, 26 Bom. 33 = 3 Bom. L. R. 545	225, 234
Bansidhar v. Sitaram, (1891) 13 All. 381	51
Banu v. Krishnambhat, 1886 P. J. 159	36
Bapuji v. Mahadeo, 1897 P. J. 137	294, 295
Bapuji v. Mahadu, 1892 P. J. 111	234
Basangowda v. Churchigiriauda, 12 Bom. L. R. 224 = 34 Bom. 408	137
Basantram v. Mahammad, (1922) 4 Lah. L. J. 293	51
Basappa v. Tayawa, 31 Bom. L. R. 1266 = 54 Bom. 30 = 1930 Bom. 79	93, 94
Bellamal v. Ahmadshah, (1918) 48 I. C. (P. C.) = 21 Bom. L. R. 558	4

INDEX OF CASES

Bhagirthibai v. Hari, 19 Bom.	318	170
Bhagu v. Narayan, 28 Bom. L. R. 428 = 1926 Bom. 337 = 94 I. C. 658		299, 308
Bhagu v. Rama, 1885 P. J. 36		151, 146
Bhagwandas v. Hathibhai, 4 Bom.	25	234
Bhagwant v. Rango, 1884 P. J. 30		279
Bhanaji v. De Brito, 30 Bom. 226 = 7 Bom. L. R. 995		289
Bhau v. Antaji, 1884 P. J. 77	122, 133, 134, 199,	200
Bhau Babaji v. Gopala, 11 Bom. 325 = 1886 P. J. 261		50
Bhau v. Hari, 7 Bom. 377		193
Bhika v. Raichand, 15 Bom. L. R. 68 = 37 Bom. 398 = 18 I. C. 380		31, 33
Bibi Hayatu v. Sayad Gulam, 4 S. L. R. 264 = 10 I. C. 980		106
Bikchand v. Vehromal, 8 S. L. R. 57		190
Bikram v. Bir, 1888 P. R. 191		10
Bilaram v. Choitram, 6 S. L. R. 245		87, 90
Carpenter v. Dean, 23 Q. B. D. 566		234
Chaganmal v. Abdul Gafur, (1929) O. C. J. 443 of 1928 (unrep.)		104
Chandabhai v. Ganpati, 36 I. C. 517 = 18 Bom. L. R. 673 67, 68, 111, 196, 197		
Chanbasayya v. Chennappa, 22 Bom. L. R. 44 = 44 Bom. 217		30, 87
Chandikaprasad v. Shivappa, 30 Bom. L. R. 1099 68, 196, 197, 198		
Chandra Mayi v. Gegson, 48 I. C. 465		96
Chanmalaswami v. Gangadharappa, (1914) 16 Bom. L. R. 954 = 39 Bom. 339		42
Chhaganmal v. Farasram, (1921) 23 Bom. L. R. 473 = 45 Bom. 1128		322
Chitta v. Bai Jamni, 18 Bom. L. R. 438 = 40 Bom. 483 113, 132		
Choitram v. Lalbux, 1921 Sind 29 = 15 S. L. R. 47 236, 239, 240, 241, 242		228, 229,
Chotay Lal v. Emperor, 1926 Bom. 220		4
Chunilal v. Bhanumati, 13 Bom. L. R. 1053 = 36 Bom. 151 35, 36		
Chunilal v. Vinayak, 33 Bom. 376 = 11 Bom. L. R. 342 21, 23, 25		
Clarke v. Bradlagh, 8 Q. B. D. 69		149
Collector of Satara v. Mahadu, 28 Bom. L. R. 1231 = 50 Bom. 844		223, 232
Collector of Vijagapalla v. Pataik, 55 Mad. L. J. 584		10

D. Rubin v. Balwantrai, 105 I. C. 795 = A. I. R. 1923, Bom. 12	18
Dada v. Bahiru, 29 Bom. L. R. 1419 = 105 I. C. 754	92, 94, 95
Dadabhai v. Dadabhai, 32 Bom. 516 = 10 Bom. L. R. 745	8, 122, 142, 157
Dagdu v. Balvant, 22 Bom. 820 = 1897 P. J. 211	6, 40
Dagdu v. Mirasaheb, 14 Bom. L. R. 385 = 36 Bom. 496	22, 23, 24, 91
Dagdusa v. Ramchandra, 20 Bom. 611	152
Daluchand v. Api, 22 Bom. L. R. 1093	128, 129
Damodar v. Manubai, 34 Bom. 65 = 11 Bom. L. R. 1143	36, 37
Darubhai v. Bechar, (1924) 49 Bom. 305 = 27 Bom. L. R. 196	187
Dattatraya v. Annaji, 1886 P. J. 237	162, 185, 186
Dattatraya v. Radhabai, 23 Bom. L. R. 92	43
Dattatraya v. Salvo, 34 Bom. L. R. 404	148, 149
Datto v. Balwant, 1885 P. J. 248	179, 180
Deomal Rachandmal v. Firm Lalchand, A. I. R. 1931 Sind 97 (F. B.)	278
Dev Narayan Dutt v. Narendra Krishna, 16 Cal. 267	46
Devu v. Revappa, (1922) 24 Bom. L. R. 370 = 46 Bom. 964	48, 66, 170, 173, 175, 176
Dharamsey v. Balkrishna, 31 Bom. L. R. 984 = 53 Bom. 787	19, 23, 105
Dhondi v. Lakshman, 19 Bom. 553 = 1894 P. J. 214	120, 124, 147
Dhondi v. Revappa, 19 Bom. L. R. 276 = 40 Bom. 453	128, 130
Dhondo v. Bhikaji, 17 Bom. L. R. 144 = 39 Bom. 138	128, 129
Dhondu v. Narayan, (1863) 1 Bom. H. C. 47	152
Dinsha v. Hargovindas, 13 Bom. 215 = 1888 P. J. 134	294, 295
Dinu v. Shripad, 21 Bom. L. R. 720 = 43 Bom. 703	186, 187
Dipchand v. Gokuldas, 4 Bom. 363	216, 233
Dipchand v. Kashi, 1881 P. J. 116	60, 149
Dipchand v. Sahebino, 5 S. L. R. 92	141
Dnyanu v. Appa, 1883 P. J. 271	40, 64, 113, 132
Dola Khetaji v. Balya Kanho, 24 Bom. L. R. 236	99
Dulichand v. Dhondhi, 5 Bom. 184 = 1880 P. J. 277	60, 75, 122, 333
Dwarkojirao v. Balkrishna, 19 Bom. 255 = 1894 P. J. 70	21, 22, 23, 25

INDEX OF CASES

5

Emperor v. Chunilal, 14 Bom. L. R. 876	10
Emperor v. Govind, 16 Bom. L. R. 683 = 27 I. C. 178	38, 314
Emperor v. Noor Mahomed, 1928 Sind L. R. 103	3
Essa Abdulla v. Khatijabi, 33 Bom. L. R. 13	8, 60, 103, 104
Esu v. Waman, 1881 P. J. 316	217
Fatmabibi v. Ganesh, 31 Bcm. 630 = 9 Bom. L. R. 917, 116, 117	
Firm of Ayaram v. Firm of Hitraj, 66 I. C. 682 = 16 S. L. R. 76	29, 107
Firm of Kcdumal Jetbaram v. Bulchand, 119 I. C. 543 = 1929 Sind 209	227, 228
Gadadhar v. Gangaram, 33 Bom. L. R. 825	23, 24
Ganapati v. Sitharama, 10 Mad. 292	121
Gavdappa v. Girimallappa, 19 Bcm. 331	121
Ganesh v. Hari, 1895 P. J. 373	120, 125, 126, 147
Ganesh v. Kashi, 1888 P. J. 132	126, 142
Ganesh v. Krishnaji, 14 Bcm. 387 = 1889 P. J. 336	6, 55, 56, 61, 278, 280, 282
Gangadhar v. Mahadu, 8 Bom. 20 = 1883 P. J. 332	7, 50, 65, 136, 137, 140, 141, 178, 214
Gangaram v. Deymal, 1929 Sind 163 = 116 I. C. 537	105
Gangaram v. Punamchand, 21 Bom. 822	114
Gangashankar v. Badhur, 33 Bom. 249 = 10 Bom. L. R. 1163	77
Ganpat v. Tulshi, 26 Bom. L. R. 118 = 48 Bom. 214	30, 86, 87
Ganpat Bhujang v. Hamangauda, 35 Bom. L. R. 956 = 57 Bom. 593	120
Gautam v. Malhari, 18 Bom. L. R. 247 = 40 Bom. 397	66, 67, 88
Genu v. Narayan, 22 Bom. L. R. 1147 = 45 Bom. 117	126, 163
Ghulam Jilani v. Mahammad, 29 Cal. 167	178
Girwarsing v. Thakur Narain, 14 Cal. 730	235
Gokuldas v. Govind, 32 Bom. 98 = 9 Bom. L. R. 1334	171
Gopal v. Morar, 15 Bom. L. R. 555	93
Gopal v. Rajaram, 14 Bom. L. R. 14 = 36 Bom. 305	38, 86, 87, 89, 93
Gopal v. Yeshwantrao, 1887 P. J. 273	125, 128, 130
Gopal Chandra v. Bhuthnath, 1926 Cal. 312 = 42 C. L. J. 520	27, 28
Gopaldas v. Vithal, 31 Bom. L. R. 915 = 1929 Bom. 357	9, 157, 158

Goturam v. Barku, 24 Bom. L. R. 88 = 46 Bom. 560	138, 140
Goverdhan v. Yesu, 1882 P. J. 24	129, 131
Govind v. Kallu, 2 All. 778	80
Govind v. Mavji, 1897 P. J. 364	201
Govind v. Narayan, 33 Bom. L. R. 844	185, 186
Govind v. Vithal, 14 Bom. L. R. 560 = 36 Bom. 536	42, 44
Govindrao v. Ambalal, 13 Bom. L. R. 352 = 35 Bom. 310	65, 141, 179, 180, 214
Govind Sing v. Kallu, 2 All. 778	59
Gulab v. Secretary of State, 8 Bom. 596	114
Gulabpuri v. Pandurang, 1886 P. J. 142	6, 7, 170, 198
Gulam v. Hazi Badruddin, 13 Bom. 336	121
Gulam Hussein v. Clara D'Souza, 31 Bom. L. R. 988 = 53 Bom. 819	59, 62, 104, 203
Gulam Hussein v. Falib, 2 S. L. R. 28	61
Gulzarsingh v. Sheonath, 11 O. L. J. 275 = 78 I. C. 547	96
Gur Narayan v. Shivilal Singh, 46 Cal. 566 (P. C.)	112
Gurubasayya v. Chanmalappa, 19 Bom. 286 = 1894 P. J. 90	283, 284, 286, 333
Gurunath v. Sadashiv, 22 Bom. L.R. 1190 = 59 I.C. 217	127, 129
Hallappa v. Irappa, 24 Bom. L. R. 406 = 46 Bom. 843	4, 9, 88, 89, 91
Hambirkhan v. Muirjmal, 65 I. C. 357 = 1922 Sind 39	94
Hanmant v. Babaji, 16 Bom. 172	142, 147, 150
Hanmant v. Shidu, 25 Bom. L. R. 358 = 47 Bom. 692	186
Hari v. Laxman, 5 Bom. 614	193, 203, 206
Hari v. Sitaram, 1882 P. J. 15	51, 193
Harkisandas v. Bai Dhanu, 50 Bom. 566 = 28 Bom. L. R. 954	93
Hasanali v. Sanli Begum, 33 Bom. L. R. 1139	213, 214
Hassomal v. Khushiram, 6 S. L. R. 209 = 19 I. C. 564	141
Hemant kumari v. Midnapur Zamindari Co., 47 Cal. 485 = 46 I. C. 534	39
Hicks v. Powell, L. R. 4 Ch. App. 741	296
Hira v. Daula, 28 Bom. L. R. 539 = 1926 Bom. 287	49, 217, 220
Hirachand v. Aba Lala, 24 Bom. L.R. 269 = 46 Bom. 761	184, 185
Hirachand v. Hansabai, 25 Bom. L. R. 76 = 47 Bom. 527 = 72 I. C. 62	239, 240

INDEX OF CASES

7

Hiralal v. Narsilai, 37 Bom. 326 = 18 I. C. 909 = 15 Bom. L. R. 483	152
Hiralal v. Parbhulal, 23 Bom. L. R. 796 = 46 Bom. 48	27
Hiramal v. Hajarising, 78 I. C. 583 = 1925 Sind. 49	48, 227
Hotchand v. Kishinchand, 17 S. L. R. 178 = 83 I. C. 584 = 1924 Sind 23	65, 141
Hurro Chunder Roy v. Soordhones, 9 W. R. 402	5
Imperial Bank v. Rai Gyan Thu & Co., 25 Bom. L. R. 1279	3
In re. A. E. Smith, 1924 Mad. 389	4
Jalbhai Ardesar v. Luis, 19 Bom. 680	11
Janardan v. Ananta, 1896 P. J. 396	51, 52, 82
Jankibai v. Ramchandra, 30 Bom. L. R. 1148 = 1928 Bom. 475	195
Janoji v. Janoji, 7 Bom. 185 = 1882 P. J. 411	128, 155, 156, 194
Javanmal v. Muktabai, 14 Bom. 316 = 1890 P. J. 33	5, 115, 293, 296, 306
Jhanda Singh v. Wahiduddin, 38 All. 570	96
Johermal v. Tejram Jagrup, 17 Bom. 235	294
Johnson v. Uphan, 2 K. B. 171	5
K. N. Malpekar v. Khanduji, 1930 O. C. J; S. No. 2004	104
Kachu v. Laxmansing, 25 Bom. 115	154
Kalkaprasad v. Chandan, 10. All. 20	39
Kaluram v. Gangaram, 16 Bom. L. R. 67 = 38 Bom. 231	45
Kadappa v. Martand, 17 Bom. 227 = 1892 P. J. 95	46
Kanji v. Dhonde, 6 Bom. 729 = 1882 P. J. 10	294
Kashinath v. Ambaji, 1881 P. J. 74	164
Kashinath v. Rama, 18 Bom. L. R. 475 = 40 Bom. 492	183, 184
Kashinath v. Vinayak, 13 Bom. L. R. 242 = 35 Bom. 266	35, 36
Kashi Prasad v. Bajrang Prasad, 30 All. 36	154
Kashiram v. Hirachand, 15 Bom. 30 = 1890 P. J. 139	56, 61, 63, 81
Kasturchand v. Jakhia, (1915) 40 Bom. 74 = 17 Bom. L. R. 923	96
Kedari v. Gajai, 18 Bom. 690 = 1893 P. J. 460	296, 315
Kenreck v. Lawrence & Co., 25 Q. B. D. 99	5
King Emperor v. Alexander Allen, 25 Mad. 628	28
Kirpashankar v. Govinda, 1880 P. J. 329	236
Kisandas v. Muktabai, 1888 P. J. 287	163

Kisandas v. Nama, 12 Bom. L. R. 1024 = 35 Bom.	190
	110, 137, 180
Kisandas v. Ramchandra, 13 Bom. L. R. 1009	132
Kondaji v. Anau, 7 Bom. 448 = 1883 P. J. 234	57, 279, 280
Kondan v. Inderchand, 22 Bom. L. R. 1299 = 59 I. C. 576	
	125, 126, 134, 147
Kondi v. Gunda, 1882 P. J. 156	96, 48
Kondumal v. Kashiba, 1881 P. J. 1	281, 333
Krishnaji v. Gopal, 28 Bom. L. R. 676 = 1926 Bom. 478	27
Krishnaji v. Hari, 28 Bom. 635 = 6 Bom. L. R. 588	64, 66, 67
Krishnaji v. Maruti, 12 Bom. L. R. 762	42, 58, 278
Krishnaji v. Motilal, 21 Bom. L. R. 476	154
Krishnaji v. Sadanand, 28 Bom. L. R. 341 = 1924 Bom. 417	
	196, 198
Krishnaji v. Sambhu, 1892 P. J. 280	134, 142
Kuppa v. Mhasti, 33 Bom. L. R. 633	96, 98
Ladhaji v. Hari, 23 Bom. 679 = 1 Bom. L. R. 176	106
Ladu v. Balaji, 7 Bom. 532 = 1883 P. J. 301	182, 186
Lakshman v. Maina, 1883 P. J. 320	130
Lakshman v. Malhar, 1886 P. J. 191	131, 166
Lala Fatesh Chand v. Rani Kishen Kunwar, 14 Bom. L. R. 1090	289
Lalji v. Mahomed Ali, 1 S. L. R. 75	75, 119, 122
Laluchand v. Girjappa, 20 Bom. 469	192, 193, 194, 200
Laxman v. Ramabai, 28 Bom. L. R. 736 = 50 Bom. 236	65,
	214, 323
Laxman v. Ramchandra, 23 Bom. 321 = 1898 P. J. 236	67, 68,
	279, 280
Laxman v. Rampiarabai, 1897 P. J. 290	59, 60, 81
Laxmandas v. Baban, 16 Bom. L. R. 671 = 39 Bom. 73	129, 193,
	194
Laxmanswami Naidu v. Rangamma, 26 Mad. 31	137, 180
Lawrence Philip & Co. v. M. R. F. Nazareth, 1925 Sind	
86 = 19 S. L. R. 247 = 78 I. C. 806	66, 75, 122
Le Bret v. Pappilon, 4 East. 502	114
Madhav v. Appaji, 45 Bom. 1123 = 23 Bom. L. R. 503	180
Madhavrao v. Raoji, 1885 P. J. 150	58, 81, 82
Madhusudan v. Bidhaymani, 6 C. W. No. 192	96

INDEX OF CASES

Mahadeo v. Mahadu, 22 Bom. 788=1897 P. J. 190	294, 295, 296, 321
Mahadeo v. Rama, 40 Bom. 194=17 Bom. L. R. 962	232
Mahadeo v. Shridharbhat, 27 Bom. L. R. 488	195, 196
Mahadeo v. Vinayak, 33 Bom. 504=11 Bom. L. R. 721	37, 38
Mahadji v. Ramchandra, 1885 P. J. 159	55, 81, 82
Mahadu v. Bayaji, 19 Bom. 239=1893 P. J. 596	294, 297, 306
Mahadu v. Rajaram, 1887 P. J. 216	124, 126
Mahalayu v. Kusaji, 18 Bom. 739=1893 P. J. 520	226, 230, 233
Mahamad v. Bagas, 32 Bom. 569=10 Bom. L. R. 742	162
Mahamad Ibrahim v. Sheikh Mahamad, 44 Bom. 372=22 Bom. L. R. 124	172
Mahananda v. Mogala, 31 Cal. 937	28
Mahaprasad v. Ramani Mohan, 16 Bom. L. R. 824; 41 I. A. 197	4
Maharaj Kumar v. Mohan Ganesh, 8 Bom. L. R. 719	283
Mahipatrao v. Gambhirmal, 1886 P. J. 141	63, 162
Mahamad v. Cohen, 13 Cal. 221	10
Mahomed Syedol v. Yeeh Ooi Garke, 19 Bom. L. R. 157	88
Malappa v. Shamji, 1897 P. J. 49	162
Malmocand v. Emp., 28 I. C. 738	4
Maloji v. Vithu, 9 Bom. 520=1885 P. J. 117	119, 124, 135
Manaji v. Narayanrao, 19 Bom. 46=1894 P. J. 1	70
Mancharji v. Thakurdas, 31 Bom. 120=8 Bom. L. R. 963	170, 176, 182, 189, 212
Maneklal v. Ganeshlal, 35 Bom. L. R. 588=1933 Bom. 298	235, 236
Maneklal v. Mahipatram, 51 Bom. 454=29 Bom. L. R. 1109	36, 37, 48, 49, 50, 174, 218, 219, 220, 227
Manohar v. Bavani, 1885 P. J. 90	278
Manohar v. Collector of Nasik, 37 Bom. 97=14 Bom. L. R. 943	24, 31, 111, 112
Mareppa v. Gundo, 20 Bom. L. R. 469=43 Bom. 1	131, 150
Martand v. Amritrao, 27 Bom. L. R. 951=49 Bom. 662	40, 41, 47, 89, 91, 92
Maruti v. Martand, 24 Bom. L. R. 749=47 Bom. 44	40, 41, 50, 226, 227, 228, 229
Mathuradas v. Mahadu, 32 Bom. L. R. 320=1930 Bom. 238	240

Mattison v. Hart, 23 L. J. C. P. 108	3
Md. Kasim v. Seo Sing Swami, 32 I. C. 192	97
Md. Sulaiman v. Md. Yarkhan, 11 All. 267	3
Md. Syedol v. Yeoh Ooi Gark, 19 Bom. L. R. 157 = 43 I. A. 256	4
Milkimal v. Hussein, 1934 Sind 65	61, 63
Mohan v. Tukaram, 21 Bom. 63 = 1895 P.J. 435	65, 141, 178, 214
Moreswar v. Umraosing, 34 Bom. L. R. 778	27, 28, 52
Mugappa v. Mahamad Saheb, 34 Bom. 260 = 12 Bom. L. R. 137 117, 118, 156	
Muktaji v. Manaji, 12 Bom. 684 = 1888 P. J. 32	286
Mukund Krishna v. Mohanlal, 26 Bom. L. R. 620 = 1924 Bom. 514	35
Mulchand v. Bachal, 26 Bom. 403	27
Mulchand v. Ravji, 1883 P. J. 114	64, 66, 67, 191
Mulji v. Goverdandas, 24 Bom. L. R. 1291 = 1923 Bom. 36 49, 176, 213, 214, 220	
Municipal Committee of Nasik v. Collector of Nasik, 17 Bom. L. R. 324	43
Murugesu v. Chinnathambi, 24 Mad. 42	27, 28
Musammatt Bachi v. Bikchand, 13 Bom. L. R. 56 67, 68, 111, 140, 196, 198	
Musamat Begum v. Topanmal, 3 S. L. R. 106 = 4 I. C. 599 75, 122	
Nader Shaw v. Sharin Bai, 25 Bom. L. R. 839	3
Najibulla v. Nasir, 7 Cal. 196	234
Narasingji v. Partha Sarathi, 47 Mad. 729	96
Narsingji v. Ranchodbhai, 13 Bom. L. R. 109 = 9 I. C. 929 31, 118	
Narayan v. Chapsi, 23 Bom. L. R. 1186 = 46 Bom. 419 111, 127, 130	
Narayan v. Chengalamma, 10 Mad. 1	51
Narayan v. Dhondo, 28 Bom. L. R. 305 = 1926 Bom. 246 49, 174, 175	
Narayan v. Gangadhar, 1888 P. J. 283	61, 62, 81
Narayan v. Gowbai, 37 Bom. 415 = 15 Bom. L. R. 278 46, 226, 230, 231	

INDEX OF CASES

11

Narayan v. Kaji Gulam, 27 Bom. L. R. 1240 = 49 Bom. 833	40, 113, 132
Narayan v. Sonusing, 76 I. C. 659 = 1923 Bom. 333	26
Narayan v. Vithal, 1893 P. J. 191	131, 132
Nathu v. Vazir, 31 Bom. 450 = 9 Bom. L. R. 550	171
Navlaji v. Rama, 34 Bom. 158 = 11 Bom. L. R. 1285	200, 201
Nilamanikar v. Satiprasad, 48 Cal. 556	3
Nurmahomed v. Sayad, 1 S. L. R. 246	66
Padgaya v. Baji, 11 Bom. 469 = 1887 P. J. 224	47, 48, 56, 114, 115
Panadai v. Ramaswami Chitti, 45 Mad. 710	27, 28
Pandharinth v. Shankar, 8 Bom. L. R. 488	189
Pandu v. Ganesh, 1885 P. J. 228	119
Pandurang v. Krishnaji 28 Bom. 123 = 5 Bom. L. R. 799	230
Pannalal v. Kalu, 8 Bom. L. R. 798	116
Parvati v. Yeshwant, 36 Bom. 199 = 13 Bom. L. R. 1204	22
	23, 26
Patlu v. Naru, 7 Bom. L. R. 688	50, 118, 121
Pessumal v. Valoo, 101 I. C. 844 = 1927 sind 197	139, 140
Pillai's case, 2 I. A. 233	57
Pir Abdul Satar Jan v. Firm of Vaparimal, 27 S. L. R.	
183 = 1933 sind 331	211
Piraji v. Ganpati, 34 Bom. 502 = 12 Bom. L. R. 378	50,
	135, 136, 137, 139, 179
Pirappa v. Annaji, 40 Bom. 189 = 17 Bom. L. R. 974	331
Prabhakar v. Khanderao, 10 Bom. L. R. 625	116, 117
Pranjivandas v. Miyachand, 22 Bom. L. R. 1123 = 45 Bom.	
87 = 59 I. C. 418 = 1921 Bom. 426	7, 101
Premchandmal v. Newandmal, 1931 sind 121	105
Purshottam v. Bhavanji, 4 Bom. 360 = 1880 P. J. 102	29, 107
Pursumal v. Sadhumal, 3 S. L. R. 1 = 1 I. C. 935	80, 89
Purushottam v. Sitaram, 8 Bom. L. R. 606	33
Putaji v. Sadashiv, 1887 P. J. 211	122
Queen Emp. v. Babulal, 6 All. 509	4
Queen Emp. v. Tilak, 22 Bom. 112	5
R. v. Athos, 8 Mad. 144	6
R. v. City of London Court, 1 Q. B. 273	3
Radhabai v. Ramchandra, 35 Bom. 204 = 13 Bom. L. R. 30	24

Raghunath v. Ramchandra, 23 Bom. L. R. 1098 = 46 Bom. 384	157
Raja Har Narayan Singh v. Chaudharani Bhagwant Kuar, 13 All. 300	121
Rajai v. Appaji, 1888 P. J. 220	82
Rajaram v. Lakshman, 1882 P. J. 424	40, 113
Rijhumal v. Khiomal, 3 S. L. R. 218 = 6 I. C. 855	30, 31 32, 48
Rama v. Yesu, 1896 P. J. 284	63, 64
Rama v. Karimkhan, 1885 P. J. 112	133, 194
Rama v. Ramchand, 1894 P. J. 456	188
Rambhat v. Laxman, 5 Bom. 630	48, 114
Ramchand v. Chimanlal, 1930 O. C. J ; S. No. 1767 of 1928 (unrep.)	104
Ramchandra v. Bahiru, 1891 P. J. 72	182
Ramchandra v. Balbhim, 25 Bom. L. R. 211	185, 186
Ramchandra v. Draupadi, 20 Bom. 281 = 1895 P. J. 18	281, 285, 333
Ramchandra v. Gowrinath Dutt, 1926 Cal. 927	5
Ramchandra v. Janardan, 14 Bom. 19 = 1899 P. J. 44	59, 128, 130, 155, 156, 194
Ramchandra v. Hari, 1884 P. J. 88	142, 151
Ramchandra v. Kallo, 39 Bom. 587 = 17 Bom. L. R. 630	155, 156, 172
Ramchandra v. Kondaji, 22 Bom. 221 = 1896 P. J. 294	164, 190, 210
Ramchandra v. Shivram, 1888 P. J. 204	125, 147
Ramchandra v. Tukaram, 1885 P. J. 142	148, 150, 151
Ramchandra v. Tukaram, 35 Bom. L. R. 715	25, 30, 31, 33, 34, 45, 46
Ramkrishna v. Ramchandra, 32 Bom. L. R. 1093 = 54 Bom. 776	183, 184
Ramji v. Pandharinath, 51 Bom. L. R. 56	184, 185
Ramlal v. Ratanlal, 33 Bom. L. R. 1466	170, 176
Ram Sahai v. Devi Din, 1926 All. 617	3
Ramsing v. Babu Kisansing, 19 Bcm. 116 = 1893 P. J. 575	281, 286, 333

INDEX OF CASES

13

Rango v. Kalu, 1885 P. J. 221	61, 289
Ranu v. Laxmanrao, 33 Bom. 44 = 10 Bom. L. R. 943	312
Raoji v. Raghunath, 52 Bom. 349 = 30 Bom. L. R. 495	284, 333
Ratanchand v. Hanmantrao, 6 Bom. H.C.R. App. C.J. 166	46
Rayachand v. Sultan, 18 Bom. 347 = 1193 P.J. 188	284, 286, 333
Roshanlal v. Bhurising, 1922 All. 476 = 70 I. C. 899	154
Rubin v. Balwantrao, 105 I. C. 795	18
Rudrappa v. Chanbasappa, 26 Bom. L. R. 153 = 1924 Bom. 305 = 80 I. C. 162	48, 174, 175
Ranjit Sing v. Meherban Koer, 3 Cal. 662	46
Rupchand v. Balwant, 11 Bom. 591 = 1887 P. J. 116	58, 59, 80, 283
Sadhu v. Sambhu, 6 Bom, 592	236
Sahoo v. Narayanshastri, 33 Bom. L. R. 476 = 55 Bom. 411	31, 33, 287
Sai Kom Appa v. Nana, 1896 P. J. 707	295
Sakari Dutt v. Sheikh Amuddin, 5 I. C. 336	154
Sakharam v. Dagdu, 14 Bom. L. R. 739 = 16 I. C. 998	152, 171
Sakharam v. Parvati, 1888 P. J. 274	287
Sakharam v. Sadashiv, 15 Bom. L. R. 382 = 37 Bom. 480	45
Sakharam v. Shripati, 16 Bom. 183 = 1891 P. J. 125	68, 69, 81
Salter's Co. v. Jay, 3 Q. B. 109	5
Sangatmal v. Jan Mahamad, 79 I. C. 553 = 1921 Sind 102 = 16 S. L. R. 260	171, 181
Sangira v. Ramappa, 34 Bom. 59 = 11 Bom. L. R. 1130	90
Savalapuri v. Bala, 36 Bom. 543 = 14 Bom. L. R. 566	18, 25
Savant v. Bharmappa 35 Bom. L. R. 604	65, 67, 197, 202
Savantrao v. Giriappa, 15 Bom. L. R. 778 = 38 Bom. 18	38, 87, 90
Secretary of State v. Yasudeo, 30 Bom. L. R. 1494	5
Shaikh Chamman v. Emperor, 54 I. C. 623	4
Shamlal v. Hirachand, 10 Bom. 367 = 1885 P. J. 29	47, 114, 115
Shamrao v. Malkarjun, 33 Bom. L. R. 797	50, 174, 226, 227 228, 229
Shankar v. Bhikaji, 31 Bom. L. R. 129 = 53 Bom. 353	199
Shankar v. Krishnaji, 34 Bom. 161 = 11 Bom. L. R. 1288	33, 194

Shankar v. Shankar Gandayya, 32 Bom. 445 = 10 Bom. L. R. 538	172
Shankarbhāt v. Raghunāthbhāt, 1892 P. J. 288	62
Shankarappa v. Dhanappa, 5 Bom. 604 = 1881 P. J. 93	166, 169 192, 206, 209, 212
Shaikh Gulam v. Kashinath, 25 Bom. 244 = 2 Bom. L. R. 795	61, 62, 81, 280
Sheik Sultan Rahim v. Ranchhodji Mulji, 51 Bom. 224 = 29 Bom. L. R. 249	37
Sheomal v. Mulomal, 8 S. L. R. 260 = 28 I. C. 50	141
Sheonath v. Gayaprasad, 8 Oudh cases 302	154
Shidhu v. Bali, 15 Bom. 180 = 1890 P. J. 160	284
Shidlingappa v. Rajava, 1932 Bom. 23	170
Shidraj v. Renaki, 27 Bom. L. R. 1490 = 1926 Bom. 140	49 174, 175
Shidu v. Ganesh, 16 Bom. 128 = 1891 P. J. 114	61, 62, 81, 279, 280
Shivbasappa v. Balappa, 25 Bom. L. R. 1209 = 81 I. C. 673	99
Shivayagappa v. Govindappa, 37 Bom. 614 = 15 Bom. L. R. 768	137, 179, 180
Shivlal v. Bhika, 34 Bom. 220 = 11 Bom. L. R. 1372	8, 117
Shivram v. Kondiba, 8 Bom. 340 = 1884 P. J. 26	234
Shokomal v. Jagatmal, 118 I. C. 221 = 1930 Sind 16	229
Shripati v. Balavantrao, 26 Bom. L. R. 149 = 1924 Bom. 345	298, 299, 309, 310
Shripati v. Sitaram, 1887 P. J. 296	40, 64, 113, 132
Shridhar v. Ramchandra, 35 Bom. L. R. 573	151, 326, 327
Sitaram v. Nana, 1883 P. J. 298	134, 152
Sitaram v. Shri Khandoba, 39 Bom. 165 = 16 Bom. L. R. 756	61, 81, 381
Smith A. E. In re, 1924 Mad. 389	4
Sojbro v. Changomal, 15 S. L. R. 77 = 63 I. C. 238 = 1921 Sind 10	141, 323
Somana v. Gedigea, 35 Bom. 231 = 13 Bom. L. R. 113	86, 92
Sukalal v. Bapu, 24 Bom. 305	152
Suklya v. Suklal, 25 Bom. L. R. 1214 = 48 Bom. 172	184
Sultan Rahim v. Ranchhodji, 29 Bom. L. R. 249 = 51 Bom. 224	90, 91, 100

Surendra v. Hari, 31 Cal. 174	28
Suryaji v. Tukaram, 4 Bom. 358 = 1880 P. J. 80	116, 118
Tablra v. Maghanlal, 1929 Sind. 170 = 117 I. C. 150	60, 105
Tatya v. Bapu, 7 Bom. 330 = 1883 P. J. 161	129, 130, 131
Trimbak v. Abaji, 13 Bom. L. R. 508.	149
Tukaram v. Bahirav, 1888 P. J. 7	40
Tukaram v. Ramchand, 26 Bom. 252 = 3 Bom. L. R. 778	63, 161, 162
Tulshidas v. Virbasappa, 4 Bom. 624	4, 6, 30, 31, 32, 48, 55, 74, 103, 104, 106, 111, 278
Udhowdas v. Ukamal, 60 I. C. 942 = 14 S. L. R. 217	238
Usmanbhai v. Imrathbhai, 1893 P. J. 148	284, 286, 333
Usuf-ud-din v. Queen Emp., 2 C. W. N. 1	11
Vamanacharya v. Govind, 25 Bom. L. R. 826 = 1924 Bom. 33	29, 43, 45
Varada Pillai v. Jeevarathammal, 22 Bom. L. R. 444 = 43 Mad. 244	94
Vasudeo v. Gopal, 21 Bom. L. R. 687 = 43 Bom. 689	188
Vishwanath v. Aba, 1886 P. J. 11	281, 283, 333
Vishwanath v. Rahibai, 55 Bom. 102 = 32 Bom. L. R. 1385	306
Vasudeo v. Ramkrishna, 24 Bom. 394 = 2 Bom. L. R. 122	331
Venkayya v. Ramasami, 22 Mad. 39	28
Vinayakrao v. Shamrao, 40 Bom. 655 = 18 Bom. L. R. 708	68, 69, 111, 140
Vishnu v. Satwaji, 1897 P. J. 87	128, 130, 155, 156
Vishwanath v. Bala, 1889 P. J. 343	47
Vithal v. Mahadji, 1888 P. J. 71	125, 142, 147
Vithaldas v. Murtaja, 24 Bom. L. R. 267 = 46 Bom. 764	157
Wadhupal v. Tharo, 3 S. L. R. 133	230, 231
Wilson v. Konubley, 7 East. 128	6

ADDENDA

These pages contain cases that were published while the book was being printed. The figures within brackets refer to the pages of the book where the ruling should be incorporated.

S. 13. Rules for taking accounts:—

S. 76 cl. (a) of the Transfer of Property Act is not applicable: In taking accounts under s. 13 of this Act, the Court is to set aside any agreement between the parties as to setting off profits in lieu of interest and then it is to take account according to the rules laid down in this section. In doing so, *actual receipts by the mortgagee are to be taken as being what he has received*, though with more careful management he would have realised more from the property. In such a case s. 76 cl. (a) of the Transfer of Property Act, which provides that the mortgagee must manage the property as a man of ordinary prudence would manage it if it were his own does not apply. For "there is a special Act, the D. A. R. Act, regulating the relations between impoverished and indebted agriculturists and their creditors, while the General Act, the T. P. Act, prescribes those between the mortgagor and the mortgagee generally, and for circumstances where the special Act does not lay down exceptions to the general rule. Under the D. A. R. Act, the relations between the mortgagor and the mortgagee are practically set aside, and the Court is directed to go into the history of the transactions between them, to calculate debits and credits according to the rules in the special Act, and to set aside certain kinds of contracts, such as the one in this case, that the profits are to be taken in lieu of interest. It seems to us difficult to reconcile this complete setting of the original contractual relations between the parties, with the rules of general law which would apply had not the special Act dealt with the particu-

lar case, and we think that in the circumstances, s. 76 does not apply to this case.¹

A Reasonable rate of interest :— In this case the lower Court had allowed interest at nine per cent per annum. In appeal it was argued that the Court rate of six per cent only should be allowed. It was held that "the ordinary rate of interest in the mofussil is a rupee per hundred per month, that is twelve per cent. We think that in the circumstances of the case the rate adopted by the learned Subordinate Judge of nine per cent is a reasonable one." Considering that some Subordinate Judges often allow only six p. c., p. a., it is hoped that this observation of the learned Judge will help the Courts in exercising their discretion in fixing a reasonable rate of interest.²

Prices of grain where payment is in kind :— Where the payment is made in kind, in settling the prices of grain for each year the Court should not rely only on the statements of the plaintiff. It should try to find the course of actual prices, evidence of which must be available locally. Attempt should be made to look at records of prices during the series of years. Such evidence on the point as is available should be called for and taken, and that if none is offered, statistics must be consulted to show the course of prices in the interval of years, and the conversion from payment in kind into payment in money should be effected on this basis.³

(P. 67) Suit under s. 3 cl. (z) :—A special suit under S. 15 D of the D. A. R. Act does not lie where the suit though for redemption, is really for reconveying property of which the plaintiff is alleged to have been deprived by fraud. Such a suit is not within the terms of S. 3 cl. (z) of the D. A. R. Act.⁴

1 Sakharam v. Dhaktojirao, (1934) 36 Bom. L. R. 633. In this case it was alleged by the mortgagor that the mortgagee had put a relation of his in possession of the land, as tenant and that a low rent was taken from him, whereby damage had been caused to the interests of the mortgagor. The latter claimed therefore that in taking accounts under s. 13 the mortgagee should be debited with a fair rent (what he would have received if he had managed the property

as a man of ordinary prudence would have managed his own property : S. 76 (a) J. P. Act.) It was held that the mortgagee must only be debited with what he received, as 76 of the T. P. Act was not applicable in a case under the D. A. R. Act.

2 Sakharam v. Dhaktojirao, (1934) 36 Bom. L. R. 633.

3 Ibid.

4 Chhotabhai v. Dadabhai, (1934) 36 Bom. L. R. 738.

(p. 31) S. 2: **Or who ordinarily engages personally in agricultural labour** :—A man who has been a trader cannot, by merely working in the fields for a couple of months, acquire the status of an 'agriculturist' within the meaning of the second part of the definition of the term in S. 2 (1) of the D. A. R. Act, i. e. on the ground that he ordinarily engages personally in agricultural labour.

The finding of the lower Court as to the status of the judgment-debtor relates to the date of the decree and not to the date when the suit was filed.

The date of determining the status of the judgment-debtor in the execution proceedings is the date on which the order for sale is made, and not the date on which the subsequent order is made after the issue of notice under Order XXI r. 66 of the C. P. Code.

In suit brought by the plaintiff to recover a sum of money the Court decreed his claim on Feb. 20, 1932 holding that the defendant was not an agriculturist. On March 7, 1932, the judgment creditor filed a darkhast and the property of the judgment debtor was ordered to be attached and the Court ordered the sale of the attached property on April 21, 1932. In reply to the notice under Or. 21 r. 66 of the C. P. Code, the judgment debtor contended that he was an agriculturist and that his property could not be attached and sold under S. 22 of the D. A. R. Act. It was *held* that as the judgment debtor was not an agriculturist on Feb. 20, 1932 he could not be deemed to have become an agriculturist within the definition of that Act on 21 April 1932.¹

()

¹ Sopana v. Dattatraya, (1934) 86 Bom. L. R. 804.

S. 13 (g). (P. 151) Under s. 13 of the D. A. R. Act, the account of the transaction in dispute can be taken to the date of the suit and not to the date of the decree. The account between the date of the suit and the date of the preliminary decree can be taken under the ordinary law under r. 7 Or. 34 of the C. P. Code, and the award of interest is governed by r. 11 of the Order.¹

1. Chhotalal V. Nathubhai 36 Bom. L. R. 1342; Dattatraya V. Mahomedkhan 37 Bom. L. R. 76.

CONTENTS OF THE ACT

	PAGE.
PREAMBLE	1
CHAPTER I.	
PRELIMINARY.	
SECTIONS.	
1. Short title.	9
Commencement.	9
Local Extent.	10
2. Construction.	14
2A. Jagirdars, etc. to be deemed subordinate Judges	52
CHAPTER II.	
OF THE HEARING OF CERTAIN SUITS BY	
SUBORDINATE JUDGES.	
3. Application of this chapter.	53
4. Certain suits to be instituted in Courts of first class Subordinate Judges.	69
5. Subordinate Judges not to act as Judges of Small Causes Court.	70
6. Jurisdiction of Subordinate Judge and small cause Judge.	71
7. Summons to be for final disposal of suit.	73
8. } <i>Repealed.</i>	78-79
9. }	
10. No appeal to lie.	79
CHAPTER III.	
OF SUITS AND OTHER PROCEEDINGS TO WHICH	
AGRICULTURISTS ARE PARTIES.	
10A. Power of Court to determine nature of transac-	

	tions and to admit evidence of an oral agree- ment or statement. ...	83
11.	Agriculturists to be sued where they reside.	101
12.	History of transaction with agriculturist-debtors to be investigated. ...	107
13.	Mode of taking account. ...	142
13A.	In certain cases rent may be charged in lieu of profits. ...	158
14.	} <i>Repealed</i>	158-159
15. ...		
15A.	Mortgagor entitled to decree for redemption ... though time fixed by mortgage has not ... arrived or debt has not been paid. ...	159
5AA.	Power of Court to name some future date for payment by the mortgagor. ...	165
15B.	Power to order payment by instalments in case of decree for redemption, foreclosure or sale. ...	167
15C.	Power to order payment by instalments in suits for possession of mortgaged property.	190
15D.	Mortgagor may sue for account. ...	191
16.	Agriculturist-debtors may sue for accounts. ...	202
	... Amount of debts in such cases to be deter- mined according to foregoing provisions. ...	203
17.	Decree under section 16 <u>may</u> provide for payment by instalments. Execution of decree under this section. ...	205
18.	Payment into Courts in cases under section 16.	206
19.	+ <i>Repealed</i>] ...	207
20.	Power to fix instalments in execution. ...	208
21.	Arrest and imprisonment in execution of decree for money abolished. ...	215
2.	Immoveable property exempted from attach- ment and sale unless specifically pledged. ...	223

22A. Power of Collector to set aside sale. ...	242
23. Chapter not to apply to Village-munsifs' Courts.	243

CHAPTER IV.

OF INSOLVENCY.

24. Subordinate Judges to have jurisdiction in agriculturists' cases. ...	244
25. Agriculturists may apply for adjudication in cases not provided for by Code. ...	250
26. Modification of section 351 of the Code.	251
27. Receiver.	253
28. Proof of debts. ...	253
29. Immoveable property not to vest in Receiver but may be managed for benefit of creditors	253
30. Secured debts. ...	256
31. Insolvent incompetent to sell, etc., property dealt with under sections 29 and 30.	258
32. Scheduled debts discharged. ...	258
33. Appeals barred. ...	258

CHAPTER V.

OF VILLAGE-MUNSIFS.

34. Appointment of Village-munsifs. ...	260
35. Suits triable by them. ...	261
... Jurisdiction of other Courts excluded.	262
Proviso. ...	262
36. District Judge's power of revision. ...	263
37. Power of Local Government to make rules.	265

CHAPTER VI.

OF CONCILIATION.

38. Appointment of Conciliators. ...	268
39. Matters which may be brought before Conciliator	268

40. ...Procedure thereupon. ...	268
Day for attendance may from time to time be postponed. ...	269
41. When all parties appear, Conciliator to endeavour to reconcile them. ...	269
42. Conciliator to hear statements of witnesses, ... etc. ...	269
43. Any agreement arrived at to be reduced to ... writing. ...	270
44. Procedure when agreement finally disposes of case and in other circumstances. ...	270
45. Procedure where agreement is for reference to arbitration. ...	272
46. Certificate to be given to applicant if concili- ation fail. ...	272
47. Suit or application for execution, not to be entertained by Civil Court unless suit ... certificate is produced. ...	272
48. Allowance to be made in period of limitation	273
48A. [<i>Repealed</i>]	273
49. Local Government to make rules	273

CHAPTER VII.

SUPERINTENDENCE AND REVISION

50. District Judge to inspect, etc. ...	275
51. District Judge may withdraw case from Conciliator or Subordinate Judge ...	275
52. Appointment of Assistant or Subordinate Judges to aid District Judge ...	276
53. Of revision ...	277
54. Special Judge ...	287

CHAPTER VIII.

REGISTRATION BY VILLAGE-REGISTRARS

55. Appointment of Village-registrars ...	292
---	-----

CONTENTS OF THE ACT

28

56.	Instruments executed by agriculturists not ...to be deemed valid unless executed before a village registrar ...	292
57.	Such instruments to be written by or under the superintendence of a Village-registrar and executed in his presence ...	297
	Attestation of such instruments, ...	297
58.	Registration of instruments by Village- registrars ...	300
59.	Consideration to be fully stated in every instrument executed before a Village- registrar ...	301
	Previous instruments to be produced ...	301
	Production of copy of previous instrument ...when to be permitted ...	301
60.	Registration under this Act to be deemed equivalent to registration under Indian Registration Act, 1877 ...	303
61.	Superintendence of Village-registrars and custody and destruction of their records	303
62.	Exemption of instruments to which Govern- ment or any officer of Government is a party	303
63.	Power of Local Government to make rules	304

CHAPTER VIII A.

REGISTRATION OF INSTRUMENTS REFERRED TO IN
SECTION 17 OF THE INDIAN REGISTRATION

ACT 1877

63 A.	Mode of execution by agriculturists of instru- ments required to be registered under Act III 1877 ...	304
-------	---	-----

CHAPTER IX.

ON RECEIPTS AND STATEMENTS OF ACCOUNT

64.	Agriculturists entitled to written receipts	314
-----	---	-----

65.	Agriculturists entitled to annual statements of accounts	...	315
66.	To have account made up from time to time in a pass book	...	315
67.	Penalty for contravention of sections 64 to 66		316

CHAPTER X.

LEGAL PRACTITIONERS.

68.	Pleaders, etc., excluded in certain cases...		317
69.	Power of Court to appoint pleader for agriculturists	...	319
70.	Mortgages, etc., to be valid only when written		319
71.	Bar of application of section 258, Act XIV of 1882.	...	321
71.A.	Rate of interest allowable on taking an account	...	323
72.	Limitation.	...	327
73.	[<i>Repealed</i>]	...	331
73A.	Certain agricultural produce exempted from attachment, etc.	...	331
74.	Civil Procedure Code to apply in Subordinate Judges' Courts	...	332
74A.	Co-operative Credit Societies	...	334
75.	Additional power to make rules	...	334
76.	Rules to be published	...	335

THE DEKKHAN AGRICULTURISTS' RELIEF ACT, 1879.

ACT No. XVII of 1879. [a]

(Received the assent of the Governor-General
on the 29th October, 1879.)

An Act for the Relief of Indebted Agriculturists in certain
parts of the Dekkhan.

Whereas it is expedient to relieve the agricul-
tural classes in certain parts of the
Dekkhan from indebtedness; It is here-
by enacted as follows:

Synopsis of Commentary.

- | | |
|--|---|
| 1. Object of this Act. | 5. Literal construction where language is plain. |
| 2. General rules of construction. | 6. Illustrations. |
| 3. The Act goes beyond the preamble. | 7. Effect of change of status on rights of parties. |
| 4. Beneficial construction where possible. | 8. Retrospective operation of the Act. |

1. **Object of the Act**—*The Deccan Riots*—The Deccan Riots took place in 1875. "They extended to 33 villages in the Districts of Poona and Ahmednagar, and many more were threa-

[a] For Statement of Objects and Reasons, see *Gazette of India*, 1879; Pt. V, p. 796; for Report of the Select Committee, see *ibid.*, p. 939; for Proceedings in Council relating to the Bill it was originally proposed to introduce, see *ibid.*, 1878, Supplement, p. 1028; and for Proceedings relating to the Bill which included the provisions of both this Bill and the Bill which the Local Council had introduced, see *ibid.*, 1879, Supplement, pp. 595, 683 and 1927.

tened.....The movement was simply an organised and temperately but determinedly conducted effort, directed to the definite object of obtaining and destroying the bonds, decrees and account-books of the money-lenders. No persons except the latter were molested. The mobs were composed of respectable members of the community and were often led or encouraged by the headmen of the villages."¹

Commission of Enquiry—To enquire into the causes of these Riots the Bombay Government appointed a Commission in the same year (1875). The Commission found that the agriculturists in the Central Deccan, which consists of four districts—Poona, Satara, Sholapur and Ahmednagar—were, due to various causes, very heavily in debt. The enquiries made at that time also revealed that the difficulties under which the agriculturists in those districts laboured were due, in a great measure, to the unsatisfactory nature of the relations subsisting between them and the money-lending class.

In order to put those relations on a better footing, it was deemed necessary—

First, to provide some safeguards against the money-lenders committing frauds in their accounts and obtaining from ignorant peasants bonds for larger amounts than are actually paid to or due from them.

Secondly, to arrange disputes by conciliation as far as possible; to increase the number of Courts, and to simplify and cheapen the administration of justice, and thus to afford facilities to the agriculturist to defend any suit that may be brought against him.

Thirdly, to insist that in suits against agriculturists the Court shall in certain cases of its own motion investigate the entire history of the transactions between the parties, and do substantial justice between them.

Forthly, to restrict the sale of the raiyat's land in execution of decrees, and to provide an insolvency-procedure more

¹ Opening Speech of the Hon. Mr. | for the relief of agriculturists in certain
Hops in introducing the Bill in 1879 | parts of the Dekkhan.

liberal to the debtor than that of the Code of Civil Procedure.¹

With these objects in view, was introduced the Bill in 1879 for the relief of agriculturists in certain parts of the Dekkhan. The Bill was passed in the same year as Act XVII of 1879.

2. General Rules of Construction :—As this Act is very badly drafted, in construing its provisions the following rules will be found to be of great help :—

(1) *Literal Construction* :—The cardinal rule of construction is that “ we ought to give to an Act the plain, fair, literal meaning of its words, where we do not see from its scope that such meaning would be inconsistent or would lead to manifold injustice.”² The Legislature must be intended to mean what it has plainly expressed, and consequently there is no room for construction. Where by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the Legislature, it must be enforced even though it be absurd or mischievous.³

But where the language is not quite plain, but admits of interpretations, the following rules should be applied :—

(2) Words operating in derogation of the rights of the subject should be strictly construed.⁴

(3) *Reasonable Construction* :—Where the Statute is not clear, a reasonable construction should be adopted.⁵ A construction which leads to an absurd result,⁶ or produces injustice or defeats the object of the Act itself should be avoided.⁷

1 Statement of Objects and Reasons.

2 Per Jarves C. J. in *Mattison v. Hart* (1954) 23 L. J. C. P. 108.

3 Per Lord Eshar M. R. in *R. V. City of London Court* (1892) 1 Q.B. 73. See also *Emp. v. Noor Mahomed*, 1928) A. I. R. Sind 1; *Azis Khan v. Chote Lal*, A. I. R. 1928 All. 241; *Abdul Rahim v. Abumal*, 30 Bom. L. 778; *Imperial Bank v. Rai Gyaw hu and Co.* 25 Bom. L. R. 1279.

Maxwell, 'Interpretation of Statutes' (1920) P. 3.

4 *Nader Shaw v. Sharin Bai*, A. I. R. 1924 Bom. 264=25 Bom. L. R. 839; *Ali Mohamed v. Bombay Municipality* 27 Bom. L. R. 581. Maxwell (1920) P. 501.

5 *Md. Sulaiman v. Md. Yarkhan*, (1889) 11 All. 267.

6 *Nilamanikar v. Sati Prasad*, 48 Cal. 556.

7 *Ram Sahai v. Devi Din*, A. I. R. 1926 All. 617.

(4) Provisions ousting the jurisdiction of Court, and those conferring jurisdiction on special bodies should be strictly construed¹.

(5) *Marginal Notes* :—It is now settled that marginal notes to sections do not form part of the statute itself and cannot be referred to for construing or explaining the section.² But where there is ambiguity in the section, the marginal note can be referred to for solving that ambiguity.³

(6) *Illustrations* :—Unlike marginal notes, illustrations are to be considered as part of the Statute itself.⁴ They are to be accepted, if that can be done, as being both of relevance and value in the construction of the section.⁵ The rule however is subject to two limitations: (i) An illustration only explains the section and cannot be taken to restrict the sense of the section,⁶ (ii) where an illustration is in conflict with the main section, the illustration must give way to the section.⁷

(7) *Proviso* :—A proviso is subordinate to the main section to which it is appended either to allay unfounded fears or as a condition precedent to the enforcement of the operating clauses, or for explaining what peculiar matters are not within the meaning of the enactment or for providing exceptions and qualifications for the enactments.⁸ A proviso should be taken together with the language of the previous section of the enactment.⁹ As a general rule it must be taken to govern the main proposition of law which immediately precedes such proviso, unless the language of the statute shows a different intention.¹⁰ But in no case can a proviso

1 *Tulshidas v. Virbasappa*, 4 Bom. 624.

2 *Shaikh Chamman v. Emp.* (1920) 54 I. C. 623; *Balraj Kunwar v. Jagatpal Singh* (1904) 26 All. 399=11 Bom. L. R. 516.

3 *In re A. E. Smith*, 1924 Mad. 389.

4 *Bellamal v. Ahmadshah* (1918) 48 I. C. (P. C.) 21 Bom. L. R. 558.

5 *Md. Syedol Yoeh Ooi Gark* (1916) 39 I. C. 411; 19 Bom. L. R. 157; *Hallappa v. Irappa*, 24 Bom. L.R. 406.

6 *Chotay Lal v. Emp.* 1926 Bom. 220.

7 *Malmoccard v. Emp.* (1915) 25 I. C. 738.

8 *Mrs. Annie Besant v. Govt. of Madras* (1916) 37 I. C. 525.

9 *Maha Prasad v. Ramanimohan*, A. I. R. 1914 P. C. 140=25 I. C. 451=16 Bom. L. R. 824.

10 *Queen Emp. v. Babulal*, 6 All. 509.

extend or enlarge the operative effect of the substantive portion unless there is an ambiguity therein.¹

(8) *Previous history of the law* :—If the language of the Act is plain, it is not proper to have recourse to the previous state of law. But if the meaning is doubtful, resort may be had to the previous state of law for the purpose of aiding in the construction of the Act.²

(9) *Proceedings of the Legislature* :—Proceedings of the Legislature in passing an Act are to be excluded from consideration of the judicial construction of the Act.³ These proceedings include report of the Select Committee, Statement of Objects and Reasons, and details of Legislature.⁴

(10) *Retrospective Operation* :—Every Statute which takes away or impairs vested rights acquired under existing law must be presumed to be intended not to have a retrospective operation. But the presumption does not apply to enactments affecting procedure or practice. The reason is that no person has a vested right in any course of procedure.⁵

(11) *The title of the Act* :—It may be looked to for explaining an enacting part when it is doubtful.⁶ The title of the Act does not go for much in construing it. But it cannot be disregarded.⁷

(12) *The Preamble* :—The preamble of an Act sets forth the reason of that particular Act of the Legislature, and foreshadows what is intended to be effected by that Act. It is a key to open the minds of the framers of the Act. It may be referred to for the purpose of clearing up any ambiguity.⁸ But the preamble cannot either restrict or extend the enacting part, when the language and the scope of the Act are not open to doubt.⁹ It is not

1 Ramchander v. Gowrinath Dutt. (1926) A. I. R. Cal. 927.

2 Administrator General v. Prem-lal (1895) 22 Cal. 788.

3 Administrator General v. Prem-lal (1935) 22 Cal. 788.

4 Queen Empress v. Tilak (1898) 22 Bom. 112.

5 Javanmal v. Muktabai (1830) 14 Bom. 516.

6 Hurro Chunder Roy v. Soordhonnee, 9 W. R. 402 (F. B.); Johnson v. Uphan (1859) 2 K. B. 171.

7 Kenreek and Co. v. Lawrence and Co. (1820) 25 Q. B. D. 99. Maxwell Statutes P. 72.

8 Secretary of State v. Vasudeo (1928) 30 Bom. L. R., 1494.

9 Salters Co. vs. Jay, 3 Q. B. 109. Maxwell Interpretation of Statutes P. 77

unusual to find that the enacting part is not exactly co-extensive with the preamble. Oftentimes the preamble is no more than a recital of some inconveniences, and does not therefore exclude any others for which a remedy is given by the Statute.¹ So also where the preamble is found more extensive than the enacting part, it is equally inefficacious to control the effect of the latter when otherwise free from doubt.²

Cases under this Act.

3. The Act goes beyond the preamble :— The preamble declares this Act to be intended 'to relieve the *agricultural* classes in certain parts of the Dekkhan from *indebtedness*.' But some of the provisions of this Act go beyond the object as declared in the preamble and apply to non-agricultural classes, or to agriculturists who are not indebted. Thus the provisions of clauses (w) and (x) of S. 3, and of Chapter V (of Village Munsifs), apply to non-agriculturist parties provided certain conditions given in that section are fulfilled. The conditions are that the suit in question must be in amount or claim under Rs. 500 or 100 according to the class of Court in which they are instituted and must have arisen in one of the districts to which the Act applies.³ The provisions about Conciliation apply to agriculturists whether indebted or not. The other provisions of the Act such as Ss. 12 and 13 apply to a non-agriculturist when he is joined with one who is an agriculturist. The anomaly of non-agriculturists getting the benefit of the Act at the cost of creditors is one expressly provided by the law itself.⁴

(See Note ' Application of this Section ' under S. 3.)

Illustrations.

1. G and K were to perform the worship of a temple in alternate years, and to spend Rs. 25 each for that purpose. For two years, when it was K's turn to provide for the worship, K did not so provide and G had to spend that amount. G sued K to recover the amount thus spent by him. Both G and K were non-agriculturists. Yet the suit falls under S. 3 clause (w) of this act.⁵

1 R. V. Athos, 8 Mad. 144.

2 Wilson v. Konubley, 7 East 128.

3 Tulshidas v. Virbasappa, (1880)

4 Bom. 624; Ganesh v. Krishnaji, 18 Bom. 387=1889 P. J. 336.

4 Gulabpuri v. Pandurang, 1836

P. J. 142; Amichand v. Kanhu, 1884

P. J. 203; Dagdu v. Balwant, 22 Bom. 820.

5 Ganesh v. Krishnaji, 14 Bom. 387.

See other cases given under clauses (W) and (X) in commentary on S. 3.

2. G, an agriculturist, mortgaged his lands to P. Subsequently G sold the equity of redemption of a part of the mortgaged property to X. G now sues P for the redemption of the whole of the property and seeks to get the benefit of the provisions of this Act. G can do so, though thereby part of the benefit will be transferred to X who is a non-agriculturist.¹

4. **Beneficial construction where possible:**—As this Act is intended for the benefit of the agriculturists, wherever the words of this section are not plain, a beneficial construction should be put upon those words so as to advance the remedy for which the Act is intended. Thus an agriculturist will be allowed to take the advantage of this Act though he was not the original party to a transaction but is only an assignee.² Similarly, the Court will have to apply the provisions of this Act for the benefit of agriculturists though the parties do not claim them.³ Again, in admitting oral evidence to determine the real nature of the transaction, even a bona fide transferee for value will not be protected unless he holds for 12 years under a registered deed.⁴

It is for the same reason that the parties to a transaction are allowed to enter into a compromise and to settle their claims by arbitration, though the compromise or award contravenes some of the provisions of this Act.⁵ The reason for thus allowing private settlement of disputes is that "if the creditor and debtor cannot define their relations by the mediation of persons in whom they have confidence, still less should they be allowed to do so unaided, and thus the settlement of accounts would be no settlement unless made by a Court. The foundation would thus be laid for universal litigation, but this is so generally disapproved that it cannot without an express declaration be supposed to have been the policy of the Legislature in this particular instance."⁶

Similarly, the object of Ss. 12 and 13 is to open up all transactions between the parties having a bearing upon the claim, out of which the suit arises from the very commencement. This

1 Gulabpuri v. Pandurang, 1886, P. J. 142; Amichand v. Kanhu, 1884 P. J. 203.

2 Amichand v. Devchand, 1884 P. J. 203.

3 See note "Shall examine the parties and shall enquire," under S. 12.

4 Pranjivandas v. Miyachand, (1920) 22 Bom. L. R. 1123.

5 Shiwayagappa v. Govindappa, 15 Bom. L. R. 768 (F. B.).

6 Gangadhar v. Mahadu, 8 Bom. 20=1883 P. J. 332. See Notes on

Awards and Compromise under S. 12.

is one of the means adopted by the Legislature to carry out the intention expressed in the preamble of relieving the agricultural classes from indebtedness. Hence those sections must be applied to indebtedness existing at the date of the passing of the Act as well as future indebtedness.¹

5. Literal construction where language is plain:—But where the words of the section are plain, the Court has to apply them though they seem to lead to illogical or inequitable results. Thus, S. 11 provides that every suit of the description mentioned in S. 3 clause (w), where the defendant (or one of the defendants) is an agriculturist, has to be filed in a Court within whose jurisdiction the defendant resides, and not elsewhere. But that section does not so provide for suit falling under clauses (x), (y) and (z) of S. 3. So a suit under any of these clauses can be filed in a Court allowed by the provisions of the C. P. Code (1908). Now it seems illogical to provide that when you are suing a defendant on his personal covenant for payment you can only sue him where he resides, but if you are suing him to enforce your mortgage by foreclosure or sale, you can sue him, say in Bombay, which may be hundreds of miles away from the place where he resides. But the language of the Legislature is plain, and the Court can only give effect to it.²

Similarly, in construing the definition of ' agriculturist ' it appears to be inequitable that a trader should be entitled to the advantages of this Act because he happens, in conjunction with his trading transactions to carry on agricultural business which entitles him accordingly, if the income from agriculture is more than the income from his trading transactions, to have the accounts of the trading transaction taken under this Act. But that is the law and the Court has to apply it.³

Again, when the Court enquires into the history of a transaction under S. 12 and takes accounts under S. 13, the balance appearing due under the account must be deemed to be the amount due at the date of the suit even if the amount found due is greater than the amount due under the terms of the original mortgage.⁴

1 Shivalal v. Bhika, 34 Bom. 220 = 11 Bom. L. R. 1372.

2 Essa Abdulla v. Khatijabi, 33 Bom. L. R. 13. See this case under S. 11.

3 Narayan v. Chapsi Dosa, 23 Bom. L. R. 1186.

4 Dadabhai v. Dadabhai, 32 Bom. 516.

The Court cannot imply merely by reason of the Act being meant generally for the relief of agricultural classes that notwithstanding the imperative language of this section, it is open to the Court to set aside the account and the result if the amount is found to be larger than the amount due on the original language between the parties.¹

6. Illustrations :—The illustrations given in the statute being of relevance and value, full effect must be given to them. So it was held that advantage of S. 10 A can be taken in a suit though the suit does not fall under S. 3. For, the section itself provides that oral evidence can be given at any stage of *any* suit or proceeding, and the suits referred to in illustrations (a) and (c) to the section do not fall within the restricted class of suits described in S. 3.²

7. Effect of change of status on rights of parties :— See Note 'Change of Status *pendente lite*' given under S. 12.

8. Retrospective operation of the Act :— See Note 6 given under S. 12.

CHAPTER I.

PRELIMINARY.

1. This Act may be cited as the Dekkhan Agriculturists' Relief Act, 1879; [a]

and it shall come into force on the first day of Commencement, November 1879.

[a] Acts XVII of 1879, XXIII of 1881 and XXII of 1882 may be cited collectively as the Dekkhan Agriculturists' Relief Acts, 1879 to 1882—see Act XXII of 1882, s. 1 (I). The Acts of 1879 to 1892 and Act XXIII of 1886 may be cited collectively as the Dekkhan Agriculturists' Relief Acts, 1879 to 1886—see Act XXIII of 1886, s. 1 (I). The Acts of 1879 to 1886 and Act VI of 1895 may be cited collectively as the Dekkhan Agriculturists' Relief Acts, 1879 to 1895—see Act VI of 1898, s. 1 (I). The Acts of 1879 to 1895 and Bom. Act 1 of 1902 may be cited collectively as the Dekkhan Agriculturists' Relief Acts, 1879 to 1902—see Bom. Act I of 1902, s. I (I).

1 Gopaldas v. Vithal 31 Bom. L. R. 915 (E B).

2 Hallappa v. Irappa (1922) 24 Bom. L. R. 406.

[^a]This section and[^a] sections 11, 56, 60 and 62 extend to the whole of British India. Local extent. The rest of this Act extends only to the districts of Poona, Satara, Sholapur and Ahmednagar, [^b]but may, from time to time, be extended wholly or in part by the Local Government, [^c] to any other district or districts in the Presidency of Bombay, [^b] [^d] or to any part or parts of any other such district or districts[^d].

Synopsis of the Commentary.

- | | |
|---|--|
| <p>1. British India.
2. Local extent.
3. Repealing and Amending Acts.</p> | <p>4. Government attitude regarding amending the Act.
5. Effect of change of law <i>pendente lite</i>.</p> |
|---|--|

1. **British India** :— The expression ' British India ' is not defined in this Act. It is thus defined in the General Clauses Act (X of 1897) : " British India " shall mean all territories and places within Her Majesty's dominions which are for the time being governed by Her Majesty through the Governor-General of India or through any Governor or other officer subordinate to the Governor-General of India.¹

Aden,² British Burma,³ Luccadive, Andaman and Nicobar Islands, Ajmere Merwada in Rajputana are in British India.⁴ The phrase ' whole of British India ' includes the Scheduled Districts.⁵ A list of Scheduled Districts is given in the Scheduled Districts Act XIV of 1874.

The expression does not include Native States,⁶ Civil Stations,⁷ territories

[a—] These words were inserted by Act XXIII of 1881, s. 3, and are to be deemed to have always been inserted.

[b—] These words were added by Act XXIII of 1886, s. 3.

[c] Words repealed by XXXVIII of 1920, s. 2, and Schedule I are omitted.

[d—] These words were added by Act VI of 1895, s. 4.

<p>1 S. 3 cl. (1). 2 Aden Laws Regulations, 1891 S. 2. 3 Mahmud v. Cohen (1885) 13. Cal. 221.</p>	<p>4 Acts 14 and 15 of 1875. 5 Collector of Vijagapalla v. Pataik. (1929) 55 Mad. L. J. 584. 6 Bikram v. Bir (1888) P. R. 131. 7 Emperor v. Chunilal (1912) 14 Bom. L. R. 876.</p>
---	--

given by Native States for railway administration only;¹ but where full sovereignty has been ceded, or a new territory acquired, the territory is in British India.²

2. Local extent³ :— By S. 1 of the D. A. R. Act, Ss. 1, 11, 56, 60 and 62 are extended to the whole of British India and the rest of the Act, including the new section 10 A, extends to the districts of Poona, Satara, Sholapur and Ahmednagar.

In exercise of the powers conferred by section 1 of the Dekkhan Agriculturists' Relief Act, 1879 (XVII of 1879), and with the previous sanction of the Governor-General in Council, the Governor of Bombay in Council is pleased to extend the provisions of the portions of this Act specified in the first column of the following Schedule to the parts of the Presidency mentioned in the second column by the Government Resolutions cited in the third column thereof :—

The extended portions of the Act.	The parts of th Presidency to which they are extended.	Government notification extending the portions of the Act.
Sections 2 and 20. do.	Khandesh. All parts of the presidency of Bombay (except Aden) in which these sections are not already in force. Khandesh.	No. 3154, dated 14 th May 1902, B. G. G. for 1902, Pt. I p. 776. No. 278, dated 21st January 1903, B. G. G. for 1903, Pt. I p. 89.
Chapters V and VI and Chapter VII so far as it relates to the proceedings of the village Munsiffs and Conciliators.	All Districts of the Bombay Presidency excluding those to which they are already extended and excluding Aden and the City of Bombay.	No. 620, dated 3 rd February 1903, B. G. G. for 1903, Pt. I. p. 144.
Section 7, sections 11 to 21 (both inclusive), section 23, Chapters V, VI, VII and section 71 A.	All Districts of the Bombay Presidency excluding those to which they are already extended and excluding Aden and the City of Bombay.	No. 4144, dated 15 th August 1905, B G. G. for 1905, Pt. I. P. 1038.
Sections 6, 22A, 68 and 69.	All parts of the Bombay Presidency (except Aden and the City of Bombay) in which those sections are not already in force.	No. 275, dated 14th January 1903, B. G. G. for 1903, Pt. I. p. 106.

1 Usuf-ud-din v. Queen Empress (1895) 13 Bom. 680.
 (1897) 2 C. W. N. 1.
 2 Jalbhai Ardesar v. Luis Manual p. 142.
 3 See Manual of Civil Circulars

The extended portions of the Act.	The part of the Presidency to which they are extended.	Government notification extending the portions of the Act.
Sections 10 A and 71.	All Districts of the Bombay Presidency (except Aden and the City of Bombay) in which those sections are not already in force.	No. 578, dated 27th January 1911, B. G. G. for 1911, Pt. I, p. 201.
Section 74.	Khandesh.	No. 578, dated 27th January 1911, B. G. G. for 1911, Pt. I, p. 201.
Sections 64, 65, 66 and 67.	Khandesh and Nasik.	No. 1644, dated 20th March 1911, B. G. G. for 1911, Pt. I, p. 443.
Section 2 A.	All parts of the Presidency of Bombay except Aden and the City of Bombay) in which the section is not already in force.	Notification No. 4774, dated 20th August 1907, Vide B. G. G. Pt. I, p. 1406.
Chapter III and sections 2, 7 and 71A.	Province of Sind.	Notification No. 1663, J. D., dated 13th March 1901, B. G. G. 1901, Pt. I, p. 490.
Sections 6, 22 A, and 69.	Province of Sind.	Notification No. 578, J. D., dated 27th January 1911, B. G. G. 1911, Pt. I., p. 210.

Table of local extent:—

District.	Portion of this Act extended.
1. Whole of British India.	Ss. 1, 11, 56, 60, 62,
2. Districts of Poona, Satara, Sholapur and Ahmednagar.	The whole of this Act.
3. All districts of the Bombay Presidency except Aden and the city of Bombay.	Ss. 2, 2 A, 6, 7, 10 A, 11-21, 22 A, 23, chapters V, VI, VII, Ss. 68, 69, 71, 71 A.
4. Districts of Khandesh and Nasik.	Portion given in (3) above, and Ss. 64, 65, 66, 67.
5. Khandesh.	Portion given in (3) and (4) above and S. 74.
6. Province of Sind.	Ss. 2, 6, 7, Ch. III, S. 69, 71 A.
7. City of Bombay.	Ss. 2 and 20.

3. Repealing and Amending Acts:— The D. A. R. Act has undergone many changes by subsequent enactments. A list of the enactments and the Legislature by which they were made

is given below:—

No. of the Act.	Passed by:—
XXXIII of 1881	Supreme Legislative Council.
XXII of 1882	"
XXIII of 1886	"
XII of 1891	"
VI of 1895	"
XVI of 1895	"
I of 1902	Bombay Legislative Council.
II of 1907	"
I of 1910	"
I of 1912	"
XXXVIII of 1920	Supreme Legislative Council.
II of 1921	Bombay Legislative Council.
VII of 1927	"
XIV of 1932	"

4. Government attitude regarding amending the Act:—As the operation of the Act is in the opinion of Government, a subject of great interest and importance, in discontinuing detailed annual reports, they have no desire to discourage the submission of well considered and definite proposals for the extension or amendment of particular provisions.

But constant alterations of the law are neither possible nor expedient, and Government consider that it will be best to bring the Act under occasional review, and to that end contemplate the appointment of a special officer at intervals of not less than five years.¹

5. Effect of change of law pendente lite:—When during the pendency of a proceeding, the law governing the subject-matter of the proceeding is changed either by repeal or by amendment, a question arises how far this change of law affects the pending proceedings. The rule as to the *effect of repeal* is laid down by S. 6 of the General Clauses Act (X of 1897). The section runs:—

Where this Act, or any Act of the Governor-General in Council, or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not,

¹ Manual of Civil Circulars of the High Court of Bombay, P. 149-50.

(a) revive anything not in force or existing at the time at which the repeal takes effect ; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder ; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed ; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed ; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty forfeiture or punishment as aforesaid ; and any such investigation, legal proceeding or remedy may be instituted, continued, or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.

The application of a *new enactment* to pending proceedings depends on whether the enactment affects vested rights. The rule is that where a statute affects vested rights or the legality of past transactions, or impairs contracts, or creates new obligations, or imposes a new duty, the statute is not retrospective unless there is a clear intention that the Act should have a retrospective operation. But where the new enactment only affects the practice and the procedure of the Court, it will have a retrospective operation, unless there is some good reason against it.¹

(For further discussion see Note 7 " Retrospective operation of this section " given under S. 12.)

[*]2. In construing this Act, unless there is something repugnant in the subject or context, the following rules shall be observed, namely :—

1st.—" Agriculturist " shall be taken to mean a person who by himself or by his servants or by his tenants earns his livelihood wholly or principally by agriculture carried on within the limits of a district or

[a] This section was substituted for the original section 2 by Act VI of 1895.

part of a district to which this Act may for the time being extend, or who ordinarily engages personally in agricultural labour within those limits.

Explanations.—(a) An agriculturist who, without any intention of changing his status as such, temporarily ceases to earn his livelihood by agriculture or to engage personally in agricultural labour as aforesaid, or who is prevented from so earning his livelihood or engaging in agriculture by age or bodily infirmity or by necessary absence in the military service of Her Majesty, does not thereby cease to be an agriculturist within this definition.

(b) An assignee of Government assessment or mortgagee is not as such an agriculturist within this definition.

2nd.—In Chapters II, III, IV and VI and in section 69, the term “ agriculturist, ” when used with reference to any suit or proceeding, shall include a person who, when any part of the liability which forms the subject of that suit or proceeding was incurred, was an agriculturist within the meaning of that word as then defined by law.

3rd.—An agriculturist shall be deemed to reside where he earns his livelihood by agriculture or personally engages in agricultural labour as aforesaid.

4th.—“ Money ” shall be deemed to include agricultural produce, implements and stock.

5th.—“ Lease ” shall be deemed to include a counterpart, kabuliyat, an undertaking to cultivate or occupy, and an agreement to lease.

6th.—“ Standing crops ” shall include crops of all sorts attached to the soil, and leaves, flowers, and fruits upon and juice in trees and shrubs.

[a] *7th*.—For the purposes of Chapters VIII and VIII-A an instrument or a copy of an instrument drawn up on a printed form by or under the superintendence of a village-registrar or of a sub-registrar shall be deemed to be an instrument or copy written or made by or under the superintendence of such registrar or sub-registrar. In this clause the term “printed form” shall be deemed to include a form prepared by any mechanical copying press.

Synopsis of Commentary.

- | | |
|---|--|
| <ul style="list-style-type: none"> 1. Extent. 2. Old Law. 3. Agriculturist as defined by this Act. 4. Shall be taken to mean. 5. Person-Firm as person. 6. By himself or by his servants or tenants. 7. Earns his livelihood. 8. Dependence for livelihood upon an agriculturist. 9. His livelihood. 10. Principally. 11. Agriculture. 12. What is agricultural income. 13. What is not agricultural income. 14. Carried on within a district to which this Act extends. 15. This Act. 16. Agriculturist must be bonafide. 17. Wealth or social position immaterial. | <ul style="list-style-type: none"> 18. Or who ordinarily engages personally in agricultural labour. 19. Ordinarily. 20. Personally. 21. Following two occupations. 22. Explanation (a). 23. Explanation (b). 24. 2nd. Special definition of 'agriculturist.' 25. Agriculturist as then defined by law. 26. Money. 27. Lease. 28. Standing crops. 29. Privileges of agriculturist are personal. 30. Status of agriculturist as a preliminary decree. 31. Question of status must be tried by the Court itself. 32. Proceeding. 33. Burden of proof. 34. Estoppel. 35. Res judicata. |
|---|--|

[a] Clause 7 was inserted by Act I of 1910, serial No. 1, of the first Schedule.

- | | |
|--|--|
| <p>36. Change of status at different stages.</p> <p>37. Provisions of the Act must be applied.</p> | <p>38. The plea of status must be enquired into.</p> <p>39. The plea of status raised first in appeal.</p> <p>40. Agriculturist or middleman.</p> |
|--|--|

1 Extent :—This section now extends to all parts of the Bombay Presidency (excepting Aden) including the Province of Sind. *Vide* table given under S. 1.

2 Old Law :—The definition of 'agriculturist' has been amended by the Legislature from time to time. Before the present definition was enacted by Act VI of 1835, the word was thus defined by the previous Acts:—

Act XVII of 1879 enacted—

"Agriculturist" means a person who earns his livelihood wholly or principally by agriculture carried on within the limits of the said districts."

Act XXIII of 1881 enacted—

"Agriculturist" means a person who, when or after incurring any liability, the subject of any proceeding under the Act, by himself, his servants or tenants, earned or earns his livelihood, wholly or principally by agriculture carried on within the limits of the said districts. A cultivator who has temporarily ceased to earn his livelihood in manner aforesaid, without any intention of changing his status as such, does not thereby cease to be an agriculturist within this definition. An assignee of Government, or a mortgagee is not as such an agriculturist within this definition."

Act XXII of 1882 enacted—

1st—"Agriculturist" shall be taken to mean a person who by himself, his servants or tenants, earns his livelihood wholly or principally by agriculture carried on within the limit of the said districts," or who ordinarily engages personally in agricultural labour within those limits."

Explanation:—(a) "An agriculturist who, without any intention of changing his status as such, temporarily ceases to earn his livelihood or to engage personally in agricultural labour as aforesaid, does not thereby cease to be an agriculturist within this definition."

(b) "An assignee of Government assessment or a mortgagee is not as such an agriculturist within this definition."

2nd—In chapters II, III, IV and VI and in S. 69 the term agriculturist when used with reference to any suit or proceeding shall be deemed to include also a person who, when any liability incurred by him and forming the subject or part of the subject of that suit or proceeding was so incurred, was an agriculturist as defined in the first rule."

It will thus be seen that the purpose of the various amendments was to widen the scope of the definition of the term 'agriculturist.' As the special definition of the term given in '2nd'

* Poona, Satara, Ahmednagar and Sholapur.

has reference to old definitions, it is necessary to study these definitions carefully.

3. 'Agriculturist' as defined by this Act:—This definition notes down two different classes of persons as coming within its sphere :

(A) In the first class comes a person who (i) by himself or by his servants or tenants, (ii) earns his livelihood, (iii) wholly or principally, (iv) by agriculture, (v) which agriculture is carried on in a district to which this Act may apply.

To fall under this class a person need not work personally on the land. Here the source of his income only is taken into consideration. And if the income is derived wholly or principally from agriculture carried on within the limits of a district to which this Act is applied he is held to be an agriculturist.

(B) In the second class will come a person who (i) ordinarily and (ii) personally, (iii) engages in agricultural labour (iv) within the limits of a district to which this Act may apply.

To fall under this class a person must *ordinarily and personally* work on the land. But it is not necessary that he should own any land at all. Again, it is not necessary that his income should be derived wholly or principally from agriculture. Even if his income from non-agricultural sources exceeds his income from agriculture, he can come within this definition.¹

4 Shall be taken to mean: *the definition is exhaustive:*—The words 'shall be taken to mean' show that the definition of the term 'agriculturist' as given in this section is exhaustive and not merely illustrative. Hence a person claiming the status of an agriculturist must prove either that he is earning his livelihood wholly or principally by agriculture carried on within the limits of a district to which this Act applies; or that he ordinarily engages personally in agricultural labour carried on within the limits of the district.²

5 Person: *Firm as a person:*—The word person includes any company, association, or body of individuals whether incorporated or not.³ The word 'firm' is a collective name for the

1 D. Rubine v. Balwantrao 105 I. C. 795=A. I. R. 1923 Bom.

2 Savalpuri v. Bala (1912) 14 Bom. L. R. 566=36 Bom. 543 per

Chandavarkar J.

3 S. 3 Sub-section (39) of Act X of 1897 (General Clauses Act).

individuals who constitute the partners. In the Indian Partnership Act, 1932, the following definition of 'firm' is given in S. 4 :

"Persons who have entered into partnership with one another are called individually 'partners' and collectively a 'firm'....."

A firm is thus not a legal entity like a corporation or a company registered under the Indian Companies' Act of 1913. The question whether a firm apart from the individual partners constituting the same could be an agriculturist or not was considered in *Dharamsey v. Balkrishna* 31 Bom. L. R. 934 = 1929 Bom. 378 = 53 Bom. 787. It was contended in this case that if the partners constituting a firm came within the definition of 'agriculturist' as given in this Act, the firm also should be deemed to be an agriculturist within that meaning. Fawcett J., deciding the question, overruled the contention and though agreeing that ordinarily a firm does, in law, only mean the partners of which it is composed, observed :

"I do not think that it necessarily follows that a definition like that of agriculturist in the Dekkhan Agriculturists' Relief Act is on that account applicable to any partner in that firm. It is recognised law that any partner can put in a pleading on behalf of the firm, but that pleading has to be confined to pleas that can be raised on behalf of the firm and he cannot put in a purely personal defence."

Thus it was pointed out that the status of the partners constituting a firm does not affect the nature of the status of the firm itself. Fawcett J. further pointed out that the definition of agriculturist in S. 2 of the Act must be read as only applying to a firm at the utmost, if that firm by itself or by its servants or by its tenants earns its livelihood wholly or principally by agriculture carried on within the limits of a district to which the Act extends. His Lordship observed :

"There can, I think, in that view, be an agriculturist firm and it might be held that the firm could only be sued at the place where it resided in the sense of carrying on its business.....I think the fact of an individual partner of a firm, or even all the partners of the firm, earning their livelihood principally from agricultural income cannot affect the right of a plaintiff to sue

the firm at the place where it actually carried on business or where the cause of action has arisen."

It was contended in this very case that the word 'person' in the definition of an agriculturist cannot by reason of the context be taken to cover a body of individuals, such as it would otherwise include under the definition of the word in S. 3 (39) of the General Clauses Act, 1897. Fawcett J. observed:—

"That definition is subject to the opening proviso 'unless there is anything repugnant in the subject or context,' and there are in my opinion, good grounds for saying that the definition ordinarily contemplates the case of an individual, who actually earns his livelihood by agriculture or ordinarily engages personally in agricultural labour so that there is something in the context repugnant to its application to a body of individuals, unless it is limited in the particular way that I have mentioned about an agriculturist firm. Therefore in my opinion, it is not open to the defendant firm to set up this contention in this suit."

Thus it is that though the status of the partners be that of agriculturist that will not make the status of the firm to be an agriculturist one. Nor will the status of partners who are not agriculturists affect the status of the firm from that of agriculturist if the firm by itself or by its servants or by its tenants earns its livelihood wholly or principally by agriculture, carried on within the limits of a district to which the Act extends.

The decision in *Dharamsey v. Balkrishna* was followed in *Premchand v. Newandmal* 25 S. L. R. 104 = 1931 Sind 121 = 134 I. C. 397. It may by analogy be argued that a Devasthan, if its income is derived principally from agricultural sources, may be an agriculturist within the meaning of the term as defined by the Act, provided its chief place is within a district to which this Act is extended.

6. By himself or by his servants or tenants:—

In interpreting the words 'by servant or by tenant,' a question often arises how far they include relatives or friends. In practice we often find that a joint Hindu family owns large fields and is almost entirely maintained by agriculture carried on by its manager. We also here and there meet with a case where a man is

himself unable to carry on his agricultural business, for some reason or other, and the business is therefore carried on for him by his friends. In such cases, it seems, the answer will depend on whether the person can be said to *earn* his livelihood by agriculture. If the property belongs to the person claiming to be an agriculturist, the manager in the first case and the friend in the latter may be said to be working in the capacity of his servants and managing his business for him. But if he *merely depends* for his maintenance upon another he cannot be said to earn his income and would not be held to be an agriculturist. (See Note on 'Dependence is not earning.')

7. Earns his livelihood:—The expression 'earns his livelihood,' as explained by Sargent C. J., can only mean 'obtains the means of maintaining himself.'¹ As the Act is intended for the relief of agriculturists, it may seem that the logical construction of the expression 'earns his livelihood' would be that the income from non-agricultural sources must be so small that it is not sufficient for the maintenance of the claimant. But it was held in the above-mentioned case that although the income from non-agricultural sources might be *sufficient* for his maintenance, nevertheless the construction of the term agriculturist as given in the Act is quite independent of such considerations.² When a person has two or more sources of income, of which the income from agriculture is one, in ascertaining whether he is an agriculturist or not, the Court must take into account all those sources and ascertain whether the income from agriculture is larger or smaller than the income from all other sources taken together. All the sources must be taken to be the means of livelihood, and if the income from agriculture exceeds the other income he must be held to be earning his livelihood principally by agriculture.³

Income actually earned to be considered:—In considering whether a man earns his livelihood from agriculture, his actual income at the time of consideration must be looked to. If at a particular time his income from non-agricultural sources has be-

1 Dwarkojirao v. Balkrishna 19 Bom. 255=1894 P. J. 70.

2 Ibid.

3 Chunilal v. Vinayak (1909) 33 Bom. 376=11 Bom. L. R. 342 Chandavarkar J. Explaining 19 Bom. 255.

come less than the income from agricultural sources, owing to mortgages on the non-agricultural property or otherwise, he must be deemed to be an agriculturist at that time.¹

'Earning' does not include mere bounties:— A person to fall under this definition must be one who works for gain as an agriculturist and whose income is derived from agricultural labour. The underlying idea of the definition is that agricultural labour must be contrasted with labour of other kinds, and the income derived by a man must be income derived from some occupation, agricultural or otherwise, pursued for livelihood. In the case of a student who holds a scholarship and derives income from it, it cannot be said that he is following any occupation or is engaged in any labour for the purpose of his livelihood. He cannot be described as a labourer or as a person who is earning his income by work for his livelihood. The scholarship is a matter of mere bounty, and a student is one who is qualifying himself for an occupation. If we bear, therefore, the dominant idea of the definition, and the eleemosynary and precarious character of a scholarship as contrasted with the essential characteristics of labour for livelihood, it is reasonable to conclude that a scholarship held by a student was intended by the Legislature to be excluded from the kinds of income contemplated by that definition.² For the same reason other uncertain incomes of the nature of mere bounties and windfalls cannot be held to be earnings for livelihood.

Dependence is not earning:— The definition speaks of 'earning one's livelihood' which means 'obtaining the means of maintaining oneself.' So mere dependence for livelihood upon another who is an agriculturist is not the same thing as earning livelihood for oneself by agriculture.³ (See next note under this heading.)

Illustrations.

(1) E and D sue B for redemption. B contends that the plaintiffs are non-agriculturists. They receive from the Kolhapur State a monthly pension of

1 Dwarkojirao v. Balkrishna 19 Bom. 255 supra.	Chandavarkar and Russel JJ.
2 Parvatibai v. Yeshwant (1911) 13. Bom. L. R. 1204=96 Bom. 199	3 Dagdu v. Mirasaheb (1912) 36 Bom. 496=14 Bom. L. R. 385.

Ra. 33 and their mother receives Rs.19. Their mother also receives from another source a sum of Rs. 6 P. M. They are also owners of certain Inam villages, the revenue from which is considerable but owing to mortgage on them they only yield to the plaintiffs a sum of Rs. 333 per annum. Their income from agriculture exceeds all these incomes. R and D are agriculturists though the above income from non-agricultural sources is sufficient for their maintenance, and though their non-agricultural income is only temporarily less than the agricultural income only because the former was mortgaged.¹

(2) P sued X and Y to recover Rs. 3000. X and Y pleaded that they were agriculturists. Their income from agriculture was Rs. 250 a year. They were both College students, and received scholarships of Rs. 15 and 7 respectively, their income from this source being Rs. 264. They are agriculturists, because, in considering their status, the income from scholarships must be excluded.²

S. Dependence for livelihood upon an agriculturist :—

'Earning one's livelihood by agriculture' means 'obtaining the means of maintaining oneself.'³ To earn is not the same thing as to 'derive.' The privileges of an agriculturist being personal⁴ dependence for livelihood upon another who is an agriculturist is not the same thing as earning livelihood for oneself by agriculture.⁵ The legislature appears to have used the expression 'earns his livelihood' advisedly. The decision that a minor son of an agriculturist who depends upon his father for his support is not an agriculturist is based upon the language in the definition, and the reasoning applies just as much in the case of a Hindu as in the case of a Mahomedan, and hence it cannot be said that in a Hindu joint family any co-parcener, even though he be a minor, has a share in the joint estate and that hence he cannot be said to derive his income from another. For, the minor cannot be said to be earning his livelihood at all, and further even if he could be said to be earning his livelihood, he earns it not through his servants or tenants but through his father.⁶ For the same reasons the wife of an agriculturist cannot be said to be an agriculturist,

1 Dwarkojirao v. Balkrishna, 19 Bom. 255; Also Chunilal v. Vinayak, 33 Bom. 376.

2 Parvatibai v. Yeshwantrao (1911) 13 Bom. L. R. 1204.

3 Dwarkojirao v. Balkrishna, 19 Bom. 255.

4 Dharamsey v. Balkrishna, 1928 31 Bom. L. R. 984.

5 Dagdu v. Mirasaheb, (1912) 14 Bom. L. R. 385.

6 Per Broomfield J. in Gangadhar v. Gangaram (1931) 33 Bom. L. R. 825.

for he might change his occupation to-morrow, and she will not be affected by the change.¹

But where the minor does not *depend* upon another for his maintenance, but *his property* is only managed by another viz- by the Court of Wards, the minor is the real party to the suit, and if his income from agriculture exceeds his income from other sources, he must be held to be an agriculturist.²

Illustrations.

(1) Minor son:—M sued T for redemption. M was not an agriculturist at the date of the suit, but when the suit transaction took place, he was a minor depending for his livelihood on his father who was an agriculturist. On that ground alone M cannot be said to be an agriculturist, at the time of the transaction, and so he cannot be given the benefit of this act. (Here from their names, the parties seem to be Mahomedans.³)

(2) G sues A for redemption of a mortgage in the form of a sale-deed passed by his father. G claims the advantages of this Act on the ground that he was an agriculturist at the time of the transaction. He was then a minor depending on his father for his maintenance. G could not be said to be an agriculturist at the time of the transaction.⁴

(Note:—Here G contended that even while a minor he had a share in the ancestral property, he being a coparcener in a joint Hindu family, at the time of the transaction and so he must be deemed to be an agriculturist. It was held that that circumstance made no difference and that the principal laid down in *Dagdu v. Mirasahab* applied.)

3 Wife:—Radhabai sued A for redemption of a mortgage. She claimed the benefit of this Act on the ground that she was the wife of an agriculturist, and that she depended upon him for her maintenance, and looked to his household. It was held that as she did not earn her livelihood by agriculture, she was not an agriculturist.⁵

(Note:—It may be submitted with respect that some of the remarks passed by Broomfield J. in the course of his judgment in *Gadadhar v. Gangaram*⁶ above are rather too wide. It is said in the course of the judgment "It is conceivable that difficulties might arise from the application of the doctrine that dependence upon an agriculturist is not enough to give the status of an agriculturist, for instance in cases where that dependence is due not to infancy but to old age or physical incapacity." But it must be pointed out that this

1 Radhabai v. Ramohandra, (1911) 13 Bom. L. R. 80.

2 Manohar v. Collector of Nasik, 14 Bom. L. R. 243.

3 Dagdu v. Mirasahab, (1912), 14 Bom. L. R. 385 = 36 Bom. 496.

4 Gadadhar v. Gangaram (1931) 33 Bom. L. R. 825.

5 Radhabai v. Ramchandra, 13 Bom. L. R. 80.

6 Gadadhar v. Gangaram, (1931) 33 Bom. L. R. 825.

latter class of incapacities are provided for by the Act itself in Explanation (a) to S. 2 which lays down that in such cases the person does not cease to be an agriculturist.)

9. **His livelihood** :—The definition so far as it goes leaves the point, whether earning one's livelihood will include what is needed for the maintenance of his family, open and undefined. But this difficulty would not arise in practice as the status of an agriculturist is to be determined by comparing his income from agriculture with that from other sources (if any) and by finding if his income from agriculture is greater.

10. **Principally** :—Where a man has several sources of income, to come under this definition he must earn his income *principally* by agriculture. In ascertaining whether a man who has two or more sources of income of which the income from agriculture is one, occupies the status of agriculturist as defined in the Act, the Court must take into account all these sources and ascertain whether the income from agriculture is larger or smaller than the rest. All the sources must be taken to be the means of livelihood, and if the income from agriculture exceeds other incomes, he must be held to be earning his livelihood principally by agriculture.¹ But where a person follows two occupations, and it is not proved that his income from agriculture exceeds his income from other sources, the Court may presume that his income from agriculture is less than the income from other sources and that he is not an agriculturist.²

The word 'principally' shows that it is not sufficient to prove that a person's income from agriculture is sufficient to maintain him. It must further be proved that his income from agriculture exceeds his other income.³

In considering the various sources of income, the income that a person is *actually earning* must be taken into consideration. So even if his non-agricultural income exceeds his income from agriculture, but if at the time of the suit, owing to mortgages on the property or otherwise, it has become less than the agricultural income, he must be held to be an agriculturist.⁴

1 Chunilal v. Vinayak, 33 Bom. 376=11 Bom. L. R. 342.

2 Savalpuri v. Bala, (1912) 14 Bom. L. R. 566=36 Bom. 543. This case was

criticised in Ramchandra v. Tukaram,

35 Bom. L. R. 715.

3 Chunilal v. Vinayak, 33 Bom. 376=11 Bom. L. R. 342.

4. Dwarkojirao v. Balkrishna, 19 Bom. 255=1894 P. J. 70.

Again, in considering the various sources of income, mere uncertain incomes and bounties like scholarships earned by students must be excluded. For scholarships cannot be said to be earnings for livelihood at all.¹

In considering the status of a joint Hindu family, the joint income of all the members of the family must be ascertained; and if their income from agriculture exceeds that from other sources, then the joint family will be said to be an agriculturist.²

11. Agriculture :—The word 'agriculture' is nowhere defined in this Act, in the General Clauses Act or in any other Indian Act. It seems therefore to be intended by the Indian Legislature, that this word should be taken in its ordinary meaning. The following definitions will help to make that meaning clear :—

(1) Webster's Dictionary :—'Agriculture is the art or science of cultivating the ground, including the harvesting of crops, and the rearing, feeding and management of livestock.'

(2) Oxford English Dictionary :—'The science and art of cultivating the soil including the allied pursuits of gathering the crops and rearing livestock, tillage, husbandry and farming. (in the widest sense).'

(3) Anderson's Law Lexicon :—'The cultivation of the ground for the purpose of procuring vegetables and fruits for the use of man and beast including gardening or horticulture, and the raising and feeding of cattle and other stock.'

(4) In Wharton's Law Lexicon it is defined as 'including horticulture, forestry, and the use of land for any purpose of husbandry.'

(5) Small Holdings and Allotment Act, 1908 ; 8 Edw. 7 ch. 36 :—'Agriculture includes horticulture, and the use of land for any purpose of husbandry, including the keeping or breeding of livestock, poultry and bees, and the growth of fruit, vegetables and the like.'

— **Agriculture, and Horticulture, Cereculture, etc.** :—
From these definitions it is clear that the word 'agriculture' in

¹ Parvatibal v. Yeshwant, (1911) 86 Bom. 199 = 13 Bom. L. R. 1204

See note above).

² Narayan v. Sonusing, (1923) 76 I. C. 659.

its ordinary meaning is used in a very wide sense as meaning cultivation for any useful purpose whatsoever. Agriculture connotes the raising of useful and valuable products which derive nutriment from the soil with the aid of human skill and labour; and thus it will include horticulture, arboriculture and silviculture in all cases where the growth of trees is effected by the expenditure of human care and attention in such operations as those of ploughing, sowing, planting, pruning, manuring, watering, protecting, etc.¹ To give a narrower interpretation to the term and to confine it to the raising of products used as food for man and beast will exclude all cultivation of fibrous plant such as cotton, jute and linen, and all plants used for dyeing purposes such as indigo, etc. and all fibrous trees and flowering plants. It does not seem to be the intention of the Act to exclude them.²

12. What is agricultural income:—Cases under the D. A. R. Act:—

(1) Income from *fruit of mango trees* is agricultural income; for, 'standing crops' includes leaves, flowers, fruits and juice in trees and shrubs, S. 2 (6). It does not make any difference that the trees being full grown require no attention, for, the test seems to be whether the income is derived from the produce of land, and not the quantum of labour which has been bestowed in getting up the crop.³

(2) Similarly, produce from other fruit trees.⁴

(3) Income from juice of toddy trees.⁵

(4) Income from grass produced on leased land is agricultural income. There cannot be the slightest doubt that grass is agricultural produce.⁶

*Cases under the T. P. Act:—*In the following cases decided under S. 117 of the T. P. Act, the purpose was held to be agricultural purpose :

1 Panadai v. Ramaswami Chitti, 15 Mad. 710. See also Gopal Chandra v. Bhutnath, 42 C. L. J. 520 = A. I. R. 926 Cal. 312.

2 45 Mad. 710 supra. See also *furugeso v. Chinnathambi*, 24 Mad. 21. These cases are on S. 117, T. P. Act which deals with leases for agri-

cultural purposes.

3 *Hiralal v. Parbhulal*, 23 Bom. L. R. 796.

4 *Mulchand v. Bachal*, 2 S. D. 403,

5 *Krishnaji v. Gopal*, 28 Bom. L. R. 676.

6 *Moreswar v. Umraosing*, 34 Bom. L. R. 778.

(1) Lease for cultivation of betal leaves is a lease for agricultural purpose.¹

(2) Raising cocconut tope in a land held for cultivating *paddy* and *ragi* does not change the nature of the holding which is yet an agricultural holding.²

(3) Pasture grounds and lands used for raising livestock.³

(4) Cultivation of indigo.⁴

(5) A lease of land for growing *casarena* trees to be used as fuel.⁵

(6) A lease of land as a yard for ploughing cattle, or as a habitation for agriculturists, or as a pasture for ploughing cattle, or for the purpose of storing manure or growing plants to be used as manure for agriculture.⁶

13. What is not agricultural income :— But though agriculture includes *cultivation* for any useful purpose, it would not include the working or manuring of the products thus produced, or changing their natural form by any process or improvement. Thus, the cultivation of indigo is an agricultural purpose but the manufacturing of indigo into cakes out of indigo plants cannot be said to be so.⁷ Similarly the income earned by ginning cotton, grinding grain, making mattresses out of grass, preserving fruits will not be agricultural income. A lease of tank which does not appertain to an agricultural holding; but is used only for the preservation and rearing of fish is not an agricultural lease.⁸ The mere fact that in a lease for residential purposes, there is given a right to take fruit from the trees on the land and to plant other fruit trees and take their fruits does not convert the lease into a lease for horticultural purposes.⁹ Income obtained from selling agricultural produce is not agricultural income.¹⁰

As the D. A. R. Act is not extended to the whole Presidency, income derived from agriculture carried in a place to which the

1 *Murgesa v. Chinnathami*, 24 Mad. 424.

2 *Venkayya v. Ramasami*, 22 Mad. 39.

3 *King Emp. v. Alexander Allen*, 25 Mad. 628.

4 *Surender v. Hari*, 31 Cal. 174.

5 *Panadai v. Ramaswami*, 45 Mad. 710.

6 *Murugesu v. Chinnathambi*, 24 Mad. 424.

7 *Surendra v. Hari*, 31 Cal. 174.

8 *Mahananda v. Mongala*, 31 Cal. 937.

9 *Gopal Chandra v. Bhutnath*, 42 Cal. L. J. 520 = A. I. R. 1926 Cal. 312

10 *Moreswar V. Umraosing* 34 Bom. L. R. 778.

Act is not extended is not agricultural income within the meaning of this Act.¹

14. Carried on within a district to which this Act extends:—To constitute a person an agriculturist for the purposes of this Act, he must earn his livelihood principally by agriculture carried on within the limits of a district to which this Act applies. The districts to which this Act is extended from time to time are given in the table under S. 1. If he derives his income from agriculture carried on outside those districts, viz., in Kolhapur State, or in the Punjab, or in a district in British India to which this Act is not extended, he must be held to be a non-agriculturist, and such income must be treated as the income on the other side of the account i. e. as non-agricultural income.²

15. This Act:—The person claiming to be an agriculturist must earn his income in a district to which *this Act* is for the time being extended. The words 'this Act' can be construed in either of three different ways, namely, (1) that they necessitate the *whole* of the Act being extended to the district in question; (2) that it suffices if the whole or the *substantial* part of the Act is so extended; or (3) that the words 'this Act' mean 'this Act wholly or in part.' If the words 'this Act' are taken to mean the whole Act, the result would be that the power given to the Government to extend the provisions of this Act from time to time would be rendered nugatory; for, none but an agriculturist in the four districts where the whole Act extends can take advantage of the whole Act. That is a result which ought to be avoided if possible, and hence the literal construction has to be rejected. The second construction has the demerit that it is not the literal construction, nor one necessitated by implication by the remaining provisions, nor is it even a convenient construction in practice. For, it is much embarrassing to be called upon to decide in each case what would be a substantial part of the Act. This construction would lead also to much uncertainty. These words therefore must be taken to mean 'this Act wholly or in part.' Hence even where only

1 Yamanacharya v. Govind, (1923) 25 Bom. L. R. 826; Bhavanji, 4 Bom. 360=1880 P. J. 102; Firm of Ayaram Tolaram v. Firm of

2 Yamanacharya v. Govind, (1923) 25 Bom. L. R. 826; Purshottam v. Hitraj, 66 I. C. 682=16 S. L. R. 76.

Ss. 2 and 20 of the Act are extended, this Act must be deemed to have been extended to that place and an agriculturist residing in that district must be given the advantages of this Act.¹ It was held in a previous case (*Chambasayya v. Chennappavada*),² that 'this Act' must be taken to mean the whole Act or any substantial portion of it. The decision in this case was based on the ground that 'there must be an extension of the Act sufficient to provide that its main purpose applies to the district, or a really substantial part of the main purpose.' That case as shown above³ is no longer good law.

16. Agriculturist must be bona-fide:—This Act only protects those persons who are bona-fide agriculturists. It does not protect one who only for the purpose of his suit or otherwise, temporarily clothes himself with that status. So where the defendant who claimed to be an agriculturist was a trader within a few months of the suit, he was held to be a non-agriculturist. The status of agriculturist and of trader is not to be taken up and laid aside momentarily in order to embarrass a creditor. A man must have gained his livelihood for at least one agricultural season by farming to have acquired the condition of an agriculturist under the Act.⁴

Similarly the word 'ordinarily' in the second part of the definition clearly shows that only a bona-fide agriculturist will come under the terms of that part. It does not cover the case of a person who gives up his usual avocations for a time and temporarily engages personally in agricultural labour. So an unsuccessful trader who shortly before the suit was actively employed in trade cannot be an agriculturist by retiring to his fields and superintending ploughing operations and occasionally taking a spell of manual work.⁵

He must not be a middleman:—see note 40.

17. Wealth or social position immaterial:—When a person's income is derived wholly or principally from agriculture,

¹ Ganpat v. Tulshi, (1928) 26 Bom. L.R. 118 (F. B.)=48 Bom. 214.

² (1919) 22 Bom. L. R. 44=44 Bom. 217.

³ Ganpat v. Tulshi, 26 Bom. L.R. 118.

⁴ Tulshidas v. Virbasappa, (1880)

4 Bom. 624; Rajhumal v. Khiomal, 3 S. L. R. 218=6 I. C. 855.

⁵ Rajhumal v. Khiomal, *Supra*; Ramchandra v. Tukaram, (1933) 35

Bom. L. R. 715; Sopana v. Dattatraya—36 Bom. L. R. 804.

he must be held to be an agriculturist. The definition of the word as given in the Act 'has nothing to do with a man's wealth or social position. All that is required is that his livelihood should be earned wholly or principally in a certain way'.....(or that he should ordinarily and personally engage in agricultural labour). Thus the Thakor of Dehwan whose income from agriculture was Rs. 16000 per year was held to be an agriculturist because that was his principal source of income.¹

18. Or who ordinarily engages personally in agricultural labour:—This is the second part of the definition of 'agriculturist,' and is quite independent of the first. Under this provision a person claiming to be an agriculturist must prove that he (i) ordinarily engages himself, (ii) personally, (iii) in agricultural labour, (iv) within the limits of a district to which this Act applies.

19. Ordinarily:—The word ordinarily does not mean solely or in the main. It only means regularly and habitually, whether for a larger or for a smaller portion of the day. Even if the number of hours for which a person thus engages in agricultural labour varies and is sometimes small, he can yet be said to be ordinarily engaged personally in agricultural labour.²

Rules for deciding whether a person ordinarily engages in agricultural labour:—In a recent case³ Wadia J. laid down the following as some of the tests to decide whether a person ordinarily engages in agricultural labour:—

(1) It is not necessary for an agriculturist to engage in agricultural labour throughout the day. It is enough if he is engaged for a larger or a smaller portion of the day. It must however be an appreciable amount of work which he is engaged in and not merely some casual or desultory work in the field.

(2) The agriculturist cannot be said to engage personally in agricultural labour if he gets the work done *only* through labourers, but he can still be said to be engaged personally in agri-

¹ Narsingji v. Ranchhodbhai, (1910) 13 Bom. L. R. 109; Manohar v. Collector of Nasik, 14 Bom. L. R. 243; Ramchandra v. Tukaram, 35 Bom. L. R. 715.

² Sahoo v. Narayan Shastri, (1930) 33 Bom. L. R. 475; Bhika v. Raichand, 15 Bom. L. R. 68.
³ Ramchandra v. Tukaram, (1933) 35 Bom. L. R. 715.

cultural labour if he himself works side by side with the labourers employed by him. He need not cultivate the lands all by himself.

(3) Even if the principal income of the agriculturist is from non-agricultural sources, as for instance, from a shop or money-lending, he will still be an agriculturist if he does an appreciable amount of *agricultural work for a portion of the day*.

(4) Whether a person who claims to be an agriculturist has or has not any bullocks or agricultural implements of his own is a matter to be considered. But the mere want of possession of these is not conclusive against him.

(5) It is not necessary that an agriculturist should be engaged in agricultural labour personally throughout the year, as there are months when no agricultural labour is done at all. He should have been engaged in agricultural labour for at least one agricultural season before the date of the suit and he should also be so engaged at the date of the suit. This is the minimum period.

(6) It is not necessary that during the agricultural season the agriculturist should work from day to day. His omission to work on a day or on some days here and there will not matter, provided he has engaged personally in agricultural labour for the substantial portion of the agricultural season.

(7) Even if a person follows another occupation during some portion of the day, he may still be an agriculturist if during another portion of the day he engages ordinarily in agricultural labour.

Only bona-fide agriculturists protected:—The word 'ordinarily' shows that it is only *bona-fide* agriculturists who come within the definition.¹ See note 16 'Agriculturist must be bona-fide' above.

20. Personally:—The party claiming to be an agriculturist must engage himself personally in agricultural labour. It must be an appreciable amount of work he engages in and not merely some casual or desultory work in the fields. He cannot be said to engage personally in agricultural labour if he gets his

¹ Fulshidas v. Virbasappa, 4 Bom. | 218=6 I. C. 855.
624; Rajhumal v. Khimol, 3 S. L. R. |

work done only through labourers, but he can still be said to engage personally if he himself works side by side with the labourers. Again if the person does some work like weeding shrubs or supervising growth of plants, that is enough.¹

In agricultural labour :—See note on 'agriculture' above.

Within a district to which this Act applies :—See note under this heading above.

21. Following two occupations :—If a person ordinarily engages himself personally in agricultural labour as above he is an agriculturist even if during his spare time he follows some other occupation, the income from which exceeds the income from his agricultural work. It is plain that any person who satisfies the conditions imposed by this section is an agriculturist irrespective of the proportion which his strictly agricultural income may bear to any other income accruing to him.² There is no ground to suppose that when an agriculturist who has lands of his own and who ordinarily engages himself personally in agricultural labour, finds that labour does not occupy the whole of his day and supplements it usefully by any other work, such as sale of milk, that therefore the Legislature intended that he should be penalised by being taken out of the scope of the definition of agriculturist.³ He may thus during his spare time do the work of writing books of account, carrying on correspondence, etc.⁴

But if the person is not able to satisfy the Court that he thus works ordinarily and personally on land, the Court may presume that he ordinarily follows his other occupation.⁵

Illustrations.

(1) B is a shepherd. He earns Rs. 100 from his lands; and earns more than Rs. 100 from the rearing of goats and sheep, by the sale of these animals and of their milk. He cultivates his own lands and personally works there. B is an agriculturist though his income from agriculture is less than his other income.⁶

1 Sahoo v. Narayan Shastri, 33 Bom. L. R. 476; Ramchandra v. Tukaram, 35 Bom. L. R. 715.

2 Bhika v. Raichand 15 Bom. L. R. 68.

3 Sahoo v. Narayan Shastri, supra,

4 Ramchandra v. Tukaram, 35 Bom. L. R. 715.

5 Savalpuri v. Bala, (1912) 36 Bom. 543.

6 Bhika v. Raichand, 15 Bom. L. R. 68.

(2) S is a milk-maid by profession. She collects milk from her own cattle and purchases more milk in the village, and sells it in a neighbouring city. From the profits thus made she purchases two pieces of land in her village. When free from the milk-selling work, she devotes the rest of the day in personally working as a labourer either on her own fields or on the fields of her brothers. Her income from milk-selling exceeds her income from agriculture. Yet she is an agriculturist as she personally works on land.¹

(3) T stays at Pandharpur and has a cloth shop there. He has certain pieces of land a mile distant from Pandharpur. The land is 26 acres in extent. He cultivates this land *personally* with the help of labourers. He does the work of weeding out superfluous weeds from the lands, watching the crops grow and protecting them from cattle, etc. He has no bullocks nor agricultural implements of his own. From March to August when there is no agricultural work to be done he looks solely to his shop. T is an agriculturist.²

(4) S who was a Gosavi (religious beggar) sued B to redeem a mortgage contending that he was an agriculturist. S had ceased to be an agriculturist at the date of the suit but had obtained lands after that date. S did not prove either that he earned his livelihood wholly or principally by agriculture, nor did he prove that he ordinarily engaged personally in agricultural labour. So it must be presumed that S earned his income by mendicancy only.³

22. Explanation (a):—A man, who is not an agriculturist at a time when his status as an agriculturist comes into question, will nevertheless be deemed to be an agriculturist under this explanation in two cases: (a) where he, being an agriculturist, without any intention of changing his status as such ceases to be so only for a short time; (b) where he, being ordinarily an agriculturist, is prevented from continuing to be so by reason of age, bodily infirmity, etc.

23. Explanation (b):—This explanation lays down that 'an assignee of Government assessment or a mortgagee is not, as such, an agriculturist within this definition.' The words 'as such' show that the object of the Legislature was to exclude assignees of Government or mortgagees to the extent to which their income is derived from their rights as assignees of Government assessment or mortgagees, from claiming the special benefit of the Act. The income derived from tenants by an Inamdar

¹ Sahoo v. Narayan Shastri, 33 Bom. L. R. 476.

² Ramchandra v. Tukaram, 35 Bom. L. R. 715.

³ Savalpuri v. Bala, (1912) 14 Bom. L. R. 566. It was held in Ramchandra v. Tukaram above that this statement was rather too wide.

which is to a certain extent attributable to the fact that he is the assignee of Government revenue and therefore does not have to pay over a portion of that income to Government but may keep it for himself, cannot be taken into consideration in estimating whether or not he earns his livelihood wholly or principally by agriculture.¹ The income attributable to a person's position as Jahagirdar, that is to say what he received as assessment, must be excluded from the calculation of his agricultural income. Assuming that he is the grantee of the soil, he might be able to earn certain income, which otherwise he would not be able to do, if the grant was merely confined to the share of the royal revenue, but that cannot make his income from assessment, agricultural income. It surely was never intended that a Jahagirdar relying entirely upon the income derived from the assessment which would be recovered by the village officers from occupants or tenants, should be considered an agriculturist earning his livelihood by agriculture within the meaning of the D. A. R. Act.²

When a question arises as to whether a person, who holds some land under a grant holds it as an assignee of Government revenue or not, the question has to be decided from the terms of the grant.³

But a person is not excluded from being an agriculturist merely because he may happen to be an assignee of Government assessment if in fact he by himself or by his servants or by his tenants earns his livelihood wholly or principally by agriculture, or if he ordinarily engages himself personally in agricultural labour. Thus an Inamdar, who is merely an assignee of Government revenue, may also have occupancy rights in respect of the lands over which he has these Inam rights, and it is clear that in respect of those occupancy rights, there may arise an income which would make the person who also happens to be an Inamdar, an agriculturist within the meaning of the D. A. R. Act.⁴

Illustrations.

(1) K an agriculturist had three sources of income; (i) Saranjam (ii) Inam, and (iii) agriculture. His income from agriculture was Rs. 716. His

1 Kashinath v. Vinayak, 35 Bom. 266=13 Bom. L. R. 242.

2 Mukunda Krishna v. Mohanlal, (1924) 26 Bom. L. R. 620.

3 Chunilal v. Bhanumati, (1911) 13 Bom. L. R. 1058.

4 Purushottam v. Sitaram, (1906) 8 Bom. L. R. 606.

income from Saranjam, Inam and Deshpande Watan was Rs. 1114. K is not an agriculturist.¹

(2) A watan was continued by the British Government in the family of A, subject to certain specified conditions hereditarily without demand of service and without any deduction therefrom on account of service, and without any objection or question on the part of Government as to the right of the holders. A is a holder simply of a share of revenue, and he is not an agriculturist under this Act.²

24. '2nd'; Special definition of 'agriculturist':— The word 'agriculturist' is defined by clause 1st. This (2nd) clause only gives a special definition of the term. This definition is not exhaustive but only inclusive, and is intended for a special purpose. It lays down that a person will get the benefit of Chapters II, III, IV and VI, and S. 69, if he was an agriculturist at the time the cause of action arose (though he loses the status subsequently and is not an agriculturist at the time of the suit). Thus in suits of the nature mentioned in S. 3 (w) he will have to be sued where he resides, the history of the transaction will be investigated (S. 12), accounts taken in the manner given in S. 13, he will be allowed to pay his debts by instalments (S. 15 B and 20), he will be exempt from arrest and his property from attachment (Ss. 21 and 22).³

But the definition of the word 'agriculturist' given in this clause being only inclusive, a person can claim all these privileges if he is an agriculturist under clause I, i. e. at the time of the suit. The clause does not lay down the proposition that a party cannot claim the privileges of an agriculturist under this Act if he was not an agriculturist at the time the liability in question was incurred, even though it may be that he is an agriculturist within the meaning of the first clause of S. 2.⁴ The words 'shall be deemed to include also a person' show that the intention was to apply the Act as well to persons who were agriculturists when the liability which is the subject of the suit was incurred as to those who are so when the suit is instituted.⁵

1 Keshinath v. Vinayak, (1911) 13 Bom. L. R. 242.	(F. B.).
2 Chunilal v. Bhanumati, (1911) 13 Bom. L. R. 1053.	4. Damodar v. Manubai, (1909) 34 Bom. 65=11 Bom. L. R. 1143.
3. Maneklal v. Mahipatram, (1927) 19 Bom. L. R. 1109=51 Bom. 154.	5. Banu v. Krishnambhat, 1886 P. J. 159; Kondi v. Gunda, 1883 P. J. 156.

This definition has the advantage of obviating all questions that may arise as to a change of status since the date of the transaction or even during the pendency of a suit.¹

This definition further requires that the person must be an agriculturist at the time of the transaction within the meaning of that word 'as then defined by law.' So if the liability was incurred when the D. A. R. Act was not passed, the party cannot be an agriculturist at the time of the transaction within the meaning of this Act which was passed in 1879.²

Illustrations.

(1) A sues B and obtains a money decree against him. B was an agriculturist at the date of the decree, but he was not an agriculturist at the date of arrest. Here the liability which is the subject-matter of execution was incurred at the date of the decree, and as B was an agriculturist then, he is exempt from arrest though now he has ceased to be an agriculturist.³

(2) P mortgaged his property to D in 1874. P alleging that D went in possession in 1875, and that the mortgage-debt was satisfied out of the profits so received, instituted a suit for possession in 1905. Here though P was not an agriculturist at the time the liability was incurred, for this Act was not passed then, is yet an agriculturist at the time of suit, and so he is an agriculturist under clause 1.⁴

(3) G mortgaged his property to V in 1871. The mortgage was not to be redeemed before 1886. V sued G for foreclosure in 1905. G was an agriculturist in 1871 and 1886, but he had ceased to be so in 1905. Here the liability in suit was incurred in 1871 when the money was borrowed, and as this Act was not passed then, G was not an agriculturist at that time.⁵

25. Agriculturist as then defined by law ;—To claim the benefits of the special provisions of clause 2nd of the section, it must be shown that the person for whom the status of agriculturist is claimed was, at the time the liability was incurred, an agriculturist as then defined by law. 'Then defined by law' relates to the time when any part of the liability was incurred. Obviously the benefit of this Act cannot be claimed by a person who was an agriculturist before, and not after the passing of this

1 Sheik Sultan Rahim v. Ranchhodji Mulji, (1926) 51 Bom. 224=29 Bom. L. R. 249.

2 Mahadev v. Vinayak, 33 Bom. 504=11 Bom. L. R. 721.

3 Maneklal v. Mahipatram, 29

Bom. L. R. 1109.

4 Damodar v. Manubhai, 34 Bom. 65.

5 Mahadev v. Vinayak, 33 Bom. 504=11 Bom. L. R. 721.

Act in 1879 which contained the first legal definition of the term agriculturist for, whatever may have been his occupation in fact, he cannot be an agriculturist under the Act.¹ Nor will it apply to a person who was an agriculturist within the limits of a district to which this Act was not extended when the liability was incurred,² or who was not an agriculturist within the meaning of the term as *then* defined by law though the definition is subsequently changed and he happens to be an agriculturist within the meaning of the new definition.³ For the definition of the term 'agriculturist' under old law see note 2.

Illustrations.

(1) V executed a mortgage in favour of M in 1871. It was provided that the mortgage was not to be redeemed before 1886. V was an agriculturist in 1871 but he was not one when the suit was brought in 1905. V cannot claim the benefit of this Act for he could not be an agriculturist 'within the meaning of the term as then defined by law' in 1871 when the Act was not enacted.³

(2) S who alleged himself to be an agriculturist residing in Ratnagiri district, executed a mortgage in favour of K in 1881. This Act was not extended to the district of Ratnagiri in 1881. In 1896 S brought a suit against K for an account of what was due on the mortgage under S. 15 D of this Act. S cannot claim the benefit of this Act as he was not an agriculturist within the meaning of the Amending Act (XXIII of 1881).⁴

26. Money:—(Clause 4) the word ' money ' includes agricultural produce, implements and stock; the word is here purposely used in a very broad sense, so as to secure to the agriculturist the protection of this Act in all dealings with regard to his occupation. Under the head ' stock ' it would necessarily include cattle.⁵

27. Lease:—The definition of ' lease ' as given here is the same as in the Indian Registration Act. It was inserted by Act XXIII of 1886. The insertion of this definition was deemed

1 Mahadev v. Vinayak, (1909) 11 Bom. L. R. 721; 33 Bom. 504.

2 Shankar v. Krishnaji, 11 Bom. L. R. 1288 = 84 Bom. 161. See also Savant-rava v. Giriappa, (1913) 15 Bom. L. R. 778 (F. B.) overruling Gopal v. Rajaram, 14 Bom. L. R. 14.

3 Mahadev v. Vinayak, (1909) 11 Bom. L. R. 721, Supra.

4 Shankar v. Krishnaji, 11 Bom. L. R. 1288.

5 Emperor v. Govind, 16 Bom. L. R. 593.

desirable because in S. 56 the word 'lease' must be taken to mean a *Kabuliyat* or undertaking to cultivate or occupy.¹

The word 'lease' however is not fully defined in this Act. It is thus defined in the Transfer of Property Act: "A lease of immoveable property is a transfer of a right to enjoy such property made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service, or any other thing of value, to be rendered periodically or on specified occasions, to the transferor by the transferee who accepts the transfer on such terms." (S. 105).

The expression 'undertaking' in 'undertaking to cultivate or occupy' means an undertaking accepted by the landlord which would give the tenant an interest in the land, not an undertaking to take up the land if the landlord should at some future time desire it.²

'An agreement to lease' must be one which creates a fresh and immediate demise. If the agreement is contingent upon the happening of an event which is indeterminate it would not be an 'agreement to lease' within the meaning of this section.³

28. Standing crops :—The definition as given here is only inclusive and not exhaustive. Standing crops are moveable property according to the definition of immoveable property given in the Transfer of Property Act, Registration Act, etc. S. 22 of this Act also lays down that for the purpose of an attachment under that section 'standing crops' shall be deemed to be moveable property. The term 'growing crops' must be held to include all vegetable growth, whether in the form of fruit, bark or roots.⁴ A crop of sugarcane is not immoveable property.⁵

Attached to the earth.—The expression is thus defined in the Transfer of Property Act: "Attached to the earth means—(a) rooted in the earth as in the case of trees and shrubs; (b) imbedded in the earth as in the case of walls or buildings; and (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached (S. 3).

¹ See Statement of Objects and Reasons for Act XXIII of 1886.

² *Apu Budgavda v. Narahari*, (1879) 3 Bom. 21.

³ *Hemanta Kumari v. Midnapur Zemindari Co.*, (1919) 47 Cal. 485=46

I. C. 534=46 I. A. 240.

⁴ *Atmaram v. Doma*, 11 C. P. L. R. 87.

⁵ *Kalka Prasad v. Chandan*, 10 All. 20.

29. Privileges of agriculturist are personal:— The privileges conferred on an agriculturist by the D. A. R. Act are personal; they are not such as can pass from one person to another either by assignment or by devolution. They are limited to him in that personal character. So when an agriculturist dies, and his property passes into the hands of non-agriculturists, the latter cannot get the benefits of this Act.¹ So the assignee of an agriculturist, who is not himself an agriculturist is not entitled to the benefits of this Act.² But if the assignee is himself an agriculturist, he can claim the benefits of this Act.³ He can do so even if the original mortgagor is not an agriculturist.⁴ And if the assignment is valid, the assignee must be given the benefit of this section. The Court is not to consider the question of the adequacy of the consideration for assignment.⁵ But where a purchase is made by an agriculturist benami in the name of a non-agriculturist in order that the real purchaser may escape the consequences to which the latter may be liable if he purchased and sued in his own name, the Court will look behind the record to see who the real purchaser is and will put the plaintiff in the same position as if the real purchaser were the actual plaintiff. So if the purchase is made benami in the name of an agriculturist in order to escape payment of certain Court fee stamps from which the agriculturist may be exempt, the Court will require the real plaintiff to pay the full amount of Court fee.⁶ So if the real purchaser has remained back in order to escape the examination under S. 12, the Court will order him to be examined as a party.⁷

Illustration.

(1) R, an agriculturist executed a mortgage in favour of M. R sued M to redeem the mortgage. But during the pendency of the suit R died and his son A was brought on record. A was an agriculturist when the suit was

1 Martand v. Amritrao, (1925) 27 Bom. L. R. 951=49 Bom. 662 (Case under S. 10A); Maruti v. Martand, (1922) 24 Bom. L. R. 749 (Case under S. 22).	520=1883 P. J. 274.
2 Rajaram v. Lakahman, 1882 P. J. 424; Amichand v. Kahnu, 1884 P. J. 203.	4 Shripati v. Sitaram, 1887 P. J. 296.
3 Dayanu v. Apa, 1883 P. J. 271; Annaji v. Bapuchand, (1883) 7 Bom.	5 Tukaram v. Bahirav, 1888 P. J. 7.
	6 Dagdu v. Balwant, 22 Bom. 820=1897 P. J. 211.
	7 Narayan v. Kaji Gulam Mohiddin, (1925) 27 Bom. L. R. 1240=49 Bom. 682.

brought, but not when he was made a party. There being now no agriculturist party to the suit, the provisions of S. 10A cannot be applied.¹

(2) M obtained a money decree against N who was an agriculturist. While N was living M could not attach his property by virtue of S. 22. On N's death his property passed into the hands of his son A who was not an agriculturist. A cannot claim the benefit of S. 22 and hence N's property in his hands can be attached by M.²

30. Status of agriculturist as a preliminary decree :—

As all the privileges under this Act depend upon the party claiming them being an agriculturist, whenever a suit purports to be under this Act, the first point that is generally taken up for consideration is whether the party is an agriculturist. When the Court decides this point, the question arises how far this decision amounts to a preliminary decree. This question is important because, if the decision does amount to a preliminary decree, a party deeming himself aggrieved by the decision must appeal against that decision forthwith. If he fails to do so, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree (S. 97, C. P. Code, Act II of 1908). But if it does not amount to a preliminary decree, the decision of the lower Court on that issue cannot be challenged immediately. The aggrieved party will have to raise that point only in an appeal against the decree in the suit.

The course of decisions on this point is not uniform. The question involved may be divided into two parts; (A) How far a decision on the preliminary issue that a person is or is not an agriculturist, amounts to a preliminary decree? (B) Where it does amount to a preliminary decree, but the Court fails to draw up a decree accordingly, and the party does not ask the Court to draw it, is his right of challenging that point in an appeal against the final decree lost?

Definition of a 'decree' :— Before considering the course of decisions on this point, it will be useful to see the definition of the term 'decree' as given in the C. P. Code, 1908. "Decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights

¹ Martand v. Amritrao, 27 Bom. L. R. 351.

² Maruti v. Martand, (1922) 24 Bom. L. R. 749.

of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 47 or section 144, but shall not include—

(a) any adjudication from which an appeal lies as an appeal from an order.

(b) any order of dismissal for default.

Explanation— A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.¹

So the answer to the question (viz. how far a decision on the preliminary issue that a person is or is not an agriculturist amounts to a preliminary decree,) will depend on how far this decision conclusively determines the rights of the parties with regard to a matter in dispute. It was formerly held that the formally expressed decision upon the point would be a preliminary decree within the meaning of S. 2, being an adjudication which so far as regards the Court expressing it conclusively determines the rights of the parties with regard to the manner in which accounts between them should be taken notwithstanding any written contract they might have entered into before suit.²

The correctness of this decision was doubted by Beaman J. in his judgment while referring the case of *Channmalaswami v. Gangadharappa*³ to the full Bench, when his Lordship said: "But in suits under the D. A. R. Act the finding that a party is or is not an agriculturist does not determine any of the substantial rights which the Court is asked to give or withhold. It is true that it is a matter in controversy, in respect of which the rights must be determined. But so is every detail of procedure and rule of evidence more or less directly. But the Full Bench in that case however gave no decision regarding a decree under the D. A. R. Act. It merely decided that a deci-

1. The Code of Civil Procedure S. 2 clause 2. | ruti, (1910) 12 Bom. L. R. 762; Govind v. Vithal, (1912) 14 Bom. L. R. 560.

2. Per Scott C. J. in *Krishnaji v. Ma-* | 3. (1914) 16 Bom. L. R. 954 F. B.

sion as to misjoinder, jurisdiction or limitation is not a preliminary decree.

In a later case¹ Beaman J. laid down: A decision that a party is or is not an agriculturist is something more than a decision to go on with the suit for it determines also the law that the Court will apply: whether the D. A. R. Act or the ordinary law. But that does not seem to make any difference in principle, for the principle is that the progress of a suit is not to be interrupted by an appeal until there has been a decision either partial or entire on the merits. This means that if the suit is to proceed there shall not be a true judgment and consequently not a decree at that stage. There may be a pronouncement of the Court's finding so far as it goes, but this is not a judgment of the kind to be followed by a decree." Shah J. said in the same case "No such finding by itself can be the basis of a preliminary decree, unless it necessarily involves a conclusive determination of the rights of the parties with regard to the matter in controversy. He explained the difference by pointing out that if the suit is on a mortgage and the party claims that he being an agriculturist, accounts should be taken in the manner laid down in S. 13, a finding that he is an agriculturist would amount to a preliminary decree. But if the suit is for redemption of a mortgage in the form of a sale, the finding that he is an agriculturist would not of itself entitle him to accounts under S. 13; for he will have further to prove that the transaction is a mortgage and not a sale.

The law on this point was laid down in still clearer words by Macleod C. J. in a recent case.² "It is only when the finding on an issue is sufficient for the decision of the suit or a part of the suit that the Court may pronounce judgment. When the finding is not sufficient for the decision, the suit must be postponed for further hearing. The question in each case is "are the rights and liabilities of the parties decided? If they are not decided the decision cannot amount to a preliminary decree. A formal expression by a decree of a finding by a Court that a party is an agriculturist *cannot conclusively determine the rights of the parties* with regard to any or all the matters in controversy in the suit.

1. Municipal Committee of Nasik v. Collector of Nasik, (1915) 17 Bom. L. R. 324.

2. Dattatraya v. Radhabai, 25 Bom. L. R. 92. See also Vamanaacharya v. Govind, 25 Bom. L. R. 826.

Undoubtedly that is an issue which is the first issue to be tried in the case, and a decision may be given on it, but it by no means follows that because that is the first issue to be tried, therefore it is a preliminary issue on which a decree can be drawn up. The whole case must be decided first before a judgment can be pronounced. There will then be a judgment deciding the rights of the parties with regard to all or any of the matters in controversy in the suit. It is a general rule in cases falling under O. 26 r. 16 of the C. P. Code that the main points at issue in the case should be decided first by the Court, and a preliminary decree passed only when nothing more remains to be done than the ministerial function of drawing up the account in accordance with the directions of the Court. It is an abuse of the procedure intended by the Code to draw up a preliminary decree directing accounts to be taken under S. 13 before, for instance as in this case, it has been even decided whether the mortgage sued upon was proved."

(B) The second point to be determined is: does the finding amount to a preliminary decree though the Court has not drawn up a formal decree on that issue? And again, if the Court does not draw up a preliminary decree accordingly, and the party also does not request the Court to draw up the decree, can the party be said to have forfeited the right of appealing against this issue

In an early case¹ it was held that though the statutory obligation lay on the Court to draw up a preliminary decree to entitle the appellant to appeal, yet it was equally the duty of the appellant to ask the Court to draw up the decree in order to enable him to present an appeal to the appellate Court. If the appellant fails to discharge this duty in his own interest, it is a reasonable inference to draw from it that he has waived the right of appeal. But this case is no longer good law. In a subsequent case it was held that the duty to draw up a decree is the duty of the Court ... The duty of the litigant to remind the Court of its duty to draw up a decree is no more than the duty that devolves on any person in common every day affairs to see that there is no undue delay in the performance of matters in which he is interested. It is a 'duty' of a very different character from the obligation which the

1. Per Chandavarkar J. in *Govind v. Vithal*, (1912) 14 Bom. L. R. 560.

law casts on the Court itself.¹ Mere omission on the part of the party or his pleader to ask the Court to draw up the decree which it is the duty of the Court to draw up of its own motion, cannot affect the right of the party to appeal which can arise only when the decree is drawn up by the Court. No waiver can be inferred from the party's omission to do so.² The drawing up of a decree or the omission to do so, must be taken as conclusive on the question whether the Court has in fact passed or not passed a preliminary decree, and this is the only proper test to apply in considering whether the provisions of S. 97 of the C. P. Code are or are not applicable.³

31. Question of status must be tried by the Court itself:—The Court cannot refer the question 'whether a party is an agriculturist' to the Commissioner. For, the power to issue commissions is expressly limited by law. It is given by S. 75 and Or. XXVI of the C. P. Code, 1908. This section and this Order do not include a reference on a question such as whether a party engages personally in agricultural labour.⁴ It is generally left to the Commissioner to determine whether a person's income is derived principally from agricultural sources, and that is generally done by ascertaining whether his income from agricultural sources exceeds his income from non-agricultural sources for a period of three years before the date of the suit. But it is for the Court to determine whether the person who claims to be an agriculturist under the second branch of the definition is a person who ordinarily engages personally in agricultural labour within the limits of the district to which the Act applies.⁵

32. Proceeding:—The word proceeding is a very general one. It is not limited to proceedings connected with civil suit but includes civil proceedings other than suits. When applied to suits, it may be used to mean the suit as a whole, or it may be used and often is used to express the separate steps taken in the

1 Sakharan v. Eadashiv, (1913) 15 Bom. L. R. 382=37 Bom. 480; Bai Divali v. Vishnu, 11 Bom. L. R. 1326, followed.

2 Kaluram v. Gangaram, (1913) 16 Bom. L. R. 67.

3 Yamanacharya v. Govind, (1923) 25 Bom. L. R. 826.

4 Alimahomed v. Shamsuddin, (1927) 30 Bom. L. R. 131.

5 Ramchandra v. Tukaram, 85 Bom. L. R. 715.

course of a suit.¹ It is sufficiently comprehensive to include all proceedings in the suit from the date of its institution to its final disposal, and therefore to include proceedings in appeal, second appeal, revision and execution.²

33. Burden of proof:—Under S. 101 of the Indian Evidence Act "whoever desires any Court to give any judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Therefore a party who sets up the plea of agriculturist must prove it. If a person follows two occupations one of them being agriculture, he must, in order to succeed, show either that he earns his livelihood principally by agriculture, or that he ordinarily and personally engages himself in agricultural labour.³ Similarly, a defendant who seeks to resist the attachment or sale of his immoveable property under S. 22 must prove that he belongs to the privileged class. That conclusion seems to follow from the provisions of Ss. 101, 102 and 103 of the Evidence Act.⁴

34. Estoppel:—The mere fact that the defendant describes himself in the instrument on which the suit is brought as a trader would not of itself estop him from pleading at the trial that he was an agriculturist and entitled to the protection of this Act. All the elements of estoppel under S. 115 of the Evidence Act must be proved. Thus there must be evidence to show that by describing himself as a 'trader' he represented himself as a trader, and intended that that representation should be acted on by the plaintiff.⁵

35. Res Judicata:—If in a previous litigation between the same parties it has been held that the defendant was not an agriculturist, the decision will not operate as *res judicata* on the question of the personal status of the defendant in a subsequent suit between the same parties; for, the question before the Court in the first suit was whether the defendant was an agriculturist at the date of that suit. The question in the subsequent suit

1 Dev Narayan Dutt v. Narendra Krishna, 16 Cal. 267 (F. B.).

2 Ratanchand v. Hanmantrao, Bom. H. C. R. Ap. C. J. 166 F. B.; Runjit Sing v. Meherban Koer, 3 Cal. 662.

3 Savalpuri v. Bala, 86 Bom. 543=

14 Bom. L. R. 566=16 I. C. 311.

4 Narayan v. Gowhai, 15 Bom. L. R. 278=37 Bom. 415.

5 Kadappa v. Martand, 17 Bom. 227=1892 P. J. 95; Ramchandra v. Tukaram, (1939) 95 Bom. L. R. 715.

is whether he is so at the date of this suit. Thus the matter in issue in the two suits is not the same within the meaning of S. 11 of the C. P. Code. During the interval, the status may have changed.¹

36. Change of status at different stages:—A party to a suit may be an agriculturist only at some of the stages of the suit, but not at others. Thus he may be an agriculturist only—

(a) when the liability was incurred, but not afterwards;

(b) when the cause of action arose, but not afterwards;

(c) when the suit was instituted, but not afterwards.

Or, a party may become an agriculturist:

(d) at any of the above stages, but not before;

(e) at the hearing of the suit, but not before;

(f) when the *darkhast* was filed, but not before;

(g) in the course of the execution proceedings but not before.

In all these cases different considerations arise as shown below:—

(a) A person who is an agriculturist at the time the liability was incurred will be deemed to be an agriculturist only in reference to suits or proceedings under Chapters II, III, IV, VI and under S. 69 (vide S. 2 cl. 2). See note on Clause (2) above.

(b) A person who is an agriculturist when the cause of action arose, but has ceased to be so afterwards, will be considered to be an agriculturist only for the purpose of limitation under S. 72. But a person under this class may in certain cases fall under class (a) also.

(c) When a party is an agriculturist when the suit was instituted, but loses his status subsequently, he will lose the privileges of this Act. For, the privileges of this Act being of a special character, a party claiming them, must fulfil that character at the trial. He cannot claim the benefit if he loses the status even *pendente lite*.²

(d) A party who becomes an agriculturist at any of the above stages will get the privileges of this Act though he was not an

1. Vishwanath v. Bala, 1899 P.J.343. | tand v. Amritrao, 27 Bom. L. R. 951 ;
2 Shamlal v. Hirachand, 10 Bom. | see note "Change of Status *Pendente*
357; Padgaya v. Baji, 11 Bom. 469; Mar- | *Lite*" under S. 12.

agriculturist before. But he must be proved to have become a bona fide agriculturist. The definition of an agriculturist in S. 2 of the D. A. R. Act is not limited to a judgment-debtor being an agriculturist at the date of the suit or of the decree. It is comprehensive enough to include an agriculturist at any stage of the proceeding.¹ If he has given up his other occupations only for the purpose of the suit, he will not be held to be a bona fide agriculturist.²

(e) A party who acquires the status of an agriculturist at the hearing of the suit, will get the privileges of this Act, provided he has become a bona fide agriculturist.³ The privileges being dependant on status, with the loss or gain of that status, a party may lose or gain the privileges of this Act.⁴

(f & g) How far a party who is an agriculturist when the darkhast is filed, though he was not so before, can claim the privileges of this Act, depends on the nature of the relief claimed by him in the execution proceedings. The importance of status for the purpose of Ss. 15 B, 20, 21 and 22 may be thus summarised:—*For the purpose of S. 15 B.*—The Court can, in passing a decree for redemption, foreclosure or sale, in any suit of the description mentioned in S. 3 clauses (y) or (z), or in the course of any proceeding in the execution of such a decree, direct the amount to be paid by instalments. But the description of 'suit' in S.3 includes the status of parties also, and hence to claim the benefit of this section, a party *must be an agriculturist at the time of suit*. So a person who brings himself subsequently within the definition of agriculturist, cannot be allowed the privileges of S. 15 B.⁵ But if an ex-parte decree is passed against a person, he can prove in execution proceedings that he was an agriculturist at the date of the suit.⁶ And the defendant can thus prove that he was an agriculturist at the date of the decree in subsequent execution proceedings, though there have been previous execution proceedings against

1 Hiramal v. Hajarising, 78 I. C. 583.

2 Tulsidas v. Virbasappa, 4 Bom. 624;

Rajhumal v. Khicmal, 3 S. L. R. 218.

3 Kondi v. Gunda, 1882 P. J. 156;

Hiramal v. Hajarising, supra.

4 Padgaya v. Baji, 11 Bom. 469. Cl.

Rambhat v. Laxman, 5 Bom. 690.

5 Devu v. Rewappa, (1922) 24 Bom.

L. R. 370=46 Bom. 964; Maneklal v.

Mahipatram, 29 Bom. L. R. 1109.

6 Rudrappa v. Chanbasappa, (1923)

26 Bom. L. R. 153.

him arising out of the same decree, and he had not raised the plea in those proceedings.¹ And if the party against whom an *ex parte* decree is passed is dead, his legal representatives can prove that they were agriculturists at the date of the decree and obtain the benefit of the privileges of this Act.²

For the purpose of S. 20 :—Under this section, the Court can, at any time direct that the amount of any decree *passed against an agriculturist* shall be paid by instalments. The words 'passed against an agriculturist' show that the material date for the determination of status under this section is the date of decree.³ A person who was held to be not an agriculturist when the decree was passed, cannot claim the benefit of S. 20 though he becomes an agriculturist at the time of execution.⁴ The result will be the same if a person was held by *necessary implication* to be a non-agriculturist at the date of the suit, when an *ex parte* decree is passed against him in a Court which would have no jurisdiction if he had been an agriculturist.⁵ But if a party is not thus held to be an agriculturist, either expressly or by necessary implication, he can prove in execution proceedings that he was an agriculturist at the date of the decree.⁶

For the purpose of S. 21 :—S. 21 provides that 'no agriculturist shall be arrested or imprisoned in execution of a decree for money.' The question under this section therefore is whether a person sought to be arrested in execution of a decree for money is an agriculturist at the time of arrest; and if he is, then he is exempt.⁷ It is not necessary that he should be so at the date of the decree;⁸ and hence it is not material whether the decree against him was an *ex parte* decree or otherwise. So even if a party suffers an *ex parte* decree to be passed against him as a non-agriculturist, he cannot be precluded from showing

1 *Namyan v. Dhondu*, (1925) 28 Bom. L. R. 305.

2 *Shidraj v. Renaki*, (1925) 27 Bom. L. R. 1490.

3 *Maneklal v. Mahipatram*, (1927) 29 Bom. L. R. 1103.

4 *Balchand v. Chunilal*, 15 Bom. L. R. 387.

5 *Mulji v. Goverdandas*, 24 Bom. L. R. 1291.

6 *Maneklal v. Mahipatram*, (1927) 29 Bom. L. R. 1109.

7 *Hira v. Daula*, 28 Bom. L. R. 539.

8 *Maneklal v. Mahipatram*, 29 Bom. L. R. 1109.

that he is an agriculturist at the date of arrest.¹ He can prove this either by showing that he comes under the general definition of 'agriculturist' or under the special definition given in clause 2 of S. 2 (i.e. as being an agriculturist at the time the liability in question arose.²).

For the purpose of S. 22:—Under this section immoveable property 'belonging to an agriculturist' is not to be attached and sold in execution of a decree unless it has been specifically mortgaged. Hence it must be proved under this section that the property belonged to an agriculturist at the date of attachment.³ It is not necessary that the defendant should be an agriculturist at the date of the decree.

37. Provisions of this Act must be applied:—As the provisions of this Act are intended for the benefit of agriculturists, where a party is proved to have that status, the Court must apply these provisions. No Court can neglect this duty or omit its performance on the ground that the party for whose benefit it was created waived it. It is not at the invitation of any party to a cause that the Court is to perform its duty under this Act. So it was held that the Court must make an enquiry under S. 12 even *suo motu*.⁴

But out of the Court, of course, the parties are at liberty to settle their claims in any way they like, and in thus settling they are not bound by any of the provisions of this Act.⁵

Similarly, if the parties to a suit arrive at a compromise, the Court can pass a decree in terms of the compromise without applying the provisions of this Act, provided that the Court is satisfied that there is a *bona fide* settlement of a disputed claim. In such a case the Court need not go into the history and merits of the transaction as required by S. 12; nor need it take accounts as required by S. 13.⁶ The decree will not be said to be against public

1 Maneklal v. Mahipatram, 29 Bom. L. R. 1109.

2 Ibid.

3 Maruti v. Martand, (1922) 24 Bom. L. R. 749; Shamrao v. Malkarjun, (1931) 83 Bom. L. R. 797. See discussion under 'Property belonging

to an agriculturist under s. 22.

4 Patlu v. Naru, 7 Bom. L. R. 688.

5 Bhau Babaji v. Gopala, 11 Bom. S25=1886 P. J. 261.

6 Gangadhar v. Mahadu, 8 Bom. 20, Piraji v. Ganpati, 34 Bom. 502=12 Bom. L. R. 378.

policy, though it provided for the payment of the whole amount in case of default to pay any instalment.¹

38. The plea of status must be inquired into

Whenever the plea of agriculturist is set up by one party and denied by the other, the Court must inquire fully into the allegation. In cases to which the provisions of this Act apply the allegation is a material proposition of fact and should form the subject of a distinct issue. (Order XIV, r. 1, C. P. Code, 1908.) If the Court declines to enquire into the question, its action will be interfered with in appeal or in revision.²

Whenever the status of a party is in question there should be a preliminary issue on the point. The finding of this issue should afterwards be stated in the decree. A party found to be an agriculturist should not be described in the decree as a non-agriculturist, or vice versa.³

39. Plea of status raised first in appeal :—But if a party fails to raise the plea of status in the suit, he cannot be allowed to do so for the first time in appeal.⁴ For the determination of the question being dependent on the decision of facts, the appellate Court will not allow, without satisfactory reason, new questions of fact to be raised for the first time in appeal.⁵ For, a Court of appeal is not justified in exposing a party after he has obtained his decree to the brunt of a new attack, of which he has never had notice during the hearing of the suit.⁶ But the appellate Court is not precluded from basing its decision upon a ground not set forth in the memorandum of appeal. But this power is exercised by the Court alone, and neither party can claim it as of right.⁷ In *Janardan v. Anant*,⁷ the plea of status seems to have been raised by the appellate Court itself from the record of the case.

1 Shivayagappa v. Govindappa, 15 Bom. L. R. 768 (F. B.). See note on this subject under Ss. 12 and 15 B.

2 Hari v. Sitaram, 1882 P. J. 15; Raghunath v. Anant, 1882 P. J. 368.

3 Civil Circulars issued by the High Court (1925).

4 Narayan v. Chengalamma, (1887) 10 Mad. 1.

5 Nathu v. Umedmal, (1909) 35 Bom. 35; Basant Ram v. Mahammad, (1922) 4 Lah. L. J. 293.

6 Bansidhar v. Sitaram, (1891) 13 All. 381.

7 1896 P. J. 396.

In *Janardan v. Anant*, the suit was filed as an ordinary suit, and as such tried by the Subordinate Judge, second class. The plea of the defendants being agriculturist was not raised on their behalf, and the suit was tried and the decree made on the footing of the defendants being ordinary litigants. Had the plea been raised and found to be established, the Subordinate Judge second class would, in the absence of consent, have had no jurisdiction to try the suit. The defendants appealed. When the case came on in appeal before the District Judge, he raised and tried an issue as to whether the defendants were agriculturists, and having found that they were, dealt with the appeal as though he had, on appeal, jurisdiction to deal with the suit. It was held "If the District Judge thought that the suit was an agriculturist suit he ought to have referred the parties to the proper tribunal and not himself to have dealt with it in appeal." Thus the High Court in effect ruled that the status can be raised by the Court for the first time in appeal.

40. Agriculturist or middleman:— In order to be entitled to the status of an agriculturist, the claimant must have some direct connection with the soil. A person who grows vegetables on his land and sells them is an agriculturist, but a person who buys vegetables from the actual cultivator and sells them in his shop would not be. The point is that in the case of failure of rains or anything of the kind the agriculturists lose their crop and the loss falls actually on the growers, while the middleman is unaffected by any such change.¹

[a] 2A. Every jagirdar and other authority invested with powers under Bombay Regulation XIII of 1830 and Act XV of 1840 shall, for the purposes of this Act, be deemed to be a Subordinate Judge of such class as the Local Government may from time to time direct.

Old law:— This section was inserted by Act XXII of 1892, S. 4.

Extent:— This section extends to all parts of the Bombay Presidency except Aden and the city of Bombay. *Vide* table given under s. 1.

[a] Section 2A was inserted by Act XXII of 1892, s. 4.

¹ *Moreshwar v. Umraosing*, (1931) 34 Bom. L. R. 778.

CHAPTER II.

OF THE HEARING OF CERTAIN SUITS BY SUBORDINATE JUDGES.

3. The provisions of this chapter shall apply

Application of
this chapter. to—

(a) suits for an account, [a]whatever be the amount or value of the subject-matter thereof [a] instituted [b] by an agriculturist in the Court of a Subordinate Judge under the provisions hereinafter contained, and

(b) suits of the descriptions next hereinafter mentioned [b]—

(1) When such suits are heard by Subordinate Judges of the first class and the subject-matter thereof does not exceed in amount or value five hundred rupees, or

(2) when such suits are heard by Subordinate Judges of the second class and the subject-matter thereof does not exceed in amount or value one hundred rupees, or

(3) when such suits are heard by Subordinate Judges of the second class and the subject-matter thereof exceeds one hundred rupees, but does not exceed five hundred rupees, in amount or value, and the parties to the suits agree that such provisions shall apply thereto.

The descriptions of suits referred to in clause (b) are the following, namely :—

(w) suits for the recovery of money alleged to be due to the plaintiff—

[a—a] These words were inserted by Act XXII of 1892, s. 5.

[b] Words repealed by Act XVI of 1895 are omitted.

on account of money lent or advanced to or paid for the defendant, or

as the price of goods sold, or

on an account stated between the plaintiff and defendant, or

on a written or unwritten engagement for the payment of money not hereinbefore provided for ;

(*x*) suits for recovery of money due on contracts other than the above and suits for rent or for moveable property, or for the value of such property, or for damages ; and

(*y*) suits for foreclosure or for the possession of mortgaged property, or for sale of such property, or for foreclosure and^[a] sale, when the defendant, or any one of the defendants, ^[b] is an agriculturist ; and

(*z*) suits for the redemption of mortgaged property when the plaintiff, or, where there are several plaintiffs, any one of the plaintiffs, is an agriculturist.

Synopsis of the Commentary.

1. Scope of this chapter.	9. Suits under clauses (<i>w</i>) and (<i>x</i>).
2. Extent of this Section.	10. Suits under cl. (<i>w</i>).
3. Application of this section.	11. Suits under clause (<i>x</i>)
4. Suits for Accounts.	12. Suits not under clauses (<i>w</i>) or (<i>x</i>).
5. Cl. (<i>b</i>) - the Pecuniary Jurisdiction.	13. Suits under clauses (<i>y</i>) and (<i>z</i>).
6. Jurisdiction assumed through honest misin-formation.	14. Mortgaged property.
7. Jurisdiction by consent.	15. An agriculturist assignee
8. Valuation of a suit for re-emption.	can sue under these clauses.

[a] The word " and " was substituted for the original word " or " by Act XXIII of 1886, s. 5.

[b] Words repealed by Act XXIII of 1881 are omitted.

<p>16. Mortgage in the form of sale.</p> <p>17. Awards do not fall under this section.</p>	<p>18. 'Suit' includes status.</p> <p>19. Suits under clause (y).</p> <p>20. Suits under clause (z).</p>
--	--

1. Scope of this chapter:— S. 3 of this chapter enumerates certain classes of suits which are selected on account of their simple nature, and the subsequent sections lay down the special procedure that applies to suits falling under S. 3. The main provisions of this chapter are: (i) the defendant is to be compulsorily examined, (s. 7); and (ii) no appeal is to lie from any decree or order passed in any such suits (s. 10). These decrees and orders are however subject to revision by the District Judge (s. 53).

The provisions of this chapter are applicable to the districts of Poona, Satara, Sholapur and Ahmednagar (s. 1). Ss. 6 and 7 are extended to the rest of the Presidency, excepting Aden and the City of Bombay.¹

2. Extent:— This section extends only to the four Districts of Poona, Satara, Sholapur and Ahmednagar. *Vide* the table given under S. 1.

3. Application of this section:— Although the main object of this Act is "to relieve the agricultural classes in certain parts of the Deccan from indebtedness," clauses (w) and (x) of this section, as distinguished from clauses (y) and (z) *extend to all classes of people*, not only to agriculturists, provided the given conditions are satisfied."² Those conditions are that the suits in question must be in amount of claim under Rs. 500 or Rs. 100 according to the class of Court in which they are instituted, and must have arisen in the districts to which the Act applies.³

Even clauses (y) and (z) apply to non-agriculturist parties when they are joined in suits with agriculturist parties.

The provisions of this Chapter are only applied to suits heard by Subordinate Judges. They are not applied to suits heard by Assistant Judges. Hence an appeal lies from a decree or order passed by the latter Judge.⁴

¹ See table of Local extent given under s. 1.

² Per West J. in *Tulshidas v. Virbassappa*, 4 Bom. 624.

³ *Ganesh v. Krshnaji*, 14 Bom. 38 = 1889 P. J. 336, Scott J.

⁴ *Mahadji v. Ramchandra*, 1885 P. J. 159.

For a suit to fall under clause (y) or (z) of this section, the party must be an agriculturist even during the pendency of the suit. If he loses that status *pendente lite*, the suit will not fall under this section.¹

Illustrations.

(1) G and K were to perform the worship of a family idol in alternate years, and to pay Rs. 25 each for the proper performance of the same. K not having paid the amount for two years, G had to spend the same. G sued K in the Court of the First Class Sub-Judge of Satara to recover that amount of Rs. 50 with interest. Here though neither of the parties is an agriculturist, the suit falls under S. 3 (w), and the provisions of this chapter apply to it.²

(2) H sues K in the Court of the First Class Sub-Judge at Satara to redeem an ornament below Rs. 500 in value. Neither H nor K is an agriculturist. But as the requisite conditions are satisfied the suit falls under S. 3(x).³

4. Suits for Accounts.—Clause (a) mentions 'suits for an account under the provisions hereinafter contained.' These latter words seem to refer to Ss. 15 D and 16, because there are no other sections in this Act which relate to suits for account. If suits under Ss. 15 D and 16 will thus be governed by this Chapter, it will follow that by virtue of S. 10 no appeal will lie from decrees or orders passed in such suits so far as they declare the amount due between the parties concerned. But it is clear that when in the same suit a decree for redemption or for payment by instalments is passed under S. 15 D or S. 17 and if the suit does not fall under clauses (y) or (z) of S. 3 because the value of the suit exceeds the value given in S. 3 such decree will not be affected by S. 10 and an appeal will lie from the decree.

5. Cl. (b)—The pecuniary jurisdiction.—Chapter II mentions a special procedure that has to be followed by the Subordinate Judges of the First and Second Class if the limits of pecuniary jurisdiction given in clause (b) are satisfied and if the suit falls under (w), (x), (y) or (z). The limits are that the amount or value of the subject matter of the suit must not exceed Rs. 500 if the suit is tried by a First Class Sub-Judge. If the suit is tried by a Second Class Sub-Judge, its amount or value must not exceed rupees one hundred; and if it exceeds one hundred rupees but does not exceed five hundred

¹ Padgaya v. Baji, 11 Bom. 469.

³ Kashiram v. Hirachand, 15 Bom.

² Ganesh v. Krishnaji, 14 Bom. 387.

30=1890-P. J. 139.

rupees, and the suit is tried by a Second Class Sub-Judge, the parties must agree that the provisions of the Chapter shall apply to the suit. If these limits are not satisfied, the Court will try the suit not under this chapter but under its ordinary jurisdiction, and an appeal will lie from the decree in such suit.

6. Jurisdiction assumed through honest misinformation:—The Court thus having a general jurisdiction over the subject matter of the suit, if it applies the particular procedure given in Chapter II to a suit honestly believing that the suit comes under this Chapter, its proceedings will not be void even if the value of the suit is above that required under this clause. In such a case the remarks and the reference made by the Judicial Committee in *Pillai's case*¹ show that a highly irregular proceeding where there is no jurisdiction may be cured by agreement or by acquiescence. Hence even where jurisdiction depends on particular facts stated, the proceedings will not be null and void through a mere error in stating the facts so as to found the jurisdiction though they will be void probably by fraud, or at any rate will be voidable against him who has practised it. It follows that an application of Chapter II which would be illegal and wrong if the Sub-Judge knew that the subject matter was more than Rs. 100 in value, may be sustained if he was led into applying it by honest misinformation.²

Illustration.

A sued K in the Court of the Second Class Sub-Judge of Akola to redeem a mortgage made in 1824 for Rs. 24. The Sub-Judge honestly believed, that Rs. 24 represented the original debt and tried the suit under chapter II. The Special Judge reversed the decree and sent the suit for re-trial. On taking more evidence, the Sub-Judge found that there was a previous mortgage of Rs. 166. Here though the amount exceeds Rs. 100, since the Sub-Judge reasonably supposed that the value of the subject matter was Rs. 24, the proceedings under Chapter II are not illegal. They being thus justified, the revisional proceedings of the Special Judge cannot be held to have been without jurisdiction.³

7. Jurisdiction by consent:—Under sub-clause (3) of clause (b) the Court of second class Sub-Judge derives jurisdiction by consent of parties. The section does not say in

1. 2 I. A. at p. 233.

2 Per West J. in *Kondaji v. Anau*, 7 Bom. 448=1883 P. J. 234.

what form the consent is to be taken. In practice it is generally taken in the form of a *purshis* and not orally. If a party or his pleader once gives his consent, it cannot be withdrawn after the hearing has begun.¹ Where the parties do not agree that the provisions of Chapter II should apply to the case, an appeal would lie from the decision of the Sub-Judge.²

S. Valuation of a suit for redemption:— Under the Court Fees Act (VII of 1870), the value of a suit by a mortgagor against a mortgagee for the recovery of mortgaged property, and of a suit by the mortgagee for foreclosure of the mortgage, or where the mortgage is made by a conditional sale, to have the sale declared absolute, the valuation is to be according to the principal money secured by the instrument of mortgage [S.6(ix)]. But the rules contained in that Act are not to be taken as necessarily a guide in determining the value of the subject-matter of suit for any purpose other than the court-fee and for which the Act does not provide. Hence in a redemption suit, the valuation of the subject matter for purposes of jurisdiction must be taken to be the amount yet remaining due on mortgage or the alleged mortgage which the plaintiff seeks to redeem. That amount and the rights connected with it form the usual subject of contention in a mortgage-suit. For in a redemption suit, the whole of the mortgagor's interest is not, except in rare instances, in litigation. The measure of the value of the subject-matter in contention is the sum which must be paid for the recovery of the possession of the property.³ The valuation does not depend on the value of the property, but upon the principal money expressed to be secured by the document of mortgage.⁴

Even if the defendant (i. e. creditor) denies the mortgage and claims the property as his own, such denial would not alter the character or nature of the subject-matter of the suit. It continues, even after the denial, in its original shape so far as the plaintiff is concerned; nor is the complexion of it entirely changed because the defendant puts forward certain grounds of defence which if well founded must defeat the plaintiff's right to redeem."

1. Rupchand v. Balvant, (1887) 11 Bom. 591.

2 Madhavrao v. Raoji, 1885 P. J.150.

3 Rupchand v. Balvant, 11 Bom.591 =1887 P. J. 116. See also Ram-

chandra, v. Janardan, 14 Bom. 19= 1879 P. J. 44 and the cases referred in the next foot note following.

4 Krishnaji v. Maruti, 12 Bom. L.R. 762.

The words 'mortgaged property' in Clauses (y) and (z) must not be construed to mean "admittedly mortgaged property."¹

Illustrations.

(1) B sued R in the Court of the Second Class Sub-Judge at Malshiras, to redeem certain lands worth more than Rs. 500 mortgaged with R for Rs. 100. At the first hearing the parties gave their consent in writing that the provisions of Chapter II should apply to the suit. Here the valuation of the subject matter of the suit for the purpose of redemption is only Rs. 100 and so the Second Class Sub-Judge can try the suit under Chapter II.²

(2) A sued N in the Court of the Second Class Sub-Judge at Satara to redeem certain property worth more than Rs. 100 mortgaged with N for Rs. 50. N denied the mortgage and claimed the property as his own. The Sub-Judge found that the mortgage was proved and that it was more than paid off out of the profits of the property. The denial of the mortgage by N does not change the nature of the suit, and the value of the subject matter being less than Rs. 100, no appeal will lie from the decision of the Sub-Judge.³

9. Suits under clauses (w) and (x):—The object of the Legislature appears to be to include within S. 3 cl. (w) and cl. (x) all claims of a pecuniary character arising out of contracts whether written or unwritten, and to bring them within the special jurisdiction created by the Act.⁴ Clause (w) may be taken to refer to suits for price of goods sold and to suits arising out of money-lending transactions between a creditor and a debtor. It would thus include 'all suits on bonds, Khatas, written acknowledgments and the like, and would exclude suits for rents, for damages,' etc.⁵ So cl. (w) refers to suits in respect of which only a decree for payment of money can be passed; while cl. (x) refers to suits in which in addition to a decree for payment of money some other relief e. g. sale or declaration may be granted.⁶ The words of clause (w) 'on a written or unwritten engagement for the payment of money, not herein provided for,' are wide enough to cover the case of a surety. Cl. (x) does not refer to a contract of suretyship which falls within the

¹ Amrita v. Naru, 13 Bom. 489 = 1888 P. J. 265 and Govindsing v. Kallu, 2 All. 778.

² Rupchand v. Balwant, 11 Bom. 591 = 1887 P. J. 116. See also Ramchandra v. Janardan, 14 Bom. 19 = 1899 P. J. 44 and the cases referred in the next foot note.

³ Amrita v. Naru, supra.

⁴ Laxman v. Rampiarabai, 1897 P. J. 290.

⁵ See Statement of Objects and Reasons for amending S. 72 by Act XXIII of 1886.

⁶ Gulam Hussain v. Clara D' Souza (1928) 31 Bom. L. R. 988.

purview of clause (w).¹ Though the two clauses can thus be distinguished from each other, the distinction is slight, as both of them deal with suits for recovery of money, and it is difficult to ascertain the precise intention of the legislature in subdividing suits under the two clauses.

The distinction between the two clauses, so far as suits under this Chapter are concerned, is immaterial. But it assumes an immense importance when the other provisions of this Act are considered. For, outside this Chapter cl. (x) is nowhere separately mentioned, and so suits under cl. (x) are not entitled to the special benefits of this Act. Thus if a suit against an agriculturist falls under cl. (x), he need not be sued where he resides, (S. 11), history of the transaction cannot be entered and accounts cannot be taken in the manner provided by this Act (Ss. 12 and 13), and the special period of limitation mentioned in S. 72 will not apply. But all these provisions will apply if the suit comes under cl. (w). This distinction made between the two clauses is rather anomalous in an Act intended for the benefit of agriculturists. To provide that the agriculturist should get all the benefits if the money-suit brought against him is of a particular nature, but not if it is of some other nature, seems rather illogical. But however that may be, the language of the Legislature is clear and the Court can only give effect to it."²

10. Suits under cl. (w):—(1) R sued L in the Court of the First Class Sub-Judge of Satara to recover from him the sum of Rs. 176 on taking an account of cloth alleged to have been taken by him from R's shop at Satara for sale in the surrounding villages under an agreement of service. The suit falls under this clause.³

(2) D sued K in the Court of the Sub-Judge of Junnar to enforce the payment of Rs. 37 due on a bond to secure Rs. 30. This sum of Rs. 30 consisted of Rs. 5 the value of *bajri* supplied by D to K and Rs. 25 interest on a previous mortgage bond. This suit, being on a written engagement for the payment of money falls under S. 3 (w).⁴

(3) G sued K in the court of the First Class Sub-Judge at Satara to recover from him Rs. 50 as being the amount spent by him on account of K towards the worship of a family temple which was to be worshipped by G and K in

¹ Tahilram v. Magnelal, 23 S. L. R. 365=117 I. C. 150=A. I. R. 1923 Sind 170.

² Essa Abdulla v. Khatyabi, 33 Bom. L. R. 13.

³ Laxman v. Rampirabai, 1897 P. J. 290.

⁴ Dipchand v. Kashi, 1881 P. J. 116. Dulichand v. Dhondhi, 5 Bom. 184=1880 P. J. 277.

alternate years, K not having paid the amount of his share towards the worship, G had to spend the same. Neither of the parties was an agriculturist. The suit, being a suit for the recovery of money due to the plaintiff on account of money paid for the defendant, falls under S. 3 (w).¹

(4) K sued S, an agriculturist, in the Court of the Second Class Sub-Judge at Karad to recover from him Rs. 60 which K had spent on behalf of S towards the expenses of an idol. The suit falls under S. 3 (w) and no appeal lies from a decree in the suit.²

(5) A suit based on commission agency accounts falls under S. 3 (w).³

11. Suits under clause (x):— Under this clause come (i) suits for money due on contracts other than those mentioned in cl. (w); (ii) suits for rent; (iii) suits for moveable property, or (iv) for the value of such property, and (v) suits for damages. This clause like cl. (w) applies to non-agriculturists also.⁴ A suit properly falling under cl. (x) does not cease to be so though the question of title is incidentally decided in the suit.⁵ Cases for redemption of a pledge fall under this clause.⁶

Rent:—The word 'rent' used in this clause must be taken in its ordinary acceptance i. e. something agreed upon to be paid in consideration of the transfer of a right to enjoy immovable property. It would not include *mamuli judi* (money due on account of Deshmukhi allowance) payable to an Inamdar,⁷ nor would it include land revenue.⁸

Illustrations.

(1) X sues K in the Court of the First Class Sub-Judge at Satara to redeem a gold ornament alleging that it had been pledged with the applicant for Rs. 154. Neither of the parties is an agriculturist. This suit is of the nature of a suit for the recovery of moveables and it falls under S. 3 (x).⁹

(2) A, a pleader sues K to recover from him the fees due to him in a previous suit. The suit is one on an implied contract and falls under cl. (x).⁹

1 Ganesh v. Krishnaji, 14 Bom. 387 = 1883 P. J. 336. See this case above under 'Application of this Act.'

2 Sitaram v. Shri Khandoba, 16 Bom. L. R. 756.

3 Gulam Hussain v. Fatib, 25 I. C. 28.

4 See above: Application of this Act.

5 Shidu v. Ganesh, 16 Bom. 128.

6 Kashiram v. Hirachand, 15 Bom. 30 = 1890 P. J. 139; Milkimal v. Hussein, A. I. R. 1934 Sind. 65.

7 Narayan v. Gangadhar, 1888 P. J. 283.

8 Sheik Gulam v. Kashinath, 25 Bom. 244 = 2 Bom. L. R. 795.

9 Rango v. Kalu, 1895 P. J. 221.

(3) S sued R to recover from him one-fourth share in the emoluments received by R for reading Purans before a deity, he being an owner of one-fourth share in the watan, and having performed the service proportionately to his share. This suit is based on an implied contract by R to pay S his share of the emoluments, and hence it falls under S. 3 (x).¹

(4) G sued S to recover from him Rs. 30 on account of rent for a certain piece of land. In support of his claim G relied on his title as a mirasdar of the land. S disputed G's title to the land. The Sub-Judge allowed G's title to the land, and so allowed G's claim. Here the suit falls under S. 3 (x) though the question of G's title is incidentally raised and decided in this case.²

(5) G sues C to recover money due on a promissory note and seeks to enforce his charge on a car pledged by C. This is a suit on a pledge and it falls under S. 3 (x) and not under 3 (w).³

12. Suits not under clauses (w) or (x):— For a suit to fall under either clause (w) or (x) of this section there should be some dealing between the parties or some contractual engagement. This is clear from the words "written or unwritten engagement" in cl. (w), and the words "contracts other than above" in cl. (x). So if there is no 'contractual engagement' between the parties the suit will fall under neither of these clauses. Thus a suit for land revenue does not spring from contractual engagement and a claim in respect thereof is not one for rent or damages within the meaning of this section.⁴ Similarly a suit by an Inamdar of a village to recover from the holder of certain Inam lands in the village a certain sum as *mamuli judi* (i. e. money due on account of Deshmukhi allowance) does not fall under this section. For such an amount is not payable under any written engagement; it partakes of the nature of a cess or tax imposed on the land; and it cannot be said that the defendant agreed to pay it any more than the ordinary tax-payer can be said to have agreed to pay a tax imposed upon his property by the State.⁵

13. Suits under clauses (y) and (z):— Both these clauses deal with suits relating to *immoveable* property. Clause (y)

1 Shankarbhat v. Raghunathbhat, 1892 P. J. 288.

2 Shidu v. Ganesh, 16 Bom. 128 = 1891 P. J. 114.

3 Gulam Husain v. Clara D'Souza, (1928) 31 Bom. L. R. 288.

4 Shaikh Gulam Jilane v. Kashinath, (1900) 25 Bom. 244 = 2 Bom. L. R. 795.

5 Narayan v. Gangadhar, 1888 P. J. 288.

deals with suits for foreclosure, possession, sale, or foreclosure and sale of mortgaged property when the defendant or one of the defendants is an agriculturist; and clause (z) deals with suits for redemption of mortgaged property when the plaintiff or one of the plaintiffs is an agriculturist. The following rules are common to cases under both the clauses.

14. Mortgaged property:— The expression mortgaged property in clauses (y) and (z) of S. 3 means only immoveable property. It does not apply to moveable property.¹

The term 'mortgage' is defined as "the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability."² But the expression mortgaged property is not used here by a technical consideration of what in a lawyer's point of view constitute a mortgage. It should be read in its ordinary popular sense.³

The Court under such circumstances should consider the true intention of the parties. It must ascertain whether the property comprised in the bond is made security for an existing debt. If on a consideration of all the circumstances the Court comes to the conclusion that it is a mortgage, the name given by the parties to the contract is immaterial. The question must be decided not by reference to the name by which the particular contract was called, but according to the true construction of the document itself and the internal evidence it furnishes of the intention of the parties.⁴ If the parties themselves designate the transaction as a mortgage, it may be assumed that they believed themselves to be clothed with the rights and remedies incidental thereto.⁵

The words 'mortgaged property' in these clauses must not be taken to mean admittedly mortgaged property. The rules laid

¹ Kashiram v. Hirachand, 15 Bom. 30.

² S. 58 (a) Transfer of Property Act, IV of 1882.

³ Rama v. Yesu, 1896 P. J. 281 following Mahipatrao v. Gambhirmal, 1896 P. J. 141. Milkimal v. Hussein,

A. I. R. 1934 Sind. 65. See also cases on this point given under S. 22.

⁴ Balkrishnadas v. W. F. Legge, (1899) 22 All. 149.

⁵ Tukaram v. Ramchand, 26 Bom. 252 = 3 Bom. L. R. 778 (F. B.).

down in this Chapter apply even where the mortgage is denied.¹ But these provisions will not apply where there is even no allegation of a mortgage, but the plaintiff's claim is based on dispossession.²

Illustration.

L mortgaged his lands to H. On L's death accounts were taken of the transaction and it was agreed that H should enjoy the income of the property for a term of 61 years at the end of which it should be restored to R the son of L. Here the transaction amounts to a mortgage and R can sue for redemption under the provisions of this Act.³

15. An Agriculturist assignee can sue under these Clauses:— Under cl. (y) it is necessary that the defendant or one of the defendants should be an agriculturist; and under clause (z) the plaintiff or one of the plaintiffs must be an agriculturist. But these words are not limited to an agriculturist who is himself the original mortgagor or mortgagee. They would equally apply to an assignee who is an agriculturist.⁴ It is even immaterial whether the original party to the transaction was an agriculturist or not.⁵ "It may be that certain inconveniences will arise from the construction of the enactments we are considering according to their literal sense, but that is not a reason for our amending the work of the Legislature according to our notions of fitness."⁶

Illustration.

The land originally belonging to V was mortgaged by him to B. Subsequently the same was sold in execution of a decree against V and was purchased by A. A sues B for redemption and claims that accounts should be taken under S. 12 of the profits received by B. A being an agriculturist the suit falls under this section, and he is entitled to the privileges of Ss. 12 and 13. In this case V also was an agriculturist. But the result would have been the same even if V was a non-agriculturist.⁵

1 *Amrita v. Naru*, 13 Bom. 489 = 1888 P. J. 265.

2 *Mulchand v. Ravji*, 1883 P. J. 184; *Krishnaji v. Hari*, 6 Bom. L. R. 558 = 28 Bom. 635.

3 *Rama v. Yesu*, 1896 P. J. 284.

4 *Dyanu v. Apa*, 1893 P. J. 271;

Annaji v. Bapuchand, 7 Bom. 520 = 1883 P. J. 274.

5 *Shripati v. Sitaram*, 1887 P. J. 296.

6 West J. in 7 Bom. 520 supra.

7 *Annaji v. Bapuchand*, 7 Bom. 520.

16. Mortgage in the form of sale :—The provisions of this Chapter are applicable even to a transaction which is really a mortgage though it is made in the form of a sale.¹ The rules for deciding whether a transaction is really a sale or is a mortgage in the form of a sale, are given under S. 10 A.

17. Awards do not fall under this section :—An application to file an award under the C. P. Code, 1908, is not a suit within the meaning of S. 3, if it can be said to be a suit at all. For a suit contemplated by this Act is one in which the Court is required to do something which the Act by necessary implication forbids in the case of an application to file a private award. It is in truth an application to have legal effect given to a legal decision already arrived at by a judge chosen by the parties. The result is that when a decree is passed in terms of an award arrived at on arbitration out of Court, the provisions of Ss. 12, 13, 15B, 20, 71 etc. cannot be applied, because these provisions apply only when the suit falls under S. 3² (For a complete discussion see notes on this subject under S. 12 and S. 15 B.).

Illustration.

A obtained a decree against G based on an award arrived at on a reference to arbitrators without the intervention of the Court. The terms of the award were that G should pay A Rs. 700 with interest and in case of his failure to do so, the property mortgaged was to be sold. A applied to execute the decree and G prayed for instalments under S. 15 B. The application to pass a decree in terms of an award is not a suit under S. 3 (y) and so G is not entitled to the benefit of S. 15 B.³

18. The term 'suit' includes status of parties :— For a suit to fall under cl. (y) the defendant or one of the defendants must be an agriculturist, and under clause (z) the plaintiff or one of the plaintiffs must be an agriculturist. The description of suit in S. 3 is not confined to the relief claimed in the suit, but also includes the status of the parties, and the parties must be agriculturists at the time of the suit. If a party is not an agriculturist

¹ Savant v. Bharmappa, 35 Bom. L. R. 604; see case under S. 15 D;

² Mohan v. Tukaram, 21 Bom. 63 = 1895 P. J. 435; Gangadhar v. Mahadu, 8 Bom. 20; Govindrao v. Ambalal, (1911) 13 Bom. L. R. 352 = 35 Bom. 310; Laxman v. Ramabai, (1925) 28 Bom. L. R. 736 = 50

Bom. 236; Hotchand v. Kishinchand, 83 I. C. 548 = 17 S. L. R. 178 = A. I. R. 1924 Sind 23.

³ Govindrao v. Ambalal, 13 Bom. L.R. 352; for other cases and further discussion see Comment on Ss. 12, 13 and 15 B.

at the time of the suit, but becomes so subsequently, the 'suit' cannot be said to be of the nature described in S. 3 and the party cannot claim the benefit of S. 15 B.¹ And if owing to the absence of plea of status on the part of the defendant even where he raises other pleas, the Court passes an *ex parte* decree without examining him and the plaintiff under Ss. 7 and 12, the Court must be deemed to have decided by necessary implication that the defendant is not an agriculturist; the defendant cannot in execution proceedings of such a decree plead that he was an agriculturist at the time of the decree.²

19. **Suits under clause (y)**— Under this clause a suit can be brought for the possession of mortgaged property from the mortgagor. But the suit will not fall under this clause if the possession is asked of leased property from the lessee even though the relationship of mortgagor and mortgagee subsisted between them,³ or if it is asked from a person who is not the mortgagor, and an incidental reference to the mortgage in the plaint does not affect the question.⁴ But the words of this clause must not be very strictly construed. Reading this section with S. 10A, we must conclude that it appears that the intention of the Legislature was that the nature of the suit under clause (y) should not be determined by the frame of the plaint, but by the allegations of the parties which, if proved, raise the question of mortgage or no mortgage; and hence though the suit is framed as one on a lease, if from the allegations of the parties it is found that there is a mortgage, the suit falls under this clause.⁵ A suit to recover money charged on immoveable property falls under the specific description of this clause.⁶

Illustrations.

(1) K sued H to recover possession of the property in suit, alleging that it was mortgaged to him by the owner N, that he was put in possession and was wrongfully dispossessed by H. Here the possession is asked from H who

1 Dewu v. Rewappa, (1922) 24 Bom. L. R. 370 = 46 Bom. 964.

2 Lawrence Philip & Co. v. M.R.F. Nazareth, 78 I. C. 806.

3 Mulchand v. Raoji, 1883 P. J. 184.

4 Krishnaji v. Hari, 28 Bom. 635 =

6 Bom. L. R. 588, following Mulchand v. Raoji, supra.

5 Gautam v. Malhari, (1916) 18 Bom. L. R. 247 = 40 Bom. 337.

6 Nurmahomed v. Sayad, I. S. L. R. 246.

is not the mortgagor but a third person merely. The suit does not fall under Chapter II of this Act.¹

(2) M sued R to recover from him Rs. 35 being the value of a lease, which he had failed to pay, and to recover possession of the land leased out to him. Here the relation between M and R is not of a mortgagor and mortgagee, but that of lessor and lessee. The suit does not fall under S. 3 (y).²

(3) Ganesh sold his lands to Gautam. On the same day Gautam leased the lands to Bapu. Bapu passed further rent notes to Gautam from time to time. Gautam now sues Bapu for possession of the leased property. Bapu alleges that the land in dispute belonged to him, but was purchased benami in the name of Gautam because Gautam was the Sawkar who advanced the purchase money; and that the rent notes were to secure the interest on the money lent. Here from the defendant's allegation the suit appears to be based on a mortgage, and though it is framed as on a lease, it falls under S. 3 (y).³

20. Suits under cl. (z).—An agriculturist-plaintiff can sue for redemption under this clause. But for the suit to be governed by the provisions of this clause it is necessary that the plaintiff should be an agriculturist, i. e. *admitted or proved* to be an agriculturist; it is not sufficient that he merely claims to be one. When the Court finds that he is not an agriculturist (and this point, if at issue, ought to be raised and decided as a preliminary one), the Court has no jurisdiction to proceed under this Chapter.⁴

But it is not necessary that there should be an admitted mortgage. A suit will lie under this clause even if the mortgage is denied and has to be proved.⁵ But a suit will not lie under this clause if the suit is for redemption in name only, but is in reality something different, e. g. a suit to recover the property of which the rightful owner has been deprived by fraud,⁶ or, 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,⁷ or if it is a suit for ejectment of a person in possession, there being no allegation of

1 Krishnaji v. Hari, 28 Bom. 635.

2 Mulchand v. Ravji, 1893 P. J. 184.

3 Gautam v. Malhari, 18 Bom. L. E. 247.

4 Lakshman v. Ramchandra, 23 Bom. 321=1898 P. J. 236.

5 Savant v. Bharmappa, (1938) 35 Bom. L. R. 604.

6 Musammat Bachi v. Bikchand etc., (1910) 13 Bom. L. R. 56 (P. C.).

7 Chanabhai v. Ganpati, 18 Bom. L. R. 763.

mortgag,¹ or if it is a suit for redemption after *setting aside a sale-deed* and a Court's decree whereby the mortgaged properties were freshly mortgaged; for, the suit contemplated by this section is a mortgage suit either simpliciter or primarily or substantially.²

Similarly, where the manager of a joint Hindu family first mortgages the family property and then sells the equity of redemption in the same, one member of the joint family cannot absolutely ignore the sale and sue for redemption of the property under this section.³

Illustrations.

1. R sued D to redeem certain property claiming that he was an agriculturist. The Sub-Judge held that R was not an agriculturist, and that he was not the owner of the equity of redemption. As R was not *proved* to be an agriculturist, his suit cannot fall under S. 3 (z).⁴

2. Three persons, A, B and C (members of a joint family), mortgaged 500 acres of land to D and M in 1892. In 1894 B and his brother X sold 122 out of the 500 acres to D and M for the balance of the consideration of the original mortgage, and the mortgagors obtained possession of the remaining land. A and C died. In the meanwhile D and M sold these 122 acres of land to K. The heirs of A and C sue K to redeem their two-third share of the 122 acres of land, as being themselves members of a joint family, and contend that B and X had no right to sell the land in 1894, and so the mortgage of 1892 must be regarded as subsisting. Here the suit though in name for redemption is in reality a suit to recover property of which the rightful owners have been deprived by fraud. The suit cannot lie under S. 3 (z).⁵

3. P, the father of G mortgaged five survey numbers to C in 1900. After P's death in 1904 his wife sold two out of the five survey numbers to A, the son of C. G, P's son, was a minor at the time of that sale. G sued C in 1912 to redeem the mortgage made by his father praying that the sale of 1904 being fraudulent was not binding on him. This in effect is a suit to set aside the sale as being fraudulent, and it does not fall under S. 3 (z).⁶

4. S sued A, B and C to recover possession of certain lands, alleging that they had been mortgaged by him to the father of A and B, but that the mortgage-debt had been satisfied by the profits of the lands. C was joined in the suit because he was in possession of the land. Here the suit is a suit for redemp-

1 Sakharam v. Shripati, 16 Bom. 183 = 1891 P. J. 125.

2 Vinayakrao v. Shamrao, (1916) 18 Bom. L.R. 708 = 40 Bom. 655, following Mt. Baochi v. Bikhchand, supra.

3 Chandikaprasad v. Shivappa, 30 Bom. L. R. 1099.

4 Laxman v. Ramchandra, 23 Bom. 321 = 1898 P. J. 236.

5 Musammatt Baohi v. Bikhchand, 13 Bom. L. R. 56 (P. C.).

6 Chandabhai v. Ganpati, 18 Bom. L. R. 763.

tion under clause (z) against A and B, but against C it must be treated merely as a suit for ejectment and so the suit against C does not fall under clause (2).¹

5 In 1894, B mortgaged his property to V for Rs. 500. In 1900, by a consent decree the mortgaged property (with the exception of S. No. 50) was again mortgaged to V; and on the same day S. No. 50 was sold to V for Rs. 1000. In 1911 B sued V to redeem the mortgage of 1894 alleging that the consent decree of 1900 was obtained by fraud. It was held that the suit was not tenable under this Act unless the decree was set aside by a separate suit.²

4. Where a Subordinate Judge of the first class and a Subordinate Judge of the second class have ordinary jurisdiction in the same local area, every suit referred to in section 3, clause (b), and instituted in such local area shall, if the amount or value of the subject-matter of such suit exceeds one hundred rupees and does not exceed five hundred rupees, be instituted in the Court of the Subordinate Judge of the first class.

1. Extent :—This section extends only to the districts of Poona, Satara, Sholapur and Ahmednagar. *Vide* the table given under S. 1.

2. Object of this Section :—The general rule about the institution of suits is laid down in S.15 of the Code of Civil Procedure, 1908, which runs thus : "Every suit shall be instituted in the Court of the lowest grade competent to try it." According to that rule, where a Subordinate Judge of the First Class and a Subordinate Judge of the Second Class have ordinary jurisdiction in the same local area, a suit below Rs. 5000 in value shall have to be instituted in the Court of Subordinate Judge of the Second Class and thus the application of this Chapter to suits below Rs. 500 in value when they are instituted in the Court of the Subordinate Judge of the First Class would be prevented. To preserve the jurisdiction of these latter Courts in applying the provisions of this Chapter, it is here laid down that where a Subordinate Judge of the First Class and a Subordinate Judge of the Second Class have ordinary jurisdiction within the same local limits, suit under S. 3 Clause (b) must be instituted in the Court of the Subordinate Judge of the First Class only.

1 Sakharam v. Shripati, 16 Bom. 183=1891 P. J. 125. | 2 Vinayakrao v. Shamrao, (1916) 18 Bom. L. R. 708=40 Bom. 655.

3. Instituted:— The requirements of this section are complied with when a suit has been *filed* in the Court of the Subordinate Judge of the First Class. The word 'instituted' does not mean 'heard and determined' or 'tried.' The Judge can under S. 23 of Act XIX of 1869 (the Bombay Civil Courts Act) make over the suit to the Subordinate Judge of the Second Class who is deputed to his Court to assist him in the disposal of suits on his file.

Illustration.

N sued D to establish his title and to recover a moiety of cash allowance payable to him from the Mamlatdar's treasury at Satara. The claim was valued at Rs. 455. The plaint was filed in the Court of the First Class Subordinate Judge at Satara who transferred the case for trial to the Joint Subordinate Judge of the Second Class. Can the latter Judge try the suit on merits? Yes; because this section only requires that the suit should be 'instituted' in the Court of the Subordinate Judge of the First Class.¹

4. Ordinary jurisdiction in the same local area:— This section is based on the assumption that there are some areas in which both the First Class Subordinate Judge and the Second Class Subordinate Judge exercise ordinary local jurisdiction and a suit can be instituted in either Court indifferently. But as was pointed out by the Commission appointed in 1912 to enquire into the working of the D. A. R. Act 'one local area has but one Court in which all suits have to be instituted, though there may be more than one Sub-Judge to try them.' The Commission, therefore, recommended the repeal of this section.²

5. Notwithstanding anything contained in the
 Subordinate Bombay Civil Courts Act, 1869, section
 Judges not to act 28, no Subordinate Judge shall be invested
 as Judges of Small Cause Court. with the jurisdiction of a Judge of a
 Court of Small Causes.^[3]

1 Local Extent:—The section extends only to the districts of Poona, Satara, Sholapur and Ahmednagar. *Vide* the table of Local Extent given under S. 1.

[3] Words repealed by Act XVI of 1895 are omitted.

1 Manaji v. Narayanrao, 19 Bom. 46
 = 1894 P. J. 1.

2 See Report of the Commission
 appointed to enquire into the work-
 ing of the D. A. R. A. 1912.

2 Old Law:—Act XVI of 1835 repealed the latter part of the section which ran as follows:—“And any such jurisdiction heretofore conferred on the Subordinate Judge shall be deemed, except as regards suits instituted before the said first day of November, 1879, to have been withdrawn.”

3. S. 28 Bombay Civil Courts Act:—This section runs as follows:—

“The Governor of Bombay in Council may invest, within such local limits as he shall from time to time appoint, any Subordinate Judge with the jurisdiction of a Court of Small Causes for the trial of suits cognizable by such Courts up to such amount as he may deem proper, not exceeding in the case of any Subordinate Judge of the first class one thousand rupees, and in the case of any Subordinate Judge of the second class three hundred rupees.

Power to invest Subordinate Judges with small cause powers.

The Governor of Bombay in Council may, whenever he thinks fit, withdraw such jurisdiction from any Subordinate Judge so invested.”

4. Object of this section:—This section is intended to allow a thorough investigation in suits to which agriculturists are parties, and hence it lays down that no Subordinate Judge shall (for the purposes of this chapter), be invested with the jurisdiction of a Judge of a Court of Small Causes. But at the same time chapter II invests all Subordinate Judges in the districts to which this Chapter applies, with powers more or less summary, the powers being enlarged so as to include mortgage cases. No appeal lies from any decree or order in any suit to which this Chapter applies (S. 10).

6. The Local Government may, from time to time, by notification in the local Gazette, direct that any class of suits which a Subordinate Judge would be precluded from hearing by section 12 of [a] Act XI of 1865 (to consolidate and amend the law relating to Courts of small Causes beyond the local limits of the ordinary original civil

Jurisdiction of Subordinate Judge and Small Cause Court.

[a] See now s. 16 of the Provincial Small Cause Courts Act, 1887 (IX of 1887).

jurisdiction of the High Courts of Judicature), shall be heard and determined by him and not otherwise, and may, by a like notification, cancel any such direction.

1. Extent:—This section now extends to the Province of Sind and all other parts of the Bombay Presidency except Aden and the city of Bombay. *Vide* the table of local extent given under S. 1.

2. Object of this section:—Under S. 16 of the Provincial Small Cause Courts Act, the Courts of Subordinate Judges are precluded from hearing suits which are cognizable by courts of Small Causes. This section allows the Local Government to authorise the Subordinate Judges to hear and try such suits when they fall under this Chapter.

3. Section 16 of the Provincial Small Cause Courts Act 1887 (IX of 1887) runs thus:—

“ Save as expressly provided by this Act, or by any other enactment for the time being in force, a suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable. ”

4 Notifications under this section :—

Description of suits to be heard by the Subordinate Judge of Poona :—It is directed that any suit of the descriptions mentioned in section 3, clauses (w) and (x) of the said Act, which the Subordinate Judge of Poona would be precluded from hearing by section 12 of Act XI of 1865 shall, if the defendant or any one of the defendants, not being merely a surety of the principal debtor, is an agriculturist, be heard and determined by him and not otherwise. (Notification No. 7957 dated the 22nd November 1879, B. G. G. for 1879, Part I. p. 934).

Description of suits to be heard by Subordinate Judges of Hyderabad, Shikarpur, Hala and Larkhana :—It is directed that any suits of the descriptions mentioned in clauses (w) and (x) of S. 3 of the said Act which the Subordinate Judges of Hyderabad, Shikarpur, Hala and Larkhana, respectively would ordinarily hear as Courts of Small Causes under the jurisdiction in that behalf conferred on them under S. 28 of the Bombay Civil Courts Act 1869, shall, notwithstanding the provisions of S. 16 of the Provincial Small Cause Courts Act 1887, be heard and determined by them in the exercise of their ordinary jurisdiction as suits which are not cognizable by a Court of Small Causes, and not otherwise [Notification No. 1664 dated 13th March 1901, B. G. G. for 1901, Part I, p. 490].

7. In every case in which it seems to the Court possible to dispose of a suit at the first hearing, the summons shall be for the final disposal of the suit.

Summons to be for final disposal of suit.

In every suit the Court shall examine the defendant as a witness unless, for reasons to be recorded by it in writing, it deems it clearly ^[a] unnecessary so to do.

Court to examine defendant as witness.

^[b]*Explanation.*—The compulsory examination of the defendant shall not be dispensed with merely by reason of the fact that the defendant has filed a written statement.

Synopsis of the Commentary.

1 Extent.	7 Unless.....it deems it
2 Old law.	clearly unnecessary.
3 Object of this section.	8 Explanation.
4 In every suit : Applicability of this section.	9 Payment of batta to the defendant.
5 The Court shall examine.	10 Summons for final disposal of suit.
6 The defendant.	

1. **Old Law:**—The word 'clearly' after the words 'it deems it,' and the Explanation to the section have been added by S. 6 of Act VI of 1895. These additions were made to emphasise the necessity of examining the defendant.

2. **Extent:**—This section now extends to the Province of Sind and all the districts of the Bombay Presidency except Aden and the City of Bombay. *Vide* the table of local extent given under S. 1.

3. **Object of this section:**—The Commission appointed to enquire into the Deccan riots of 1875 found that in Bombay generally, and in the Deccan in particular, the proportion both of uncontested suits and of *ex parte* decrees was unusually large. Thus, the proportion of suits decided *ex parte* in 1873-74 in the whole Presidency was 66 per cent of the whole number disposed

[a] The word "clearly" was added by Act VI of 1895, s. 6.

[b] This *Explanation* was inserted by Act VI of 1895, s. 6.

of. The Commission found that the principal reasons why suits to which a defence might be made were uncontested were, (1) the ignorance and the poverty of the debtor, (ii) his fear of the creditor and the desire to keep on good terms with him, and (iii) his inability to produce evidence. The fraud practised by the process-servers by arranging that the notice to appear should never reach the debtor, and the delay in disposal of contested suits owing to the Subordinate Judges being overworked were alleged to be other causes of the large number of *ex parte* decrees.¹

For protecting the interests of the agriculturist debtors the Act provides for a thorough investigation into the history and merits of their transactions. "The presence of the defendant being essential for the thorough investigation proposed, and the rayats being through various difficulties apt to leave their suits undefended, it has been provided (in this Section) that except for special reasons, no suit shall be decided *ex parte* but that the Court shall compel the defendant to appear."²

4. **In every suit:** *Applicability of this section:*— In districts to which the whole of Chapter II is applicable, the provisions of S. 7 will evidently apply to suits of the nature described in S. 3. But S. 7 is extended to all the districts of the Bombay presidency excluding Aden and the city of Bombay, while Chapter II is not so extended. Hence in districts where S. 7 alone is extended but not Chapter II, it becomes difficult to ascertain the precise meaning of the expression 'in every case.' The expression itself is too comprehensive, and is not followed by any qualifying words as are to be found in S. 10, to show that it has reference to suits to which Chapter II applies. Yet the words cannot be construed to apply to suits not of the nature described in S. 3, for to do so would be to give them a meaning which the legislature never intended. But in doing so, by the analogy to the construction placed on S. 3 in Ss. 11 and 12, the description of suits, given in S. 3 must be looked upon as illustrative merely,³ and the provisions of S. 7 must be applied to suits of the kind specified in S. 3, though *unlimited in value*.

5. **The Court shall examine:**—The provisions of this section and S. 12 about the examination of the defendant as a

¹ Report of the Deccan Riots Commission, 1876 pp. 72-78. for Act VII of 1879.

³ Tulshidas v. Virbasappa, (1880)

² Statement of objects and Reasons | ⁴ Bom. 624.

witness are mandatory, and the legislature imposes this duty upon the Court as a matter of public policy. It is not for the Court to enquire whether the procedure enjoined by these sections will result in any benefit to the party. It is not necessary that the party should insist in the lower Court on the procedure, and hence one cannot be estopped from doing so in appeal. The principle of estoppel has no application because the right to have the defendant examined and an account taken of past transactions is not one which the party can waive. It is a point of law and may be taken up for the first time even in second appeal.¹

As this examination is intended for a thorough investigation of the merits of the case, if after his examination, the defendant applies for having his witnesses summoned for proving his case as disclosed in the examination, the Court must summon the witnesses, though the defendant did not appear on the date first fixed for final hearing.² But where owing to the absence of pleas on the part of the defendant, the Court passes on *ex parte* decree without examining the parties under Ss. 7 and 12, the Court must be deemed to have decided by necessary implication that the defendant is not an agriculturist.³

In suits under the D. A. R. Act, the provisions of Ss. 7 and 12 should be first complied with and then issues framed. It is not right first to frame an issue like the following:—“Was the bond sued or passed for cash payment as alleged by the plaintiff” and then examine the parties. The object of S. 12 is that the Court should do its best to discover whether there is any defence on the ground of fraud, mistake, accident, undue influence, or otherwise, and issues are to be framed after the duty is discharged and not before.⁴

6. The defendant :— The word ‘defendant’ is wide enough and evidently refers to both agriculturist as well as non-agriculturist defendants. It would be wrong practice not to examine a defendant because he is described in the plaint as a non-agriculturist. The plaintiff creditor is presumably interested in representing an agriculturist defendant to be a non-agriculturist:

1 *Mussamat Begum v. Topanmal*, 3 S. L. R. 106=4 I. C. 593 (Read also the cases referred here) See also *Lalji v. Mahamad Ali*, 1 S. L. R. 75.
2 *Dulipchand v. Dhondi*, 5 Bom.

184=1880 P. J. 277.

3 *Lawrence v. M. R. F. Nazareth*, 78 I. C. 806=19 S. L. R. 247.

4 Civil Circulars issued by the High Court (1925) p. 147.

and hence in suits of the nature described in S. 3, it would be necessary to examine every defendant to ascertain whether he is an agriculturist or not. If the defendant is not present, though duly served, the Court issues a proclamation for his attendance before it proceeds further with the case.

7. Unless.....it deems it clearly unnecessary :—Though it is for the benefit of the agriculturist-debtor that he should be examined as a witness in every case against him, it may sometimes happen that he has no defence to offer, or not being a party to the transaction in dispute (viz. as being an heir or assignee of the original debtor) is not in a position to enlighten the Court on the history of the transaction. In such a case it is obviously undesirable to forcibly drag a man away from his home and his cultivation, possibly at a season when every day is of importance to him merely to compel him to appear when he could give no assistance to the Court. To remove this hardship, a discretionary power is conferred on the Courts to exempt the defendant in any particular case from personal appearance. But this discretion is to be used in very exceptional cases. The word 'clearly' and the 'explanation' have been added by subsequent legislation to very strongly emphasise the necessity of examining the defendant. Further, the reasons for such exemption must be recorded in writing.

8. Explanation :—The mere fact that the defendant has given a written statement is not sufficient to exempt him from personal appearance. " It is a favourite dodge with the Sawkar to get the defendant to file a written statement containing an admission of his liability and then keep him out of Court. It is for the purpose of not allowing such a dodge to be successful, and to enable the Court to see that the defendant has exercised an intelligent option in defending the suit, that this explanation has been inserted. "1

9. Payment of batta to the defendant :—The duty of the compulsory examination is imposed on the Court and not on the party. Besides, the provisions have been enacted in the interests of agriculturists. It could not therefore have been contemplated by the Legislature that the expenses of the compulsory attendance of the defendant should be paid by the plaintiff, or

1 Hon. Mr. P. M. Metha's speech- } Council for 1895.
Proceedings of the Supreme Legislative }

that any expenses are to be paid to the defendant for his attendance.¹ The Commission appointed in 1891 to enquire into the working of the D. A. R. Act had also recommended that the expense of enforcing the attendance of the defendant should not be thrown on the plaintiff.

10. Summons for final disposal of suit :— It was found by the Deccan Riots Commission of 1875 that the average duration of contested suits was over a year. The greater the duration of contested cases, the greater is the reluctance of agriculturists to defend their suits, as it means spending more money and time than they can afford.² The first clause of this section is intended to remove the hardship thus caused. The form of summons given below applies only to suits of a simple character which can at once be fixed for final disposal at the first hearing. They are suits against poor debtors who are agriculturists resident within the local jurisdiction of the Court.³

The provisions of this section give ample discretion to the Court to decide in each case whether the summons should or should not be issued for the final disposal of the suit at the first hearing, and there is no particular reason why such summons should be issued in redemption and account suits. If the summons be not for final disposal, the form prescribed has no application, and no difficulty need arise.⁴

Form of Summons.

Summons to Defendant in Suits under the Dekkhan Agriculturists' Relief Act (XVII of 1879).

(Title)

<p>To <i>Notice</i> :—Should you apprehend your witnesses will not attend of their own accord, you can have summonses from this Court to compel the attendance of any witness, and the production of any document that you have a right to call upon the witness to produce on applying to the Court at any time before the trial, depositing the necessary travelling and subsistence money.</p>	<p>dwelling at Whereas has instituted a suit against you for you are hereby required to appear in person before this Court to give evidence on the day of at the hour of A.M.</p>
--	---

1 Gangashankar v. Badhur, 33 Bom. 249=10 Bom. L. R. 1163.
 2 Report of the Deccan Riots Commission, p. 77.

3 Manual of Civil Circulars (1925) p. 146.
 4 Ibid.

As the day fixed for your appearance is appointed for a final disposal of the suit, you must be prepared to produce all your witnesses on that day: and you will bring with you which the plaintiff desires to inspect, and any documents on which you intend to rely in support of your defence.¹

You are further informed, that the said plaintiff has presented with his plaint the following document, namely:—

(Describe documents).

You are hereby required, within four days from the receipt of this summons, to file in this Court a written admission, signed by you, that the aforesaid documents are genuine, or within four days to appear in person and make such admission. If you fail to do this, you will be liable, whatever may be the result of the suit, to bear the expense which the plaintiff may incur in proving the aforesaid documents.

This admission may be made without prejudice to all other just grounds of defence.

Given under my hand and the seal of the court this

day of 19 .



Judge.

Where the court in its discretion under section 7 of Act XVII of 1879 does not issue the summons for the final disposal of the suit, in any suit for an account under section 16, or a suit for redemption or other suit the above form of summons should not be used.²

8 [*Written statements.*] Repealed by Act VI of 1895, s. 3.

¹ The following notice to be pasted on the above summons in cases where the plaintiff asks that this should be done.

² Manual of Civil Circulars, (1925) P. 166.

Old Law:—Section 8 was:—“In suits of the descriptions mentioned in S. 8, clauses (w) and (x), no party shall be entitled, without the permission of the Court to file a written statement.”

9. [Record of evidence.] Repealed by Act VI of 1895, s. 3.

Old Law:—Section 9 was “When the subject-matter of any suit does not exceed ten rupees in amount or value, it shall not be necessary to take down the evidence, or to make a memorandum thereof in manner provided by the Code of Civil Procedure; but in cases where the evidence is not so taken down, and no memorandum is so made, the substance of the evidence shall be stated in the judgment.”

10. No appeal shall lie from any decree or order passed in any suit to which this chapter applies.

Synopsis of Commentary.

- | | |
|---|--|
| <p>1. Extent.</p> <p>2. Object of this section.</p> <p>3. Similar provisions.</p> <p>4. Decree ... to which this chapter applies.</p> | <p>5. The plea of bar.</p> <p>6. No reference can be made if appeal lies.</p> <p>7. If the district judge finds the parties to be agriculturists.</p> |
|---|--|

1. Extent:—This section extends only to the districts of Poona, Satara, Sholapur and Ahmednagar. *Vide* the table of Local extent given under S. 1.

2. Object of this Section:—The suits coming under this chapter are comparatively of small value. To allow appeals from decrees passed in such suits would involve the agriculturists into much unnecessary trouble and expense. This section therefore lays down that no appeal shall lie from any decree or order passed in any suit to which this chapter applies. But at the same time, to protect the interests of agriculturists against incorrect decisions by the subordinate judges, three special safeguards are introduced in chapter VII. *Firstly: Inspection.* The District judge inspects, supervises and controls the proceedings of the Subordinate judges and munsifs (and also of the conciliators so long as the system of conciliation existed) and sees that the principles and policy of this Act are effectively carried out, (S. 50). *Secondly: Revision.* The power of revision vested in the High Court by S. 115 of the C. P. Code, 1908, is extended to the District Judge

who is enabled to call for and examine the record of any case, and correct failure of justice, (S. 53). *Thirdly: Sitting in Banco.* The District judge is enabled to stay the proceedings in any case pending in a subordinate Court, and to sit with the judge as a Bench to try it (S. 51).

During the debate over the Bill, it was pointed out in favour of substituting the system of revision for that of appeal that all the serious abuses and irregularities come to light in examination and revision, though many escape in appeal; that by the former, from fifty to sixty per cent of the cases tried are brought before the Court while by the latter the proportion is only three to four per cent; and that the mortgage cases in which the agriculturists are involved being of a simple nature, it is not necessary to provide appeals in such cases.

3. Similar provisions :—As the tendency of this Act is to bar appeals, provisions similar to the one contained in this section are to be found in Chapter IV (Insolvency, see S. 33), Chapter V (Village-Munsifs, see S. 36), Chapter VII (Superintendence and Revision, see S. 53), and the old S. 73 (Decision as to whether a person is an agriculturist, final) which is now repealed.

4. Decree.....to which this Chapter applies :—The provision of this section applies and an appeal is barred only when the decree or order is made in a suit to which this Chapter applies. For the conditions under which this Chapter applies see the commentary on S. 3 and the cases given thereunder.

Illustrations.

Where an appeal does not lie :— (1) A who is an agriculturist sues to redeem certain lands of the value of more than Rs. 100 alleging that they were mortgaged to N for Rs. 50 and that the debt had been satisfied out of the profits of the property. The Sub-Judge finds on evidence that the allegations are true and passes a decree for possession. Here the value of the subject-matter of the suit is less than Rs. 100, though the value of the property is more than Rs. 100. Hence the suit falls under S. 3, and no appeal lies from the decree.¹

(2) R sued L in the court of the First Class Sub-Judge at Satara to recover the sum of Rs. 176 on taking account of cloth alleged to have been taken by L from R for sale in the surrounding villages. The Sub-Judge dismissed the

¹ Amrita v. Naru, 13 Bom. 489= | 11 Bom. 591 and Govind v. Kallu, 2
1888 P. J. 265 (Ruchand v. Balwant, | All. 778 relied on).

suit holding that the agreement for sale was not bona fide and that the suit was time-barred. This suit falls under S. 3 and no appeal lies therefrom.¹

(3) G sues S to recover from him Rs. 30 for two years' rent of a certain piece of land relying upon his title as a Mirasdar of the land. S disputed G's title as Mirasdar. The Sub-Judge allowed G's claim. Here though the question of title was *incidentally decided*, the suit falls under S. 3 (x) and no appeal lies from the decree.²

(4) A, representing an idol, sued B an agriculturist to recover from him Rs. 50 which A had spent for B towards the expenses of the idol. The suit falls under S. 3(w) and no appeal lies from the decree passed in the suit.³

Where an appeal lies:—(1) As the provisions of S. 3 are not applicable to the cases heard by an Assistant Judge, an appeal lies against the Assistant Judge's decision.⁴

(2) S sues K to recover from him Rs. 48 for the assessment of certain Jagir lands. The Sub-Judge decrees the claim of S. This suit does not fall under S. 3(w) as that clause applies only to contractual engagements. An appeal lies from the decree.⁵

(3) S sues A and C for redemption of certain lands, and C for *ejectment* as being in possession of the land. The Sub-Judge decrees S's claim. Here the suit against C does not fall under S. 3 and hence an appeal lies.⁶

(4) When in a suit heard by a Sub-Judge of the Second Class, the subject-matter of the suit exceeds Rs. 100 in value, and the parties have not agreed that the provisions of Chapter II should apply to the case, an appeal lies from the decision of the Sub-Judge.⁷

5. The plea of bar:—When a suit falls under S. 3, the provisions of Chapter II apply to it, and an appeal from the decree in such suit is barred. The plea that an appeal is thus barred, being a point of law, can be taken by the respondents for the first time at the *hearing* of the appeal, though the Court of first instance has decided that the suit does not fall under Ch. II, and though there is no appeal or memorandum of objections filed.

¹ Laxman v. Rampiarbai, 1897 P. J. 290 (Kashiram v. Hirachanda, 1890 P. J. 139 followed. In this latter case the suit was for redemption of a pledge. Both parties were non-agriculturists. Yet the suit was held to be under S. 3).

² Shidu v. Ganesh, 16 Bom. 128 = 1891 P. J. 114.

³ Sitaram v. Shri Khandoba, (1914) 16 Bom. L. R. 756.

⁴ Mahadji v. Ramchandra, 1885 P. J. 159.

⁵ Sheikh Gulam v. Kashinath, 25 Bom. 244 = 2 Bom. L. R. 735, Jenkins C. J. (Similarly it was held in Narayan v. Gangadhar, 1888 P. J. 283 that a suit by an Inamdar to recover certain sum as Mamuli Judi does not fall under S 3 (b) and hence an appeal lies).

⁶ Sakharam v. Shripati, 16 Bom. 188 = 1891 P. J. 125.

⁷ Madhavrao v. Ravji, 1885 P. J. 150.

against such decision.¹ Again, if an appeal is filed in the Court of the District Judge against the decision of the Sub-Judge, but it is not urged there that no appeal lies, that point can still be taken up in the High Court.²

Illustration.

A sues N for redemption of certain property worth more than Rs. 100 alleging that it was mortgaged to N for Rs. 50 but that the mortgage was paid off. The Sub-Judge decreed A's claim awarding him possession, and held that as the value of the property was more than Rs. 100, Ch. II did not apply to the case. N appealed to the District Judge who held that the mortgage was not proved and reversed the decree. A appeals to the High Court and now pleads for the first time that as the suit was governed by S. 3 no appeal lay to the District Judge. A can raise the point for the first time in second appeal.³

6. No reference can be made if appeal lies:—If an appeal lies from the decision of a suit, viz., because the value of the subject matter in dispute exceeds Rs. 500 or because it exceeds Rs. 100 but does not exceed Rs. 500 and the parties have not agreed that the provisions of Chapter II should apply to the suit,⁴ or because the suit is heard by an Assistant Judge,⁵ no reference can be made by the trial Judge to the High Court about any doubtful point arising in the suit. For, according to S. 113 of the C. P. Code, 1908, a reference can be made to the High Court only where the decree would be final.

7. If the District Judge finds the parties to be agriculturists:—If at the hearing of a suit (which would otherwise fall under S. 2) the defendant does not raise the plea of agriculturist, but it is raised and tried in appeal by the District Judge who finds the defendant to be an agriculturist, the District Judge has no further jurisdiction to dispose of the case in appeal. After the finding (that the defendant is an agriculturist) the case must be dealt with in revision only.⁶

1 Rajai v. Appaji, 1868 P. J. 220.

2 Amrita v. Naru, 13 Bom. 489 = 1888 P. J. 265.

3 Ibid.

4 Madhavrao v. Ravji, 1885 P. J. 150.

5 Mahadji v. Ramchandra, 1885 P. J. 159.

6 Janardan v. Ananta, 1896 P. J. 396.

CHAPTER III.

OF SUITS AND OTHER PROCEEDINGS TO WHICH
AGRICULTURISTS ARE PARTIES.

[^a] 10A. Whenever it is alleged at any stage of any suit or proceeding to which an agriculturist is a party that any transaction in issue entered into by such agriculturist or the person, if any, through whom he claims was a transaction of such a nature that the rights and liabilities of the parties thereunder are triable wholly or in part under this chapter, the Court shall, notwithstanding anything contained in section 92 of the Indian Evidence Act, 1872, or in any other law for the time being in force, have power to inquire into and determine the real nature of such transaction and decide such suit or proceeding in accordance with such determination and shall be at liberty, notwithstanding anything contained in any law as aforesaid, to admit evidence of any oral agreement or statement with a view to such determination and decision:

Provided that such agriculturist or the person, if any, through whom he claims was an agriculturist at the time of such transaction:

Provided further that nothing in this section shall be deemed to apply to any suit to which a *bona fide* transferee for value without notice of the real nature of such transaction or his representative is a party where such transferee or representative holds under a registered deed executed more than twelve years before the institution of such suit.

[^a] Section 10A was inserted by Bombay Act II of 1907, s. 2.

Illustrations.

(a) A landlord sues for possession of land leased by him to an agriculturist. The defendant alleges that he mortgaged the land with possession to the lessor, who is entitled to its possession only as such mortgagee and not as owner, and asks that he may be allowed to redeem the mortgage without being ejected. The Court may admit evidence on this allegation, and, if satisfied that it is correct, may decline to eject the defendant as tenant, and allow the suit to be converted into one for redemption of the mortgaged property.

(b) An agriculturist sues to redeem property alleged to have been mortgaged by a deed in the form of a lease. The Court may admit evidence of the intention of the parties outside the deed in order to determine whether the transaction was a mortgage or a lease, and if satisfied that the transaction was a mortgage may enforce the deed as a mortgage deed.

(c) A money-lender sues to enforce a sale-deed entered into by an agriculturist. It is alleged that there was a contemporaneous oral agreement that the transaction should be deemed to be a mortgage. The Court may admit evidence of such oral agreement, and if satisfied of the existence of the agreement may decline to enforce the deed as a sale-deed.

(d) An agriculturist sues to redeem property alleged to have been mortgaged by a deed in the form of a sale. The Court may admit evidence of the intention of the parties outside the deed in order to determine whether the transaction was a mortgage or a sale, and if satisfied that the transaction was a mortgage may enforce the deed as a mortgage-deed.

Synopsis of the Commentary.

- | | |
|---|---|
| <p>1. Extent.</p> <p>2. Object of the section.</p> <p>3. Retrospective operation.</p> <p>4. Any suit, Scope of this section.</p> <p>5. At any stage.</p> <p>6. Agriculturist a party.</p> <p>7. Triable under this chapter.</p> <p>8. Notwithstanding S. 92 or any other law.</p> | <p>9. Sale or mortgage.</p> <p>10. Suit to set aside not necessary.</p> <p>11. Another suit on a different cause of action.</p> <p>12. Proviso 1. Agriculturist at the time of transaction.</p> <p>13. Proviso 2. Bona-fide transferee.</p> |
|---|---|

1. **Extent:**—This section now extends to the whole of Bombay Presidency and Sind (except Aden and the city of Bombay). *Vide* the table of local extent given under S. 1.

2. **Object of this section:**—S. 92 of the Indian Evidence Act, subject to the provisos therein contained, forbids evidence to be given of any oral agreement or statement for the purpose of contradicting, varying, adding to or subtracting from the terms of a contract, grant or other disposition of property, the terms of which have been already reduced to the form of a document as mentioned in that section. Advantage was taken of these stringent provisions by money-lenders, and there was strong reason to believe that the real nature of the monetary dealings between the agriculturists and money-lenders was frequently misrepresented in the documents recording such transactions with the intent of avoiding the wholesome scrutiny by the Courts under the provisions of this Act. The frequency of the complaints that agriculturists were entrapped in the execution of documents of sale in the belief that the right to redeem still remains with them, led a Bench of the Bombay High Court to express the hope that “there may be early legislation which will enable the Courts, at least when an agriculturist is concerned, to investigate and determine the real nature of the transaction unfettered by S. 92 of the Indian Evidence Act and to award such relief as the justice of the case may require.”¹ In 1907 effect was given to this hope by enacting this section which confers on the Court full powers to enquire into and determine the real nature of the monetary transactions in

¹ *Abaji v. Larman*, (1906) 30 Bom. 426=8 Bom. L. R. 553.

proceedings to which agriculturists are parties, and go behind the documents with a view to determine the suits according to the real nature of the transactions, conformably to the spirit and intention of this Act, and not according to their purpose as misrepresented in the document.¹ This section has been added to the statute with a view of getting rid of the difficulty created by S-92 of the Evidence Act.²

3. Retrospective operation of this section:— This section is intended to admit oral evidence about 'any transaction' entered into by an agriculturist or by any person through whom such an agriculturist claims. The words of this section are clear and they show that the section is intended to be retrospective in its operation, and that, the only test is that which the section itself lays down, viz. whether a person seeking the benefit of the section was an agriculturist at the time of such transaction.³ The provisions of this section are retrospective so far as they relate to procedure, and the law of evidence, which is a branch of the law of procedure now includes the special provisions of this section. The words "at any stage of any suit or proceeding" and "notwithstanding any other law for the time being in force" and "notwithstanding anything contained in any law as aforesaid" occurring in the section, entitle a party to claim the right of enquiry given by this section even in second appeal.⁴ So the provisions of this section will be applied to a pending proceeding even in second appeal, though they could not be applied in the suit or in the first appeal because the section was not then extended to the district.⁵

But before the benefit of this section can thus be given in a suit or proceeding it is necessary that some transaction must have been entered into by a party who was an 'agriculturist' at the time of the transaction, within the definition of the term as then defined by law. So if the transaction was entered into at a time when the D. A. R. Act was not passed, or was not extended to the particular district, the party to the transaction could

1 Statement of Objects and Reasons, Bom. Act II of 1907.

2 *Somana v. Gedigeysa*, (1910) 35 Bom. 231 = 13 Bom. L. R. 113.

3 *Ganpat v. Tulshi*, (1923) 26 Bom.

L. R. 118 (F. B.).

4 *Pursumal v. Sadhumal*, 3 S. L. R.

1 = 1 I. C. 935.

5 *Gopal v. Rajaram*, (1911) 14 Bom.

L. R. 14.

not be said to be 'an agriculturist' at the time of the transaction even though he was actually earning his livelihood by agriculture, and hence the provisions of this section cannot be applied.¹ See note 'Suit or proceeding to which an agriculturist is a party' below.

Illustrations.

(1) In 1905 T executed a deed of mortgage in the form of a sale in favour of G. Ss. 2 and 20 were extended to the district in 1902. In 1910 S. 10 A was extended to the district. In 1919 T sued G for redemption of the mortgage, and sought to give oral evidence of the transaction. T can do so, for, Ss. 2 and 20 being extended to the district before the transaction, T was an agriculturist at the time of the transaction; and though S. 10 A was extended to the district after the transaction, it being retrospective, T could get advantage of it.²

(2) S executed a sale-deed in favour of G in 1899. This Act was extended to the district in 1905. S sued G in 1912 to redeem the transaction of 1899 alleging that it was a mortgage in the form of sale, and sought to give oral evidence in proof of his allegation. S cannot do so, for as the section was not extended to the district at the time of the transaction, the transaction was not entered into by an agriculturist.³

(3) R executed a mortgage in the form of a sale in favour of G in 1869. In 1908, R sued G to redeem the mortgage and sought to give oral evidence to show that the transaction was a mortgage. The suit was wrongly decreed by the lower Court, and the decree was confirmed by the appellate Court. This section was not extended to the district both at the time of the suit and of the first appeal. But it was so extended at the time of the second appeal. The High Court held that the provisions of S. 10 A relate to procedure, and so being retrospective, could be applied even in second appeal.⁴

(Note:—In this case (*Gopal v. Rajaram*) the attention of the Court was only directed to proving that S. 10 A being retrospective could be applied even in second appeals. But its attention was not drawn to the other provisions of S. 10 A and hence the Court overlooked the fact that the transaction in issue was entered into in 1869 when this Act was not enacted, and so the party could not be an 'agriculturist' at the time of the transaction. This case was to that extent overruled by the subsequent case of *Sawantrawa v. Giriappa*.⁵

1 *Sawantrawa v. Giriappa*, (1913) 15 Bom. L. R. 778 (F. B.) overruling *Gopal v. Rajaram*, (1911) 14 Bom. L. R. 14; *Bilaram v. Choitram*, 6 S. L. R. 245.

2 *Ganpat v. Tulshi*, 48 Bom. 214 = 26 Bom. L. R. 118 overruling Chan-

basappa v. Chenappawda, 22 Bom. L. R. 44.

3 *Sawantrawa v. Giriappa*, (1913) 15 Bom. L. R. 778.

4 *Gopal v. Rajaram*, 14 Bom. L. R. 14.

5 (1913) 15 Bom. L. R. 778 F. B.

4. Any suit—Scope of this section:—For this section to be applicable it is only necessary that an agriculturist must be a party to the suit and that the transaction in issue entered into by such agriculturist or the person through whom he claims must be of such a nature that the rights and liabilities of the parties thereunder are triable wholly or part under the provisions of Chapter III. This section is not confined in its operation to suits mentioned in S. 3, but applies to all sorts of transactions between an agriculturist and his creditor. This is clear from a comparison of the language used in Ss. 10 A, 11 and 12; for, whereas the words used in S. 10 A are "any suit or proceeding to which an agriculturist is a party," those used in Ss. 11 and 12 are 'suit of the description mentioned in S. 3, That this variation of the language is not to be attributed to a desire of improving the style or of avoiding repeated use of the same words, becomes obvious on a mere reading of Ss. 11 and 12. The illustrations given to section 10 A also make this clear. Neither of the illustrations (a) and (c) falls within the restricted class of suits described in S. 3. The illustrations given in statute 'are of relevance and value in the construction of the text' and as remarked by the Privy Council in *Mahomed Syedol v. Yeeh Ooi Gark*¹ 'it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves.' The benefit of this section can therefore be given to an agriculturist whether the suit falls under S. 3 of this Act or not.²

Illustrations.

(1) Ganesh sold his lands to Gautam. On the same day Gautam leased the lands to Bapu. Bapu passed further rent notes to Gautam from time to time. Gautam now sues to recover from Bapu the possession of land and rent for three years. Bapu alleges that he had really purchased the lands for himself from Ganesh, but that Gautam having lent him money for that purchase, the purchase was benami in the name of Gautam; and that the rent note was only to secure the amount of interest on the money lent. Here though the suit does not fall under S. 3 the Court can enquire into the real nature of the transaction.³

(2) I sued A, B, C and D to recover his half share in certain ancestral lands from his bhaubands A, B and C. D who was an alienee of portions

¹ (1916) 43 I. A. 256=19 Bom. L. R. 157.

² Hallappa v. Irappa, (1222) 24

Bom. L. R. 406=46 Bom. 843.

³ Gautam v. Malhari, (1916) 18

Bom. L. R. 247.

of the land did not appear and the suit was decreed *ex parte* against him. Subsequently D appeared and got the decree set aside with respect to lands sold to him by the ancestor of A, B and C. I now sues D to redeem the mortgage, alleging that the transfer to D was really a mortgage in the form of a sale. I can lead evidence to prove the real nature of the transaction though the suit does not strictly fall under S. 3.¹

(See also Illustrations to this section. The section will similarly apply to the variety of transactions that take place between the debtors and creditors though they do not fall under S. 3.)

5. At any stage:—The benefit of this section can be claimed by an agriculturist at *any* stage of a suit or proceeding, even in second appeal; and if the requisite conditions are satisfied the Court will apply this section.² (See note on 'Retrospective operation' above; see also note on the word 'proceeding' given under S. 2.)

6. Suit or Proceeding to which an agriculturist is a party:—*Conditions of applicability:*—In order that the provisions of this section shall be applicable, two conditions about the status of the parties must be satisfied: (a) one of the parties to the suit or proceeding must be an agriculturist; and (b) such party or the person, if any, through whom he claims must be an agriculturist at the time of the transaction (See note on proviso 1).

The main part of the section lays down that an agriculturist must be a party to the suit. But the privileges conferred by the D. A. R. Act being personal, the party must *himself* be an agriculturist. For, the privileges are not such as can pass from one person to another either by assignment or by devolution. "When his right as mortgagor passes into non-agriculturist hands, the special privileges previously annexed to the right perish."³ So when an agriculturist party to the suit dies, and his son who is a non-agriculturist is brought on the record, there is no longer an agriculturist party to the suit, and oral evidence cannot be taken to determine the real nature of the transaction.⁴

But though the section lays down that the suit or proceeding to which S. 10 A is sought to be applied should be one to which

¹ Hallappa v. Irappa, 24 Bom. L. R. 406=46 Bom. 843.

² Pursumal v. Sadhumal, 3 S. L. R. 1=1 I. C. 435. Gopal v. Rajaram, (1911) 14 Bom. L. R. 14.

³ Amichand v. Kanhu, (1884) P. J. 203.

⁴ Martand v. Amritrao, (1925) 27 Bom. L. R. 361=49 Bom. 662. The principle laid down in this case

an agriculturist is a party, it is not necessary that the party should be actually earning his livelihood by agriculture or engaging personally in agricultural labour *at the time of the suit*. He may be an agriculturist under the extended meaning of the term as given in the special definition in S. 2, 'secondly.' That definition runs thus: In Chapters II, III, IV, VI and in S. 69, the term 'agriculturist' when used with reference to any suit or proceeding shall include a person who, when any part of the liability which forms the subject of that suit or proceeding was incurred, was an agriculturist within the meaning of that word as then defined by law." This definition has the advantage of obviating all questions that may arise as to a change of status since the date of the transaction or even during the pendency of the suit. It must be applied to S. 10 A as much as to S. 12 or any other provision in Chapter III. The mere fact that S. 10A was enacted subsequently to S. 2 does not make any difference. In amending an Act, the legislature must be taken to have due regard to the existing provisions of the Act, which is being amended. So a party to a suit or proceeding can be an agriculturist within the meaning of this section, if he was an *agriculturist at the time of the transaction*, though he has subsequently ceased to be so.¹

But in applying this extended definition it must be seen that the party to the transaction was '*an agriculturist as then defined by law*.'² So if the Act was not passed when the transaction took place, or if it was not then extended to the district,³ the party cannot be said to have been an agriculturist' at the time of the transaction, though he was actually earning his livelihood by agriculture.⁴

has been criticised in an article written by Mr. G. V. Joglekar, pleader of Junnar, in Bombay Law Reporter (Journal) 1926 pp. 105-116. Mr. Joglekar points out in his article that considering the inclusive nature of the definition of 'agriculturist' given in S. 2 'secondly,' and the fact that the Act is a remedial measure, even though the agriculturist transactor is dead, every claimant through him

should, irrespective of his status, be allowed to question the real nature of the transaction under S. 10 A.

1 Sultan Rahim v. Ranchhodji, (1926) 29 Bom. L.R. 249=51 Bom. 224.

2 Bilaram v. Chitram, 6 S. L. R. 245.

3 Sangira v. Ramappa, 11 Bom. L. R. 1130.

4 Sawantrawa v. Girippa, 15 Bom. L. R. 778.

(For further discussion see note under S. 2 'As then defined by law,' and the note on 'Retrospective operation' above.)

Illustrations.

(1) In June 1885, R an agriculturist conveyed his lands to M by a sale-deed. On March 19, 1913 R sued M to redeem the transaction alleging that it was a mortgage in the form of a sale. In 1916, during the pendency of the suit R died and his son A was brought on the record. A was not an agriculturist. There is no longer an agriculturist party to the suit and so A can not claim the benefit of S. 10 A.¹

[Note:—In this case, the Court only decided that A was not an agriculturist at the time of the suit. It did not consider the question whether A was an agriculturist at the time of the transaction and so entitled to come under the definition given under S. 2 'secondly.' So this case was distinguished by Fawcett J. in *Sultan Rahim v. Ranchhodji*² where his Lordship observed 'the decision can, I think only be treated as one where either A was not an agriculturist at the time of the transaction (possibly he was not even in existence then), or the definition in the second clause of S. 2 was overlooked. In either view, it is not a decision which prevents us from holding that the second part of the definition applies to a case under S. 10A as well as to any other part of Chapter III].'

(2) R sued S for redemption of a mortgage. R was an agriculturist at the time of the transaction, but had ceased to be so at the time of the suit. R is an agriculturist under S. 2 'secondly,' and can claim the benefit of S. 10 A.³

7. Triable under this Chapter.—For S. 10A to be applicable it is only necessary that an agriculturist must be a party to the suit, and that some transaction shall be in issue entered into by such agriculturist or the person, if any, through whom he claims, which shall be of such a nature that the rights and liabilities of the parties are triable wholly or in part under Chapter III.⁴ So it is not necessary that the suit should be of the nature described in S. 3 (See note "Any suit—scope of this section" above). But if the conditions described above are not satisfied [viz. either if the party to the suit is not an agriculturist, or if the transaction in issue was not entered into by an agriculturist], it will not be a suit falling under Chapter III, and the provisions of this section will not apply to it.

¹ *Martand v. Amritrao*, 27 Bom. L. R. 351.

² (1927) 23 Bom. L. R. 249; *Dagdu v. Mirasahab*, 14 Bom. L. R. 385 followed.

³ *Sultan v. Ranchhodji*, (1927) 29 Bom. L. R. 249.

⁴ Per Macleod C.J. in *Hallappa v. Irappa*, (1922) 24 Bom. L. R. 406.

Illustrations.

(1) R, an agriculturist, sued to redeem certain property alleging that it was a mortgage in the form of a sale. Before the hearing of the suit R died, and his legal representative A was brought on the record. A was a non-agriculturist. Now there is no agriculturist party to the suit, and so it is not triable under this Chapter, and the provisions of this section do not apply to it.¹

(2) S sued G to redeem certain property alleging that he signed the deed knowing it to be a mortgage, but there was at the same time an oral agreement made by G to treat it as a mortgage. S was not an agriculturist, nor did he plead fraud on the part of G. S cannot lead oral evidence to prove the oral agreement.²

S. Notwithstanding S. 92 or any other law:—The object of the present section is to enable the Courts to enquire into and determine the real nature of a transaction entered into by an agriculturist. For that purpose this section enables the Courts to admit oral evidence though the terms of the transaction are purported to be contained in a written document. S. 92 of the Evidence Act, subject to the provisions given therein excludes oral evidence for the purpose of subtracting from, varying, contradicting or adding to the terms of a document. Under this section oral evidence for the same purpose can be admitted, notwithstanding the provisions of S. 92 or any other law for the time being in force.³

S. 91 of the Evidence Act:—The words 'any other law for the time being in force' must be taken *ejusdem generis* with S. 92, and must be taken to include S. 91 of the Evidence Act; for Ss. 91 and 92 of the Evidence Act are successive sections in Chapter VI of that Act: 'On the exclusion of oral by documentary evidence,' and are in fact illustrations of the principle that a document must speak for itself. S. 91 excludes oral evidence of the *contents* of the document, and S. 92 excludes oral evidence of the *variation* of its terms. To hold that S. 91 is not *ejusdem generis* with S. 92 would treat the words 'any other law for the time being in force' as mere surplusage. Taking the object of S. 10 A, namely, the decision as to the real nature of the transaction by admission of the oral evidence which would otherwise be excluded by the ordi-

1 Martand v. Amritrao, (1925) 27 Bom. L. R. 951. | R. 119.

2 Somana v. Gedigeysa, 13 Bom. L. | 3 Dada v. Bahiru, (1927) 29 Bom. L. R. 1419.

nary law whether S. 92 or the like, S. 10A must be taken to override not only S. 92 but S. 91 also.

The result of S.91 being held to be *ejusdem generis* with S.92 is that *though a document is inadmissible in evidence for being unregistered, oral evidence of its contents is admissible* by reason of S. 10A, notwithstanding S. 91 of the Evidence Act.¹

Registration Act not affected.—But as the words ‘or any other law’ have to be read *ejusdem generis* with the preceding words which refer to S. 92 of the Indian Evidence Act, they do not include the provisions of the Registration Act. The legal restrictions intended to be removed are those which would stand in the way of pursuing the enquiry beyond the written words, but when that enquiry is opened, the Court is as usual bound by the ordinary laws of evidence or otherwise.² So evidence that would be inadmissible under the Registration Act would not be admitted under S. 10A.

Under the Indian Registration Act, an agreement to reconvey does not require to be registered if it merely creates a right to obtain another document which when executed will create any right [s. 17 (2) ii]; and a document purporting or operating to effect a contract for sale of immoveable property does not require to be registered by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money [Expl. S. 17 (2) i]. But if the document containing the agreement to reconvey is executed as part of the transaction of sale (of immoveable property of the value of Rs. 100 or more), and not as an independent transaction, or where the transaction constitutes a mortgage, the agreement to reconvey is inadmissible in evidence for want of registration.³ Where the transaction is a bona-fide sale with a contract for repurchase, “The intention of the parties in such a case must be proved by the Court according to the facts of each case, and ordinarily speaking when the agreement to sell is evidenced by a separate document it would be proof that although the parties had come to previous arrangement with regard to a particular course of conduct between themselves, there was an intention to give effect to that arrangement by entering into two transactions, and therefore the agreement would be admissible in evidence.”⁴

(Note:—So far as the above-mentioned case⁵ lays down that S. 10A does not override the Registration Act, it was not questioned

1. Basappa v. Tayawa, 31, Bom. L. R. 1266; Madgaonkar J.

2. Gopal v. Morar, 15 Bom. L. R. 555.

3. Harkisandas v. Bai Dhanu, (1926) 50 Bom. 566=28 Bom. L. R. 954.

4. Ibid.

5. Gopal v. Morar, 15 Bom. L. R. 555.

by subsequent decisions;¹ and in *Dada v. Bahiru*, Crump J. even said that, "It is unnecessary to hold that S. 10 A of the D. A. R. Act which is in the nature of adjective law was intended to override the substantive provisions of the Indian Registration Act and the Transfer of Property Act. But its result was considerably weakened by the decision of *Basappa v. Tayawa* given above. In *Gopal v Morar* it was held that a document required to be registered, if not registered, was inadmissible in evidence. In the latter case (*Basappa v. Tayawa*) it was held that though the document was inadmissible in evidence under the Registration Act, oral evidence of the contents of such document which would be otherwise inadmissible by reason of S. 91 of the Evidence Act would be admitted in evidence under S. 10 A of the D. A. R. Act. Similarly, in a suit where there was at the time of sale an oral agreement to reconvey, and in consequence of that agreement kabulayats and afterwards a lease were passed, providing for the payment of interest and capital, but they were not registered, it was held that "the kabulayats did not constitute the agreement but were ancillary to it, and the fact that they could not be proved as they were unregistered, did not stand in the way of the vendor proving that the transaction was only a mortgage as under S. 10A, a contemporaneous oral agreement could be proved even though it had subsequently been embodied in a document which was inadmissible in evidence."²

Illustration.

B, an agriculturist, sued to redeem a mortgage dated June 13, 1907. The document was in the form of a sale-deed. Contemporaneously with the above, and as part of the same transaction T passed on June 12, 1907 an unregistered writing agreeing to reconvey the lands sold to B within 12 years from the mortgage. The unregistered writing is not admissible in evidence for want of registration, but oral evidence of the contents of the document is admissible.³

Notes :— In this case it was also contended that the agreement to reconvey dated 12th June 1907 was admissible in evidence for collateral purpose, viz. for showing the nature of M's possession. Madgavkar J. said "but for the view of Their Lordships of the Privy Council in *Varatha Pillai v. Jeevarathammal*,⁴ I

1 *Dada v. Bahiru*, (1927) 29 Bom. L. R. 1419; *Basappa v. Tayawa*, 31 Bom. L. R. 1266.

2 *Hambirkhan v. Muirjmal* and others, 65 I. C. 356 = 1922 Sind 39.

3 *Basappa v. Tayawa*, 31 Bom. L. R. 1266.

4 (1919), 43 Mad. 244 = 22 Bom. L. R. 444 = 46 I. A. 235.

should myself be inclined to the opinion that it was not so admissible." His Lordship however left that question open as not being of much importance for the decision of that case. But S. 49 of the Indian Registration Act which has been subsequently amended by Transfer of Property (Amendment) Supplementary Act (1929), provides that an unregistered document affecting immoveable property though required to be registered may be taken as evidence of any collateral transaction not to be effected by registered instrument.)

(2) In June 1896 V sold two pieces of land to H but retained their possession. In June 1900 he sold two other pieces of land to H but remained in possession. In 1910 H reconveyed to V two of the four pieces thus sold, and V put H in possession of the remaining two pieces. In 1923 V sued H to redeem all the lands alleging that the sale transactions of 1896 and 1900 were in the nature of mortgages and that by the sale-deed of 1910 only two of the numbers were reconveyed to H. H contended that at the time of exchange made in 1910 by an oral agreement V's right of redemption in the two numbers was extinguished. This plea cannot be allowed for the right of redemption can be only extinguished by a deed in writing and registered, and S. 10 A cannot override the provisions of the Registration Act. Here however, the case was decided in favour of H on the ground of part-performance.¹

9. Sale or mortgage:— Whenever it is alleged in a suit triable under this section that a sale-deed executed by an agriculturist is not a real sale-deed, but only a mortgage executed in the form of a sale, the Court has under this section the power to inquire into and determine the real nature of the transaction, and for that purpose it can admit an oral evidence of any statement or agreement between the parties. In thus making an enquiry, the Court looks to the surrounding circumstances and the intention of the parties, and decides whether the transaction was intended to be a sale or a mortgage.

A sale is defined in the Transfer of Property Act thus: "Sale" is a *transfer of ownership* in exchange for a *price* paid or promised or part paid and part promised (S. 54).

A mortgage is thus defined in the same Act: "A mortgage" is the transfer of an *interest* in specific immoveable property for the purpose of *securing the payment of money* advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability (S. 58).

Thus in a sale the *ownership* of some property is transferred in exchange for some *price* while in a mortgage only an *interest*

¹ Dada v. Bahiru, (1927) 29 Bom. L. R. 1413.

in specific immoveable property is transferred, to secure the payment of some money advanced or to be advanced, etc. In other words the transaction is a mortgage if the relation of creditor and debtor subsists between the parties.

In judging such transactions, the Courts are usually guided by facts such as the following:—

(1) The relationship of debtor and creditor existed between the parties at the time of the alleged sale.¹

(2) The agreement for sale was made before or at the time of the alleged sale.²

(3) That the money paid by the grantee is not a fair price paid for the absolute purchase of the property.³

(4) that the purchaser was not let into immediate possession of property.

(5) That instead of recovering the rents for his own benefit the purchaser accounted for them to the grantor, and only retained the amount of interest.

(6) That the expense of preparing the deed of conveyance was borne by the transferor.

(7) That there exists a power to the transferee to recover the sum named as price of the repurchase.

(8) That there is a covenant for the payment of interest.⁵

(9) That the time given for repurchase is not of the essence of contract.⁶

In all of these cases the deeds are to be taken as constituting mortgages. But a mere stipulation as to payment of interest is not by itself conclusive to show that the transaction is not an absolute sale but a mortgage.⁷ Nor does its absence make a mortgage a sale if it is described as a mortgage.⁸ Nor does the fact

1 *Jhanda Singh v. Wahiduddin*, 38 All. 570 (P.C.); *Kuppa v. Mhasti*, (1980) 33 Bom. L. R. 633.

2 38 All. 510 (P. C.) *Supra*.

3 *Kasturhand v. Jakhia*, 40 Bom. 74. *Kuppa v. Mhasti*, 33 Bom. L. R. 633.

4 *Kuppa v. Mhasti*, 33 Bom. L. R. 633.

5 *Gulzar Singh v. Sheonath*, I.O.L. J. 275=78 I. C. 547.

6 *Narasingji v. Partha Sarathi*, 47 Mad. 729.

7 *Madhusudan v. Ridhaymani*, 6 C. W. N. 192.

8 *Chandra Mayi v. Gegson*, 48 I. C. 465.

that the terms of mortgage are onerous, justify the conclusion that the transaction which purports to be a mortgage is in reality sale.¹

Prior to the amendment of clause (c) of S. 58 of the T. P. Act, (by the Amending Act of 1929) a mortgage by conditional sale was usually made by two documents, one being a sale deed and the other containing the condition of reconveyance; and the question frequently arose whether the second document operated to convert the sale into a mortgage. The above tests were applied in deciding that question. But now since the amendment, " no such transaction (of conditional sale) shall be deemed to be a mortgage unless the condition is embodied in a document which effects or purports to effect the sale." But under S. 10 A of the D. A. R. Act in the case of agriculturists the Court can admit evidence to show that a transaction which purports to be a sale is in reality a mortgage.

The Commission appointed in 1912 to enquire into the working of the D. A. R. Act² thus summarised the *points to be considered by the Court when an apparent sale is said to be a mortgage*:— (1) Is price utterly inadequate? Under this head consider (a) area, (b) assessment, (c) nature of soil, (d) are tenants easy to find, (e) was it a year of famine, (f) is there a well on the land, etc., (g) was the land sold or leased before the sale in question and if so for how much?

(2) Were there former dealings between the parties?

(3) Did the sale purport to cancel all former debts?

(4) (In case of a conditional sale) Does the deed provide for payment of interest before re-entry of vendor? (this is a sign of existing debt and points to mortgage.)

(5) Were the parties related to each other? If so, some probability in favour of a mortgage.

(6) At the time of sale did possession pass to vendee?

(7) Was Khata changed?

(8) Who paid assessment after sale?

(9) Has vendee improved land or built on it since sale? If he has (to any great extent) this fact is against mortgage.

(10) Was the land leased (after sale) to vendor, though other tenants were available?

(11) If so, is the amount of rent about equal to interest at about 15 per cent on sale price? (this is a sign of mortgage.)

(12) Had vendor other land?— If he had, not so unlikely that he would sell this one. Also apply *vice versa*; generally a man won't sell his only land unless the cattle are dead. (An important point often omitted.)

1 Mhd. Kasim v. Seo Sing Swami, 32 L. C. 152.

2 See Report of that Commission pp. 35—36.

- (13) Did vendee live in the village where lands are ?
 (14) Did vendor leave the village soon after sale ?
 (15) Was vendee better educated and more clever than the vendor ?
 (16) Direct oral evidence about contemporaneous oral agreement of mortgage.

It is clear that consideration of such points as the above is necessary in order to arrive at a decision in such a case, and oral evidence on these points must not be excluded, while it is desirable, if possible, to exclude direct oral evidence of the contemporaneous agreement.

9. Sale or mortgage by conditional sale:—Since the amendment of S. 58 (c) of The Transfer of Property Act, a transaction of sale will be held to be a mortgage by conditional sale only if the condition of reconveyance on payment of the purchase money on a certain date is contained in the same document which purports to effect the sale. But that proviso has been added to the section only to restrict the inference to be drawn in favour of a mortgage only when the condition to repurchase has been embodied in the document which purports to effect the sale. But it does not dispense with the condition that it *must be a transaction between the creditor and the debtor*. There must therefore be a debt and the relation of a creditor and a debtor between the parties.¹ To decide whether a transaction is a sale or a mortgage by conditional sale, all the tests given above have to be applied.

Illustration.

In 1910 N conveyed his lands to V for Rs.500 (an adequate price) under a deed which was in the form of a sale-deed but which contained a clause enabling N and his wife or male issue to have the land reconveyed within 20 years on payment of Rs. 500. On the same day N took the lands from V on a permanent lease. In 1925 K the heir of V sued to have the transaction of 1910 declared to be a mortgage. In this case, the clause in the document restricting the right of repurchase to the vendor and the persons specified in the document clearly shows that the document was intended to be a sale and not a mortgage. For, if the transaction had been a mortgage, it would have been unnecessary to restrict the right of repurchase in this way. Again the fact that a permanent lease is passed in favour of the transferor is a circumstance more in favour of the inference that the transaction is a sale and not a mortgage. The price was found to be adequate. There was no pre-existing debt and there is nothing to show that the relationship of debtor and creditor existed between the parties after execution of the document. Under these circumstances the transaction was held to be a sale and not a mortgage.²

¹ *Kuppa v. Mhasti*, (1930) 39 Bom. L. R. 698.

² *Kuppa v. Mhasti*, 39 Bom. L. R. 698.

10. Suit to set aside sale not necessary:—Where the document is in the form of a sale but the vendor alleges the transaction to be a mortgage, it is not necessary for the vendor to sue to set aside the sale. For, if the transaction was a real sale, it would be necessary for the vendor to sue to set it aside. But, when he accepts the transaction as a real one, but only challenges its real nature and alleges that it is in fact a mortgage and not a sale, he can sue at once to make out that case in view of the provisions of S. 10 A.

Illustration.

In May 1896 B mortgaged the property in dispute for Rs. 100 to N. In 1907 while B's son C was a minor, B's wife sold the property to N for Rs. 220. C attained majority in June 1915. He sued N in Nov. 1919 to redeem the mortgage of 1896 and also of 1907 and to have it declared that the transaction of 1907 was a mortgage. His suit is maintainable under this section. It is not necessary for him to sue for setting aside the sale of 1907.¹

11. Another suit on a different cause of action:—If an agriculturist-vendor brings a suit under this section, alleging that the sale was in reality a mortgage, but the suit is dismissed, he can yet bring another suit in regard to the same property if the second suit is based on a different cause of action and if it is yet within the period of limitation.

Illustration.

B sold his property to D in March 1906, continuing to remain in possession as a tenant. In August 1906 D executed a *satekhat* in favour of B agreeing to sell the property to him at any time within 12 years for Rs. 395, Rs. 5 being paid as earnest-money. B sued D in 1911 claiming to redeem the property on the ground that the document of March 1906 was a mortgage. That suit was dismissed. B can again sue D within 12 years to recover the property on payment of Rs. 395 as agreed in the *satekhat*.²

12. Proviso 1—Agriculturist at the time of transaction:—Under the first proviso to the section, it is necessary that the agriculturist or the party through whom he claims must be an agriculturist *at the time of the transaction*. The object of this proviso is to limit the benefit of this section to *transactions entered into by agriculturists*. If there had been no such provi-

1 Shivbasappa v. Balapa, (1923) 25 Bom. L. R. 1209=81 I. C. 673. | 2 Dola Khetaji v. Balya Kanhoj (1921) 24 Bom. L. R. 236.

sion, the person claiming the benefit of S. 10 A might be a person who was not an agriculturist at the time of the transaction but merely became one afterwards, or a person who, though himself an agriculturist, had merely acquired the rights of a non-agriculturist transferor. This proviso limits the benefits of this section to a person who was himself an agriculturist, when he entered into the transaction, or who claims through such an agriculturist.¹

But this proviso does not mean that the person claiming the benefit of S. 10A must be both (a) an agriculturist within the first part of the definition at the time of the suit, and (b) an agriculturist at the time of the transaction. It is sufficient if he is an agriculturist at the time of the transaction. Put in a simple language, the case may be stated thus: The definition of agriculturist in S. 2 says that he may be A or B. S. 10 A says that the agriculturist party (i. e. A or B) must be B to get the benefit of the section. This requires that he must be B, and he can also be A; but it does not require that he must be A as well as B.²

Reading the proviso with the main section the result is that when the party to the suit was himself the party to the transaction, he must have been an agriculturist at the time of the transaction; and then he may or may not be agriculturist at the time of suit; for, under the special definition of the term 'agriculturist' he is still an agriculturist; but if the party to the suit simply claims through another, then the party to the transaction must have been an agriculturist at the time of the transaction and the party to the suit must be an agriculturist at the time of the suit.

13. Proviso 2 — Bona-fide transferee for value without notice:—Under S. 41 of the Transfer of Property Act (1882) a bona-fide transferee for value without notice from an ostensible owner of property is protected even though there be some defect in the title of the vendor. But as this Act is enacted to protect the agriculturists, not only against the rapacity of money-lenders but also against adventitious circumstances which

¹ Sultan Rahim v. Ranchhodji, (1926) 29 Bom. L. R. 249.

² Sultan Rahim v. Ranchhodji, (1926) 29 Bom. L. R. 249.

are likely to operate to the prejudice of an agriculturist on account of ignorance, the provisions of S. 41 of the Transfer of Property Act are not applicable to cases governed by this section. Under this Act the ordinary rule as to a purchaser for value without notice is abrogated. Under this section a bona-fide transferee for value without notice of the real nature of such transaction is not protected unless he holds (i) under a *registered deed*, (ii) executed more than *twelve years* before the institution of suit. The object of the Legislature in enacting this section was to protect the mortgagor and not the transferee, if the mortgagor was sufficiently diligent in seeking to redeem the property.

Illustration.

M, an agriculturist, executed a mortgage in the form of a sale-deed in March 1911, in favour of T. In 1915 T sold the property in dispute to P. M sued in 1917 for redemption of the property. P contends that he is a bona-fide transferee for value without notice and that the property in his hands cannot be redeemed. P's contention will not stand, for even if he is a bona-fide transferee for value without notice, he is not a transferee for twelve years before the suit.¹

11. Every suit of the description mentioned in section 3, clause (w), may, if the defendant or when there are several defendants, one only of such defendants, is an agriculturist, be instituted and tried in a Court within the local limits of whose jurisdiction such defendant resides, and not elsewhere.

Every such suit in which there are several defendants who are agriculturists may be instituted and tried in a Court within the local limits of whose jurisdiction any one of such defendants resides, and not elsewhere.

Nothing herein contained shall affect Sections 22 to 25 (both inclusive) of the Code of Civil Procedure^[a].

[a] The reference to the Code of Civil Procedure should now be read as applying to the Code of 1908 (V of 1908).

1 Pranjivandas v. Mia Chand Bahadur, (1920) 22 Bom. L. R. 1123.

Synopsis of the Commentary.

- | | |
|--|---|
| <p>1. Object of this Section.</p> <p>2. Rule under the C. P. Code.</p> <p>3. Scope of this Section.</p> <p>4. Defendant is an agriculturist.</p> <p>5. Defendant or one of the defendants.</p> | <p>6. Suit against a firm.</p> <p>7. 'The Court' means the Court of the lowest grade.</p> <p>8. Suit filed in wrong court.</p> <p>9. Sections 22 to 25 of the C. P. Code.</p> <p>10. Extent of application.</p> |
|--|---|

1. **Object of this section**—“In order to prevent the provisions of Chapter III of the Bill being evaded by entering into contracts with agriculturists of the four districts to which the Bill extends at places beyond the limits of those districts, we have introduced a Section in the beginning of Chapter III requiring suits against such agriculturists to be brought where the defendants reside.”¹

2. **Rule under the C. P. Code**—Under S. 20, C. P. Code 1908, a suit can be instituted where the defendant or one of the defendants resides or where the cause of action has arisen. Under this section suits against agriculturist, falling under S. 3 (w) must be instituted and tried in a Court within the local limits of whose jurisdiction the defendant or one of the defendants resides.

3. **Scope of this Section**—This section applies only to suits falling under S. 3 (w). It does not say anything about suits falling under clauses (x), (y) or (z). So, suits under those clauses can be instituted in the places allowed under the rules of the C. P. Code. It seems somewhat illogical to provide that if you are suing a defendant on his personal covenant for payment you can only sue him in the place where he resides, but if you are suing him to enforce your mortgage by foreclosure or sale you can then sue him (say) in Bombay which may be hundreds of miles away from the place where he resides and probably from the place where the land is situated. However that may be,

¹ Report of the Select Committee on relief of indebted agriculturists in the Bill introduced in 1879 for the certain parts of the Deccan.

the language of the Legislature is clear and the Court can only give effect to it.¹

If the plaintiff asks for any reliefs, some of which fall under clause (w), while the others fall under clause (x) or (y) or (z), this section will apply only in respect of relief under clause (w), while the rules given in the C. P. Code 1908 (Ss. 16-20), will apply in respect of reliefs under the latter clauses [See Illus. (1) below]. Thus an ordinary action to enforce a mortgage may fall within clause (w) and clause (y). Where a mortgage contains a covenant for payment and a conveyance of property as security for the debt, an action to enforce the mortgage may involve a claim for a money judgment which would fall under clause (w), and it may include a claim to enforce the mortgage by foreclosure or sale which would fall under Cl. (y). But these two forms of reliefs are quite distinct. In many cases you have a mortgage without any covenant for payment, in which cases your only relief is for foreclosure or sale or you may desire to enforce a mortgage by an originating summons in which case you must confine your relief to foreclosure or sale and you can't ask for a money judgment. Hence the Court can grant a relief under clause (y) but refuse to grant one under clause (w).³

When a suit falls under S. 3(w) it has to be instituted in a Court within whose jurisdiction the defendant resides. The section makes no distinction between suits for a larger or for a smaller amount though clause (b) of S. 3 speaks of suits upto Rs. 500 in value. This Act is not confined to suits of that value.³

Illustrations.

(1) K, mortgaged his properties at Panwel, outside the original jurisdiction of the Bombay High Court, to E. E sued K, on the mortgage on the original side of the Bombay High Court and prayed for three reliefs; viz. (i) that K should be ordered to pay the sum due on the mortgage; (ii) that in the event of K failing to do so the property mortgaged may be sold and the sale proceeds be applied towards the satisfaction of the mortgage; (iii) and that if the sale proceeds are insufficient to pay the amount due, liberty be reserved to E to sue K for the balance. K pleads that she is an agriculturist residing at Panwel

¹ Beaumont C. J. in case *Abdulla v. Khatijabi*, (1931) 33 Bom. L. R. 13 = 55 Bom. 536; *Tulshidas v. Virbasappa*, 4 Bom. 624.

² *Essa Abdulla v. Khatijabi*, 33 Bom. L. R. 13.

³ *Tulshidas v. Virbasappa*, 4 Bom. 624.

and that therefore the High Court has no jurisdiction to try the suit. Here the reliefs (i) and (iii) fall under cl. (w) of S. 3. So the High Court cannot grant any reliefs as to those prayers. But the relief (ii) falls under cl. (y) which is not governed by S. 11. The High Court can therefore grant a relief to E so far as that clause is concerned.¹

(2) T sued V in the High Court of Bombay, on its original side, to recover Rs. 1500 being the price of goods sold and delivered. V contends that he is an agriculturist residing at Sholapur. T replies that though V be an agriculturist residing at Sholapur this suit will lie in Bombay, for S. 11 is not to apply to suits for large amounts, as clause (b) of S. 3 speaks only of suits upto Rs. 500 in value. It was held that S. 11 is not confined to suits below Rs. 500 in value and so if V is an agriculturist he must be sued in the Sholapur Court.²

(3) G sued C in the High Court of Bombay on its original side to recover money due on a promissory note and to enforce a charge on the moveable property (a car) pledged by sale thereof. C claims that he is an agriculturist residing outside the jurisdiction of the High Court and that the High Court has therefore no jurisdiction to entertain the suit. The suit of G falls under clause (x) and hence though C is an agriculturist, the High Court can entertain the suit.³

(For other illustrations of cases falling under clause (w), see notes on S. 3.)

(Note:—It may be submitted with respect that the decision in *Essa Abdulla v. Khatijabi* is not wholly correct. It must be taken to lay down that S. 11 is confined to suits falling under clause (w), and that it does not apply to suits under clauses (x), (y) and (z). So in such latter classes of suits the rules given in the C. P. Code apply. But S. 15 of that Code lays down that 'suits for foreclosure, sale or redemption in the case of mortgage of or charge upon immovable property shall be instituted in the Court within the local limits of whose jurisdiction the property is situate: [S. 15 s. cl. (c)]. Therefore suits falling under cl. (y) or cl. (z) are not governed by S. 20, and such suits must be instituted where the property is situate. Applying this rule to the case mentioned above it seems that the High Court should not have allowed the relief by sale of the property also.)

4. Defendant is an agriculturist:—Under this section the suit has to be instituted in a Court within whose local jurisdiction the defendant resides. The word 'defendant' must be taken to mean the defendant at the time of instituting the suit.

¹ *Essa v. Khatijabi*, supra. In this case *Chaganlal v. Abdul Gafur*, (1929) O. C. J. suit No. 443 of 1928 (Unrep.) decided by Kemp J. on 1 January 1929 was overruled; and *Ramchand v. Chimanlal*, (1930) O. C. J. suit No. 1767 of 1928 decided by Mirza J. on July 7, 1930 (Unrep.)

and *K. N. Malpekar v. Khanduji*, (1930) O. C. J. suit No. 2004 decided by Rangnekar J. on January 20, 1930, were followed.

² *Tulshidas v. Virbasappa*, 4 Bom. 624.

³ *Gulam Hussein v. Clara D'Souza*, (1928) 31 Bom. L. R. 988.

But if the original defendant is a non-agriculturist and the suit is properly instituted the mere fact that one or more legal representative of his is an agriculturist would not oust the jurisdiction of the Court. For if that were the case, great hardship and inconvenience would arise in cases in which agriculturists were only concerned in a representative capacity.¹

5. Defendant or one of the defendants:—When there are several defendants in a case, one only being an agriculturist, the suit shall have to be instituted in a Court within whose jurisdiction the agriculturist defendant resides. But if all the defendants are agriculturists residing within the jurisdiction of different courts, the suit may be instituted within the jurisdiction of any of those Courts.²

Illustration.

A and B executed certain hundis in favour of X, and C and D stood sureties for A and B. A and B are agriculturists residing within the jurisdiction of the Larkhana Court. C and D are agriculturists residing within the jurisdiction of the Hyderabad Court. The suit against sureties also falls under clause (w) and hence it may be instituted either in the Hyderabad or in the Larkhana Court.³

6. Suit against a firm:—A firm can be an agriculturist, if that firm by its servants or by its tenants earns its livelihood wholly or principally by agriculture carried on within the limits of a district to which this Act extends; such a firm can be sued only at a place where it resides, in the sense of carrying on its business irrespective of the place where the cause of action may have arisen. But the firm must be distinguished from the individual partners. And the fact that an individual partner of a firm, or even all the partners of a firm, earn their livelihood principally from agricultural income cannot affect the right of a plaintiff to sue the firm at the place where it actually carries on business or where the cause of action has arisen⁴ (For further discussion as to how far a firm can be an agriculturist see note on 'Person' under S. 2).

7. 'The Court' means the Court of the lowest grade:—The suit must be instituted in the Court of the lowest

¹ Gangaram v. Devmal Nihalchand, A. I. R. 1929 Sind 163.

² Tahliram v. Maghanmal, A. I. R. 1929 Sind 170.

³ Ibid.

⁴ Dharamsey v. Balkrishna, (1928) 31 Bom. L. R. 984; Premchand v. Newandmal, A. I. R. 1931 Sind 121.

grade. Under this section the suit has to be instituted in a Court within whose local limits the defendant resides. But a superior Court has a concurrent jurisdiction with a Court of subordinate jurisdiction. In such cases the rule given in S. 15 of the C. P. Code, 1908, must be applied, viz : Every suit shall be instituted in the Court of the *lowest grade* competent to try it. This provision is imperative and leaves no option to the plaintiff.¹ Though the jurisdiction of a superior Court cannot be taken away, except by express words or by necessary implication, here the words are in themselves clear and there is nothing in the clause in which they stand or in the general purpose of the Act to qualify their sense.² Hence where a suit is brought in the Court of superior jurisdiction, but the defendant is an agriculturist residing within the local limits of a subordinate Court, the suit must be transferred to the latter Court, though the defendant pleads his status at a late stage of the proceeding.³

S. Suit filed in wrong Court:—Under this section a suit under S. 3 (w) can only be filed in a Court within whose jurisdiction the defendant resides. If the plaintiff files it in a Court which has no jurisdiction either because the defendant does not reside there, or because in the trial of the suit the defendant is proved to be an agriculturist, the Court in which the suit is thus wrongly filed must, under Or. 7 r. 10 of the C. P. Code, 1908, return it to be presented to the proper Court. It is not entitled to dismiss the suit.

Illustration.

L sued H and G in the Court of the Subordinate Judge of Haveli to recover money due on an account. It was alleged by L that H was an agriculturist residing in the jurisdiction of the Haveli Court, and that G was an agriculturist residing in the jurisdiction of the Saswad Court. The Subordinate Judge of Haveli found that H was not an agriculturist, and that the suit ought to have been instituted in the Court of the Subordinate Judge at Saswad within whose jurisdiction G resided. He therefore dismissed the suit. It was held that the Court should have returned the plaint for presentation to the Court of Saswad.⁴

1 Bibi Hayatu v. Sayad Gulam Hussein, 4 S. L. R. 264=10 I. C. 980.

2 Tulahidas v. Virbassappa, 4 Bom. 624.

3 Bibi Hayatu v. Sayad Gulam Hussein, *Supra*.

4 Ladhaji v. Hari, 23 Bom. 679=2 Bom. L. R. 176.

9. Sections 22 to 25 of the C. P. Code:— Para 3 of this section lays down that nothing herein contained shall affect Ss. 22 to 25 (both inclusive) of the C. P. Code of 1882. These sections in the Code of 1882 correspond with Ss. 22-24 of the C. P. Code of 1908. They provide for transfer of suits. Under Ss. 22 and 23, a suit which may be instituted in more than one Courts can be transferred from one Court to another on an application to the appellate Court. S. 24 reserves the general power of the High Court and the District Court to transfer suits from one Court to another, or to withdraw suits and try the same. The power of transfer provided in the C. P. Code being thus hereby preserved, this Act does not make a provision for that purpose.

10. Extent of application:— This section extends to the whole of British India. The effect of the extension of this section to the whole of British India is simply to impose upon any person in any part of India who brings a suit of the nature mentioned in the 3rd section [clause (w)] of the Act against an agriculturist *residing within the districts to which this Act applies*, the necessity of instituting such suit and having it tried in a Court within the local limits of whose jurisdiction such agriculturist resides which Court must necessarily be in some one of those four districts. It cannot be given a general operation throughout the whole country.¹ An agriculturist residing outside such districts cannot claim the protection of this Act.²

Illustration.

B is an agriculturist residing in Punjab. He accepts some commission-agency work of A in Sind. B does not pay the money due on that work. B can be sued in Sind where the cause of action has arisen though the dependant does not reside there.³

12. In any suit of the description mentioned in

History of transaction with agriculturist-debtors to be investigated. section 3, clause (w), in which the defendant or any one of the defendants [a] is an agriculturist,

[a] Words repealed by Act XXIII of 1881 are omitted.

1 Purushottam v. Bhavanji, 4 Bom. 360=1880 P. J. 102.

2 Firm of Ayaram Toleram v. Firm of Hitraj Bodraj, 66 I. C. 683.

and in any suit of the descriptions mentioned in section 3, clause (*y*) or clause (*z*),

[^a]the Court, if the amount of the creditor's claim is disputed, shall examine both the plaintiff and the defendant as witnesses, unless, for reasons to be recorded by it in writing, it deems it unnecessary so to do, and shall enquire[^a] into the history and merits of the case, from the commencement of the transactions between the parties and the persons (if any) through whom they claim, out of which the suit has arisen, first with a view to ascertaining whether there is any defence to the suit on the ground of fraud, mistake, accident, undue influence or otherwise, and secondly, with a view to taking an account between such parties in manner hereinafter provided.

When the amount of the claim is admitted and the Court for reasons to be recorded by it in writing believes that such admission is true and is made by the debtor with a full knowledge of his legal rights as against the creditor, the Court shall not be bound so to enquire, but may do so if it thinks fit.

In other cases in which the amount of the claim is admitted the Court shall be bound to enquire as aforesaid.

Section 9 clause first, of Bombay Regulation V of 1827 is repealed so far as regards any suit to which this section applies.

Nothing herein contained shall affect the right of the parties to require that any matter in difference between them be referred to arbitration.

[^a—^a] These words were substituted for the original words by Act XXIII of 1886, s. 6.

Synopsis of the Commentary.

- | | |
|---|---|
| <p>1. Extent.</p> <p>2. Object of Ss. 12 and 13.</p> <p>3. Scope of these Sections.</p> <p>4. Application to benamidars.</p> <p>5. Application to assignees.</p> <p>6. Change of Status pendente lite.</p> <p>7. Retrospective operation of these Sections.</p> <p>8. The Court.</p> <p>9. Disputed claim.</p> <p>10. Burden of proof.</p> <p>11. Shall examine... shall enquire.</p> <p>12. Examination of parties.</p> <p>13. Nature of enquiry.</p> <p>14. Unless it deems...unnecessary.</p> <p>15. From the commencement.</p> <p>16. Transaction out of which the suit has arisen.</p> <p>17. Same transaction.</p> <p>18. Separate accounts.</p> <p>19. Court cannot go behind a decree.</p> <p>20. Mortgage with Court's</p> | <p>sanction.</p> <p>21. Between the parties.</p> <p>22. Or the persons through whom they claim.</p> <p>23. Powers of the Court making an enquiry.</p> <p>24. Effect of admission of claim.</p> <p>25. In other cases.</p> <p>26. S. 9 [cl. (i)] Bombay Regulation 1827.</p> <p>27. Compromise and Arbitration.</p> <p>28. Compromise.</p> <p>29. Compromise : How far against public policy.</p> <p>30. Court can go behind compromise before filing it.</p> <p>31. Sind view.</p> <p>32. Compromise decree cannot be opened.</p> <p>33. Arbitration.</p> <p>34. Enquiry before filing awards.</p> <p>35. Fraudulent awards should not be filed.</p> <p>36. Remand.</p> |
|---|---|

1. Extent:—Ss. 12 and 13 now extend to the province of Sind and all districts of the Bombay Presidency, excluding Aden and the city of Bombay. *Vide* table of Local extent given under S. 1.

2 Object of Sections 12 and 13 — The Commission appointed to enquire into the Deccan Riots of 1875 found that "a Court proceeding to determine the amount of debtor's liability is met by the undeniable fact that the passing of a bond by a native of India is often of no more value as proof of a debt he thereby acknowledges than the confession by man under torture of the crime he is charged with. The money-lenders do obtain bonds

on false pretences; enter in them larger sums than agreed upon; deduct extortionate premiums; give no receipts for payment, and deny them; credit produce at fraudulent prices; retain liquidated bonds and sue upon them; use threats and warrants of imprisonment to extort fresh bonds for sums not advanced; charge interest unstipulated for, over calculated, or in contravention of Hindu Law and commit a score of other rogueries."¹

As these facts were proved by overwhelming evidence before the Deccan Riots Commission of 1875, it was thought necessary to protect the interests of agriculturists against such inequities. Hence the first object of this Act was declared to be "to provide some safeguards against the money-lenders committing frauds in their accounts and obtaining from ignorant peasants bonds for larger amounts than are actually paid to or due from them." Ss. 12 and 13 were therefore introduced in the Act, making an important change in the ordinary law of the land. They require the Courts to (i) examine the parties, (ii) to enter into the merits of every claim against an agriculturist, (iii) open transactions that are apparently settled, (iv) go behind bonds and after taking accounts in the manner prescribed in S. 13, only award such sums as they find to be really due. Under the ordinary law when the terms of a contract etc. are reduced, or are required to be reduced to the form of a document, no evidence, except the document itself or its secondary evidence can be given in proof of the terms of such contract; and except under certain circumstances, no evidence can be given to vary the terms of the contract.²

As the agriculturists are not able to protect their own interests against the money-lenders, these sections place the interests of defendant-agriculturists rather in the hands of the Court for protection than to trust them to the hands of the defendant himself.³

¹ See Hon. Mr. Hope's Speech on the occasion of introducing the Bill in 1879. Vide Proceedings in G. G.'s Council for the purpose of making laws and regulations (for the year 1879) Vol. XVIII pp. 116—153. See

also Statement of Objects and Reasons.
² See Ss. 91 and 92 Indian Evidence Act, I of 1872.

³ *Kisandas v. Nama*, (1910) 13 Bom. L. R. 1024.

3. Scope of these Sections— These sections apply 'in any suit of the description mentioned in S. 3 clause (w), in which the defendant or one of the defendants is an agriculturist, and in any suit of the description mentioned in S. 3 clause (y) or clause (z).' The relief given by this Act being an extraordinary one, in order to be entitled to the benefit of these sections, the suit should fall under clause (w) or (y) or (z) not in form only but in reality also. So if the suit is in form a suit for redemption but in reality is a suit to set aside the sale and to recover property of which the rightful owner has been deprived by fraud, it does not fall under S. 3 (z); and Ss. 12 and 13 will not apply.¹

But though these sections apply to suits falling under S. 3 (w), (y) or (z) it cannot be said that they are limited to suits for sums not exceeding Rs. 500. These sections apply whether the suit falls under Chapter II or not. It cannot be said that Chapter III regulates the procedure in cases specified in Chapter II, for the latter Chapter itself prescribes the mode of procedure in Ss. 7 and 8.²

Again though clause (a) of S. 3 is not mentioned in S. 12, still the provisions of Ss. 12 and 13 will apply to account suits by force of S. 15D and S. 16 of this Act.

This Act makes no distinction between poor agriculturists and rich agriculturists. The only point to be considered under this section is whether the suit falls under S. 3 (w), (y) or (z).³

The benefit of these sections will be given to a trader also if in conjunction with his trade he carries on agricultural business and if his income from agriculture is more than his income from trade.⁴

Again S. 12 purports to apply only to those cases of the kind specified in S. 3 (w), (y) or (z) where the amount of the

1 *Mt. Bachi v. Bickchand*, (1910) 18 Bom. L. R. 56 (P. O.); *Vinayakrao v. Shamrao*, (1916) 18 Bom. L. R. 708 = 40 Bom. 655; *Chandabhai v. Ganapati*, (1910) 18 Bom. L. R. 763 (See these cases under S. 3).

2 *Tulshidas v. Virbassappa*, 4 Bom.

624. For further discussion see note under S. 11. "Suits of the description etc."

3 *Manohar v. Collector of Nasik*, 14 Bom. L. R. 943 = 37 Bom. 97 (1912).

4 *Narayan v. Chapsi*, 23 Bom. L. R. 1185.

claim is disputed or admitted. It does not therefore cover the common case where the defendant admits, or is not prepared to deny, the existence of a debt but is ignorant of its proper amount. This however was probably a mere oversight in drafting and as a matter of fact the section has always been applied to those cases.¹

This Act applies where the party is an agriculturist, and it makes no difference that because temporarily the agriculturist party is disabled, the estate is under the management of the Court of Wards. Even in such cases the party must be deemed to be an agriculturist.²

4. Application of Ss. 12 and 13 to benamidars:— It has been ruled by the Privy Council in *Gur Narayan v. Shivalal Singh*³ that a benamidar can maintain a suit on a mortgage and that so long as a benamidar's transaction does not contravene the provisions of the law, the Courts are bound to give it effect and it cannot be contended that the benami transaction contravenes the provisions of the Contract Act or any other law. It cannot be said that the provisions of S. 12, which require the Court to examine the parties and to inquire into the history of the case, imply that the plaintiff should be the original creditor, and that the section does not therefore contemplate a benamidar being the plaintiff. For the words 'the persons through whom they claim' clearly show, as was held in *Annaji v. Bapuchand*⁴ that the section can not be supposed to prevent the plaintiff being an assignee of the original creditor, and for the same reason S. 12 must be held to apply to a benamidar also. But on the other hand the provisions of S. 12 have to be observed by the Court in a suit by a benamidar just as much as in a suit by the real creditor; for a mortgagor agriculturist who has a right under S. 12 to ask the Court to go into the entire account and to ascertain the actual amount due under the same, cannot lose that right by the simple process on the mortgagee's part of an assignment. It is quite possible for the Court to carry out these provisions because the actual creditor

<p>¹ See Report of the Commission appointed to enquire into the working of the D. A. R. Act, 1891—92.</p> <p>² <i>Manohar v. Collector of Nasik</i>,</p>	<p>(1912) 37 Bom. 97=14 Bom. L. R. 943.</p> <p>3 (1918) 46 Cal. 566 (P. C.).</p> <p>4 (1883), 7 Bom. 520=1883 P. J. 274.</p>
--	--

can be examined and called upon to produce his accounts as a witness just as well as if he was a party.¹

Illustrations.

(1) K, an agriculturist, executed a mortgage in favour of N who was a benamidar for S. N sued K to recover the money due on the mortgage; N's suit will be governed by Ss. 12 and 13 and the Court must examine S as the real mortgagee and enquire into the history of the transaction.²

(2) B executed a simple mortgage of two properties Y and Z in favour of N. On B's death his wife K took a *tagavi* advance from Government and created a charge on property Y as collateral security. K then passed a possessory mortgage of both the properties in favour of N. The *tagavi* advance was not paid and hence the Government sold property Y which was purchased by M as benami for N. M and N then assigned their interests in the property to C who was a brother of the original mortgagor B and knew of the whole transaction. As C claims through M who was a benamidar for N, and as the property was sold for the default of N in not paying *tagavi* advance, C is bound by the equities against M and N and if the representative of M sues C for redemption of the properties, the suit will be governed by the provisions of Ss. 12 and 13.³

5. Application of Ss. 12 and 13 to assignees:— The provisions of this and the following section are not limited to an agriculturist who is himself the original mortgagor but are applicable to assignees also. So where an assignee of a mortgagor is himself an agriculturist, he can claim the benefit of the provisions of these sections⁴ and the fact that part of the benefit thus gained by the agriculturist will probably be transferred to another person is no ground for refusing him that benefit.⁵ Again these sections will apply to an agriculturist assignee though the original mortgagor is not an agriculturist.⁶ But if the assignee is not an agriculturist, he is not entitled to the benefit of the privileges of these sections even though the assignor is an agriculturist.⁷ For the benefits given to an agriculturist by this Act are limited to him in that personal character. When his right as mortgagor

1 Narayan v. Gulam Mohidin, 27 Bom. L. R. 1240=49 Bom. 839.

2 Ibid.

3 Chitta v. Bai Jamni, 18 Bom. L. R. 438=40 Bom. 483.

4 Dnyanu v. Apa, 1883 P. J. 271; 424.

Annaji v. Bapuchand, 7 Bom. 520=1883 P. J. 274.

5 Amichand v. Kanhu, 1884 P. J. 203.

6 Shripati v. Sitaram, 1887 P. J. 296.

7 Rajaram v. Lakshman, 1882 P. J.

passes into non-agriculturist hands the special privilege previously annexed to the right perishes.¹

Illustration.

V mortgaged his land to B. Subsequently the lands were sold in execution of a decree against V and were purchased by A subject to B's mortgage rights. A now sues B for redemption of the mortgaged lands and claims that the history of the transaction should be investigated and the accounts taken under this Act. V and A are both agriculturists. A can claim the benefit of these sections though he is an assignee from the original mortgage.¹

6. Change of status pendente lite— It is provided by S. 8 of General Clauses Act² that a change in statute will not affect proceedings begun when it comes into force. But a change of status or legal capacity generally operates at once as in the case of *Le Bret v. Pappillon*³ when it either extinguishes, enlarges, diminishes or varies the extent to which a party may claim the aid or the protection of a Court.⁴ It would be hard to say that a man suing as son of AB could continue the suit in that character after his adoption by CD; and as a right may be lost, so it may be gained, pendente lite by the acquisition of a particular status with reference to the object of the suit as in the case of *Rambhat v. Laxman*.⁵ Having regard to the very special nature of the legislation embodied in S. 12 of the D. A. R. Act for the benefit of a particular and very limited class, it was intended that a person claiming benefit of that section should *at the trial* fill the character of an agriculturist as then defined by law.⁶ The right of the plaintiff to redeem on special terms could not exist when he had even *pendente lite* lost the specific personal character on which the right depended.⁷

Illustration.

B sued P on 18th July 1882 to redeem a portion of a shop mortgaged with P. B earned his livelihood *partially* by agriculture, and so he was an agriculturist under the definition then in force. While the suit was pending, Act XXII of 1882 was passed by which 'agriculturist' was defined to mean a person

<p>1 Amichand v. Kanhu, 1884 P. J. 203. 2 Act X of 1897. 3. 4 East 502. 4 Gulab v. Secretary of State, 8 Bom. 596; Gangaram v. Punamchand, (1890) 21 Bom. 823.</p>	<p>5. 5 Bom. 630. 6 Shamlal v. Hiraehand, 10 Bom. 367=1885 P. J. 23. 7 Padgaya v. Baji, 11 Bom. 469=1887 P. J. 224.</p>
--	---

who earned his livelihood wholly or *principally* (and not partially) by agriculture, and so B ceased to be an agriculturist. B could not claim the benefit of the provisions of these sections as he was not agriculturist at the trial.¹

7. Retrospective operation of the Section:—The general rule of construction is that statutes are prospective and not retrospective. *Nova constitutio futuris formam imponere debet non praeteritis*. They are construed as operating only in cases or on facts which come into existence after the statutes were passed.² To this rule there are two exceptions: (i) when Acts are expressly declared to be retrospective and (ii) when they only affect the procedure of the Court.³

Statutes involving a change in procedure are given retrospective operations because no person has a vested right in any course of procedure. He has only the right of prosecution or defence prescribed for the time being by or for the Court in which he sues.

The question in relation to Ss. 12 and 13 is whether these sections involve merely a change of procedure or also a change of existing rights. In answering this question it is to be borne in mind that the present Act is a remedial measure and according to the usual canons of construction governing such enactments everything must be done in advancement of the remedy consistently with the plain language of the Legislature so as to afford the utmost relief which the meaning of the language can allow. We have also to remember the further rule that "a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary. Even in construing a section which is to a certain extent retrospective the maxim ought to be borne in mind as applicable whenever a line is reached at which the words of the section cease to be plain."⁴

Applying this rule of construction we find that S. 12 deals with mixed questions of procedure and of rights. It cannot be wholly given retrospective effect. "S. 12 must be allowed retrospective effect only in so far as it regulates the procedure of the

1 Padgaya v. Baji, 11 Bom. 469. See also Shamlal v. Hirachand, 10 Bom. 367.

2 See Maxwell 'Interpretation of Statutes' (1920) P. 381; Agarchand v. Gandaya, 1894 P. J. 50.

3 Ibid. See also Jawanmal v. Muktabia, 14 Bom. 516=1890 P. J. 33.

4 Maxwell 'Interpretation of Statutes' (1920) p. 382.

Court. To obviate the possibility of misunderstanding, we add that in this view of the law it appears to us advisable to specify the last sixteen words of the main paragraph of the section 'and, secondly, with a view to taking an account between such parties in manner hereinafter provided' as the particular passage to which retrospective effect must be denied.¹ So the judge can make an enquiry into the history and merits of the past dealings between the parties to a suit pending at the time of the extension of these provisions to the district, for that part of the section is entirely a matter of procedure.²

But that part of the section which deals with the vested rights of the parties, viz. the enforcement of accounts, does not apply to suits instituted before the Act came into force in the particular district in which the suit was instituted. In such a case the suit should proceed upon the footing that this Act had no application between the parties. For it is a well recognized principle of law that when a suit is pending at the time the law is altered, the law which existed when the suit was commenced must decide the rights of the parties. Nor can the Court in such a case allow a party to withdraw his suit with liberty to bring a fresh one in order that the party should get the benefit of the alteration of the substantive law.³

The ruling of Westropp C. J. in *Suryaji v. Tukaram*⁴ to the effect that the provisions of Ss. 11 and 12 of this Act are applicable only to suits instituted upon and after the 1st November 1879, is no longer good law.

Again, the provisions of this and the following section are retrospective so as to apply to the case of transactions entered into before the date of its extension to the district, but the suit in respect of which is filed after that date. For Ss. 12 and 13 show that it was the intention of the legislature to open up all transactions between the parties having a bearing upon the claim out of which the suit arises from the commencement. This is

1 *Fatmabibi v. Ganesh*, 31 Bom. 630 (F. B.).

2 *Pannalal v. Kalu*, 8 Bom. L. R. 798.

3 *Prabhakar v. Khanderao*, 10 Bom.

L. R. 625. See also *Fatmabibi v. Ganesh*, 31 Bom. 630 (F. B.).

4. 4 Bom. 358 = 1880 P. J. 80.

one of the means adopted by the legislature to carry out the intention expressed in the preamble of relieving the agricultural classes from indebtedness. This indebtedness means indebtedness existing at the date of the passing of the Act as well as future indebtedness.¹

But if the suit is *already decreed* and a decree is passed when this Act is extended to a particular district, the decree must be executed as it stands. The Act can have no application to the rights of the parties as decided by the decree; and even if it is found that the decree-holder has overpaid himself in another transaction, the judgement-debtor cannot set off that overpayment against the amount due under the decree.²

Illustrations.

(1) G sued F on 23rd April 1894 in the Court of the F. C. Sub-Judge at Thana for recovering Rs. 5500 due on a registered mortgage bond. After the suit was filed Sr. 7, 11, 21, etc. were extended to the district of Thana (on 15 August 1905). F, then contended (on 13 September 1905) that he was an agriculturist and that Ss. 12 and 13 should be applied to his case. S. 13 cannot be applied to this case as it has no retrospective effect, and S. 12 can be applied only so far as it regulates procedure. So accounts cannot be taken under that section.³

(2) K, an agriculturist, sued P for redemption of a mortgage. At the time the suit was filed this Act was not extended to the district, but it was so extended when the suit came for hearing. At the hearing the Subordinate Judge took accounts under the Ss. 12 and 13. P appealed, and while the appeal was pending *Fatmabibi's case* was decided which laid down that these sections were not retrospective so as to allow accounts being taken under their provisions. K then applied to the appellate Court for leave to withdraw the suit with liberty to bring a fresh one. The provisions of Sr. 12 and 13 are not applicable to K's suit as it was filed before the sections were extended to the district and the Judge should not allow K to withdraw his suit.⁴

(3) B an agriculturist borrowed from S on 17th May 1904 on a money bond a sum of Rs. 50. This Act was extended to the district in 1905. S sued B for the sum on 26th March 1909. The provisions of Sr. 12 and 13 are applicable to this suit.⁵

1 Shivlal v. Bhikha, 84 Bom. 220 = 11 Bom. L. R. 1872.

2 Mugappa v. Mahamad Eahab, 84 Bom. 260 = 12 Bom. L. R. 187. See also note on 'Claim for overpayment' given under s. 13.

3 Fatmabibi v. Ganesh, 81 Bom 630 = 9 Bom. L. R. 917 (F. B.).

4 Prabhakar v. Khanderao, 10 Bom. L. R. 625.

5 Shivlal v. Bhikha, 11 Bom. L. R. 1872 = 34 Bom. 220.

(4) In January 1905, R filed two suits against N in the Sub-Judge's Court at Ahmedabad to recover from N money advanced on two bonds. N claimed to be an agriculturist. In the meanwhile (on 15 August 1905) this Act was extended to the district of Ahmedabad. N then sued R under S. 16 for an account of the two transactions. The provisions of section 12 will apply to N's suit though the two previous suits by R are not yet decided.¹

(5) A mortgaged his property to B with possession. On the same day B let the property to A. In 1904 B sued A and obtained a decree for four years' rent. This Act was extended to the district in 1905. In 1906 A sued B for redemption of the mortgage. After taking accounts under sections 12 and 13 B was found to have been overpaid out of the profits of the land. B can yet execute the decree for rent.²

S. The Court :—The Court referred to in this and the subsequent section is the Court mentioned in S. 11 which must be a Court within the local limits of whose jurisdiction the defendant resides and not any other.³

9. Disputed claim :—The existence of a dispute is a preliminary condition for an enquiry under S. 12. The word 'claim' must be taken in its usual meaning to mean the *whole* amount claimed by the creditor; it cannot be narrowed to mean the amount mentioned in the bond or deed sued upon. Further, even assuming that the word 'claim' means 'the amount mentioned in the bond sued upon' such amount must be taken to be not merely the amount of the principal lent, but the aggregate of the sums payable in consequence of the liability created by the terms of the contract of lending embodied in the bond.⁴

Illustration.

P sued N to redeem the property in dispute burdened with three usufructuary and three simple mortgages. He claimed to redeem it on payment of Rs. 100 to N, the assignee. N on the other hand claimed Rs. 1700 to be due to him on the mortgages. There is here thus a dispute as to the amount of the claim, and the Court must hold an enquiry under S. 12.⁵

10. Burden of proof :—Ordinarily when a debtor executes a bond and when its execution is proved or admitted the burden of proving that the bond is invalid for fraud, illegality

1 Narsingji v. Ranohdohbhai, (1910) 19 Bom. L. R. 109.

2 Mugappa v. Mahamadsaheb, 34 Bom. 260=12 Bom. L. R. 197.

3 Suryaji v. Fakaram, 4 Bom. 353 =1880 P. J. 80.

4 Chandavarkar J. in Patlu v. Naru, 7 Bom. L. R. 688.

5 Patlu v. Naru, *Supra*.

lity, want of consideration etc. lies on the defendant (Ss. 91, 92 and 102, Indian Evidence Act, 1 of 1872). If the defendant gives no evidence he is bound to pay the amount. Though these rules are not expressly repealed by this Act, since the bond is to be disregarded and the history of the transaction is to be entered into, the intention of the legislature seems clearly to be to relieve the debtor of the necessity of proving the failure of consideration although admitted in the bond on which he is sued and the execution of which he admits. The onus of proving want of consideration is not to be placed on the defendant.¹

But this does not mean that the burden of proof is on the plaintiff to prove by affirmative evidence the consideration of the bond. The burden lies no more on the plaintiff to prove by affirmative evidence the consideration than it lies on the defendant to prove failure of consideration. It is the duty of the Court after examining both the parties to enquire into the history and merits of the case with a view to take an account between the parties.² For it may be in some cases that the plaintiff himself being an agriculturist and as ignorant as the defendant, is unable to produce any account; he may have merely advanced a loan to the defendant to relieve his wants, and being in the same position as the defendant, it would not be fair to dismiss his suit. Or it may even happen that in such a case the defendant, though coming within the definition of an agriculturist does not really belong to that helpless and ignorant class which it was the intention of the Legislature to relieve. So no strict rules as to onus of proof can be laid down in such cases. It is the duty of the Court to hear what each party has to say, and it must, in the language of §. 15, endeavour to 'satisfy itself.' Under the repealed section 15, if the Court could not satisfy itself as to the amount which should be allowed on account of the principal and interest, it could refer the matter to arbitration. But now it is the duty of the Court to find out, on such materials as are before it, the money which from time to time was received by the debtor and paid by him to the creditor. Mere guess work cannot be made in favour of

¹ Maloji v. Vithu, 9 Bom. 520=1885 J. 228.
² P. J. 117; Pandu v. Ganesh, 1885 P. 2 Lalji v. Mahamed Ali, 18. L.R. 75.

either party¹; so in some cases the Court may even place the burden on the defendant.

This rule was laid down in very clear terms in a Sind case² where it was held that in an enquiry under Ss. 12 and 13 the Judge is at liberty to place the onus on the debtor if on examining the facts he considers that course proper.

Note:—In view of the fact that the sections (12 and 13) are often interpreted as throwing in every case the burden of proving the history of the transaction on the creditor, it may be submitted that this clear statement of the law is preferable to the guarded view of the Bombay High Court. The same opinion was held by the Commission appointed to enquire into the working of the D. A. R. Act in 1891—92. It laid down : " There can be no question that any such hard and fast rule must in a number of cases be productive of injustice. It may be fair enough to require a professional moneylender who keeps regular accounts to prove the equitable nature of his claim against the ignorant ryots ; but where no accounts have been kept, or where the accounts have been destroyed (as in the riots of 1875) or where the two parties are on an equality, the fairness of requiring the creditor in every case to prove the history of the debt may well be questioned. In such cases the Court (if satisfied that the creditor is not keeping back material evidence) ought to be empowered to base its decision on such evidence as is available."³ The Commission of 1911—12 also repeats the same opinion and suggests that the keeping of accounts should be made compulsory.

It was held in a recent Bombay case that under S. 12 the Court is bound to examine the parties and enquire into the history and merits of the case. Hence the burden of proof is upon nobody's shoulders and the Court has to find the facts.⁴

11. Shall examine parties.....shall enquire:—The provisions as to examination of parties and enquiry are mandatory. It is laid down that the Court ' *shall examine* ' both the plaintiff and the defendant, and ' *shall enquire* ' into the history and merits of the case. So the mere fact that the parties did not bring to the notice of the Subordinate Judge the provisions of S. 12 and insist upon an enquiry thereby directed does not exonerate the Subordinate Judge from the responsibility cast upon him by the said provisions in plain and unmistakeable

1 Dhondi v. Lakshman, 19 Bom. 558=1894 P. J. 214; Ganesh v. Hari 1895 P. J. 378.

2 Bikchanda v. Verhomal, 8 S. L. R. 57.

3 See p. 43, Report of Commission appointed to enquire into the working of the D. A. R. Act, 1892.

4 Ganpat Bhujang v. Haman-Gauda 35 Bom. L.R. 956 = 57 Bom. 593.

terms independently of the wishes or acts of the parties. There is no discretion left to enquire or not where the creditor's claim is disputed. The duty of the Court is imperative so much so that according to the 4th para of the section even when the amount of the claim is admitted, the Court has to satisfy itself that the admission is genuine, and not the result of fraud or ignorance. The duty imposed upon the Court in imperative terms was obviously intended by the Legislature for the protection of the agriculturists as a matter of public policy, and no Court can neglect it or omit its performance on the ground that the party for whose benefit it was created waived it. It is not at the invitation of any party to a cause that the Court has to perform that duty. The Court must act *suo motu* and hold an enquiry as directed.¹

In suits falling under the D. A. R. Act the provisions of Ss.7 and 12 should be complied with and then issues framed. It is not right first to frame an issue like the following: was the bond sued on passed for cash payment as alleged by the plaintiff, and then examine the parties.²

If an enquiry is not made as directed by this section the point can be raised for the first time in appeal, though nothing was said at the hearing before the Subordinate Judge. For, it is a point which arises on the D. A. R. Act and as observed by the Privy Council in *Raja Har Narayan Singh v. Chaudharani Bhagwant Kuar*,³ "the statute is there and the Judges are bound to take judicial notice of it, even though it was not brought to the notice of the lower Court."⁴ And though the party does not appeal from the decree of the first Court, he is not precluded from attacking the decree of the lower appellate Court in cross objections.⁵ A point of law which is apparent from the face of the record,⁶ and which does not stand in need of being developed by evidence, may be taken for the first time in second appeal. The principle of estoppel recognized in *Gulam v. Hazi Badrudin*.⁷

1 Patlu v. Naru, 7 Bom. L. R. 688.

2 Manual of Civil Circulars issued by the High Court of Bombay, p. 147.

3 (1881) 13 All. 800 p. 804.

4 Patlu v. Naru, Supra.

5 Ganpati v. Sitharama, 10 Mad. 292.

6 Gandappa v. Girmallappa, 19 Bom. 331; Balaram v. Mangaldas, 34 Cal. 941.

7. 13 Bom. 336.

has no application in such a case, for the right to have the defendant examined and to have an account taken of past transactions is not one which a party can waive.¹

As this section lays down that the Court *shall examine* the parties, they have to be examined even if the defendant admits the claim and hence the plaintiff calls no evidence.²

The duty being thus imperative, the Court must go into the merits of the case, and take evidence tendered by the defendant for that purpose even if he does not appear on the day fixed for the final disposal of the suit.³

But where owing to the absence of pleas on the part of the defendant, the Court passes an *ex parte* decree without examining him and the plaintiff under Ss. 7 and 12, the Court must be deemed to have decided by necessary implication, that the defendant is not an agriculturist, and therefore in execution proceedings of the decree, the defendant cannot plead that he was an agriculturist at the time of the passing of the decree.⁴

Illustration.

A sued B to recover a sum of Rs. 50. B though duly served did not appear on the day fixed for the final disposal of the suit. The suit was therefore proceeded with in his absence. B was however examined as a witness under S. 7 para 2 of this Act. In his deposition he admitted the bond but pleaded payment of the same, and applied to the Court for having his witnesses summoned. Though B does not satisfy the Court that he had a sufficient cause for not being present in the Court in obedience to the summons, the Court should grant his application and summon his witnesses, for without doing so the Court cannot examine the history and merits of the transaction.⁵

12. Examination of the parties:—Under the C. P. Code (Act V of 1908) The Court may at the first hearing of the

1 Pratt A. J. C. in Musamat Begum v. Topanmal, 3 S. L. R. 106=4 I. C. 592. See also Lalji v. Mahamadali, I. S. L. R. 75; Putaji v. Sadashiv, 1887 P. J. 211; Amarchand v. Lakshman, 1830 P. J. 220; Appa v. Bapu, 1885 P. J. 255; Dadabhai v. Dadabhai, 10 Bom. L. R. 745; v. Dhondi, 1880 P. J. 277; Bhau v. Antaji, 1884 P. J. 77.

2 Lalji v. Mahamad Ali, I. S. L. R. 75.

3 Dulichand v. Dhondi, 5 Bom. 184=1880 P. J. 277.

4 Lawrence Philip & Co. v. M. R. F. Nazareth, 78 I. C. 806=19 S. L. R. 247=A. I. R. 1925 Sind 86.

5 Dulichand v. Dhondi, 1880 P. J. 277=5 Bom. 181.

suit or at any subsequent stage examine any party present in Court (Or. X r. 2). If the party is not present and if the pleader or any other person is not able to answer such questions as are put to him by the Court, the Court may direct such party to be present in Court in person. If the party fails to appear on the appointed day the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit (Or. X r. 4). So under the C. P. Code the examination of the party is not mandatory in each case. But under this section the examination of *both* parties is compulsory. Under S. 7 the examination of the defendant only is compulsory, and that section applies only to proceedings under Chapter II. This clause making an examination of both the parties compulsory was introduced in this section by Act XXIII of 1886 for the following among other reasons:

"Section 7 of the Act merely makes the examination of the defendant compulsory in all suits under Chapter II, which includes even non-agriculturist suits; but sections 12 to 14 apply to many suits which affect agriculturists only and do not fall under Chapter II, and it is even more important that the defendant should be examined as a witness in such suits than in many of the suits to which Chapter II applies. The defendant is generally the debtor, but in redemption suits it is the plaintiff who is the debtor, and it is his examination that is most necessary. It is, moreover, almost impossible for the Courts to investigate the past history of an old debt in a satisfactory manner without examining both the creditor and the debtor as witnesses. Again, unless a provision against *ex parte* decrees be inserted in Chapter III, it will not be possible to guard against *ex parte* decrees in other districts to which the Act may hereafter be extended without also extending the other provisions of Chapter II at the same time.¹

13. Nature of the enquiry:— The Commission appointed to enquire into the Deccan Riots of 1875 thus enumerate the chief frauds which are practised.²

By creditors:— (1) forging bonds; (2) withholding the consideration mentioned in bond; (3) obtaining new bonds in satisfaction of old bonds and of decrees and nevertheless enforcing the latter; (4) not giving credit for payments; (5) refusing to explain or wrongly representing their accounts to debtors.

By debtors:— (6) tendering in evidence false receipts and false evidence of alleged payments; (7) pleading that bonds are false when they are really genuine.

¹ See Statement of Objects and Reasons (Act XXXIII) of 1886.

² Cited from the proceedings of the Supreme Legislative Council, Vol. XXIII p. 134.

These points will be useful in the conduct of the enquiry under this section.

The enquiry is to be made *first* with a view to ascertaining whether there is any defence to the suit on the ground of fraud, mistake, accident, undue influence or otherwise (i.e. on the ground of coercion, misrepresentation, want of consideration, satisfaction and the like), and *secondly* with a view to taking an account between the parties. Under the section it is not necessary for the defendant to raise any such defence; but whether such a defence is raised by the defendant or by the Court for him, the Court must, before allowing it, be satisfied that it is a valid defence according to the laws of Contract and Evidence as applied to the particular circumstances of the case.

A Court enquiring into the history of a case under S. 12 is not intended to eke out by mere guesses a history which is defective; the proper course is to start from the point where reasonable certainty begins. The mere fact that there are some previous transactions would not make it necessary for the Court to go back to them if the transactions are very old, having taken place before the D. A. R. Act was enacted, and if the creditor has preserved no record of such transactions. For as there was no necessity then to preserve all the documents that support the title of the creditor, he is not bound to preserve all his documents.¹ If the parties adduce no evidence, the Court must endeavour to satisfy itself. Though the intention of the Legislature seems to be to relieve the debtor of the necessity of proving want of consideration, no strict rule as to burden of proof can be laid down.² As the law stands, mere guesses as to the sum of money actually advanced cannot be made in favour either of one side or the other. The Court should form its own opinion on the subject.³ In making an enquiry and taking accounts, there is no principle which enables Court to determine how much of a particular bond is made up of principal and how much of interest. There is no presumption or rule of law that half of the consideration of an ancient bond is to be attributed to principal and half to interest. The Subordinate Judge must draw his own

1 Mahadu v. Rajaram, 1887 P. J. 216.

2 Maloji v. Vithu, 9 Bom. 520 = 1885 P. J. 117. See Note on 'Burden

of Proof' and the cases referred to thereunder.

3 Dhondi v. Laxman, 19 Bom. 555 = 1894 P. J. 214.

deductions from the material which he has before him in each particular case.¹

The Legislature has recognised that there may be old bonds in respect of which it is impossible for the Judge to ascertain what amount is to be allowed for principal and what for interest. The recourse to arbitration that was open in such cases being now cut off (by repeal of S. 15) the Court must exhaust all practicable means of enquiry. If possible, it will approximately ascertain the date when the transactions giving rise to the bond sued on began; and from the course of the later dealings between the parties may infer the character of the earlier. It will draw all possible presumptions from the non-production of books of account by the creditor whom the Act seems to contemplate as the primary source from whom enquiry is to be made.² But if the transaction is very old, it does not seem equitable that the plaintiff should lose everything because he cannot go back far enough to a period before the Act was in force to distinguish what is principal and what is interest.³

Presumptions :— In taking accounts under this section, when direct evidence is not available, the Judge will have to draw proper presumptions also in some cases. For presumptions play a very important part in the elucidation of truth, and when properly raised from circumstances in the case which are either not in dispute or are satisfactorily proved ought to be duly weighed in deciding as to the credit due to direct evidence, tending in the opposite direction.⁴

14. Unless.....it deems it unnecessary :— This clause enables the Court to dispense with the examination of parties if in any particular case it thinks such examination unnecessary. The opinion of the Court shall have to be formed after considering the particular circumstances of each case. It may thus dispense with the examination of the parties if the transaction between the parties giving rise to the suit is of a recent date and is not complicated and where the parties are represented by pleaders,

1 Ganesh v. Hari, 1895 P. J. 373 ;	red therein.
Ramchandra v. Shiwram, 1883 P. J.	3 Kondan v. Inderchand, 22 Bom
204 ; Vithal v. Mahadji, 1888 P. J. 71.	L. R., 1299.
2 Ganesh v. Hari, 1895 P. J. 373.	4 Gopal v. Yeshwantrao, 1887 P. J.
See note on 13 (a) and the cases refer-	273.

or where the parties are merely the representatives or assigns of the parties to the original transaction and who consequently have no personal knowledge of the same. But each case shall have to be decided on its own merits, and no general rule can be laid down. But it seems that the provisions of this section as to examination are not as obligatory as those of S. 7. Under the latter section the examination can be dispensed with only if the Court 'deems it *clearly unnecessary*'; the word 'clearly' introduced in that section by Act VI of 1895 not being introduced here.

15. From the commencement :—The history of a transaction is to be investigated and its account is to be taken from the very commencement of the transaction out of which the transaction in suit has arisen; and for that purpose the Court is to set aside any statement or settlement of account or any contract between the parties purporting to close previous dealings and create a new obligation.¹ If there are various transactions between the parties and they are linked together so as to form one transaction, the account is to be taken from the commencement of the earliest of them. (See next note 'Transactions out of which the suit has arisen').

But in tracing the account to its commencement the Court cannot go by mere guess work. It must try to satisfy itself. There is no presumption that one half of old bonds represents the principal and one half interest.² It is not intended that a defective history should be eked out by mere guesses. The Judge must go to a point where reasonable certainty begins. It cannot be said that simply because there is some other transaction between the parties, it must be taken as the origin of the subsequent one unless some other origin for the latter is clearly made out.³ Again, if the plaintiff does not preserve the account books of a period before this Act was extended to the District, because he did not know the utility of evidence to prove each advance, the Court cannot dismiss the suit entirely. It should try to form a reasonable estimate in such a case.⁴

1 Appa v. Bapu, 1885 P. J. 255; Ganesh v. Kashi, 1888 P. J. 132; Genu v. Narayan, 22 Bom. L. R. 1147; Annambhat v. Shivappa, 30 Bom. L. R. 539 = 110 I. C. 269 = A. I. R. 1928 Bom. 232, 2 Ganesh v. Hari. 1895 P. J. 373.

See note on S. 13 (a) and the cases referred there.

3 Mahadu v. Rajaram, 1887 P. J. 216.

4 Kondan v. Inderchand, 22 Bom. L. R. 1299.

16. Transaction out of which the suit has arisen:—

Under S. 12 the Court is to enquire into the history and merits of the case from the commencement of the transaction between the parties.....out of which the suit has arisen.' In taking accounts under S. 13 also, it is to 'open the account between the parties from the commencement of the transaction.' The word 'transaction' in these sections means transactions in general between the creditor and the agriculturist-debtor. Generally, the dealings between agriculturists and their creditors are of very long standing, and are continued from generation to generation. Again, when a mortgagee opens an account in the name of the mortgagor, he generally takes care simultaneously to open several khatas in the name of his debtor, and eventually so many relationships are created. For instance, the relation of mortgagor and mortgagee originates with the deed itself, to which may also be added another relationship by the mortgagee subsequently taking a bond for the balance of the interest on the mortgage. So also a relation of landlord and tenant may arise if the mortgagee leases the mortgaged property to the mortgagor. With so many transactions in hand the mortgagee may without contest get decrees on some transaction though the debtor continues payings to the same account. To protect the interests of agriculturists in such cases these sections lay down that accounts must be taken of all such transactions together.

17. Same transaction:— *When there are several transactions between the parties, what the Court in each case has to decide is as to when the transaction out of which the suit arose first began, and what are the transactions in connection with that account. The rule in such case may be stated thus: If the several transactions are so connected together as to form part of the transaction in dispute all such transactions have to be opened up in spite of an agreement or settlement to the contrary. Thus if one sum is advanced, but it is agreed that part of it should be treated as secured and part unsecured,¹ or if several consecutive advances are made, each before the previous one was paid off,² or if several khatas are opened, some of which only are continued,³*

1 Balkrishna v. Mahadeo, 22 Bom. L. R. 1190.
520=1896 P. J. 652.

3 Narayan v. Chapsi Dosa, 23 Bom.

2 Gurunath v. Sadashiv, 22 Bom. L. R. 1186.

or when there are several mortgages involving the same security and it is agreed that the subsequent mortgage is not to be redeemed before the previous one,¹ the transactions are governed by S. 12 and their accounts must be taken together under S.13. Whether the principle of *Janoji v. Janoji*,² can be applied depends upon whether the mortgages upon a true interpretation can be entirely disconnected. Where there is an onerous condition imposed upon the mortgagor by each of the later mortgages, to fulfil the obligation carried over from the previous to the subsequent mortgage, this Act must be applied to such a series of transactions.³

To allow the mortgagor to sue on one mortgage, leaving aside other mortgages which together with the first really make up one transaction might easily lead to fraud and also to an evasion of the object of the D. A. R. Act; for a party can thereby avoid an account being taken of the whole transaction between the parties, and then at a future time file a suit on the remaining causes of action, which as a matter of fact really made up one entire cause of action.⁴

If the two mortgages are thus connected together, and if the mortgagee sues upon one mortgage only without suing upon others, a subsequent suit on the remaining mortgages is barred.⁵

18. Separate accounts.—But if the transactions are entirely distinct their account must be taken separately.⁶ So if a distinct conclusion be come to that a certain sum is actually paid in cash and no part of it is applied in satisfaction of the previous bond, the transaction in that case will be considered so disconnected from the previous bond as not to call for any enquiry into the history of the bond.⁷ So where a bond is assigned for full consideration and the original debtor acknowledges the liability that in effect is a *fresh transaction* between the assignee and the

1 Dhondi v. Rewappa, 19 Bom. L. R. 276=41 Bom. 453.

2 7 Bom. 185.

3 Dhondi v. Revappa, 19 Bom. L.R. 276; Babaji v. Maniram, 1894, P. J. 87.

4 Daluchand v. Api, 22 Bom. L. R. 1038.

5 Dhondo v. Bhikaji, 17 Bom. L. R. 144=39 Bom. 138.

6 Ramchandra v. Janardan, 14 Bom. 19=1899 P. J. 44; Vishnu v. Satwaji, 1897 P. J. 87.

7 Gopal v. Yeshwantrao, 1887 P. J. 273.

original debtor and accounts need not be taken previous to the assignment.¹

Similarly when a contract has been made the subject of adjudication by a Civil Court and a decree is passed thereon the contract is merged in the decree, and it cannot be opened in taking accounts.²

Again when there are certain mortgages between the parties and also certain monetary dealings, the accounts of the two must be taken separately. For the relief provided for the two (by Ss. 15 D and 16 respectively) are distinct; and the relief given for one cannot be imported into the relief given for the other.³

Illustrations.

Connected transactions:— (1) A lent B Rs. 150 on a bond. Of this loan Rs. 100 were advanced on a mortgage of certain land, and A was to take profits of that land in lieu of interest. Rs. 50 which were unsecured, were made repayable with compound interest at Rs. 2 p. c. p. a. The mortgage was not to be redeemed until the sum of Rs. 50 with interest was paid off. Here the two loans are so interlaced that their account must be taken together.⁴

(2) Two brothers S and R mortgaged their lands to G for Rs. 8000. They were to pay interest on Rs. 300 only. G was to enjoy profits of the land in lieu of interest on Rs. 2700. Two years later S and R again borrowed Rs. 700 from G on the same security. A year later S alone borrowed Rs. 200 from G on the same security agreeing to pay all the debts together. In this case the series of transactions between the parties is exactly of the kind contemplated by S. 13, and so the accounts of all the mortgages must be taken together.⁵

(3) A passed three mortgages to D each mortgage being for Rs. 99. The consideration for the three mortgages was the balance of Rs. 274 due on previous account and Rs. 23 paid in cash. D sued A on one only of these mortgages under the provisions of this Act and obtained a decree. He now again sues A on the two remaining mortgages. D's suit is barred under Or. II r. 2 of the C. P. Code, 1908, and S. 13 of this Act.⁶

(4) A and B who formed a joint Hindu family borrowed money from C on five khatas in the course of their business. After some years the various

1 Laxman v. Maina, 1883 P. J. 320.
2 Appaji v. Atmaram, 1882 P. J. 125; Goverdhan v. Yesu, 1882 P. J. 24; Tatyā v. Bapu, 7 Bom. 330 = 1883 P. J. 161.

3 Laxmandas v. Baban, 16 Bom. L. R. 671.

4 Balkrishna v. Mahadeo, 22 Bom. 520 = 1896 P. J. 652.

5 Gurunath v. Sadashiv, 22 Bom. L. R. 1190.

6 Daluchand v. Api Khema, 22 Bom. L. R. 1093. See also Dhondo v. Bhikaji, 17 Bom. L. R. 150.

khatas were totalled, and B acknowledged the amount due under them. After this acknowledgment the dealings were continued in two khatas. C now sues B (A being dead) for the balance due on the two khatas. Accounts of all the khatas must be taken together.¹

(5) In 1875 A mortgaged eleven survey numbers with B. In 1878 he mortgaged S. No. 58. In 1882 the eleven survey numbers were again mortgaged, the mortgagor undertaking not to redeem the lands without paying off the amounts due under the mortgages of 1875 and 1882. In 1885 all the survey numbers were further mortgaged, the mortgagor again undertaking not to redeem the mortgage until the three previous mortgages were paid off. A sues to redeem the mortgages. Accounts of all of them must be taken together; for here the third is so linked by its terms with the first that their conjoint effect is to virtually make them one and the same mortgage, and they import its liability into the first.²

Separate accounts:—(6) A mortgaged two separate pieces of land with B by two separate mortgage deeds. One mortgage was for five years, another was for four years. In the one, interest was to be paid out of profits, in the other, it was to be paid in cash. Here the two transactions are distinct and their accounts must be taken separately.³

(7) M borrowed Rs. 350 from S on a bond. S assigned the bond to L for Rs. 300. M was a party to the transaction of assignment and signed the bond as acknowledgment of the liability to pay Rs. 300. L sued M to recover the sum of Rs. 300. M claims to take accounts under Ss. 12 and 13 and to go behind the deed of acknowledgment for that purpose. M cannot be allowed to do so; by M's acknowledgment of the liability to pay, it became new transaction between L and M.⁴

(8) A sues B to redeem his land mortgaged with B. The Court decrees redemption on payment of Rs. 150, and directs that in default of payment the land should remain in possession of B. A again sues B for redemption and for account. In taking an account the Court cannot go behind the amount of Rs. 150 as settled by the decree. It can only take account subsequent to the decree.⁵

(9) A mortgaged his lands to B to secure Rs. 150 and interest at 27 p. c. p. a. M stood security for the payment. B sued A and M to recover the sum. An account was taken by the Panch and Rs. 400 were declared to be due. A made default in payment and hence the amount was recovered from M. A now sued M to redeem the lands that were transferred to M from B and claims to take an account under S. 13. In taking an account, the Court can-

1 Narayan v. Chapsi Dosa, 23 Bom. L. R. 1186.

2 Dhondi v. Rewappa, 19 Bom. L. R. 276.

3 Vishnu v. Satwaji, 1897 P. J. 87; Ramchandra v. Janardan, 14

Bom. 19=1899 P. J. 44; Gopal v. Yeshvantrao, 1887 P. J. 273.

4 Lakshman v. Maina, 1883 P. J. 320.

5 Taty v. Bapu, 7 Bom. 330=1883 P. J. 161.

not go behind Rs. 400, for M having paid the amount which he was bound to pay, it is a fresh transaction between A and M.¹

19. Court cannot go behind a decree.—Under this and the subsequent section the Court is to enquire into the history and merits of the case and take its accounts from the commencement of the transaction.² But the Court cannot go behind a decree and enquire into the history of the transaction as settled by the decree.³ In such a case the Court has only to look to the precise relation created by the decree, and the extent to which it has been satisfied. For, though the decree gives effect to the contract in a particular way, the distinction between a contract and a judgment is so great that the latter extinguishes the former.⁴ No doubt S. 13 allows the Court to go behind a private settlement or a private contract but there is nothing therein which empowers the Court to go behind a Civil Court's decree in which any preceding contract is merged.⁵

Illustration.

M and N mortgaged certain lands to G. G sued M and N on the mortgage and obtained a decree for Rs. 3000. As half owner of the land M's share of the liability was Rs. 1500. In satisfaction of this liability M executed a fresh mortgage for Rs. 1480 to G. M subsequently sued G for an account of the mortgage under the provisions of this Act. In taking accounts the Court cannot go behind the settlement made by the decree. It must take Rs. 1480 as the principal for the second mortgage and allow interest on that sum.⁶

20. Mortgage with Court's sanction :— Though in enquiring into the history and merits of a case, the Court cannot go behind the decree, the mere sanction of the Court under S. 257 A of the C. P. Code of 1882 (Act XIV of 1882) cannot have the effect of a decree. Under S. 257 A of that Code every agreement to give time to a judgment-debtor or agreement for satisfaction or adjustment of a debt was valid only if it was made with the permission of the Court. So the sanction of the Court was necessary in order to make the agreement, which would other-

¹ Lakshman v. Malhar, 1886 P. J. 191. | Taty v. Bapu, 7 Bom. 390=1883 P. J. 161.

² Narayan v. Vithal, 1893 P. J. 191.

³ Goverdhan v. Yesu, 1882 P. J. 24 ;
Appaji v. Atmaram, 1882 P. J. 125 ;

⁴ West J. in Taty v. Bapu, Supra ;

⁵ Mareppa v. Gundo, 20 Bom. L. R. 469.

⁶ Ibid.

wise have been void, a good and binding contract. It does not appear that the section was intended to do anything more, and give any future and special force to the contract. It did not and could not, interfere with the jurisdiction to enquire whether the contract included interest in the principal sum conferred by this entirely separate and special Act.¹ The provisions of section 257 A are omitted from the new C. P. Code.

21. Between the parties:—The accounts between the parties referred to in S. 12 must be taken to be the accounts between the plaintiff and the defendant, and not between defendants *inter se*.²

22. Or the persons through whom they claim:—This expression covers the case not only of legal representatives of a deceased creditor but also of an *assignee* who has purchased or otherwise acquired the right, title and interest of either the original creditor or original debtor.³ And hence the provisions of Ss. 12 and 13 are applicable to an assignee of the original mortgagor if the assignee is an agriculturist.⁴ and this decision proceeds on grounds entirely independent of the fact that the original mortgagor was an agriculturist.⁵ A *Benamidar* can sue or be sued under the provision of these sections for the same reason.⁶ But, on the other hand, the provisions of S. 12 (viz. examination of parties, enquiring into history, etc.) have to be observed by the Court in a suit by a benamidar just as much as in a suit by a real creditor. It is quite possible for the Court to carry out these provisions, in such a case, because the actual creditor can be examined and called upon to produce his accounts as a witness just as well as if he was a party.⁷

23. Powers of the Court making an enquiry:—The powers of the Court making an enquiry under S. 12 are very

¹ Hayward J. in *Kisandas v. Ramchandra*, 18 Bom. L. R. 1009. S. 257 A is omitted from the new C. P. Code of 1908. For this section see notes below under s. 13: S. 257 A; Effect of. Repeal of S. 257 A, etc.

² Narayan v. Vithal, 1893 P. J. 191.

³ Annaji v. Bapuchand, (1883) 7 Bom. 520

⁴ Dnyanu v. Apa, 1883 P. J. 271.

⁵ Shripati v. Sitaram, 1887 P. J. 296.

⁶ Narayan v. Kaji Gulam Mohidin, (1925) 49 Bom. 132, 27 Bom. L. R. 1240; Chitta Bhula v. Bai Jamni, 40 Bom. 483; 18 Bom. L. R. 439 (1916).

⁷ Narayan v. Kaji Gulam 27 Bom. L. R. 1240.

wide. Having opened the transactions between the parties it is to enquire into every fact that would be necessary to determine the extent of the liability of the debtor. It can enquire not only into the amount due but into the nature of the transaction also.¹ In doing so, the Court will have to look to the real intention of the parties, and not only to the particular form they might have chosen to give effect to their intention. Thus if the intention of the parties is that a particular transaction should constitute a new advance by the creditor to the debtor and that it should constitute a new mortgage between them, the mere fact that it is in the form of an assignment-deed is not material. Such a transaction being in fact a new mortgage, the Court cannot go behind the assignment-deed.² Similarly where a mortgagor sues for redemption, the Court has the power to determine the title of the person in possession; for without determining it, the Court cannot decide whether the profits of the land were taken by him as mortgagee or as the owner, though ordinarily in an account suit it is not necessary to go into the question of title.³

24. Effect of admission of claim :—Under this section the Court is bound to make an inquiry if the amount of the creditor's claim is disputed. But such an enquiry is not obligatory if the amount of the claim is admitted, and the Court for reasons to be recorded by it in writing believes that such admission is true and made by the debtor with a full knowledge of his legal rights against the creditor. Ss. 12 and 13 imperatively require the Court to investigate the history of all transactions with agriculturist-debtors without regard to any admission made by such debtors save in very exceptional cases and for reasons to be recorded by the Court in writing; and it is obvious that a suit for an account must, *ex necessitate rei* involve an enquiry into not only the amount, but the nature of the obligation.⁴ But when the defendant admits a claim in his written statement, the Court cannot disregard it entirely. The Judge must deal with such admission and must give his reasons for believing that:

1 *Bhau v. Antaji*, 1884 P. J. 77.

2 *Laxman v. Maina*, 1883 P. J. 320.

See this case under 'transactions out of which the suit has arisen.'

3 *Rama v. Karimkhan*, 1885 P. J. 112.

4 *Bhau v. Antaji*, 1884 P. J. 77.

there was no true admission¹. "If the Subordinate Judge thinks that the plaintiff is so ignorant that his admission could not safely be received, he ought to give some intimation of this and allow the defendant an opportunity of proving the accounts or the contents of the accounts by other evidence."² So if the mortgage is admitted, the Judge should consider it. The plaintiff should not be made to lose everything because he cannot go back far enough to a period before the Act was in force to distinguish what is principal and what is interest.³

Illustrations.

(1) A an agriculturist sues B for redemption of a mortgage admitting in the plaint that the land which is sought to be redeemed had been mortgaged to secure the repayment of three sums of Rs. 150, 150 and 155 advanced respectively at different times. In inquiring into the history, it is found that there is no evidence of the amount of the item of Rs. 155 ever having been advanced. The Court can disallow that item in spite of the plaintiff's admission.⁴

(2) K sued S to recover a sum of money. S admitted having received Rs. 500. In taking accounts, the Court did not refer to the amount of Rs. 500 admitted by the defendant. It gave no reasons for the opinion that S had not admitted receipt of cash as alleged by K. It was held that this was neither an examination of the accounts, nor an adjudication on evidence and the pleadings of parties.⁵

25. In other cases :—If the Court does not think that the admission by the debtor is true and made with a full knowledge of his rights as against the creditor, the Court shall enquire into the accounts, as where the debtor is an illiterate person and not represented by a pleader. If there are many defendants, all being agriculturists, and some of them admit the claim but others do not, the Court shall enquire into the transaction. If some only of the defendants are agriculturists, and if the agriculturist defendants do not admit the claim, an enquiry will be made under this section. But if the agriculturist defendants were to admit the claim while the other defendants who are not agriculturist were to dispute the same, it seems that there is room in the wording of the section to support the conclusion that the Court will be bound nevertheless to enquire.

¹ Krishnaji v. Sambhu, 1892 P. J. 280.

² Sitaram v. Nana, 1883 P. J. 296.

³ Kondan v. Inderchand, (1920)

⁴ 22 Bom. L. R. 1299.

⁵ Bhu v. Antaji, 1884 P. J. 77.

⁶ 5 Krishnaji v. Sambhu, 1892 P. J. 280.

26. Section 9 cl. 1 Bombay Regulation 1827 :—This section repeals that clause which ran :

“Written acknowledgments of debt in any shape shall not be held conclusive in a Court of law as to the amount, if the defendant shows that a full consideration has not been received.”

The provision regarding admissibility of oral evidence of want of consideration is now contained in S. 92 (1) of the Indian Evidence Act which runs :—

“Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact or law.”

The general rule as to burden of proof is laid down in S. 102 of the same Act which runs :—

“The burden of proof in a suit or proceeding lies on that person who would fail, if no evidence at all were given on either side.”

S. 10 A which has been introduced in this Act by Act II of 1907 now provides for the admission of oral evidence to enquire into and to determine the real nature of a transaction, and to decide a suit in accordance with such determination. Though the above rules about burden of proof in the Evidence Act have not been expressly repealed by this Act, it seems to be the intention of the legislature to relieve the debtor from the necessity of proving failure of consideration though admitted in the bond.¹

(For further discussion see note on ‘Burden of proof.’)

27. Compromise and Arbitration :—*This Act allows private settlement of dispute :—*Though the Act makes detailed provisions for guarding the interests of an agriculturist debtor when he is brought to the Court ‘there is nothing in S. 12 or in any other section of the Act which expressly deprives the parties to a suit of the power of entering into a compromise and of having the compromise recorded under Or. 23 r. 3 of the C.P. Code, 1908.² The contention that ‘in the eye of the law (i. e. this Act) the agriculturist is not competent to act independently and is not able to take care of himself’ cannot be accepted. For as it was

¹ Maloji v. Vitlu, 9 Bom. 520 = 1885 P. J. 117.

² Piraji v. Ganpati, 34 Bom. 502 = 12 Bom. L. R. 378.

expressed by West J. "If the creditor and debtor cannot define their mutual relations by the mediation of persons in whom they have confidence, still less should they be allowed to do so unaided and thus the settlement of dispute would be no settlement unless made by a Court. The foundation would thus be laid for universal litigation, but this is so generally disapproved that it cannot without an express declaration be supposed to have formed a part of the policy of the Legislature in this particular instance."¹

The parties can thus settle their disputes out of Court (a) either by themselves entering into a compromise, or (b) by referring the dispute to arbitration.

28. Compromise:—(1) *Provision for compromise under the C. P. Code, 1908*:—If after a suit is filed the parties think that their dispute can be settled by a compromise, they may adjust their dispute, and the Court will pass a decree in accordance with the compromise. R. 3 of Or. XXIII of the C. P. Code, 1908, runs thus:—

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith so far as it relates to the suit."

(2) *D. A. R. Act does not disallow Compromise*:—There is nothing in the language of S. 12 or in any other section of the Act which expressly deprives the parties of the power of entering into a compromise and of having that compromise recorded under Or. XXIII of the C. P. Code, 1908. No doubt under the latter part of S. 12, if the amount of the claim is admitted, and the Court for reasons to be recorded by it in writing believes that the admission is true and was made by the debtor with full knowledge of his legal rights as against the creditor, the Court is not bound to take accounts as directed by the provisions of the section. But that applies where the debtor admits the creditor's claim. That is different from a compromise. For a compromise is not an admission of a claim by the debtor. A compromise means the settlement of a *disputed* and not admitted claim.²

¹ West J. in *Gangadhar v. Mahadu*, 8 Bom. 20=1888 F. J. 392.

² Chandavarkar J; in *Piraji v. Ganapati*, 34 Bom. 502=12 Bom. L. R. 378.

(3) *Compromise by pleader*.— A compromise signed by a party's pleader without his consent and without his instructions in that behalf, is *ultra vires* and can be avoided.¹ But where a party complains that a compromise is so effected by his pleader, he must move the Court to cancel all that has been done and to revive the suit. If he takes no steps for that purpose, as required by law, he cannot for the first time in appeal move the appellate Court to set aside the compromise.²

29. Compromise: How far against public policy:—

A compromise is merely an agreement between the parties to settle an existing dispute, and if it is to be enforceable in law it must not contain a term opposed to public policy.³

The question then arises how far a compromise can be said to be against public policy as embodied in S. 12 which requires the Court to be satisfied that the admission by a debtor is made with full knowledge of his rights against the creditor, and to take accounts in the manner given in S. 13. In a case under S. 15 B where the parties agreed to a compromise of a mortgage-suit, under which, upon the failure to pay two instalments, the whole of the mortgaged property was to be brought to sale, it was held that the compromise though opposed to the provisions of S. 15 B is not invalid. Scott C. J. then laid down "there is nothing to show that the Legislature intended that the provisions of that section (S. 15 B) should be applied by analogy wherever a compromise is entered into, which is to be recorded by the Court and to form the basis of a consent-decree. 'As Mr. Justice West observed in *Gangadhar v. Mahadu*⁴' it is a general principle that exceptional provisions are not to receive a development to all their logical consequences contrary to the general principles of law.' A compromise which is made by parties who are *sui juris* should be given effect to. We do not think that there is anything unlawful in the compromise or contrary to public policy."⁵

In some previous cases⁶ it was held that a compromise proceeding that 'in default of payment of two instalments the whole

1 *Basangowda v. Churchigirigauda*,
12 Bom. L. R. 224.

2 *Piraji v. Ganpati*, *Supra*.

3 *Laxmanswami Naidu v. Rangamma*, (1902) 26 Mad. 31.

4 8 Bom. 20.

5 *Shivayagappa v. Govindappa*, 15 Bom. L. R. 768 (F. B.).

6 *Kisandas v. Nama*, 12 Bom. L. R. 1024. See note under S. 15 B.

mortgaged property shall be liable to sale' is opposed to public policy as laid down in S. 15 B, and so is not valid. These cases are no longer good law.

The principle laid down in *Shivayagappa v. Govindappa* is equally applicable to Ss. 12 and 13, and so a compromise cannot be said to be against public policy merely because it obviates the enquiry laid down in S. 12 and the taking of accounts as laid down in S. 13.

30. Court can go behind compromise before filing it:—

All these cases only lay down that the Court *can* pass a decree in terms of a compromise without going into accounts as required by Ss. 12 and 13; but they do not prevent the Court from going behind the transaction when the defendant *admits* the *whole* of the plaintiff's claim and asks the Court to pass a decree in accordance with that admission. "I do not think myself it can be said that Or. XXIII, r. 3 ousts the jurisdiction of the Court in this class of cases from inquiring into the nature of the admission so as to satisfy itself whether the admission is true and made by the debtor with a full knowledge of his legal rights as against the creditor. If when the case had been called on, the defendant said "I admit the claim and am willing that a decree should be passed against me accordingly," it is perfectly plain that under S. 12 of the D. A. R. Act the Court would be bound to record in writing its conclusions as to whether the admission was true and made by the debtor with a full knowledge of his legal rights and it seems to me to make no difference that before the case came to Court, the defendant has written down a paper to that effect and produces it in Court when the case is called on. I think myself, therefore that provided it is perfectly clear that the *whole* of plaintiff's claim is admitted the Court can go behind the transaction even though an application is made to record the transaction under Or. 23 r. 3."¹

In this case the Court seems to have concluded that because the defendant had in the compromise *admitted* the *whole* of the plaintiff's claim, it was virtually a case of admission and the Court can go behind it and enquire into the facts of the case. But it seems that if it were to be a case of *real* compromise where the

¹ Per Macleod C. J. in *Goturam v. Barku*, (1922) 24 Bom. L. R. 88.

whole of the plaintiff's claim is not *admitted*, the Court would not go behind the transaction.

31. Sind view :—But the view of the Sind Courts is more emphatic on the point. There it is held that even in the case of a compromise the Court can enquire into the merits of the transaction. It was laid down by Percival J. C. in *Passumat v. Valoo*¹. "When the D. A. R. Act is considered as a whole and the rulings on the point are considered, the view that the Judge can not go into the suitability of the compromise cannot be accepted. The provisions of the D. A. R. Act are very drastic regarding the power and the duty of the Court to take accounts under Ss. 12 and 13 of the Act... The whole tenor of the Act is to the effect that the Court can go and should go into the question of the correctness of awards affecting the parties. The inference is that the Court cannot be precluded from going into the question of the correctness of the compromise."

The reason of this rule was expressed in the same case by Tayabji A. J. C., by saying that even where a compromise is entered into because the plaintiff has waived a portion of his claim or altered it, it only means that the defendant *admits* the claim as altered or to the extent that it is asserted in the compromise. "There is thus an admission of the claim on the part of the defendant at the time when the Court is asked to pass a decree by consent. This admission is no doubt based on the fact that the defendant has entered into a compromise after the trial has commenced. But that does not make it the less an admission of the amount of the claim nor does it prevent the provisions of S. 12 from governing."

Illustrations.

(1) P mortgaged his lands to G to secure a loan of Rs. 8700. G was in possession of the lands. P sued G for accounts and for redemption of the mortgage. After the issues were settled the parties entered into a compromise whereby it was agreed that P was to pay G Rs. 9500 by annual instalments of Rs. 500. If the Court thinks the compromise to be reasonable, it can pass a decree upon that compromise without enquiring into the history of the transaction and without taking accounts.²

¹ A. I. R. 1927 Sind 197 = 101, I. C. | ² *Firaji v. Ganpati*, 84 Bom. 502 = 844, 12 Bom. L. R. 878.

(2) A sued B to recover the amount due on a promissory note. B denied the consideration and prayed for an account. On the day of hearing, the parties came to a compromise whereby B promised to pay the whole amount by instalments. But when examined B said that he had agreed to the compromise though he did not understand the accounts and that he had received a small amount only from A many years ago. Here the admission made by B does not seem to be with a knowledge of his rights against A. So the Court may disregard the compromise and proceed under Ss. 12 and 13.¹

(3) A sued B for a sum of money due from B. Pending the suit, the parties entered into a compromise to which C put his thumb mark. When examined by the Court B made a different statement and said that the amount was not due from him. The Court can disregard the compromise.²

32. Compromise decree cannot be opened:—When the parties enter into a compromise and the Court accepts the compromise and passes a decree thereon, the judgment-debtor cannot seek to take accounts of the transaction by opening the decree. If he alleges that the decree was obtained by fraud, he must file a separate suit to set aside the decree.³

33. Arbitration:—*This Act does not disallow arbitration:—*S. 15 allowed the Court, instead of itself enquiring into the history and merits of a case, to direct that the amount due be ascertained by arbitration. That section is now repealed but the last clause of S. 12 says "nothing herein contained shall affect the right of parties to require that any matter in difference between them be referred to arbitration." This shows that there cannot have been any distrust of arbitration as such in the mind of legislature in passing the Act. "If a creditor and debtor can not define their mutual relations by the mediation of persons in whom they have confidence, still less should they be allowed to do so unaided, and thus the settlement of accounts would be no settlement unless made by a Court. The foundation would thus be laid for universal litigation, but this is so generally disapproved that it cannot without an express declaration be supposed to have formed a part of the policy of the Legislature in this particular instance."⁴ So a Court can file a private award to which

¹ Goturam v. Barku, 46 Bom. 560 = 24 Bom. L. R. 88.

² Pessumal v. Valoo, A. I. R. 1927 Sind 197.

³ Vinayakrao v. Shamrao, 18 Bom. L. R. 708; Mt. Bachi v. Bikhchand,

18 Bom. L. R. 56 (P. C.) and Shamrao v. Nilkant, unreported but referred to in 18 Bom. L. R. 708.

⁴ Per West J. In Gangadhar v. Mahadu, 8 Bom. 20 = 1889 P. J. 932.

an agriculturist debtor is a party without adjusting accounts under Ss. 12 and 13.¹ The whole policy of the D. A. R. Act was, when it was passed, to encourage reference of disputes to conciliators. Therefore the question of arbitration was present to the mind of the Legislature, and had they decided to rule out all private arbitrations, it would have been easy for it to say so.²

The reason for not applying the provisions of the D. A. R. Act to awards made on arbitration is that an application to file an award is not a suit as contemplated by this Act. The suit in which such a decree is obtained is a suit to file on award. That is how the suit can and must be described; and so effect can be given to a decree passed on a private award without reference to the provisions of this Act.³

(For further discussion see comment on S. 15 B.)

34. Enquiry before filing awards:—Very often the so-called awards to which agriculturists are parties are mere colourable documents obtained for the purpose of avoiding the wholesome provisions which require the Court to go into the history of the transaction from its commencement, and also to shut out any defence of fraud etc. which may be urged by an agriculturist, in case the matter takes the form of a suit. It is therefore necessary that before a Court orders a decree to be passed in terms of an award, obtained without the intervention of the Court, under the Code of Civil Procedure it should be satisfied that there was a *bona fide* reference to arbitration due to a real difference between the parties.⁴ The Judge before filing an award can upon objection by the debtor enquire into the matter and if he is in doubt as to its *bona fides* or freedom from fraud, he can refer the parties to a regular suit, where the whole matter can be re-opened under S. 12.⁵

35. Fraudulent awards should not be filed:—A Compromise (and an award also) is the settlement of a disputed claim,

¹ Mohan v. Tukaram, 21 Bom. 63 = 1895 P. J. 485, following Gangadhar v. Mahadu, *Supra*.

² Hotchand v. Kishinohand 17, S. L. R. 178 (1928).

³ Govindrao v. Ambalal, 35 Bom. 310 = 13 Bom. L. R. 352; Hassomal v.

Khushiram, 6 S. L. R. 209 (1912).
Sojhro v. Changomal, 15 S. L. R. 77 (1920). Sheomal v. Mulomal, 8 S. L. R. 260 = 28 I. C. 50.

⁴ Dipchand v. Sabehdino, 5 S. L. R. 92.

⁵ Mohan v. Tukaram, 21 Bom. 63.

and if the Court is satisfied that the award is not *bona fide*, it should not file the same.¹ It was found by the Judicial Commissioner of Sind and also by the High Court of Bombay that Judges often filed and enforced fraudulent awards which were entered into to oust the jurisdiction of the Civil Courts and prevent them from enquiring into the terms of the transaction; so they issued Circulars to all the subordinate Courts emphasizing the necessity of being satisfied before allowing arbitration awards to be filed that (1) there has been some point of real difference between the parties, that (2) such matter has been really referred to arbitration and (3) that the document represents the decision of the arbitrators in that matter.² The Bombay Circular further warns the Judicial Officers to exercise extreme caution when attempts are made to enforce awards of the '*Lavad*' or arbitration Courts. Such awards should not be accepted unless and until the Court is satisfied that both the parties voluntarily made a reference to the arbitration of the '*Lavad*' Courts and the fact that the Court issued a summons to one of the parties to secure his attendance should *prima facie* be treated as evidence that a subsequent reference to arbitration was not voluntary.

36. Remand.—In suits to which the provisions of this section apply if accounts are not taken by the first Court in the manner laid down in this section, the Appellate Court will reverse the decree and remand the case for proper accounts being taken.³

13. When the Court enquires into the history and merits of a case under section 12 Mode of taking account. it shall—

Notwithstanding any agreement between the parties or the persons (if any) through whom they claim, as to allowing compound interest or setting off the profits

¹ 5 S. L. R. 92 and 21 Bom. 63
Supra.

² See Circular No. A 11496 of 1910, Court of the Judicial Commissioner of Sind; and Bom. Govt. Gazette, Part I for 1921 p. 3003.

³ Ramchandra v. Hari, 1894 P. J. R. 745.

88; Vithal v. Mahadji, 1888 P. J. 71; Ganesh v. Kashi, 1888 P. J. 132; Appa v. Gopala, 1889 P. J. 157; Krishnaji v. Sambhu 1892 P. J. 280; Hanumant v. Babaji, (1891), 16 Bom. 172; Dadabhai v. Dadabhai, 32 Bom. 516 = 10 Bom. L. R. 745.

of mortgaged property without an account in lieu of interest, or otherwise determining the manner of taking the account,

and notwithstanding any statement or settlement of account or any contract purporting to close previous dealings and create a new obligation,

open the account between the parties from the commencement of the transactions and take that account according to the following rules (that is to say) :—

(a) separate accounts of principal and interest shall be taken :

(b) in the account of principal there shall be debited to the debtor such money as may from time to time have been actually received by him or on his account from the creditor, and the price of goods, if any, sold to him by the creditor as part of the transactions :

[^a](c) in the account of principal there shall not be debited to the debtor any sum in excess of a sum due or to accrue due under a decree which the debtor may have agreed directly or indirectly to pay in pursuance of any agreement relating to the satisfaction of the said decree. [^a]

(d) in the account of principal there shall not be debited to the debtor any accumulated interest which has been converted into principal at any statement or settlement of account or by any contract made in the course of the transactions, unless the Court, for reasons to be recorded by it in writing, deems such debit to be reasonable :

(e) in the account of interest there shall be debited to the debtor, monthly, simple interest, on the

[a—^a] Dekkhan Agriculturists' Relief Amendment Act, 1932.

balance of principal for the time being outstanding,
at the rate allowed by the Court as hereinafter
provided:

(f) all money paid by or on account of the debtor to the creditor or on his account, and all profits, service or other advantages of every description, received by the creditor in the course of the transactions (estimated, if necessary, at such money-value as the Court in its discretion, or with the aid of arbitrators appointed by it, may determine), shall be credited first in the account of interest; and when any payment is more than sufficient to discharge the balance of interest due at the time it is made, the residue of such payment shall be credited to the debtor in the account of principal:

(g) the accounts of principal and interest shall be made up to the date of instituting the suit, and the aggregate of the balances (if any) appearing due on both such accounts against the debtor on that date shall be deemed to be the amount due at that date, except when the balance appearing due on the interest-account exceeds that appearing due on the principal account, in which case double the latter balance shall be deemed to be the amount then due.

Synopsis of the Commentary.

- | | |
|--|---|
| <p>1. Object of S. 13.</p> <p>2. Scope of this section.</p> <p>3. Analogous law.</p> <p>4. Profits in lieu of interest.</p> <p>5. From the commencement.</p> <p>6. Clause (a).</p> <p>7. Clause (b).</p> | <p>8. Clause (c).</p> <p>9. Section 257 A.</p> <p>10. Object of S. 257 A.</p> <p>11. Effect of repeal of Section 257 A.</p> <p>12. Clause (d).</p> <p>13. Clause (e).</p> |
|--|---|

14. Clause (r).

15. Clause (q).

16. Directions for taking accounts.

17. Claim for overpayment.

18. Money due on taking accounts.

1. Object of S. 13 :—This section aims principally at (1) opening up the accounts between the parties from the commencement of the transactions notwithstanding any statement or settlement of accounts or any contract purporting to close previous dealings and create a new obligation; (2) setting off profits, service and other advantages; (3) disallowing compound interest, and (4) introducing the rule of *damdapat* (See also the note 'object of Ss. 12 and 13 given under S. 12).

2. Scope of this section :—The provisions of this section apply only when the Court enquires into the history and merits of a case under S. 12. So a suit to which this section applies must fulfil all the conditions as to the nature of the claim, status of the parties etc. as are requisite under S. 12 (See note under S. 12).

3. Analogous law :—Under Ss. 12 and 13 the Court is to enter into the history of the transaction from its commencement and to take accounts in the manner given in S. 13 *in every case* when the transaction falls under clause (w), (y) or (z) of S. 3. Under the Usurious Loans Act, 1918, the Court is given the power to do so when the transaction is substantially unfair and when the rate of interest is excessive.

S. 3 of that Act runs thus :—

Where.....the Court has reason to believe,—

(a) That the rate of interest is excessive; and

(b) That the transaction was, as between the parties thereto, substantially unfair, the Court may exercise all or any of the following powers, namely, may

(i) reopen the transaction, take an account between the parties, and relieve the debtor of all liability in respect of any excessive interest;

(ii) notwithstanding any agreement, purporting to close previous dealings and to create a new obligation, reopen any account already taken between them and relieve the debtor of all liability in respect of any excessive interest, if anything has been paid or allowed in account in respect of such liability, order the creditor to repay any sum, which it considers to be repayable in respect thereof;

(iii) set aside either wholly or in part or revise or alter any security given or agreement made in respect of any loan, and if the creditor has parted

with the security, order him to indemnify the debtor in such manner and to such extent as it may deem just;

provided that in the exercise of these powers the Court shall not—

(i) re-open any agreement purporting to close previous dealings and to create a new obligation which has been entered into by the parties or any persons from whom they claim at a date more than twelve years from the date of the transaction ;

(ii) do anything which affects any decree of a Court.

“ *Explanation* :—In the case of a suit brought on a series of transactions the expression ‘ the transaction ’ means for the purposes of proviso (i), the first of such transactions.”

It will be noted that the powers of the Court under the D. A. R. Act are considerably wider than its powers under the Usurious Loans Act, 1918.

4. Profits in lieu of interest :—In taking accounts under this section the Court is to disregard any agreement between the parties as to setting off profits of mortgaged property without an account in lieu of interest.¹ Such agreements are not only very common but are highly convenient to an illiterate and ignorant people. The mortgagee has no trouble with accounts and no temptation to cheat; while the mortgagor knows that practically no matter what may happen, the amount of his debt is not accumulating against him. The effect of the law has been to curtail to some extent this popular and convenient form of transfer. In so far as it has substituted simple for usufructuary mortgages there probably has been no loss or inconvenience to the mortgagor but in many places it has the disastrous result of encouraging the substitution of what are in form, at any rate, out and out sales, the sale being accompanied by verbal promise on the part of the vendee to reconvey the property on repayment of the purchase money, and the vendor being generally continued in occupation of the land as tenant-at-will.²

5. From the Commencement :—See note under this head given under S. 12.

6. Cl. (a) :—*Separate account of principal and interest* :—In taking accounts the Court is to take separate account of principal and interest. But there may be old bonds in respect of which it is impossible for the judge to ascertain what amount is to be allowed for principal and what for interest. In such a case the Act at first provided a mode of escape for the judge by allowing

1 Bhagu v. Rama, 1885 P. J. 96.

2 See Report of the Commission

appointed to enquire into the working of the D. A. R. Act, 1891-92.

him to refer the parties to arbitration [*Vide* the repealed S. 15 of the Act]. That means of escape is now cut off, but it has provided no substitutory way of meeting the difficulty. The Court must under these circumstances, exhaust all practicable means of enquiry. If possible it will ascertain the date approximately when the transactions giving rise to the bond sued on began and from the course of the later dealings between the parties may infer the character of the earlier. It will draw all proper presumptions from the non-production of books of account by the defendant whom the Act seems to contemplate as the primary source from whom enquiry is to be made.¹

There are no principles which enable a Court of law to determine how much of a particular bond is made up of principal and how much of interest. There is no presumption or rule of law that half of the consideration for an ancient bond is to be attributed to principal and half to interest, though from the existence of the rule of *damdupat* amongst Hindus it may as a fact be inferred that the creditor would not have allowed interest to accumulate in excess of the principal sum before requiring a fresh bond from his debtor.²

As pointed out in *Dhondi v. Laxman*,³ the Sub-Judge must draw his own deductions from the materials which he has before him in each particular case and arrive at a solution of the difficulty.⁴ But where the mortgage is admitted, the plaintiff should not lose everything because he could not go far back to a period before this Act began.⁵

Annual rest:—The mode in which the account is directed to be taken under this section requires annual rest.⁶

7. Clause (b):—Under clause (b) of the section "in the account of principal there shall be debited to the debtor such money as may from time to time have been *actually received* by him or on his account from the creditor ..." The Court must therefore determine upon evidence in each case how much was

1 Ganesh v. Hari, 1895 P. J. 373.

2 Ganesh v. Hari, 1895 P. J. 373;

Ramchandra v. Shivram, 1889 P. J.

204; Vithal v. Mahadji, 1889 P. J. 71.

See note on "Nature of enquiry "

under S. 12.

3 1894 P. J. 214.

4 Ganesh v. Hari, 1895 P. J. 373.

5 Kondan v. Inderchand, 22 Bom.

L. R. 1299.

6 Hanmant v. Babaji, 16 Bom. 172.

actually received by the agriculturist debtor in respect of each transaction.¹

S. Clause (c) :— This clause is new. It was substituted by the D. A. R. (Amendment) Act, 1932, for the original which stood thus :— “ (c) in the account of principal there shall not be debited to the debtor any money which he may have agreed to pay in contravention of section 257A of the Code of Civil Procedure. ”

9. S. 257 A :— S. 257A of the C. P. Code, 1882, referred to in the old clause (c) ran as follows :—

“ Every agreement to give time for the satisfaction of a judgment-debt shall be void unless it is made for consideration and with the sanction of the Court which passed the decree, and such Court deems the consideration to be under the circumstances reasonable.

Agreement to give time to judgment-debtor.

“ Every agreement for the satisfaction of a judgment-debt, which provides for the payment, directly or indirectly of any sum in excess of the sum due or to accrue due under the decree, shall be void unless it is made with the like sanction.

Agreement for satisfaction of judgment-debt.

“ Any sum paid in contravention of this section shall be applied to the satisfaction of the judgment-debt; and the surplus, if any, shall be recoverable by the judgment-debtor.”

It will be seen that this new clause instead of giving reference to S. 257 A of the C. P. Code, 1882 now substitutes the relevant words of the section in the clause itself. This amendment was made to remove doubts arising from the judgment of the Bombay High Court in *Dattatraya v. Salva*.²

10. Object of S. 257 A :— S. 257 A was enacted to give protection to the judgment-debtors; because the decree-holders after obtaining the decree often compelled the debtors to execute bonds for a larger sum as a price for forbearing to execute the decree. It was found however that the section could afford little protection to the debtors. It was therefore omitted from the C. P. Code, 1908.

11. Effect of repeal of S. 257 A :— Though S. 257A was omitted from the C. P. Code of 1908, a reference to that

¹ *Ranichandra v. Tukaram*, 1885 P. J. 142. | ² 2. 34 Bom. L. R. 404, Shingne J.

section continued in this clause of S. 13. So before this clause was amended, it was often an important question as to what was the effect of the repeal of S. 257A. The general principle in this connection is, in the words of Brett L. J.¹ "Where a statute is incorporated by reference into a second statute, the repeal of the first by a third does not effect the second." So it was held that S. 257A must be held to be incorporated by reference in the D. A. R. Act S. 13 clause (c), and the repeal of the former section does not affect the latter.²

Illustrations.

(1) T sued A for the recovery of Rs. 1445 made up of principal and interest due on a mortgage for Rs. 940. The consideration for the mortgage was in part a decretal debt of Rs. 450. This agreement by A to pay a sum in satisfaction of a decree in excess of the sum due is unlawful and shall not be recognized by the Court.³

(2) A obtained a decree against B for Rs. 1200. The decretal amount was made payable by instalments. There was a default clause which provided that if any two instalment went into arrears the whole amount should be recovered at once. B did not pay the instalments, and A gave an application for execution. While the application was pending B passed to A a mortgage-deed for Rs. 1475, in satisfaction of the decree. This promise to pay an amount in excess of that due under the decree will not be recognized by the Court.⁴

12. Clause (d) :—Having taken the accounts of principal and interest separately under cl. (a), the Court is to keep them quite separate throughout the account. The clause does not allow the Court to debit the debtor with any accumulated interest which has been converted into principal by any agreement or settlement of parties; for thereby the debtor would be required, since the date of conversion, to pay interest upon interest. But a suit for interest upon interest is not sustainable.⁵ This however is not an absolute rule. It is inserted only for the protection of agriculturist-debtors lest at each conversion they be debited with amounts heavier than the accumulated interest. But where such conversion or agreement is, under the circumstances of the case, fair, this clause enables the Court to recognize and

1 Clarke v. Bradlagh, 8 Q. B. D. 69. See also Maxwell on Statutes.	3 Trimbak v. Abaji, 13 Bom. L. R. 508.
2 In Trimbak v. Abaji, 13 Bom. L. R. 508. See also Dattatraya v. Salvo, 34 Bom. L. R. 404.	4 Dattatraya v. Salvo, 34 Bom. L. R. 404.
	5 Dipchand v. Kashi, 1881 P. J. 116.

accept such conversion. For, if compound interest is absolutely prohibited by law, since the rule of *dandapat is in force*, the result will either be that the parties will either collude to evade the law by fraud, or the creditors would be forced to the Court in self-defence even though they would otherwise have been willing to give their debtors further time and thus unnecessarily would saddle the debtors with costs of the suit.¹

This discretion which is given to the Court for the benefit of the debtors is unfortunately not availed of by the Subordinate Judges. They take it for granted that compound interest can in no case be granted. This is working much hardship on the creditors.²

This clause applies only where the conversion has taken place by private agreement of parties. Where it takes place by a decree of the Court and that decree awards a single integral sum as a judgement-debt the Court cannot go behind it but must allow interest on the whole sum.³

Since this clause and clause (e) disallow compound interest the Court must ascertain the balance of the principal at the end of each year and take accounts on the principle of annual rest.⁴

For the principles on which the Court should find out the amount of principal and of interest see Commentary on clause (a).

13. Clause (e) Rate of Interest:—Under this clause in taking account of interest the Court should allow only *monthly simple* interest at a reasonable rate. Compound interest should not be allowed unless there is a conversion of interest into principal by any previous settlement or agreement and the Court deems such conversion reasonable.⁵ [See comment on cl. (d) above.] What is a reasonable rate shall depend upon the facts of each particular case. In considering whether a particular rate of interest is usurious or not the Court should consider the risk incurred by the creditor, the security for his debt, the financial position of the debtor, the result of any previous transactions by the debtor by way of loan so far as the same were known or must

1 The Report of the Commission to inquire into the working of the D. A. R. Act, 1891-92, p. 41.

2 See also the Manual of Civil Circulars (1925), P. 147.

3 *Mareppa v. Gundu*, 20 Bom. L. R. 469=43 Bom. L.

4 *Hanmant v. Babaji*, 16 Bom. 172.

5 *Ramohandra v. Tukaram*, 1885 P. J. 142.

be taken to have been known to the creditors, etc. (S. 3 Usurious Loans Act, 1918). The Court should also consider the normal rate of interest in the locality and the credit of the debtor. Interest which will yield the money-lender a fair return in the case of A, a steady-going and trustworthy cultivator, may entirely fail to remunerate him for the risk he runs in lending money to B, a well known spendthrift.¹ When the Court considers the agreed rate of interest unreasonable, it can substitute a lower rate of interest. But the Court cannot award a higher rate than what the parties bargained for.² [For a detailed explanation of 'reasonable rate of interest' see comment on S. 71A which deals with the 'Rate of Interest allowable in taking accounts'.]

It should be noted that S. 71A gives a wide discretion to the Court in deciding what is a reasonable rate of interest. This discretion, it is often complained, is not generally properly exercised by the Court which practically in each case, allows a very low rate of interest.

14. Clause (f) :—This clause provides how the account of interest is to be made up.³ It lays down that payments shall first be credited in the account of interest, and when any payment is more than sufficient to discharge the balance of interest due at the time it is made, the *residue* of such payment shall be credited to the debtor in the amount of the *principal*.⁴ The word 'profits' in this clause means 'net profits.' Therefore a mortgagee is entitled to be credited with expenses incurred in producing the profits for the mortgaged lands.⁵ An agreement by which profits are to be taken in lieu of interest is to be disregarded.⁶ It may be noted that in spite of the repealment of S. 15 of the Act, the Court has power under this clause to have the profits or other advantages estimated with the aid of arbitrators appointed by it irrespective of the wishes of the parties.

15. Clause (g) :—This clause provides how the amount due at the date of instituting the suit is to be ascertained.⁷ Under this clause accounts can be taken upto the date of institution of

¹ See Report of the Commission appointed to enquire into the working of the D. A. R. Act; 1911—12.

² Shridhar v. Ramchandra, (1933) 35 Bom. L. R. 573.

³ Ramchandra v. Tukaram, 1885 P.

J. 142.

⁴ Ramchandra v. Hari, 1884 P. J. 88.

⁵ Baburao v. Vishnu, 1885 P. J. 81.

⁶ Bhagaji v. Rama, 1885 P. J. 36.

⁷ Ramchandra v. Tukaram, 1885 P.

J. 142.

the suit.¹ But this clause only lays down a rule for taking accounts. Neither this clause nor the language in S. 15 B negatives the right to future interest which is allowed by the general law which entitles a party to interest on the amount due from the date of institution of the suit to the date of realization, at all events, upto the date of the decree.²

Again, since under clause (d) the Courts are given a certain discretion as to recognising a conversion made by the parties of accumulated principal and interest, it is clear that when any such conversion is allowed the sum so converted into principal should rank as principal and not interest for the purpose of S. 13 (g). But some Courts misinterpret the law and think that under no circumstances could accumulated interest rank as principal for the purposes of this clause.³

On taking accounts, the aggregate amount of interest should not exceed the amount of principal.⁴

Rule of Damdupat :—The rule of Damdupat is a special branch of Hindu law of debts which is now made applicable to the agriculturists in the Deccan. According to this rule, the amount of interest recoverable at any one time can not exceed the principal.⁵ But where a loan is recoverable by instalments and some of the instalments have been paid, or even where it is not payable by instalments but a part thereof has been paid, the principal for the rule of Damdupat is the balance of the principal remaining due when the interest claimed in the suit accrued.⁶ But the rule of damdupat does not forbid the conversion by subsequent agreement between the debtor and the creditor of the interest in arrear into capital, because when a fresh bond is passed by the debtor for the aggregate amount of the principal and interest due under the old bond, the principal for the purposes of the rule of *damdupat* is the amount of the fresh bond.⁷ The rule of damdupat again does not apply after a suit has been instituted.⁸ See C. P. Code, 1908, S. 34 [For a detailed discussion of this rule of damdupat see Mulla's Hindu Law.].

The rule of *damdupat* only comes into operation when on finally making up the account the amount due for interest, after all allowances, exceeds the original amount of the principal.⁹

1 Appa v. Gopala, 1889 P. J. 157.

2 Sakharan v. Dagdu, (1912) 14 Bom. L. R. 739.

3 See Report of the Commission appointed in 1891—92 to enquire into the working of the D. A. R. Act.

4 Annabhat v. Shivappa, A. I. R. 1928 Bom. 282.

5 Dhondu v. Narayan, (1863) 1 Bom. H. C. 47.

6 Dagadusa v. Ramchandra, (1896) 20 Bom. 611.

7 Sukalal v. Bapu, 24 Bom. 305.

8 Hiralal v. Narsilal, (1913) 37 Bom. 326=18 I. C. 909; Achyut v. Ramchandra, (1925) 27 Bom. L. R. 492=27 I. C. 219.

9 Sitaram v. Nana, 1893 P. J. 238.

16. Directions for taking accounts:—The following directions for taking accounts are issued by the High Court of Bombay in their Manual of Civil Circulars (1925) p. 147.

Instead of issuing costly commissions, the ordinary practice under S. 13 of the D. A. R. Act ought to be as follows:—

(a) The Subordinate Judge should settle all questions regarding the valuation of grain, advances and the allowing of wataw in the case of difference of currency, etc., and the rate of interest and the allowing of compound interest (clause d), and then call upon the plaintiff to file a statement in the following form with an affidavit as to its correctness within a particular period.

(b) He should then call upon the defendant's pleader, (if the defendant has a pleader) to verify the statement, and file his objections, with an affidavit in their support within a fixed period. If the defendant has no pleader the Subordinate Judge should tell off a careful karkun to do the verification.

(c) The Subordinate Judge should then himself take a test of the work done and satisfy himself that the bonds and the Samadaskats and the accounts are properly linked, and then frame issues as to the points on which there is any dispute and examine the plaintiff and the defendant or the Karkun regarding them. In many cases it may not be found necessary to take any further evidence.

(d) The Subordinate Judge should make the fullest use of S. 66 (g)1 of the Evidence Act.

Form of Statement mentioned in (a) above.

Consecutive No.	Amount of item of principal	Date of item of principal	Date of payment by debtor	Amount of interest at from the date in col. 3 to the date in col. 4	Amount of payment	Balance in favour of plaintiff		Balance, if any, in favour of defendant		Remarks
						Principal	Interest	Principal	Interest	
1	2	3	4	5	6	7	8	9	10	11

17. Claim for overpayment:— *Ordinary law:*— Under the C. P. Code, 1908, Or. 34 r. 9 when it is found that the mortgagee has overpaid himself,

1 S. 65 (g) of the Evidence Act provides that where the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection, secondary evidence may be given of the existence, condition and contents of a document.

the Court shall pass a decree directing the mortgagee to pay to the mortgagor the amount which may be found due to him.

So under this rule, a mortgagee who continues in possession of the mortgaged property after the mortgage has been satisfied is liable for all the receipts from the property with interest from the time when the debt was fully paid off.¹ And if the Court finds that the mortgage has been discharged, a decree for redemption can be passed without the formality of a preliminary and a final decree.²

Again the intention of the Legislature being that a suit for account should include the entire account between parties in relation to the mortgage, a separate suit for overpayment is barred under S. 11 and Or. 2 r. 2.³ But mesne profits accruing after the date fixed for payment under the preliminary decree or after the date of payment under the decree have been held to be recoverable by a separate suit.⁴ No suit can however be brought for profits accruing before suit.

Under the D. A. R. Act: Claim for refund.—But this ordinary rule of law does not apply in cases under the D. A. R. Act. The application of the ordinary rule in a suit instituted under the D. A. R. Act in cases where the provisions of the mortgage contract between the parties have been set aside for the purpose of taking the account under those of S. 13 of the Act, would not only lead to the redemption of the mortgaged lands contrary to the terms and conditions of the contract, but would in many cases, oblige the mortgagee to refund money which has rightly come into his hands under that contract. There is no express provision in the Statute either directing or enabling this to be done; and remembering that the Act encroaches on existing rights, it should on general principle, not be construed to extend beyond the particular object which the Legislature had in view in passing the Act, and which in the preamble is said in express terms to be to relieve the agriculturists in the Deccan from indebtedness. That object is effected when the agriculturist is enabled to discharge his debt and recover his lands on far easier terms than those he had contracted for, and it would be going beyond the object if the Act were construed to

1 *Krishnaji v. Motilal*, 1919 Bom. 337=21 Bom. L. R. 476.

2 *Roshan Lal v. Bhuri Sing*, 1922 All. 476=70 I. C. 899.

3 *Kashi Prasad v. Bajrang Prasad*, (1905) 80 All. 86; *Kachu v. Laxman-*

sing, (1907) 25 Bom. 115.

4 *Sakari Dutt v. Sheikh Amuddin*, (1910) 5 I. C. 336; *Abu Jafar v. Babu Rajendra Partab*, (1926) Oudh 113; *Sheonath v. Gaya Prasad*, (1905) Oudh cases, 302.

entitle him also to refund of money which had already, properly come into the mortgagee's hands under the contract. For these reasons Sargent C. J. held that a mortgagor taking accounts under S. 13 is not entitled to a refund of the balance in the mortgagee's hands.

Claim for mesne profits:—For the same reason, when the Court takes accounts under S. 13 and orders redemption it *cannot award mesne profits* to the mortgagor. For a claim to mesne profits is only based on the assumption that the mortgagee has from the date of the suit been in possession of property which he is not entitled to retain in his possession under the contract between the parties. But when accounts are taken under S. 13 which gives go-by to the provisions of the mortgage contract, it is impossible for the Court to discover whether the mortgagee would, if the contractual relations were preserved, be entitled to remain in possession, between the date of the suit and the date of the decree. Speaking generally, the enforcement of the provisions of S. 13 places the mortgagor in a much more favourable position than he would be in, if he relied upon the issues of the contract and no presumption arises that the mortgagee is, apart from the provisions of the D. A. R. Act, not entitled to retain possession after the date of the institution of the suit.¹

Claim for set off:—The same rule applies when the mortgagor does not ask for payment in cash from the mortgagee but only to *set off* that amount against anything due by him on some other transaction.² So when the two transactions are distinct, as soon as the prior bond is found to be paid off, it would not be necessary to take further accounts of that bond, but the account of the subsequent bond starts afresh from its date. That bond cannot be held to be liquidated either wholly or in part by profits lawfully received prior to its date. To hold otherwise would be to oblige the mortgagee to refund money which had rightly come into his hands under the former contract.³ And hence when the mortgagee has obtained a decree for money against the mortgagor,

1 *Janoji v. Janoji*, 7 Bom. 185 = 1882 P. J. 411.

2 *Ramchandra v. Kalle*, 17 Bom. L. R. 630 = 39 Bom. 587, Per Scott C. J.

3 *Ramchandra v. Janardan*, 14 Bom. 19 = 1899 P. J. 44.

4 *Vishnu v. Satwaji*, 1897 P. J. 87.

and accounts are subsequently taken of the mortgage, and it is found that the mortgagee has over-paid himself, he can yet execute his decree for money. The mortgagor cannot claim to set-off the amount overpaid in the mortgage transaction against the amount due under the decree.¹

Illustrations.

(1) A sued B for redemption of a mortgage. The Court took accounts under the provisions of Ss. 12 and 13 and found Rs. 107 due to A. The Court passed a decree in favour of plaintiff for that amount. The High Court varied the decree by omitting the direction ordering B to pay Rs. 107 to A.²

(2) In the above illustration, if the Court orders B to pay A mesne profits from the institution of suit till possession, the High Court will order the direction to pay the mesne profits to be omitted.³

(3) J sued R to redeem two separate mortgages effected by separate deeds for several considerations of Rs. 1200 and Rs. 3000. On taking accounts of the two transactions separately it is found that Rs. 3700 are due by J to R in the first mortgage, and Rs. 5000 are due by R to J in the second mortgage. J cannot claim to set off the amount of Rs. 5000 due to him from R against the amount of Rs. 3700 due by him to R.⁴

(4) M mortgaged his lands to C. On the same day he executed a rent note to C and entered on the land as tenant. C subsequently sued M for rent and obtained a decree. When this Act was extended to the district, M sued C for account when it was found that C had overpaid himself. C now applies to execute the decree for rent against M. M cannot contend that the excess money realized in the mortgage should be set off against the money due for rent.⁵

18. Money due on taking accounts :—The rule as to taking accounts laid down in S. 13 is imperative. S. 13 lays down that when the Court enquires into the history and merits of a case under S. 12, *it shall*, notwithstanding any agreement as to setting off the profits of the mortgaged property without an account in lieu of interest, open the account between the parties from the commencement of the transaction and take that account according to the rules specified in sub-sections (a) to (f) and when the account has been so taken, the *balance appearing due*

1 Mugappa v. Mahamad Saheb, 12 Bom. L. R. 137.

2 Jancji v. Jancji, 7 Bom. 185 = 1882 P. J. 411.

3 Ramchandra v. Kalle, 17 Bom. L. R. 630.

4 Ramchandra v. Janardan, 14 Bom. 19. See also Vishnu v. Satwaji, 1837 P. J. 87.

5 Mugappa v. Mohamad Saheb, 12 Bom. L. R. 137.

shall be deemed to be the amount due at the date of the suit even if the amount found due was greater than the amount due under the terms of the original mortgage.¹ The Court cannot imply merely by reason of the Act being meant generally for the relief of agricultural classes that notwithstanding the imperative language of this section, it is open to the Court to set aside the account and the result, if the amount is found to be larger than the amount due on the original language between the parties. It may be that in certain cases this may cause hardship to the agriculturist but the proper answer is that it is perfectly open to the agriculturist to refrain from setting up such a status and asking for accounts if the result is likely to be not to his benefit. Further, with the large discretion allowed to the Court in the matter of fixing the rate of interest, such cases are few and far between. For these reasons Madgavkar J. answered a reference to the Full Bench on this point as follows: "When an agriculturist mortgagor has asked for an account to be taken under Ss. 12 and 13 of the D. A. R. Act, and an account is taken accordingly and it is found at the foot of the account that what is due is greater than the total sum which would be payable in the terms of the mortgage, such agriculturist debtor is liable to pay the larger sum found due on the account and his liability is not limited to the sum due in terms of the mortgage."²

(This Full Bench case overrules two decisions of Macleod C. J.³ where he held that 'it would be curious result if a debtor owing to his seeking the relief afforded by the D. A. R. Act should have to pay more than he is obliged to pay according to the terms of the bond. I cannot imagine that it was ever intended that the law should produce such an extraordinary result. As a rule the object of directing accounts to be taken under the D. A. R. Act is to ascertain how much of the amount secured by the bond is the principal and how much interest after going into the history of the transaction between the parties. But once the creditor has taken a bond, then in no possible case can he recover more

¹ Per Scott C. J. in *Dadabhai v. Dadabhai*, 32 Bom. 516 = 10 Bom. L. R. 745.

² *Gopaldas v. Vithal*, 31 Bom. L. R. 915 (F. B.).

³ *Raghunath v. Ramchandra*, (1921) 46 Bom. 384 = 23 Bom. L. R. 1038; *Vithaldas v. Murtaja*, (1921) 46 Bom. 764 = 24 Bom. L. R. 267.

than the principal amount with interest.' This is no longer good law.)

Illustration.

V mortgaged his property to G. It was described as a possessory mortgage instalment deed and the amount was Rs. 8400 which was made payable in seventeen annual instalments of Rs. 200 each. Only four out of these instalments were paid. This left Rs. 2600 due on the mortgage. G sued S for possession of the mortgaged property. S claims accounts under the D. A. R. Act. On taking accounts G was found entitled to Rs. 3100. He must be paid this amount though he has claimed only Rs. 2600.¹

13A. When the mortgaged property is in the possession of the mortgagee or his tenants other than the mortgagor, and the Court is unable to determine what profits have been actually received, it may fix a fair rent for such property and charge to the mortgagee such rent as profits for the purpose of section 13 :

Provided that, if it be proved that in any year there was an entire or serious failure of the crops, an abatement of the whole or part of such rent may be allowed for the year.

Object of the Section :—This section is intended to assist the Court in taking accounts where doubts exist as to the value of the profits of mortgaged property.²

14 [*Interest to be allowed*] Repealed by Act VI of 1895, s. 3.

Old Law :—The repealed S. 14 was :—

Interest to be allowed :—The interest to be awarded in taking an account according to the rules set forth in s. 13 shall be—

(a) The rate, if any, agreed upon between the parties or the persons (if any) through whom they claim, unless such rate is deemed by the Court to be unreasonable; or

[a] Section 13A was added by Act VI of 1895, s. 7.

¹ GopalDas v. Vithal, 81 Bom. L. R. 915.

² Reports of the Select Committee on the Bill which was passed as Act VI of 1895.

(b) if such rate is deemed by the Court unreasonable, or if no rate agreed upon, or when any agreement between the parties, or the persons (if any) through whom they claim to set off profits without an account in lieu of interest has been set aside by the Court, such rate as the Court deems reasonable.

These provisions have been practically reproduced in s. 71 A. of this Act. The reason is that they gain a wider application by being transferred to Ch. IX.¹

15. [Reference to arbitration in certain cases.]

Repealed by Act VI of 1895, s. 3.

Old Law:—The repealed s. 15 was :—

Reference to arbitration in certain cases :—

Instead of inquiring into the history and merits of a case under s. 12, or if upon so inquiring, the Court is unable to satisfy itself as to the amount which should be allowed on account of principal or interest, or both, the Court may of its own motion, direct that such amount be ascertained by arbitration.

If the parties are willing to nominate arbitrators, the arbitrators shall be nominated by them in such manner as may be agreed upon between them.

If the parties are unwilling to nominate arbitrators, or cannot agree in respect of such nomination, the Court shall appoint any three persons it thinks fit.

Provided that, if all the parties reside in the same village, town or city, and, in the opinion of the Court, three persons can be found among the residents of such village, town or city, it shall appoint residents of such village, town or city.

The provisions of Ss. 508 to 522 (both inclusive) of the Code of Civil Procedure shall apply to every reference to arbitration under this section.

[²]15A. In a suit of the description mentioned in section 3, clause (z), the Court shall not refuse to pass a decree for redemption merely on the ground that the time fixed for the payment of the principal of the mortgage-money has not arrived, or on the ground that the mortgage-debt has not been completely discharged, or on both.

Mortgagor entitled to decree for redemption though time fixed by mortgage has not arrived or debt has not been paid.

[a] Sections 15A and 15B were inserted by Act XXII of 1882, s. 6.

¹ Statement of Objects and Reasons for Act VI of 1895.

Synopsis of the Commentary.

- | | |
|---|---|
| <p>1. Extent.
 2. Object of this section.
 3. Mortgage.
 4. Agreement in variance.
 5. Decree for possession.</p> | <p>6. Entire property to be redeemed.
 7. Effect of a decree.
 8. Effect of this Section.</p> |
|---|---|

1. **Extent** :— This section extends to the Province of Sind, and all the districts of the Presidency of Bombay except Aden and the city of Bombay.

2. **Object of this Section** :— This section enables the mortgagor to redeem even *before the period* fixed for the payment of the principal of the mortgage-money has arrived or even *before the debt* due by him is completely discharged. The ordinary rule about redemption is that 'the right to redeem and the right to foreclose are co-extensive' and that where there is a stipulation to pay a mortgage-debt within (e. g.) ten years, the mortgagor cannot redeem at an earlier date. This rule is laid down in S. 60 of the Transfer of Property Act (Act IV of 1882). But S. 15 A of this Act forms an exception to the general rule. This provision was thought essential "in order to give full effect to the provisions of Ss. 12 to 14¹ of the Act, which empower the Court to set aside the terms of the agreement between a mortgagor and mortgagee, and declare a mortgage-debt paid whenever the mortgagee has received the amount of his advance with reasonable interest thereon.²"

The exception laid down in this section was recognized even before this section was introduced in this Act by Act XXII of 1882. The principle on which it is based was clearly laid down by Sargent C. J. in the case mentioned below,³ which was decided before Act XXII of 1882 was passed : "The general principle is that the right to redeem is co-extensive with that of foreclosure, and that, consequently, the right to redeem, under such agreements as above, is postponed until the time fixed for payment. The question is whether that rule can still prevail in cases falling under the D. A. R. Act and we think it must be answered in the negative. The object of the D. A. R. Act as stated in the Preamble is to relieve the agricultural classes of the Deccan from

1 S. 14 is repealed by Act VI of 1895. (Amending Act XXII of 1882).

3 Babaji v. Vithu, 6 Bom. 734=

2 Statement of Objects and Reasons 1882 P. J. 327.

indebtedness, and, therefore, any agreement between the parties by which the mortgagor is compelled to remain in the mortgagee's debt for a definite period *pro tanto* frustrates the object which the Legislature had in viewHaving regard to the anomalous powers which by Ss. 12 and 13 of the Act, the Court is empowered to exercise in disregard of the contractual relations between the parties we think that a beneficial construction of the Act requires us to hold that.....S. 12 and 13 impliedly exclude any objection based on the ground that the suit is premature. "

3. Mortgage :— The term 'mortgage' is defined in S. 58 of the Transfer of Property Act, 1882. In considering whether the transaction described in any document is a mortgage or some other transaction, viz., a lease, "the question must be decided not with reference to the name by which the particular contract was called but according to the *true construction* of the document itself and the internal evidence it furnishes of the *intention* of the parties. We are of opinion that the principle by which we should be guided is that laid down by Lord Davey in *Balkishan Das v. W. F. Legge*¹ where he said (p. 159) " the case must, therefore, be decided on a consideration of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts. " And if the parties themselves deliberately and in clear words designate the transaction to be a mortgage, there is all the more reason why the Court should hold that they intended to be clothed with all the rights and liabilities incidental thereto.²

Illustrations.

(1) T sues R to redeem a mortgage for Rs. 240. The document is described in the heading as a 'mortgage-deed.' In the document R had acknowledged that he had received a consideration of Rs. 240. The debt was not to bear any interest, but towards liquidation of it, the creditor was to appropriate the income of the land described which was given in enjoyment for a period of 10 years. There was previous relation of creditor and debtor between the parties. No mention was made in the document of any premium or periodical payment of rent or share of the produce. The document was stamped as a mortgage. On a construction of all these circumstances it is clear that the document consti-

1 (1899) 22 All. 149.

2 Per Crow J. in *Tukaram v. Ram-*

chandra. 26 Bom. 252 = 3 Bom. L. R. 778 (F. B.),

tutes a possessory mortgage and not a lease. T can redeem the mortgage even before the period of ten years has expired.¹

(2) B executed a document in favour of M for Rs. 725. M was to take possession of certain lands belonging to B for a period of 199 years and to apply its profits in liquidation of the debt. The deed was headed *lease (patta)* in respect of Valatdan (which is a kind of mortgage under which the produce goes towards the payment of the principal and interest, the land being redeemed as soon as the debt is cleared). The transaction is a mortgage and B can sue to redeem it even before the period of 199 years has expired.²

4. Agreement in variance:— Under this section the Court *shall not refuse* to pass a decree for redemption merely 'because the time fixed for redemption has not arrived,' etc. The rule thus being absolute the Court must pass a decree for redemption if the mortgagor asks for it, whatever be the time fixed for that purpose in the bond. Any agreement between the parties in variance of this section offends against the spirit of the Act and has to be disregarded.³ The mortgagor can sue for redemption so long as the relationship of mortgagor and mortgagee subsists between the parties, even if the mortgagee is put in possession in furtherance of the contract of mortgage. If however a decree is passed on the mortgage and the mortgagee is put in possession for a fixed term, the result would be otherwise. See note on 'Effect of decree.'

Illustrations.

(1) D mortgaged a house to A for Rs. 50. The mortgage-deed stipulated that on D's failure to pay the money at a specified time, A was to take possession of the mortgaged property. D failed to pay before that time and A was put in possession by the decree of a Court. D now sues A for redemption. Can he do so? Yes; because the relationship of mortgagor and mortgagee between the parties was not changed by the decree which awarded possession only in furtherance of the mortgage-deed and so D's right to redeem remains in force.⁴

(2) B mortgaged his lands to M for Rs. 600 in 1870. Twenty years usufruct was to extinguish the mortgage. In 1883 there was a further charge in

¹ 26 Bom. 252 Supra.

² Mahamad Muse Umaraji, v. Begas Amanji, 32 Bom. 569=10 Bom. L. R. 742.

³ Babaji v. Vithu, 6 Bom. 734; Tukaram v. Ramchandra, 25 Bom. 252; Mahamad v. Begas, 32 Bom. 596,

above. See also Malappa v. Shamji, 1897 P. J. 49; Mahipatrao v. Gambhir-mal, 1886 P. J. 141; Babaji v. Maniram, 1894 P. J. 37.

⁴ Dattatraya v. Annaji, 1886 P. J. 237.

favour of M for Rs.90. While in possession M had to spend Rs. 225 for repairs etc. It was verbally agreed in 1890 that eight years more usufruct was to be enjoyed in consideration of the said Rs. 225. In 1892 B sued D for redemption. The Court shall disregard the term of eight years and allow B to redeem on taking accounts.¹

(3) V mortgaged his lands to Govind. It was agreed that the mortgage was not to be redeemed until after 21 years, and that if the mortgage was not redeemed then the mortgagee was to continue to enjoy the land and take profits in lieu of interest. It was further provided that if the mortgagee should at some future time, after the expiration of the 21 years, when the mortgagor sought to redeem, have planted trees which were bearing fruit, the mortgagee should not be required to give possession till the Udim had come to an end. At the end of the stipulated period of 21 years nothing was done. The mortgagee who remained in possession planted a number of orange trees in the land. Then the mortgagor sought to redeem. He could do so under the provisions of the Act.²

5. Decree for possession :— The section lays down that a Court 'shall not refuse to pass a decree for redemption merely on the ground.....that the mortgage-debt has not been completely discharged.' The words 'decree for redemption' must be construed to mean, "a decree awarding *possession* to the mortgagor," for, otherwise, the provision would be unnecessary and meaningless.³

But, the Commission appointed to enquire into the working of the D. A. R. Act, 1891-92 was of opinion that possession could be ordered only after payment of the mortgage money. The Report says: "The Commission do not understand the second part of this section. As it stands it appears simply declaratory of the ordinary law, that a Court can decree redemption subject to a certain payment. The above clause can hardly be supposed to mean (though from certain isolated cases it would appear that certain Subordinate Judges interpreted it in that way) that a Court can oust a mortgagee before the mortgage debt is paid."⁴

But it is submitted that the distinction thus made between 'decree for redemption' and 'the granting of possession' is not warranted by the wording of the section, and to interpret the words to mean 'redemption and not possession' would make the section meaningless. For what the agriculturist most needs is the possession of his property.

6. Entire property to be redeemed:—This section however does not affect the general rule that the mortgagor or a

1 Babaji v. Maniram, 1894 P. J. 37.

2 Genu v. Narayan, 22 Bom. L. R. 1147. In the Bom. L. R. this case is reported under S. 13.

3 Kisandas v. Muktabai, 1888 P. J. 287.

4 Report p. 49.

person claiming under him cannot, when the mortgage includes two properties, redeem one only.¹ If by assignment by the mortgagor, one of these properties comes to be of the ownership of a stranger, he must be prepared to pay the whole sum found due under the mortgage for principal and interest, and cannot be permitted to redeem the property assigned to him by paying off only a portion of the amount so due.²

7. Effect of a decree:—Under this section the Court can disregard any agreement between the parties and pass a decree for redemption even before the time fixed has arrived. But it cannot disregard (in the absence of consent) a *decree* that has already been passed in a suit for redemption, determining the mode in which the plaintiff is to redeem the mortgage. To do so would be an hardship on the mortgagee.³ Under S. 15 B (clauses 3 and 4) the Court can, after determining the amount due to the mortgagee, direct that the mortgagee be put in possession for a fixed term and may redeem himself out of the profits earned during that term. When a decree is passed under that section, the mortgagor cannot under this section redeem before the time thus fixed by a decree. If however the decree is one to which the plaintiff is not a party and is not otherwise binding on him, the decree being void against him, the Court can disregard it and allow redemption of the original mortgage.⁴

Illustrations.

(1) K filed a redemption suit against R and obtained a consent decree. The decree directed that K should pay Rs. 375 to R by instalments of Rs. 25 a year, and that R should be placed in possession of the property and should take its income in lieu of interest. K paid the instalments for 10 years; and then he sought to pay the whole balance that remained due and applied to redeem and recover possession of the mortgaged property. K cannot do so; for, the mode of redemption is already determined by the decree.⁵

(2) D and his eldest son B mortgaged certain ancestral property consisting of a *mokasa* allowance of Rs. 412 received from the Government treasury to M in 1888 to secure a loan of Rs. 1500. In 1890 D alone came to an agreement with M by which it was agreed that M should enjoy the income of the property till 1900 in full satisfaction of the mortgage debt. The agreement was filed in Court under S. 44 of this Act,

¹ See S. 60 (last para) Transfer of Property Act (IV of 1882).

² Kashinath v. Ambaji, 1881 P. J.

³ Ramchand v. Kondaji, 22 Bom. 221=1896 P. J. 291.

⁴ Bala v. Balaji, 22 Bom. 825.

⁵ See 22 Bom. 221 *Supra*.

when it took effect as a decree. D having died, his son sued to redeem the mortgage of 1888. Can he be allowed to redeem it? Yes; because the decree is not binding upon the sons.¹

In the course of his judgment Farran C. J. remarked, "The net result was that the father by the agreement gave up the right of the family to receive the sum of Ra. 1800 or thereabout, without any countervailing advantage or benefit. Such an agreement by a Hindu father is not in my opinion, binding upon his sons in respect of ancestral property. It amounts *pro tanto* to an alienation by him of the ancestral estate without consideration Besides, if the agreement of D was not binding upon his sons he would not properly represent his sons in a suit filed to enforce it. When the transaction is one by which the sons are bound, then a decree based upon such a transaction is binding upon them even though they are not parties to it. But where the original transaction is not binding upon the sons, then the decree against their father based upon such a transaction is not binding upon them when they are not parties to the suit in which it is passed.¹"

S. Effect of this Section:—The result of this section together with Ss. 15 B and 15 C is greatly to diminish the value to the money-lender of a mortgage with possession. At any moment he is liable to be ousted by the order of a Court, entirely different terms being substituted for those stated in the bond. The debt may be made payable in instalments probably without future interest, and he will not obtain those instalments without having to go to a Court for the recovery of each. It is these sections that have led the money lenders to resort to such devices as 'ostensible sales.' Hence the Commission appointed to enquire into the working of the D. A. R. Act in 1911 was of opinion that a discretion should be given to the Court to refuse a decree for redemption before the expiry of a mortgage or a certain period.²

[^a]15AA. So far as it may be consistent with the provisions of this Act, every decree for redemption or foreclosure of any mortgage, and every decree or order for the sale of any mortgaged property made at the instance of a mortgagee thereof, shall name such future day, not being less than six months after the

Power of Court to name some future date for payment by the mortgagor.

[a] Section 15AA was added by Act VI of 1895, s. 8.

1 See 22 Bom. 823 Supra.

2 See Report of the Commission appointed to inquire into the working of the D. A. R. Act, 1911-12.

date of such decree, as the Court may think reasonable for the payment by the mortgagor of the money payable under the decree, and no such foreclosure shall be made absolute nor shall any such sale take place before the day so named.

Commentary.

This section requires the Court in every decree for foreclosure, redemption or sale, to allow the mortgagor some period *not less than six months*, to pay the money payable by him under the decree. The provisions about drawing up of decrees in cases of foreclosure, sale or redemption were contained in Ss. 86-88 of the T. P. Act, from where they are now transferred to O. 34 of the Civil Pr. Code, 1908. Rules 2, 4 and 7 of that Order provide for drawing up of preliminary decrees in suits for foreclosure, sale and redemption respectively, allowing the mortgagor in each case to pay the money due by him at some time mentioned therein, *within six months*. On the mortgagor failing to pay within the fixed time, final decree is to be drawn for the same under rules 3, 5 and 8 respectively.¹

Even before the insertion of this section (by Act VI of 1895) it was held that "where the decree orders payment of the entire debt found due within a fixed period, there is nothing in the D. A. R. Act which can justify the omission of the ordinary direction for foreclosure in default of payment."² In another case it was held that in a redemption suit by an agriculturist mortgagor, the only decree which could be made in the absence of any special provision of the Act, was the ordinary decree for the payment of the whole amount³ within six months or in default for foreclosure.⁴ This section only affirms the correctness of these rulings and recognises a practice common in the Deccan.⁵ It also enables the Court to fix a larger period than six months for the payment of the mortgage-debt.

¹ But under this Act the decrees need not be made final. See Notes on S. 15 B.

² *Abaji v. Ganu*, 1889 P. J. 77; *Lakshman v. Malhar*, 1886 P. J. 191.

³ S. 15 B was not enacted when this case was decided.

⁴ *Shankarappa v. Dhanappa*, (1881) 5 Bom. 604.

⁵ Statement of Objects and Reasons (Act XI of 1895).

If in a particular case it appears that there ought to be default on demand before foreclosure operates, and there is no demand, there is no default also, and the debtor can pay the money due.¹

Illustration.

B obtained a decree on 21st July 1882 in a redemption suit directing him to pay a certain sum to the mortgagee within one year or the mortgage to be foreclosed. Before the year expired, B applied for an order to be allowed to pay the redemption-money by instalments under the D. A. R. Act, which was granted. On appeal that order was reversed; the judgment concluded as follows:—

“The original decree must stand, and the defendants are to be allowed to apply at once for payment of the sum originally decreed; if not paid at once, the mortgage is to be foreclosed.” B having not paid till the 15th January 1884, the mortgagee presented a darkhast for foreclosure on that date when B paid the redemption-money. *Held*, that the effect of the order above quoted was to postpone foreclosure until there had been default of payment on demand and as there had been no demand and default, before the mortgagee presented his darkhast on 15th January 1884, the payment by B then was not too late.¹

[a]15B. (1) The Court may in its discretion, in passing a decree for redemption, foreclosure or sale in any suit of the descriptions mentioned in section 3, clause (y) or clause (z), or in the course of any proceedings under a decree for redemption,

Power to order payment by instalments in case of decree for redemption, foreclosure or sale.

foreclosure or sale passed in any such suit, whether before or after this Act comes into force, direct that any amount payable by the mortgagor under that decree shall be payable in such instalments, on such dates and on such terms as to the payment of interest, and where the mortgagee is in possession, as to the appropriation of the profits and accounting therefor, as it thinks fit.

(2) If a sum payable under any such direction is not paid when due, the Court shall, except for reasons

[a] Sections 15A and 15B were inserted by Act XXII of 1882, s. 6.

¹ Babaji v. Lakshman, 1887 P. J. 83.

to be recorded by it in writing, instead of making an order for the sale of the entire property mortgaged or for foreclosure, order the sale of such portion only of the property as it may think necessary for the realisation of that sum.

[^a] (3) In passing a decree for redemption or foreclosure in any such suit as aforesaid, the Court may direct that the amount payable by the mortgagor shall be discharged by continuing the mortgagee in possession for such further period as will enable him to recover his principal with reasonable interest, and that on the expiry of such period the property mortgaged shall be restored to the mortgagor.

[^a] (4) When the amount payable to a mortgagee in possession has been determined in any such suit as aforesaid, the Court may in its discretion, instead of making an order for payment thereof, direct that the mortgagee be continued in possession for such period (to be specified by the Court) as will in the opinion of the Court be sufficient to enable him to recover from the profits the amount payable by the mortgagor together with reasonable interest, and that on the expiry of such period the property mortgaged shall be restored to the mortgagor.

Synopsis of the Commentary.

1. Local extent.	instalment order.
2. Object of this section.	6. Interest upon instalments.
3. Retrospective operation.	7. Variation of instalment order.
4. Suit of the description mentioned in s. 3.	8. Status as an agriculturist.
5. Which Court can pass an	9. Suit must be tried in a Court under this Act.

[^a] Sub-sections (3) and (4) were added by Act VI of 1895, s. 9.

- | | |
|---|--|
| <p>10. Awards and compromise decrees not affected.</p> <p>11. Sind view.</p> <p>12. When can an instalment order be made.</p> <p>13. Decree need not be made absolute.</p> <p>14. Second suit for redemption.</p> | <p>15. Limitation when instalment decree is appealed from.</p> <p>16. Limitation for application to extend time for payment.</p> <p>17. Sub-section 2; default clause.</p> <p>18. Sub-section 3.</p> <p>19. Sub-section 4.</p> |
|---|--|

1. **Local extent:**— This section extends to the province of Sind and all districts of the Bombay Presidency excluding Aden and the City of Bombay. *Vide* table of local extend given under S. 1.

2. **Object of this section:**— Ss. 17 and 20 enable the Court to direct that the amount of a decree against an agriculturist may be paid by instalments (See note 'Object of this Section' under S. 20). But it was held by the High Court that Ss. 17 and 20 apply only to personal decrees and not to mortgage decrees.¹ S. 15 B was therefore introduced by Act XXII of 1882 extending the provisions of Ss. 17 and 20 to decrees in mortgage suits as well. 'If it is allowable to empower a Court to give such a direction (for payment of the amount of a decree by instalment) in regard to an unsecured debt, it seems *a fortiori* allowable in the case of secured claim.'²

3. **Retrospective operation of this section:**— Under this section the Court may in passing a decree for redemption, foreclosure or sale, in any suit of the description mentioned in S. 3 clause (y) or (z), or in the course of any proceeding under such a decree passed in any such suit, *whether before or after this Act comes into force*, direct that the amount of the decree be paid by instalments. The section is thus clearly intended to be retrospective in its operation, and it can be applied in the execution proceeding of a decree even though the decree had been made before this Act was passed or extended to the district. It cannot be contended that when the decree was passed the D. A. E. Act was not in force, and hence the decree-holder has a vested right to recover the whole amount of the decree. For

¹ Shankarappa v. Dhanappa, 5 Bom. 604=1881 P. J. 93.

² See Statement of Objects and Reasons, Amending Act XXII of 1882.

executions are a part of the machinery by which debts are recovered and are subject to regulation by Acts of the legislature. The Act empowers the Court to pass an order for instalments at any time provided there is a proceeding pending.¹

4. Suit of the description mentioned in S. 3:—The Court can grant instalments in passing a decree or in its execution provided the decree is passed in any suit of the description mentioned in S. 3. But if the suit is tried in a Court to which this Act does not extend, it is not a suit of the description mentioned in S. 3, and so the Court cannot apply S. 15 B even in the execution of such a decree, if the decree is transferred for execution to a Court where this Act applies.² Again, the description of suit in S. 3 includes the status of parties, and so if a person is not an agriculturist at the time of decree he cannot in execution claim the benefit of S. 15 B even if he brings himself subsequently within the definition of agriculturist.³ Similarly, if it is necessary to set aside a transaction before any relief in respect of some property can be claimed, it is not a suit of the nature described in S. 3 and so S. 15 B does not apply to such a suit.⁴

5. Which Court can pass an instalment order:—The Court which has the power to act under this section is either the Court which passes the decree or the Court which carries out the decree. The first Court can exercise the power only at the time of passing the decree, and the latter can exercise the power at any time in the course of the proceeding. An application for that purpose cannot be made to any other Court.⁵

Illustration.

B sued H for redemption of a mortgage. The Court decreed redemption on payment of Rs. 2800 to H within six months. The decree was confirmed in second appeal by the High Court. B failed to pay the amount in time. B now applies to the High Court for an order for making the decretal amount

1 Balaji v. Datto, (1907) 9 Bom. L. R. 1026; Mancharji v. Thakurdas, 31 Bom. 120=8 Bom. L. R. 963.

2 Ramlal v. Ratanlal, 33 Bom. L. R. 1466. See this case discussed in note 2.

3 Devu v. Rewappa, 24 Bom. L. R.

370. See this case discussed in note 8.

4 Shidlingppa v. Rajava, A. I. R. 1933 Bom. 23.

5 Bhagirathibai v. Hari, 19 Bom. 318; Gulabpuri v. Pandurang, 1886 P. J. 142.

payable by instalments. Such an order can be made only by the Court carrying out the decree. The High Court cannot entertain the application.¹

6. Interest upon the instalments :—This section empowers the Court to make the amount of the decree payable by instalments on such terms as to payment of interest as it thinks fit. There is therefore a discretion to the Court as to whether or not interest should be allowed.²

But this section does not negative the right to future interest which is allowed by the general law.³ And where a Court in its discretion orders interest to be paid, it cannot in the course of any proceeding under the decree, direct that the interest should *cease* to run; it can only direct that the amount of the decree be paid in such instalments, on such dates and on such terms as to payment of interest as it thinks fit. But the interest is as much payable under the decree as the principal, and the section does not say that the Court may direct that any amount payable under the decree shall not be so payable; it merely enables the Court to *modify* in the particular manner there described, the terms of the payment.⁴

Note :—The discretion given to the Courts to fix the rate of interest should be exercised in a judicious manner, and the Courts should take into consideration the normal rate of interest in the locality and the risk incurred by the creditors. The Courts should not penalise one Sawkar because another is rapacious. As many Sub-Judges allow no future interest, or only a low rate of interest, the Commission appointed in 1911-12 to enquire into the working of the D. A. R. Act was of opinion that there should be a provision in the section itself to the effect that the Court should grant future interest at a reasonable rate, unless for reasons to be recorded by it in writing, it deems it unnecessary to do so.

When interest is allowed, mortgagee is bound to account :—When the Court orders the mortgagor to pay the amount due under the mortgage by instalments, and allows interest on the amount till the mortgage is paid off, it may at the same time require the mortgagee to account for the profits received from the date of suit till restoration of possession to the mortgagor. For,

¹ Ibid.

² Nathu v. Vazir, 31 Bom. 450=9 Bom. L. R. 550.

³ Sakharan v. Dagdu, 14 Bom. L. R. 732=16 I. C. 998.

⁴ Gokuldas v. Govind, 32 Bom. 98 =9 Bom. L. R. 1334; Sangatmal v. Jan Mahomad 79 I. C. 553=16 S. L. R. 260.

so long as the mortgage is continuing the accountability of the mortgagee remains.¹

7. Variation of instalment order :— This section enables the Court either in passing the decree or in the course of any proceeding under the decree to order that the amount payable under a decree should be paid by instalments. But it does not authorise the variation of an order once so made. Though it may seem a logical deduction that such a variation in order to adopt execution to the means of the debtor is a necessary corollary from the terms of the section, the legislature has not thought fit to draw it.² There is nothing in S. 15B to warrant the view that the legislature intended that where a decree allowing instalments has already been obtained, the whole matter should be reconsidered afresh by another Court, with a view to the substitution of some new scheme of instalments.³ And, if a Subordinate Judge passes a new instalment order, and the judgment-debtor pays the instalments in the Court which are withdrawn by the judgment creditor, the latter does not bind himself thereby to abide by the new instalment order. The whole amount of the decree having become due to the creditor on the first default, he was quite justified in taking all that was placed at his disposal towards the discharge of the debt due to him. The judgment-debtor cannot by merely complying with a wrong order convert it into a right one or take advantage of it as such.⁴

Note :— The remarks of the Commission appointed in 1891-92 to enquire into the working of the D. A. R. Act, made in relation to S. 20 which provides for instalments in money decrees, are equally applicable to this section: "The only objection to this section which the Commission can see is that it does not go far enough. The way in which decrees can be satisfied depends on the circumstances of the debtor, and a sufficient change in these circumstances fully justifies an alteration in the terms of the decree. Fixed instalments are only suitable in the case of persons with fixed incomes. But in the case of agriculturists whose annual income fluctuates from year to year, some power

¹ Mahomad Ibrahim v. Sheik Mahomad, (1919) 22 Bom. L. R. 124=44 Bom. 372. In this case, Ramohandra v. Kalle, (1915) 17 Bom. L. R. 360 was distinguished as in the latter case the whole of the mortgage amount was paid off, and hence the mortgagee was

held not liable to account for mesne profits.

² Balkrishna v. Absaji, 12 Bom. 326=1887 P. J. 184.

³ Shankar v. Shankar Gandayya, 32 Bom. 445=10 Bom. L. R. 538.

⁴ Balkrishna v. Absaji, 12 Bom. 326.

to alter instalments on good cause shown is necessary in the interest of justice. It is clearly out of question to expect a ryot whose crops have entirely failed, and whose revenue had in consequence to be remitted or suspended, to be able to satisfy private creditors. On the other hand, the same ryot may in another year have a bumper crop out of the proceeds of which he may be able to pay more than one instalment due."

8. Status as an agriculturist:—(a) *Must be at the time of decree:*—Under this section instalments can be allowed in passing a decree for redemption, foreclosure or sale in any suit of the description mentioned in S. 3 clause (y) or clause (z) etc. Though this section does not refer, like S. 20, to 'a decree passed against an agriculturist whether before or after the Act came into force' it must be taken to apply only when the party claiming instalments was an *agriculturist at the time of the decree*. So a person who was not an agriculturist at the time of the decree but has become so subsequently, cannot claim the benefit of S. 15B. For the description of suit in S. 3 is not confined to the relief claimed in the suit, but also includes the status of the parties. Otherwise the result would be that in all suits for redemption, foreclosure, or sale, if subsequently the defendant brought himself within the definition of an agriculturist, he would be entitled to the benefit of S. 15B, and we do not think that was the intention of the legislature, or that is what the law enacts.¹

(b) *Must be at the time of preliminary decree:*—The party claiming the benefit of this section must be an agriculturist at the time of the preliminary decree, if a preliminary decree is passed in the suit. If he is not an agriculturist then, or leads no evidence on that point, and the Court holds him to be a non-agriculturist, he will not be allowed to plead that he has become an agriculturist at the time of the final decree.²

(c) *Status at the time of decree can be proved in execution of an ex parte decree:*—As laid down in *Devu v. Rewappa* above, the party claiming instalments must be an agriculturist at the date of the decree; and if he was not an agriculturist then, he cannot claim the benefit of this section though he becomes an agriculturist afterwards. But when an *ex parte* decree is passed,

1 *Devu v. Rewappa*, (1922) 24 Bom. L. R. 370 = 46 Bom. 964. | 2 *Bal Rajaram v. Maneklal*, (1931) 84 Bom. L. R. 55 at p. 73.

the defendant can, in execution proceedings show that he was an agriculturist at the date of the decree. He will not be precluded from doing so, unless it can be said that the question has already been decided against him, and is now *res judicata* as where the trial Court would have had no jurisdiction if he were an agriculturist.¹

(d) *Status can be pleaded in subsequent execution proceedings though it was not pleaded before*:—The defendant can thus plead that he was an agriculturist at the time of the decree as stated in rule (3), in a subsequent execution proceeding of an *ex parte* decree though he has not done so in previous *dar-khasts*. For there is no rule of limitation which prevents an agriculturist from claiming to be allowed to prove his status at any stage of the proceeding so that if successful he may ask the Court to apply the provisions of the Act in his favour.²

[This case was criticised by Crump J. in *Manklal v. Mahipatram*³ where he said, "Different considerations would arise in such a case, and possibly that decision may require further consideration should the point again arise. Obviously a judgment-debtor who fails to raise a plea in bar of execution cannot raise the plea at a subsequent stage of the execution proceeding."⁴

(e) *The status can be proved in execution by legal representative*:—The rule laid down in *Rudrappa v. Chanbasappa* above, that the status of an agriculturist can be proved in execution proceeding of an *ex parte* decree, was much extended in a later case where it was held that if the judgment-debtor was dead, his legal representatives can prove that they were agriculturist at the date of the decree and thus obtain the relief provided by this section.⁵

[*Note*:—It may be submitted with respect that this extension of the rule in *Rudrappa v. Chanbasappa* is not warranted by the wording of S. 3 read with this section nor does it seem to be borne out by the intention of the legislature. What is material in suits under s. 3 clauses (y) or (z) so that the judgment-debtor may get the benefit of s. 15B is the *status of the debtor himself* and not of any one else. For, even if legal representative was proved

¹ *Rudrappa v. Chanbasappa*, (1923) 26 Bom. L. R. 153.

² *Narayan v. Dhondo*, (1925) 28 Bom. L. R. 305.

³ (1927) 29 Bom. L. R. 1109, E. B.

⁴ See also the observations in *Shamrao v. Malkarjun*, 33 Bom. L. R. 797 discussed under S. 22.

⁵ *Sidraj v. Renaki*, (1925) 27 Bom. L. R. 1490.

to be an agriculturist at the time of the decree, there would be no decree against an agriculturist, if the judgment-debtor himself was not an agriculturist. It would therefore be more consistent with the decision in *Devu v. Revappa* to hold that the legal representatives should be allowed to prove that the *judgment debtor* through whom they claim was an agriculturist at the time of the decree.]

Illustrations.

(1) D mortgaged his lands to R in 1896. R sued for redemption of the mortgage in 1909 and a decree was passed in 1916 whereby D was ordered to pay Rs. 900 to R. Neither at the date of the suit nor at the date of the decree D was an agriculturist, but he acquired the status subsequently, and then applied for instalments under S. 15B. D is not entitled to the benefit of S. 15B.¹

(2) R sued B on a mortgage; a preliminary decree was passed in the suit. B was not an agriculturist at the date of the preliminary decree; but he acquired that status at the time of the final decree. B cannot get the benefit of S. 15B, for under this section the party must be an agriculturist at the time of the preliminary decree.²

(3) C obtained an *ex parte* decree against R in October 1921. In December 1921 C sought to execute that decree. R then claimed to prove that he was an agriculturist at the time of the decree and as such entitled to instalments under S. 15B. R can prove that³; and he can prove that even in subsequent execution proceedings in spite of the fact that he has not claimed the privilege in previous execution proceedings arising out of the same decree.⁴

(4) S obtained a money decree against T in 1917. In 1918 T died and his wife K was brought on the record; but before the execution proceeded K died and T's daughter R was brought on the record. R can prove that she was an agriculturist at the date of the decree and thus entitled to instalments under this section.⁵

9. Suit must be tried in a Court to which this Act applies:—The provisions of this section can be applied even in the course of any proceeding under a decree passed in any suit of the nature described in S. 3 cl. (y) or cl. (z). But where a *decree is passed by a Court where this Act does not apply but the execution of the decree is transferred to a Court to which the Act extends*, it is not open to the executing Court to grant instalments under this section. For, in order that S. 15B may apply, the

1 *Devu v. Revappa*, 24 Bom. L. R. 370.

2 *Bal v. Maneklal*, 34 Bom. L. R. 55.

3 *Rudrappa v. Chanbasappa*, 26 Bom. L. R. 153.

4 *Narayan v. Dhondo*, 28 Bom. L. R. 305.

5 *Shidraj v. Renaki*, 27 Bom. L. R. 1420.

suit in which the decree is passed or the execution proceedings are taken must be a suit of the description mentioned in clause (y) or clause (z) of S. 3. But a suit tried in a Court to which the D. A. R. Act does not apply cannot be said to be a suit under S. 3. For, it is not a suit tried by a subordinate Judge under the D. A. R. Act; and as it was held in *Devu v. Rewappa*¹ considering the nature of the Act the description of 'suit' in S. 3 is not confined to the relief claimed in the suit, but also includes the status of the parties, and hence it was held that the Court cannot under the provisions of S. 15 B of the D. A. R. Act grant instalments under a decree to a person who at the time the decree was passed was not, but has since become, an agriculturist. There can be no doubt that the defendant in a suit tried where this Act does not extend cannot be said to be an agriculturist under the D. A. R. Act.²

Illustration.

A obtained a decree against B in the Akola Court in Berar. The provisions of this Act did not apply to the Akola District. B contended in that Court that he was an agriculturist and so entitled to the benefit of the provisions of this Act, but it was held that as the provisions of this Act do not extend to the District of Akola, B could not avail himself of them. The execution of the decree was transferred to the Jalgaon Court within whose jurisdiction B's property was situated. The D. A. R. Act applies to the Jalgaon District. B again contends at the execution that he was an agriculturist at the time of the decree with reference to his property in the Jalgaon District and prays for instalments under S. 15B. B is not entitled to claim instalments, for the suit was not tried by a Subordinate Judge under this Act.³

[*Note*:— In this case Nanavati J. expressed a different view. He was of opinion that the agriculturist debtor should in such a case be allowed to prove his status in execution. The Akola Court did not consider the question whether the defendant came within the description of an agriculturist under the D. A. R. Act for the Act was not in force in its territory. The case⁴ therefore in which it has been held that where the status of an agriculturist might have been pleaded at the trial of the suit but was either not so pleaded, or if pleaded, was decided adversely to the defendant, the same plea could not be

1 (1922) 24 Bom. L. R. 370.

2 Ramlal v. Ratanlal, (1931) 33 Bom. L. R. 1466. The case of mancharji v. Thakurdas, (1906) 8 Bom. L. R. 363 in which the Court arrived at an opposite conclusion was not followed here because, as it was held here,

this point was not considered in that case.

3 Ramlal v. Ratanlal, (1931) 33 Bom. L. R. 1466.

4 Mulji v. Goverdandas, 24 Bom. L. R. 1231.

raised again in execution proceedings, do not apply to the present case.....

When a class is defined in an Act, it does not mean that persons included in that class can have no existence where the Act does not apply. In other words, an agriculturist is an agriculturist whether the D. A. R. Act applies or does not apply to the Court in which a suit against him is brought. The only result of the non-applicability of the Act to the area is that the Court cannot give him the protection of the Act. It may further be urged that in interpreting an Act intended for the benefit of a special class it would be too narrow a construction to hold that a person who satisfies the conditions laid down in the definition cannot get the benefit of that Act even where the particular legislation applies, merely because another Court could not apply the Act...It is possible for a person to be an agriculturist as defined in the Act though sued in a Court where the Act does not apply. 'The cases which appear to lay down that he cannot, all deal with the case of a person whose "agricultural work" was carried on within a district where the Act had no application, the Court in which he was sued being also situated in the same district. In the present case, the appellant's "agricultural work" (assuming that they so earn their livelihood) is carried on in a district where the Act does apply (Khandesh), and the only point against them is that they were sued in a Court where it does not. As against this, is the fact, that the execution proceedings are in a Court where the Act does apply. If in these circumstances it were it be held that they can not possibly be "agriculturists" as defined in the Act merely because the trial Court could not apply the definition, it means not only that an agriculturist can have no existence in a Court not under the Act, but also that his existence cannot be recognized at any subsequent stage even by a Court governed by the D. A. R. Act. It would follow that when a decree of a Native Court is transferred for execution to a British Indian Court under S. 44 of the C. P. Code, the latter Court would be bound to execute the decree even by arrest of the judgment-debtor in spite of his being in a position to prove that at all material dates he was an agriculturist as defined by the Act in British India.¹ Such a result would at least be very anomalous."

It is submitted that this view of Nanavati J, (regarding the application of S. 15 B in such cases) is correct.

10. Awards and compromise decrees not affected:—

Awards:— The provisions of this section do not apply to a decree passed on an application to file an award arrived at on arbitration without the intervention of the Court; for as was said by West J. "if a creditor and a debtor cannot define their mutual relations by the mediation of persons in whom they have confidence, still less should they be allowed to do so unaided, and thus the

¹ It is submitted with respect that this statement is not correct. For, if the party is an agriculturist in British India at the time of the attempted arrest, he would be exempted from arrest. See S. 21.

settlement of accounts would be no settlement, unless made by a Court. The foundation would thus be laid for universal litigation, but this is so generally disapproved that it cannot, without an express declaration, be supposed to have formed a part of the policy of the legislature in this particular instance. The Code of Civil Procedure and the D. A. R. Act being within the territorial range of the latter statute in *pari materia* must be construed together so as to give effect as far as possible to the provisions of each. Another general principle is that exceptional provisions are not to receive a development to all their logical consequences contrary to the general principles of law.¹ The right of the parties to refer to arbitration is still preserved, though the power of compulsory reference by the Court is now taken away. If the legislature has thus thought fit to preserve the full effects of an award in the case of a reference made after proceedings begun, there is no reason for presuming that it has a contrary intention in the case of a reference and award prior to such proceedings.²

These decisions under S. 12 were based partly on the ground that an application to file an award is not a 'suit' within the meaning of Ss. 3, 12 and 47. But, now in view of the observations of the Privy Council in *Ghulam Jilani v. Muhammad*,³ an application to file an award under para 20 of the second schedule of the C. P. Code may be considered a suit "but it is not a suit of the description mentioned in S. 3 clause (y) or (z). It is a *suit to file an award*. That is how the suit can and must be described. It cannot be described as a suit for foreclosure or for the sale of property or for redemption. In the former the Court is not asked to and does not determine the amount of the mortgage debt or the conditions on which or the way in which that debt is to be discharged. All these matters are determined out of Court and the Court only has to decide, if the question be raised, whether there was an award which the law regards as binding. In a suit for foreclosure, sale or redemption, the Court goes into the relations existing between mortgagor and mortgagee, determines the amount of the mortgage debt and how

1 *Gangadhar v. Mahadu*, 8 Bom. 20 = 1889 P. J. 892.

2 *Mohan v. Tukaram*, (1875) 21 Bom. 69.

3 (1901) 29 Cal. 167 = 29 I. A. 58.

it is to be discharged." The principle laid down in the above-mentioned cases therefore applies to cases under this section, and the Court cannot grant instalments in execution of a decree passed in terms of an award without the intervention of the Court.¹

Consent decree.—The principle that is applied to awards is equally applicable to compromise decrees as well. There is nothing in the provisions of the D. A. R. Act which expressly deprives the parties to a suit of the power of entering into a compromise, and having that compromise recorded under Or. XXIII r. 3 of the C. P. Code, 1908.² S. 15B of the D. A. R. Act in terms only applies where the Court in its discretion directs that the amount due shall be paid by instalments, and where it has in its discretion given that direction, then certain consequences follow as to the amount of property which may be sold to satisfy the default in payment of instalments. But there is nothing to show that the legislature intended that the provisions of that section should be applied by analogy wherever a compromise is entered into, which is to be recorded by the Court and to form the basis of a consent decree...A compromise which is made by parties who are *sui juris* should be given effect to. We do not think that there is anything unlawful in a compromise or contrary to public policy where the compromise provides that in default of the payment of any instalment, the whole of the amount due should be recovered at once. The line of reasoning would involve the consequence that every consent-decree in a mortgage suit, in which less than six months or a greater time than six months is given to the mortgagor to discharge his mortgage debt is illegal because it violates the provisions of the C. P. Code, Or. XXXIV r. 2 (c), which would be absurd.³ So, the compromise decree would not be against public policy as laid down in S. 15B even, though it provides that on default of payment of any two instalments the whole amount should become due,⁴ or if in a suit for possession the compromise decree provides that if the defendant does not pay the whole amount in one sum within six months,

¹ Govindrao v. Ambalal, (1911) 13 Bom. L. R. 352=35 Bom. 310.

² Piraji v. Ganpati, 34 Bom. 502=12 Bom. L. R. 378. See Datto v. Bal-

want, 1885 P. J. 248.

³ Shivayagappa v. Govindappa, (1913) 15 Bom. L. R. 768 (F. B.).

⁴ Ibid.

the defendant's right to redeem should cease.¹ The Court will not allow the decretal amount to be paid by instalments in such cases. For, an application to modify a consent decree by making the amount payable by instalments is not a proceeding under a decree. - It is rather a proceeding against a decree.²

[Note:—The case of *Shivayagappa v. Govindappa* given above overrules the decision in *Kisandas v. Nama*.³ It was held in this latter case that as " a compromise is merely an agreement between the parties to settle an existing dispute if it is to be enforceable in law it must not contain a term opposed to public policy."⁴ Here the term " that in default of payment of two instalments the whole mortgaged property shall be liable to sale " is contrary to public policy, for, the public policy upon this point is declared in S. 15 B of the Act which enacts that in such circumstances not the whole mortgaged property but only such part of it as may be necessary for the realization of the overdue instalments shall be liable to sale. This is no longer a good law.]

Illustrations.

(1) In 1896 a decree was passed against G. The decree was based on an award which was arrived at on a reference to arbitrators without the intervention of the Court. It provided that G should pay Rs. 7000 with interest; and on his failure to do so, the property mortgaged was to be sold. G cannot claim instalments in execution.⁵

(2) S sued G to redeem a mortgage passed in favour of the latter. The suit was eventually compromised, and the compromise decree provided that S should pay G Rs. 4000 by twenty annual instalments; and that on his failure to pay any two instalments successively, G should recover *all* the remaining amount by getting the mortgaged lands sold through the Court. The compromise decree is valid though it contravenes the provision of Sub-s. (2) and on S's failure to pay the amount, G can apply for sale of the *whole* property.⁶

(3) M obtained a consent decree against A which provided that A should pay M for his mortgage-rights a sum of Rs. 425 within 6 months, that on A's failure to do so, his right to redeem will cease, and in that case M may get possession of the land in suit by right of ownership. A failed to pay the amount; M thereupon applied to have the above decree made absolute. A now applies for instalments. A will not be allowed the benefit of S. 15 B, for the compromise decree is valid, and the Court will not interfere with it. In this case it was remarked " At the most the Court could have allowed the defendant to pay the decretal amount although the decretal period had expired."⁷

¹ *Madhav v. Appaji*, (1921) 28 Bom. L. R. 503=45 Bom. 1123.

² *Datto v. Balwant*, 1885 P. J. 248.

³ (1910) 12 Bom. L. R. 1024.

⁴ *Lakshman v. Rangamma*, (1902) 26 Mad. 81.

⁵ *Govindrao v. Ambalal*, (1911) 13 Bom. L. R. 352.

⁶ *Shivayagappav. Govindappa*, (1913) 15 Bom. L. R. 768=37 Bom. 614.

⁷ *Madhav v. Appaji*, (1921) 28 Bom. L. R. 503=45 Bom. 1123.

11. **Sind view:**—The view of the Bombay High Court (viz. the executing Court will not interfere with consent decrees and awards) is not accepted in Sind. There it is held that the ordinary rule that a consent decree can only be varied by consent does not apply to suits under the D. A. R. Act, and cannot be allowed to override the express provisions of S. 15B which interferes to a definite extent with the rule of finality of decrees. It must be remembered that this Act is dealing with persons who *ex hypothesi* are not considered to be in possession of contractual powers; they are in a position which some legislation assigns to minors, sailors, expectant heirs and the like. Moreover, the whole policy of the Act is to provide a means by which an agriculturist should be enabled to clear himself of debts without being put to the necessity of selling his lands. This being so, it is open to the Court in proper cases even where there is a consent decree to substitute a system of instalments under S. 15 B to direct sale.¹

12. **When can an instalment order be made:**—**No bar of limitation:**—Under Art. 175 of the Indian Limitation Act, an application for payment of the amount of a decree by instalments can be made within six months from the date of the decree. But that article refers to an application made by the judgment-debtor under Or. 20, r. 11 (2) of the C. P. Code, 1908. Under this section the Court can exercise the power even *sou motu*, without any application from the judgment-debtor. The Act being intended for the relief of the indebted agriculturists, a narrower construction cannot be put upon the words of this section; and if the Court has power to order the amount to be paid by instalments at any time in the course of a proceeding, it is a power not subject to limitation.²

It can be made even after an order absolute for sale is made but before sale:—As the object of this section is to afford the debtor a *locus penitentiae* up to the very last moment before the property actually and finally passes, the Court will make an order for instalments under this section even where an order absolute for sale has been made and the decree transferred to the Collector for execution who has in execution already sold a portion of the

¹ Sangatmal v. Jan Mahomad, (1921) 79 I. C. 553=16 S. L. R. 260=A. I. R. 1921 Sind 102.

² Balaji v. Datto, (1907) 3 Bom. L. R. 1026.

mortgaged property ; for the word "decree" in S. 15B must be taken to mean "decree nisi" as well as "decree absolute." The words of S. 15B are "in the course of any proceeding under a decree for sale passed in any suit" etc. And even when the decree is transferred to the Collector for execution on an order absolute for sale it is still a proceeding in execution. "I think there is a perceptible difference between the case of a decree absolute for sale and for foreclosure. Theoretically the latter leaves nothing more to be done ; there is nothing left to be paid by any one, no further step to be taken by the creditor or the Court. All is over. But that is not so when a decree for sale is made absolute. The amount for which the decree was passed is still payable, and though strictly speaking it may not be payable by the "mortgagor" it is payable out of what, but for the decree absolute, would be still his property. Nor is the Court bound to sell the whole of it. There is again no reason why the debtor himself could not come in and buy his own property. Allowing the debtor still to take advantage of the Act, even at a late hour appears to be precisely accordant with the spirit and purpose of the whole piece of legislation.¹

The order cannot be made after foreclosure:—But where the Court orders the judgment-debtor to pay the amount within a particular time or to be for ever foreclosed against redemption, if the judgment-debtor does not pay the amount within the time mentioned, the property vests in the mortgagee. "When the order for foreclosure is made, it operates of itself to transfer the ownership when the time has expired, and the ownership having passed to the mortgagee, cannot be taken back from him by a subsequent order not founded on any new transaction or change in the jural relationship of parties." So after the foreclosure has operated, the Court cannot order that the amount due be paid by instalments. The new owner may have sold the property and boundless confusion might arise from the allowance of such an application.²

¹ Manoharl v. Thakordas, 31 Bom. 120=8 Bom.L, R. 963.

² Ladu v. Balaji, 7 Bom. 532=1883 P. J. 301; Ramchandra v. Bahiru, 1891 P. J. 72.

13. Decree upon a mortgage passed under this section need not be made absolute :—Under the C. P. Code 1908, Or. 34 r. 4, in a suit for sale, the Court first passes a preliminary decree to the effect mentioned in r. 2 of Or. 34, and if the defendant does not pay the amount as therein mentioned, the plaintiff has to apply to get the decree made final before he can execute the decree by sale of the property (Or. 34. r. 5.). But when a decree-holder obtains a decree for sale upon a mortgage in default of payment of instalments ordered under S. 15B (1) of this Act, he need not apply under Or. 34 r. 5. of the C. P. Code for making the decree final before he can apply for sale of the necessary portion of the property under S. 15B (2) of the D. A. R. Act. For, the kinds of procedure laid down by the C. P. Code and the D. A. R. Act respectively in the matter of sales in mortgages are inconsistent one with the other. Under the C. P. Code, a plaintiff mortgagor must obtain *both* a preliminary decree and a final decree. But the words of Sub-S. 2 of S. 15B clearly show that under that section the Court shall make an out-and-out sale; nor is there anything in the D. A. R. Act to suggest that anything more than this order is required for the purpose of bringing the property to actual sale. S. 15B makes special allowance for instalments and requires that only a portion of the mortgaged property be sold. ' I see no difficulty for holding that that is the limit of the concessions which the Legislature was making in behalf of an agriculturist, and in my view neither the principle of those concessions nor the words of the statute suggest that the intention was that on the failure to each particular instalment, the mortgagee would not only have to obtain a definite order under Sub-S. 2 of S. 15B but would also have to follow it up at some later period by making a fresh application in each case and obtaining from the Court a fresh order. I am of opinion that the order made by the Court under Sub-S. 2 is the order contemplated by the Legislature as effecting without more the sale of the requisite portion of the property.¹

As it is not necessary to apply for making the decree for sale absolute, if the plaintiff applies for that purpose, and the

¹ Kashinath v. Rama; (1916) 18 | Krishna v. Ramchandra, (1930) 32
Bom. L. R., 475 = 40 Bom. 492. Ram- | Bom. L. R., 1093 = 54 Bom. 776.

Court passes an order accordingly, that order cannot be treated as a decree which would form as a first starting point of limitation. The application to have the decree made absolute can at best be treated as a step-in-aid of execution for limitation.¹

The rule laid down in *Kashinath v. Aba* above is a general one applying to all decrees passed under S. 15B and hence refers not only where the decree is made payable by instalments, but also where the defendant is ordered to pay the amount in one sum. So in the latter case also, the decree need not be made absolute.²

In *Ramji v. Pandharinath*³ it was held that a decree for redemption was only a decree *nisi*, and if neither party applied to make the decree absolute, the mortgagor can, after execution of that decree is time-barred bring a fresh suit for redemption. But that case appears to have been decided upon the peculiar terms of the decree. It was not a decree which came strictly under the provisions of the D. A. R. Act,⁴ and hence the ruling was not followed in the subsequent cases given above.

Illustrations.

(1) K obtained a decree against R in terms of a compromise, declaring the amount due and ordering its payment by instalments. The decree provided: 'In default of payment of any instalments the plaintiff is at liberty to apply under S. 15 B to recover the amount by sale of the property.' Two instalments were unpaid. K can at once apply to recover the whole amount. He need not apply to make the decree final.⁵

(2) Even if in the above case the Court had ordered the defendant to pay the "whole sum with cost within six months" and allowed the plaintiff in default of payment to apply to the Court for an order for sale of the whole property, the plaintiff would not have been required to make the decree final.⁶

(3) On 10th Sept. 1900 H obtained a decree against A whereby A was ordered to pay the mortgage amount of Rs. 1800 in ten equal annual instal-

1 *Hirachand v. Aba Lala*, (1921) 24 Bom. L. R. 269=46 Bom. 761.

2 *Suklya v. Suklal*, (1923) 25 Bom. L. R. 1214=48 Bom. 172=A, J. R. 1924 Bom. 169.

3 (1918) 48 Bom. 477=21 Bom. L. R. 56 (F. B.).

4 *Ramkrishna v. Ramohandra*, (1980) 32 Bom. L. R. 1093.

5 *Kashinath v. Rama*, 18 Bom. L. R. 474.

6 *Suklya v. Suklal*, 25 Bom. L. R. 1214.

ments. In default of payment H was to wait for one year, and if the instalment was still unpaid he was at liberty to recover the whole amount by sale of the mortgaged property. No instalment was paid; H was therefore entitled to apply in 1902 for realising the whole amount. On December 1, 1903 H applied to have the decree made absolute and an order was made accordingly on January 7, 1904. H then presented applications for execution in August 1906, 1909 and 1912. The present application was made in 1912. This application is clearly time-barred not being presented within 12 years from 1902. The application made in 1904 was unnecessary; it could at the time be regarded as a step-in-aid of execution, and not a fresh starting point for limitation.¹

14. Second suit for redemption when allowed:—When an agriculturist mortgagor sues for redemption of his mortgage and obtains a decree for redemption on certain terms, but does not make the payment and redeem the mortgage, the question arises whether he can, after the execution of that decree is time-barred, file a second suit for redemption of the same transaction; and if so under what conditions? When will the suit be held to be barred by Ss. 11 and 47 of the C. P. Code?

The answer to this question may be thus briefly given: *If the first decree does not put an end to the relationship of mortgagor and mortgagee, but simply settles the amount to be then due, the mortgagor can file a second suit for redemption.* For, in equity as long as the relationship of mortgagor and mortgagee continues, the right to redeem exists. The right is recognized by S. 60 of the Transfer of Property Act, and is said to exist at any time provided it has not been extinguished either by act of the parties or by an order of a Court. A decree-nisi in a redemption suit does not bring about a merger of the mortgage; it merely directs that *if the amount be paid within a fixed time*, the mortgagor can compel the mortgagee to return the mortgaged property.² But if the mortgagor does not pay accordingly, the relationship of mortgagor and mortgagee still continues and the mortgagor may again sue to redeem the mortgage. And if in such a case, the party applies for the execution of the first decree, the Court may

¹ Hirachand v. Aba Lala, 24 Bom. L. R. 269.

² Ramji v. Pandharinath, (1918) 21 Bom. L. R. 76 (F. B.), at p. 72; Ramchandra v. Balbhim, (1922) 25 Bom.

L. R. 211; Govind v. Narayan, (1931) 33 Bom. L. R. 844; Badruddin v. Sitaram, (1930) 32 Bom. L. R. 933; Dattatraya v. Annaji, 1886 P. J. 237.

under S. 47 of the C. P. Code treat the application as a suit for redemption, and allow the mortgagor to redeem the property.¹

But if the first decree requires the mortgagor to pay the amount within a specified time or to be for ever foreclosed, if the defendant does not pay within the time specified, there is an end of the relation of mortgagor and mortgagee. The mortgagee becomes the owner of the property, and in such a case the mortgagor cannot again sue for redemption², or apply for payment of the decretal amount by instalments.³

Whether a decree made under the D. A. R. Act puts an end to the relationship of mortgagor and mortgagee or not, will always be a question for decision from the facts of each case when it comes before the Court.⁴ If the decree provides that there ought to be a demand and default before foreclosure operates, if the plaintiff makes no demand for the money due, there is no default and consequently no foreclosure; and the defendant can pay the amount at any time before a demand is actually made.⁵

Illustrations.

(1) Where a second suit is allowed:—R sued in 1892 to redeem a mortgage made in favour of B. A decree was passed in 1894 which ordered R to pay B Rs. 310 and ordered that unless the sum was paid the possession was to be given back to B. On September 20, 1895, the Court eventually ordered: "Plaintiff did not pay Rs. 310 as per decree. Therefore the land was given in the possession of B. In January 1920 R again sues B for redemption of the same mortgage. R can do so, for the first mortgage did not put an end to the relationship of mortgagor and mortgagee between R and B. But in the second suit the account taken in the first suit cannot be disturbed."⁶

(2) H obtained a decree against S in 1886 which provided that H should pay S Rs. 55 in the month of Chaitra of any year and obtain possession of the land in suit. In 1920 H applied for execution of the mortgage. The application is time-barred under S. 47 of the C. P. Code, but the application can be treated as a suit for redemption.⁷

1 Hanmant v. Shidu, (1923) 25 Bom. L. R. 358.

2 Dinu v. Shripad, (1919) 21 Bom. L. R. 720=43 Bom. 703.

3 Ladu v. Balaji, 7 Bom. 532=1889 P. J. 301.

4 Ramchandra v. Balbhim, 25

Bom. L. R. 211.

5 Babaji v. Laxman, 1897 P. J. 83.

6 Ibid. See Govind v. Narayan, 33 Bom. L. R. 844; Dattatraya v. Annaji, 1886 P. J. 237.

7 Hanmant v. Shidu, (1923) 25

Bom. L. R. 358.

(3) *Where a second suit is barred*:— In 1885 D sued S to redeem a mortgage and obtained a redemption decree which provided that D should pay S Rs. 518 and costs by six annual equal instalments. On D's failure to pay the whole amount by end of March 1893, his right to pay was forever to be barred. D does not pay the amount by the specified date. In 1913 D files a second suit to redeem the mortgage. That suit is barred under S. 47; for, D's right in the property was extinguished in 1893.¹

15. Limitation when instalment decree is appealed from:—When an instalment decree is confirmed in appeal, the instalments become payable only after the date of the appellate decree. For, under Art. 182 cl. 2 of the Indian Limitation Act, where a decree is appealed from, time begins to run from the date of the final decree or order of the appellate Court. Hence the period for making an application (for sale of the property) under S. 15 B is also counted from the date of the latter decree.²

Illustration.

B obtained a decree against D which directed B to pay D Rs. 299 with cost and interest by three annual instalments, the first instalment to be paid on 15th March 1912. The decree was subsequently confirmed by the District Court, and ultimately by the High Court in October 1914. B made some payments in May 1916. D presented an application for execution on July 12, 1916 for the recovery of the last two instalments. The application is in time, for the period of limitation is to be counted from the date of the appellate decree.³

[*Note*:—In this case, Shah Ag. C. J. seemed to imply that it shall have to be decided from the facts of each case whether the confirmation of the decree by the appellate Court thus extends the time or not. "The question is not wholly free from difficulty; and it is really a question of determining the effect of confirmation of a decree for sale of the mortgaged property under S. 15 B which directs payment by instalments on certain dates. It is always possible for the parties to have the point made clear one way or the other at the time of confirmation. But *on the facts of this case* we think that the effect of confirmation is to extend the time.³]

16. Limitation for application to extend time for payment of mortgage debt:—An application for extending time for the payment of mortgage debt is governed by Art. 181 of the Limitation Act (Application for which no period of limitation is provided elsewhere: three years: when the right to apply accrues).

¹ Dinu v. Shripad, 21 Bom. L. R. 720.

² Darubhai v. Bachar, (1924) 49 Bom. 305=27 Bom. L. R. 196.

³ Ibid.

If the application be treated as an application not merely for the extension of time for the payment of mortgage-debt but for the recovery of possession of property it would be an application for the execution of a decree and as such it would come under Art. 182. But treating the application as one for enlargement of time only, it falls under Art. 181.¹

Illustration.

In 1907 B obtained a decree against V, under the D. A. R. Act for redemption of a mortgage, which provided that B do pay V within six months a sum of Rs. 321 and the costs of the suit. In the event of his failing to pay, V may apply for obtaining relief under S. 15B of the D. A. R. Act. Nothing was done under the decree till 1915. In that year B assigned his equity of redemption to G who then applied for being allowed to pay the mortgage money into Court and to recover possession of the property from V. The application falls under Art. 181 of the Limitation Act and so is time-barred.²

17. Sub-section (2). 'Default clause' in instalment decree:—In ordinary suits whenever the Court allows the decretal amount to be paid by instalments, the decree generally contains what is known as 'a default clause,' which provides that in default of payment of one (or two) instalments the judgment-creditor may at once realise the *whole* of the amount due under the decree. But under this clause, if the judgment-debtor does not pay the amount of any instalment when due, the Court is not, except for reasons to be recorded by it in writing, to make an order for sale of the entire property mortgaged or for foreclosure, but it can order the sale of *such portion of the property* as it thinks necessary for the realization of *that amount*. In a case where the Court ordered that in default of payment of any instalment, the whole remaining mortgage debt should become due, it was held "we think that having regard to the special object of the D. A. R. Act, it could not have been intended by clause 1 of S. 15B that the Court should be able solely in the exercise of its discretion to effect by its decree, what it is expressly forbidden to do by clause 2 of that section without giving reasons to be recorded in writing."³ In another case where the decree contained

¹ Vasudeo v. Gopal, (1919) 21 Bom. 487 = 43 Bom. 689.

² Ibid.

³ Rama v. Ramchand, 1894 P. J. 456.

a default clause, the High Court ordered the substitution of the following clause: If the sum payable under the direction aforesaid is not paid when due, then defendant no. 1 will be at liberty to apply to the Court for such order as he may be entitled to under S. 15B sub-S. (2) of the D. A. R. Act."¹

This clause applies only in those cases where directions for payment have already been given under cl. 1.²

The Commission appointed to enquire into the working of the D. A. R. Act in 1911-12 was of opinion that the "provision under this clause was satisfactory neither from the point of view of the creditor nor of the debtor. It therefore should be repealed. The law should, in our opinion, provide that where he defaults in respect of the payment of two instalments, unless for reasons beyond his control such as two succeeding years of famine, the Court should have the power to recover the debt immediately."³

But if the default clause is contained in a decree passed on a compromise or on an award, the Court will not interfere with it (See note 10).

18. Sub-section (3):—Sub-sections (3) and (4) were added by Act VI of 1895. By sub-section (3), if the mortgagee be in possession and the possession be a beneficial one, the redemption may be effected without sale and without any necessity for the debtor paying any sum in cash whatever, but by merely *continuing the mortgagee in possession* for some time. The mortgagee would thus work the whole debt off and then restore the possession to the mortgagor. This sub-section contemplates a power in the Court either in the decree *nisi*, or when it is made absolute, to direct that the amount payable by the mortgagor shall be discharged by continuing the mortgagee in possession. Under this clause therefore a decree *nisi* for foreclosure can be converted into one for continuing the mortgagee in possession.⁴

19. Sub-section 4:—But in order to work out the process given in Sub-section (3) it would be necessary when the time for restoring the land comes that a further account should be taken in order to show that the debt was completely recovered. But it

Pandharinath v. Shankar, 8 Bom. L. R. 488.

2 Shankar v. Shankar Gandaya, 10 Bom. L. R. 538 = 32 Bom. 445.

3 See P. 40 of that Report.

4 Mancharji v. Thakurda, 31 Bom. 120.

would be inconvenient to take further account in this way. So Sub-section (4), instead of directing that the mortgagee should remain in possession until the result of the account shows the debt to be paid, authorizes the Court to fix a time for which the mortgagee is to remain in possession, at the end of which period he is to go out and the mortgagor is to resume possession of his property.

Possession for a specified period:—Where under a decree passed in a redemption suit under the provisions of the D. A. R. Act, a mortgagee is continued in possession of the mortgaged property for a definite time, he is entitled to retain possession until the expiration of that specified period, and is not liable to be redeemed before that at the wish of the mortgagor.¹

Illustration.

K filed a redemption suit against R and obtained a consent decree. The decree directed K to pay Rs. 375 to R by instalments of Rs. 25 a year and that R should take the income of the property in lieu of interest. K paid for some years the instalments as they became due. Then he sought to pay the whole of the balance due and to recover the possession of the mortgaged property. K cannot do so. For the decree here determines the mode in which K is entitled to redeem and in the absence of consent the Court cannot allow K to redeem earlier. For to do so would be a hardship on R. As each instalment is paid to R the stipulation as to interest contained in the decree becomes more and more favourable to him. When half the debt is paid he receives as much interest on the unpaid half as he originally obtained on the whole.²

[a] 15 C. (1) The Court may, if it thinks fit in any suit for the possession of mortgaged property under section 3, clause (y), instead of passing a decree for possession of that property, pass a decree directing that the amount payable by the mortgagor shall be payable in such instalments, on such dates and on such terms as to the payment of interest, and as to the ap-

[a] Section 15C was inserted by Act XXII of 1892, s. 6.

1 Ramchandra v. Kondaji, 22 Bom. | 2 Ibid.
221=1896 P. J. 294.

appropriation of the profits and accounting therefor, as it thinks fit.

(2) If a sum payable under any such direction is not paid when due, the Court may, if it thinks fit, instead of making any other order which it is empowered to make for the realisation of that sum, make an order directing that the mortgagee be put in possession of the whole or any portion of the property mortgaged.

Under this section, when a mortgagee files a suit for possession under S. 3 (y), the Court may, instead of passing a decree for possession of that property, pass a decree directing the amount payable by the mortgagor to be paid by instalments. The result of this section along with Ss. 15 A and 15B is greatly to diminish the value to the money-lenders of a mortgage with possession.¹ There does not seem to be much practical utility in retaining this section. If the mortgagee is entitled to possession under the terms of a valid contract, there seems to be no sufficient reason for refusing him this relief. If the defendant merely disputes the amount due, the Court must determine the amount under S. 12 and the defendant can satisfy the debt by paying the amount or sue for redemption under other provisions of this Act.²

This section only applies when the suit is for possession of the mortgaged property. It does not apply when the relation between the parties is not that of mortgagor and mortgagee but that of landlord and tenant.³

[^a]15D (1) any agriculturist whose property is mortgaged may sue for an account of the amount of principal and interest remaining unpaid on the mortgage and for a decree declaring that amount.

(2) When any such suit is brought, the amount (if any) remaining unpaid shall be determined under the same rules as would be applicable under this Act if the mortgagee had sued for the recovery of the debt.

[a] Section 15D was inserted by Act XXII of 1882, s. 6.

1 See Report of the Commission appointed to enquire into the working of the D. A. R. Act 1911-12.

2 See Report of the Commission

appointed to enquire into the working of the D. A. R. Act 1931-32.

3 Mulchand v. Ravji, 1883 P. J. 184

(3) At any time before the decree in the suit is signed, the plaintiff may apply to the Court to pass a decree for the redemption of the mortgage, or the mortgagee if he would then have been entitled to sue for foreclosure or sale, may apply to the Court to pass a decree for foreclosure or sale (as the case may be), instead of a decree merely declaring the amount remaining unpaid, and the Court may, if it thinks fit, grant the application.

(4) The provisions of section 15B shall apply to any decree passed under sub-section (3).

Synopsis of the Commentary.

- | | |
|---|--|
| <p>1. Object of this Section.</p> <p>2. Ordinary law.</p> <p>3. Scope of this Section.</p> <p>4. Agriculturist.</p> <p>5. An agriculturist whose property is mortgaged.</p> <p>6. Accounts in case of several mortgages.</p> <p>7. Accounts where the mortgage is denied.</p> <p>8. Part owner can sue for whole.</p> | <p>9. No suit for redemption against a co-mortgagor who redeems the whole mortgage.</p> <p>10. Clause (2)— Rules determining the amount.</p> <p>11. Clause (3)— Conversion of suit.</p> <p>12. Clause (4).</p> <p>13. Court fee payable under Section 15 D.</p> <p>14. Appeals in account suits.</p> |
|---|--|

1. Object of this Section:— This section is intended to extend provisions of Ss. 16, 17 and 20 (i. e. account suits and instalments) to mortgage cases. Originally mortgage cases were intended to be covered by Ss. 16, 17 and 20. But it having been held by the Bombay High Court in *Shankarappa v. Dhanappa*¹ that these sections do not apply to a debt secured by mortgage, and that in the case of a secured debt, the agriculturist's remedy lies only in a suit for redemption, this section was introduced in the Act.²

1. 5 Bom. 604=1881 P. J. 99.

2 See statement of objects and Rea-

sons, Act XXII of 1882; Laluchand v. Girjappa, 20 Bom. 463.

2. Ordinary law:—The ordinary law as to frame of suits is that "every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action" (Or. 2, r. 2, C. P. Code, 1908). So, ordinarily a suit for account only cannot be instituted, unless the mortgagee asks for redemption also.¹ And if a suit for account only is instituted, a subsequent suit for redemption cannot lie.²

But if the party brings a suit for account only, since such suit cannot lie, the Court may allow the plaintiff to convert the suit into one for redemption.³

This section now allows an agriculturist to split his remedies. He can sue for account only without asking for redemption.

3. Scope of this Section:—This section now provides for suits for account only, in respect of mortgage transactions. It is not necessary to ask in the same suit for redemption also. Clause (3) of this section, however, allows the mortgagor or the mortgagee to apply to convert the account-suit into a suit for redemption, or a suit for foreclosure or for sale respectively. But the permission given by that clause is entirely optional, and the granting of the application is in the discretion of the Court, and a party suing for accounts only, is not subsequently prohibited from bringing a separate suit for redemption.⁴ Again, this section applies only to suits for accounts of mortgage transactions. The two sections relating to accounts, Ss. 15 D and 16, provide for different classes of suits, and give different reliefs, and hence claims for accounts of the mortgage transactions cannot be combined with claims for an account of money lent on promissory notes. [See note "S.15 D and S.16: separate accounts" given under S. 16.]⁵

This section allows the mortgagor debtor to sue for accounts and if he so wishes to ask for redemption also, at the same time. But if on taking accounts under the rules laid down in Ss. 12, 13, 13A and 71A, it is found that the mortgagor has overpaid him-

1 Hari v. Laxman, 5 Bom. 614.

2 Bhau v. Hari, 7 Bom. 377.

3 Hari v. Sitaram; 1882 P. J. 15.

(This and the two previous cases were decided before S. 15 D was enacted. Now an agriculturist can sue for account only without asking for

redemption.)

4 Laluchand v. Girjappa, 20 Bom. 469.

5 Laxmandas v. Baban, 39 Bom. 73 = 16 Bom. L. R. 671; see this case under S. 16.

self, this section does not enable him to get back that amount from the mortgagee.¹

But when accounts are taken under this section of mortgage transactions, the Court may determine the title of the person in possession in order to decide whether the profits were taken by him as mortgagee and therefore to be placed at the credit of plaintiff's account.²

Illustrations.

(1) *Subsequent suit for redemption allowed*:—G filed a suit against L under S. 15 D, for accounts of the mortgaged property. The Court declared Rs. 107 to be due at the date of suit. G subsequently filed a suit for redemption of that property. The second suit is not barred under S. 43 of the C. P. Code, for the first suit for accounts only was allowed under this section.³

(2) *Accounts of mortgage transactions only*:—B, an agriculturist, had money dealings with L, as a result of which, B executed two mortgage deeds for Rs. 1,250. B was to pay off the money by annual instalments of Rs. 660 each. L was to continue in possession. Further money dealings continued and B passed four promissory notes to L. L sued B for the money due on the promissory notes, and B sued L for a general account and for redemption. The Sub-judge heard the two suits together, and on taking accounts of *all* transactions he held that both the mortgages and the debts under the promissory notes were paid off. This method of taking accounts is not correct and the accounts of the mortgage transactions must be kept distinct from the accounts of the promissory notes, and the mortgagee cannot be held to be accountable for the surplus received from the mortgage transactions.⁴

4. Agriculturist:—Under this section, a suit for accounts can be brought by an agriculturist whose property is mortgaged. But he must be an agriculturist under the Act. So, if the Act was not extended to the district in which he earned his livelihood by agriculture at the time of the mortgage, he could not be an agriculturist under the Act when the liability arose, and his case will not fall under clause (2) of S. 2.⁵

5. An agriculturist whose property is mortgaged:—The plaintiff suing under this section, must be "an agriculturist

1 Janoji v. Janoji, (1882) 7 Bom. 185, Ramchandra v. Janardan, 14 Bom. 19 (See other cases under Ss. 12 and 13).
2 Rama v. Karimkhan, 1895 P. J. p. 112.

3 Laluchand v. Girjappa, 20 Bom. 469.

4 Laxman Das v. Baban, 16 Bom. L. R. 671.

5 Shankar v. Krishnaji, 34 Bom. 161 = 11 Bom. L. R. 1289.

whose property is mortgaged." But, if the original mortgagor has sold his equity of redemption in the mortgaged property, he is no longer an agriculturist whose property is mortgaged, and he cannot sue, even if he is not yet paid by the purchaser the full price of the land mortgaged, or if he is personally liable under the mortgage deed for the deficiency of the mortgage money.¹

Illustration.

J mortgaged her property to R in 1899. In 1917 she sold her equity of redemption in the property to X. The full amount of the consideration was not paid to J. In 1922, J sued R for an account of the mortgage of 1899. Her suit will not fall under this Section, she is no longer 'an agriculturist whose property is mortgaged.'¹

6. Accounts in case of several mortgages :— 'S. 15D which provides for a suit of an exceptional character was intended to give to the mortgagor the power of obtaining an account of what was due on the mortgage of his property and therefore, in case of there being several mortgage bonds, the account must be taken of all of them in the same suit.² But this rule applies to the mortgagor only. So that if the mortgagor executes several mortgages on the same property and asks for an account of one mortgage under this section, the mortgagee could ask that an account should be taken of all the mortgages existing on the property, so that the mortgagor could not be entitled to redeem except on paying what is due on all the mortgages. But if the Court takes an account of one mortgage only, it decides nothing with regard to the validity or the existence of the other mortgages at the time when the account is taken.³ The mortgagee can sue to recover the money due on such other mortgages.

Illustrations.

(1) B sued H for an account of the mortgages on B's land. There are six mortgages in all and the aggregate amount secured is Rs. 5,750. To bring the suit within the jurisdiction of the second class Subordinate Judge B seeks to amend his plaint by withdrawing from that suit the claim with regard to one mortgage of Rs. 900/-. B cannot do so, for he must ask for accounts of all the mortgages in one suit.⁴

¹ Jankibai v. Ramchandra, 30 Bom. L. R. 1148 = 1928 Bom. 475.

² Babaji v. Hari, 16 Bom. 351 = 1831 P. J. 243.

³ Mahadeo v. Shridharbhat, (1925) 27 Bom. L. R. 488.

⁴ Babaji v. Hari, 16 Bom. 351.

(2) B sued M in 1917 to take an account of a mortgage on his lands made in 1882. M contended in that suit that there was another mortgage on some of those lands made in 1912 and that S should seek redemption of that mortgage also; but no issue was raised about the mortgage of 1912. The accounts were taken of the mortgage of 1882 only, and it was found that that mortgage was satisfied. M now sues S to recover the money due on the mortgage of 1912. S contends that the suit is *res judicata*. The contention is not valid for the former suit did not decide anything about the mortgage of 1912.¹

7. Accounts where the mortgage is denied:—This section provides that "any agriculturist whose property is mortgaged may sue for an account of the amount of principal and interest remaining unpaid on the mortgage and for a decree declaring that amount;" then by sub-section (3) "at any time before the decree in suit is signed the plaintiff may apply to the Court to pass the decree for the redemption of the mortgage." "It will be seen therefore, that a suit of this kind will only lie on the presumption that there was a mortgage in existence by the agriculturist and that an issue whether or not a mortgage was in existence could not be entertained."² So, if the property regarding which an account is sought is subsequently alienated, a suit for accounts under this section will not lie unless the plaintiff satisfies the Court that the alienation was bad.³ In this case Macleod C. J. relied upon *Chandabhai v. Ganapati*⁴ where the plaintiffs filed a suit to redeem a mortgage under the provisions of this Act praying that a sale-deed subsequently executed by their mother of some of the mortgaged lands to defendants be cancelled as fraudulent. It was held that the suit was outside the scope of S. 3 cl. (z) of the Act, because the suit was not a mere suit to redeem but a suit primarily for the setting aside of a fraudulent deed of sale.

Chandabhai's case, and the case of *Chandikaprasad v. Shivappa*⁵ were based on the Privy Council case of *Mt. Bachi v. Bhikchand*⁶ where their Lordships held that if in form the suit is for redemption, but in reality it is to recover the property of

<p>1 Mahadeo v. Shridharbhat, (1925) 27 Bom. L. R. 488.</p> <p>2 Chandabhai v. Ganapati, 18 Bom. L. R. 768.</p> <p>3 Per Macleod C. J. in <i>Krishnaji v.</i></p>	<p>Sadanand, 26 Bom. L. R. 341=1924 Bom. 417.</p> <p>4 (1916) 18 Bom. L. R. 768.</p> <p>5 (1928) 30 Bom. L. R. 1099.</p> <p>6 (1910) 13 Bom L. R. 56 (P. C.).</p>
---	---

which the rightful owner is deprived by fraud, the special provisions of this Act cannot be applied to that case.

But in all these cases, relief under this Act could not be granted because the mortgage of which an account was sought or which was sought to be redeemed was not in existence but was superceded by some subsequent alienations and it was necessary for the party in each case in order to succeed, to set aside a certain sale, that is to say, he had to ask for some substantive relief before he could get an account against the mortgagee.

But it is not necessary that the mortgage of which an account is sought should be admitted. The plaintiff can sue for accounts even if the mortgage sought to be redeemed is in the form of a sale, and the defendant denies it to be a mortgage. For even if he produces a plain mortgage he would have to prove it, and it might be that the mortgagee would dispute the execution of the document. If the document is in the form of a sale, he has to prove not only the execution of the document, but that it is in fact a mortgage transaction, and he can give evidence of that, having regard to S. 10A of the Act. In such a case he has to ask for no substantive relief.¹

Again, if the suit cannot be treated as one falling under section 15 D for the reasons given above, the Court may in a proper case allow the suit to be treated as one under the ordinary law for setting aside the sale-deed. This it will do, if by doing so it will in no way affect either the jurisdiction of the Court or the merits of the case, as where all the evidence necessary has been taken by the lower Court and no further evidence nor any interference by the Court is necessary.² But if no evidence is taken by the lower Court, the appellate Court would not thus allow the case to be treated as one for setting aside the sale.³

Illustrations.

(1) The lands in dispute belonged to S and his uncle B who formed a joint Hindu family. In 1902 S's mother and B mortgaged the lands to D. In 1908, B, acting as the manager of the joint Hindu family, sold the equity of redemp-

¹ Savant v. Bharmappa, 35 Bom. L. R. 604.

² Chandikaprasad v. Shivappa, 30 Bom. L. R. 1099.

³ Chandbhai v. Ganpati, (1916) 18 Bom. L. R. 763.

tion in the lands to D. S sued D's son in 1923 to redeem his half share in the lands mortgaged in 1902 contending that the sale of 1908 was not for legal necessity. The lower Court took evidence and found that the sale was not for legal necessity. Here the suit is in fact for *setting aside the sale*, and the Court cannot take accounts under S. 15D or allow redemption under S. 15B of the mortgage of 1902. But as the lower Court has taken all the necessary evidence, the appellate Court may allow the suit to be treated as one for *setting aside the sale*.¹

(2) S executed a deed in favour of B in the form of a sale. S sued B in 1925 for an account of the transaction contending that it was really a mortgage though in the form of sale. B denied that it was a mortgage. S can sue for accounts in spite of the denial and give evidence to prove that the transaction was a mortgage.²

8. Part owner can sue for whole:—As the owner of only a part of the equity of redemption can sue the mortgagee and redeem the whole of the mortgaged property on payment of the whole mortgaged-debt, such owner of part only of equity of redemption can sue for the redemption of the whole property or, for an account of all the mortgages under this section. The suit cannot be objected to on the ground that the other mortgagors are not agriculturists, and that yet they would be getting the benefit of the provisions of this Act. For the anomaly of non-agriculturists getting the benefit of this Act at the cost of creditors is one expressly provided for by the law itself.³

9. No suit for accounts against a co-mortgagor who redeems the whole mortgage:—Any interest however small in the mortgaged property entitles the person holding it to redeem under S. 91 of the T. P. Act, and hence the payment made by a co-mortgagor to the mortgagee must be considered a redemption of the mortgage. Otherwise the right of the mortgagor and the mortgagee would be vested in the same person, which would have the effect of extinguishing the mortgage. In any case there would remain no question of redemption of the mortgage and the position of the redeeming co-mortgagor would be that of a chargeholder under S. 95 of the T. P. Act. The mortgage can only be

¹ Chandikaprasad v. Shivappa, 80 Bom. L. R. 1039. See also Krishnaji v. Sadanand, 26 Bom. L. R. 341; Mt. Bachi v. Bhikchand, 13 Bom. L. R. 56 (P. C.) followed.

² Savant v. Bharmappa, 85 Bom. L. R. 604.

³ Gulabpuri v. Pandurang, 1836 P. J. 142; Aba v. Babya, 1833 P. J. 145.

redeemed once. And after it has been so redeemed a suit under 15 D will not lie against the co-mortgagor who redeems. The remedy for the other co-mortgagors in such a case is a suit for partition and possession of their shares on paying their quota of the redemption money. But if the redemption is not by a co-mortgagor or by a person holding any interest in the property but by a stranger only, there is a subrogation of the rights of the mortgagee to the stranger, and in such a case a suit for accounts or for redemption will lie against such stranger.

Illustration.

Five persons held an undivided four annas share in a Khoti village, and mortgaged it to G. A who held another four annas share in the same village obtained a decree to partition off his share. A next purchased from three out of the five mortgagors their shares in the equity of redemption of their four anna share with the exception of a small portion, and later purchased the mortgagee's rights from the three mortgagors in the same four annas share. The plaintiff representing one of the two mortgagors who had not sold his equity of redemption to A sues for accounts under S. 15D. The suit will not lie; for, by purchasing the equity of redemption of the three mortgagors, A had become a co-mortgagor, and so, when he paid away the mortgagee, the mortgage was redeemed. So now no suit will lie against A for accounts. The plaintiff's remedy is for partition and possession of the share.¹

19. Cl. (2)—Rules determining the amount:— In taking accounts under this section the provisions of sections 12, 13, 13A and 71A (i. e. investigating history, mode of taking accounts and rate of interest) must be applied. Ss. 12 and 13 imperatively require the Courts to investigate the history of all transactions with agriculturist-debtors without regard to admissions made by such debtors save in very exceptional cases and for reasons to be recorded by the Court in writing; and it is obvious that a suit for an account must *ex necessitate rei*, involve an enquiry into, not only the amount, but the nature of the transaction.²

Illustration.

A, a mortgagor-agriculturist sued B for an account and for redemption; he admitted in the plaint that the land which it was sought to redeem had been mortgaged to secure repayment of three sums namely Rs. 150, 50 and 155 ad-

1 Shankar v. Bhikaji, (1929) 81 Bom. L. R. 129 = 53 Bom. 353 = 1929 Bom. 139. [2 Bhau v. Antaji, 1884 P. J. 77.

vanced at different times. The Subordinate Judge on making enquiries under this Act, found that the alleged advance of Rs. 155 did not exist, and he disallowed it. The Sub-Judge was entitled to disallow the claim in spite of the admission of the plaintiff.¹

11. Cl. (3)—Conversion of suit:—Under this clause "at any time after the amount due on the mortgage has been determined but before the decree is signed the plaintiff may apply to the Court to pass a decree for redemption, or the mortgagee if he would then have been entitled to sue for foreclosure may apply to the Court to pass decree for foreclosure or sale."

This provision is intended to save the parties the trouble and expense of a separate suit.

May be in appellate Court:—An application for thus converting an account suit into a suit for redemption or foreclosure can be made even to the appellate Court and that Court can pass an order for that purpose; for, the words used are "before the decree in the suit is signed;" and when the decree of the lower Court is revised or varied in appeal, the decree of the appellate Court becomes the decree in the suit, which is to be executed in execution proceedings.²

Not obligatory:—But it is not necessary that the party suing for accounts must, if he desires redemption, apply for it in the same suit. This clause gives the parties an option to turn the suit into one for redemption or foreclosure. It is only intended to give an additional facility to litigant parties to settle their disputes without unnecessary litigation. This section was expressly intended to remove the bar created by Or. 2, r. 2 of the C. P. Code, 1908 (S. 43 of the Code of 1882). And the words "the plaintiff may apply" etc., show that if he does not so apply, a separate suit for redemption is not barred. Again the Court is given full discretion to grant such application or not as it thinks fit.³

Can be allowed once only:—But if the permission granted by this clause is once availed of, and the account suit is turned into a suit for foreclosure or redemption, a subsequent suit for the same purpose cannot lie. The test is whether the party

1 Bhau v Antaji, 1681 P. J. 77.

Bom. L. R. 1285.

2 Navlaji v. Rama, 31 Bom. 159 = 11

3 Lakuchand v. Girjappa, 20 Bom 468

could or could not obtain in execution of the first decree the relief which he seeks in the fresh suit. If in the first suit the Court finds the account due, and orders the amount to be paid by instalments, a second suit for redemption will not be. If the party does not get possession as awarded in the previous suit his remedy lies in an application for execution only.¹

Illustrations.

(1) R sued N for the account of a mortgage-bond for Rs. 160/-. The Court on taking account declared the amount due to be Rs. 100/-. N appealed from the decree. At the hearing of the appeal R applied that his suit should be treated as one for redemption. The appellate Court passed a decree for redemption on payment of the amount by instalments. The decree of the appellate Court being 'the decree in the suit,' it has the power to make an order for redemption.²

(2) G sued M for the account of a mortgage. The suit was converted into one for redemption, but G did not ask for possession as he had already been in possession. The decretal amount was not paid. Subsequently M brought a suit for possession in the Mamlatdar's Court and obtained possession. G therefore again files a redemption suit. G cannot do so now, for the former suit was converted into a redemption suit. He can however obtain possession of his property in execution proceedings.³

12. clause 4:— This clause provides that the provisions of S. 15B shall apply to any decree passed under sub-section (3) i. e. the Court can make the mortgage-amount payable by instalment; if the amount is not paid when due, the Court can order the sale of only such portion of the property as it may think sufficient for the realisation of that sum; in passing the decree it can order that the amount due be discharged by continuing the mortgagee in possession for a certain term, etc.

13. Court-fee payable for suits under section 15 D:—The Government of India by their Notification No. 4650, dated 10th September 1889, had given full exemption to agriculturist-debtors from payment of Court fees in plaints under section 16, excepting in the district of Satara where the Court-fee was reduced to one half. That Notification also gave exemption in suits for redemption when the plaintiff was an agriculturist, and when the suit was instituted in a district to which the D. A. R. Act applied. The exemption thus given was cancelled by Notification No. 501, dated 6th May, 1913, on the recommendations of the Commission appointed in 1911-12 to enquire into the working of the D. A. R. Act and so the amount of Court-fee to be payable in suits under S. 15D and S. 16 has to be determined by the rules laid down in the

1 Govinda v. Mavji, 1897 P. J. 864. | Bom. L. R. 1285.

2 Naylaji v. Rama, 34 Bom. 158=11 | 3 Govinda v. Mavaji, 1897 P. J. 864.

Court-fees Act (III of 1870). Section 7 cl. IV (f) of that Act lays down that, "The Court-fee payable in suits for accounts is to be according to the amount at which the relief sought is valued in the plaint or memorandum of appeal." But as the party does not know the amount due by him, he may make his own valuation for that purpose which may be only the minimum fixed by law. The plaint may be valued at the minimum valuation in a suit for accounts even though the mortgage is in the form of a sale, and the plaintiff has to prove first that it is a mortgage.²

But where in a suit by a landlord or purchaser for possession, the defendant, being an agriculturist, contends that he should be allowed to redeem the transaction being of the nature of a mortgage, the defendant shall have to pay the full redemption fee, and not only the difference between the Court fee paid by the plaintiff and the fee chargeable on redemption. (*Vide* Proceedings of the Judicial Conference of the Poona District, 1930).

14. Appeals in account suits:— Ss. 15D and 16 provide for suits for account only without asking for any other relief. Account suits fall under section 3 cl. (a) of Chapter II, which now provides for suits for account without any limit or value. But no appeal is allowed under Chapter II, though appeals are not prohibited in suits under Chapter III. The anomaly which unavoidably arises is that although appeals are not prohibited in all suits under Chapter III, they cannot be made in respect of suits for accounts under these sections. It seems however that S. 3 (a) should be construed very strictly, and when a simple suit for accounts has *changed* its form *e. g.* at the time of passing of decree under cl. 3 of section 15D or under section 17, and a decree for redemption or payment by instalments is passed and the valuation of the suit exceeds in amount the value given in S. 3, it is no longer a decree under S. 3 and an appeal will lie therefrom.

16. Any agriculturist may sue for an account of money lent or advanced to or paid for him by a creditor, or due by him to the creditor as the price of goods sold, or on a written or unwritten engagement for the payment of money, and of money paid by him to the creditor, and for a decree declaring the amount, if any, still payable by him to the creditor.

¹ See Govt. of India Notif. No. 501 dated 6-5-1918.

² Savant v. Bharmappa, (1933) 35-Bom. L. R. 604, Beaumont C. J.

When any such suit is brought, the amount (if any) payable by the plaintiff shall be determined under the same rules as would be applicable under this Act if the creditor had sued him for recovery of the debt.

Amount of debts in such cases to be determined according to foregoing provisions.

Synopsis of the Commentary.

- | | |
|--|---|
| <p>1. Object of this section.</p> <p>2. Application of this section.</p> <p>3. S. 15 D and S. 16 : separate accounts.</p> <p>4. Relief under this section.</p> | <p>5. Retrospectivity of the section.</p> <p>6. Appeals.</p> <p>7. Court-fee payable in suits under S. 16.</p> |
|--|---|

1. Object of this section:—The Commission appointed to enquire into the causes of the Deccan Riots of 1875 found that one of the causes that produced a feeling of hostility on the part of the debtors towards the money lenders was the general feeling that the money lenders cheated them in various ways. Thus the sawkars generally never gave any receipts to the debtors, and refused to show them accounts of their transactions as would be intelligible to a ryot.¹ This section is intended to enable an agriculturist debtor to know his exact position from time to time, and it therefore allows him to sue for accounts only.

2. Application of this section:—This section seems to have been intended by the Legislature to apply to all monetary transactions of the agriculturists (whether secured or unsecured). But it was held in *Shankarappa v. Dhanappa*² that “comparing the words of S. 16 with the words of S. 3 clause (w), it is clear that the debt in respect of which an account may be sued for, are debts not secured by mortgage, and that it is only in respect of such debts that S. 17 authorises an order for payment by instalments.” The result of this decision was that account suits could not be brought in respect of mortgage transactions. To

¹ Report of the Deccan Riots Commission 1876, P. 26.

² 5 Bom. 604, see also *Hari v. Laxman*, 5 Bom. 614 (1881); *Gulam Husain v. De. Souza*, 31 Bom. L. R. 988.

remedy the hardship caused by this decision S. 15D was enacted by the Amending Act XXII of 1882.

3 S. 15D and S. 16 : Separate accounts :—S. 16 enables a debtor to sue for a general account of money dealings between him and the lender and it enables him to sue for a *bare declaration* of the amount due without any relief being claimed. But naturally he does not require any further relief than that. The plaintiff does not wish to be authorised to pay as soon as the amount due is ascertained, if the payment is inconvenient to him. While a suit for accounts under S. 15D may be filed by a mortgagor agriculturist even where the time named for payment has not yet expired under the mortgage, and he may have either a declaration of the amount due on the mortgage or he may combine a declaration of the amount due with a decree for redemption. This section relates purely and exclusively to mortgage transactions. Therefore Ss. 15 D and 16 stand on a different footing and so the accounts of the mortgage transactions must be kept entirely separate from the promissory-note account.¹ Again, the account contemplated by the two sections being entirely separate, a suit brought under S. 15D, if it fails under that section cannot be saved under section 16.²

4. Relief under this section :—Under this section an agriculturist can only ask for a decree declaring the amount, if any, still payable by him to the creditor, and the amount (if any), payable by him, shall be determined in accordance with the rules laid down in sections 12, 13, 13 A and 71 A. He can not ask for the repayment of the moneys which had already properly come to the creditor's hands.³ The section does not provide that where, upon an account taken in accordance with the rules laid down in Ss. 12, 13, 13 A, and 71 A of the Act, it is found that the defendant creditor has overpaid himself, the overpaid amount becomes a debt due from him to the agriculturist debtor and that the latter becomes entitled to recover it (see comment on S. 13).

¹ Laxmandas v. Baban, (1914) 16 Bom. L. R. 671; = 33 Bom. 73. | L. R. 1148.

³ Laxmandas v. Baban Supra.

² Jankibai v. Ramchandra, 30 Bom.

5. Retrospectivity of the section:—The provisions of this section are retrospective so as to apply to the case of transactions entered into before the date of its extension to any particular district. A suit under this section cannot be debarred merely because the creditor had before the extension of chapter III to the district, instituted a suit for the recovery of the money alleged to be due to him, and which was still pending.¹ For as was said in a case for taking accounts under Ss. 12 and 13, these sections "show that it was the intention of the legislature to open up all transactions between the parties having a bearing upon the claim out of which the suit arises, from the very commencement. This is one of the means adopted by the legislature to carry out the intention expressed in the preamble of relieving the agricultural classes from indebtedness existing at the date of the passing of the Act as well as future indebtedness."² The same principle must be applied to accounts under this section.

Illustration.

N an agriculturist, passed two registered money bonds in January 1899 in favour of R. R sued N on these bonds in January 1905. In August 1905 the D. A. R. Act was extended to the District of Ahmedabad within whose jurisdiction the parties resided. In October 1905 while R's suit is yet pending, N sued R under S. 16 to take accounts of the two bonds. The accounts must be taken under the provisions of this Act.³

6. Appeals:—See note under section 15D.

7. Court-fee payable in suits under 16:—See note on this subject under section 15D.

17. A decree passed under section 16 may, besides declaring the amount due, direct that such amount shall be paid by instalments, with or without interest; and when any such decree so directs, the plaintiff may pay the amount of such decree, or the amount of each instalment fixed by such

Decree under section 16 may provide for payment by instalments. Execution of decree under this section.

1 Narsingji v. Ranchhodbhai, 13 Bom. L. R. 109=9 I. C. 929.

2 Shivlal v. Bhika, 34 Bom. 220=11 Bom. L. R. 1572=4 I. C. 843.

3 Narsingji v. Ranchhodbhai, *Supra*

decree, as it falls due, into Court, in default whereof execution of the decree may be enforced by the defendant in the same manner as if he had obtained a decree in a suit to recover the debt.

Commentary.

Application of this section:— This section applies to decrees passed under S. 16. It is only in respect of debts not secured by mortgage that S. 17 authorises an order for payment by instalments.¹ Payment by instalments in case of mortgage decrees is ordered under S. 15B of the Act.

With or without interest:— When the sum is made payable by instalments, a reasonable rate of interest must be allowed. The almost universal refusal to grant any interest must be pressing especially heavily on men who trade with borrowed capital.²

18. The plaintiff in any suit instituted under section 16 may at any stage of such suit deposit in Court such sum of money as he considers a satisfaction in full of the defendant's claim against him.

Payment into Court in cases under section 16.

Notice of the deposit shall be given by the Court to the defendant, and the amount of the deposit shall (unless the Court otherwise directs) be paid to the defendant on his application.

No interest shall be allowed to the defendant on any sum so deposited from the date of the receipt of such notice, whether the sum deposited be in full of the claim or fall short thereof.

Commentary.

Application of this section:— This section only applies to suits and decrees under S. 16. It does not refer to S. 15D probably because the latter section was not there when the former

¹ Shankarappa v. Dhanappa, 5 Bom. 604, Hari v. Laxman, 5 Bom. 614: See also comment on S. 16 under

² Application of this Act, '

² Report of the Commission appointed to enquire into the working of the D. A. R. Act 1912.

was originally drafted. There seems to be no particular reason for excluding S. 15 D from the operation of this section.

Analogous law :— Similar provisions as to 'Deposit in Court' are contained in Ss. 83 and 84 of the Transfer of Property Act, (IV of 1882) and in Or. 24 rr. 1-4 of the C. P. Code, 1908, which correspond with Ss. 376 to 379 of the C. P. Code of 1882. The provisions of the C. P. Code of 1908 run thus :—

(1) The defendant in any suit to recover a debt or damage may, at any stage of the suit, deposit in Court such sum of money as he considers a satisfaction in full of the claim.

Deposit by defendant of amount in satisfaction of claim.

(2) Notice of the deposit shall be given through the Court by the defendant to the plaintiff and the amount of the deposit shall (unless the Court otherwise directs) be paid to the plaintiff on his application.

Notice of deposit.

(3) No interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice, whether the sum deposited is in full of the claim or falls short thereof.

Interest on deposit not allowed to plaintiff after notice.

(4) Where the plaintiff accepts such amount as satisfaction in part only of his claim, he may prosecute his suit for the balance; and, if the Court decides that the deposit by the defendant was a full satisfaction of the plaintiff's claim, the plaintiff shall pay the costs of the suit incurred after the deposit and the costs incurred previous thereto, so far as they were caused by excess in the plaintiff's claim.

Procedure where plaintiff accepts deposit as satisfaction in suit.

Where the plaintiff accepts such amount as satisfaction in full of his claim, he shall present to the Court a statement which shall be filed and the Court shall pronounce judgment accordingly; and, in directing by whom the costs of each party are to be paid, the Court shall consider which of the parties is most to blame for the litigation.

Procedure where he accepts it as satisfaction in full.

19. [*Power to discharge judgment-debtor. Power to direct institution of insolvency proceedings.*] *Repealed by Act VI of 1895, s. 3.*

Old Law :— The repealed section ran thus :—

Power to discharge Judgment-debtor :— When a decree has been passed, whether before or after this Act comes into force, under which any sum less

than fifty rupees is recoverable from an agriculturist, the Court, "on application or of its own motion" may, either in the course of execution of such decree or otherwise, if it is satisfied that "the other debts (if any) due by him do not, taken together with such sum, amount to fifty rupees;" and that he is unable to pay the whole of such sum, direct the payment of such portion of the same as it considers him able to pay, and grant him a discharge from the balance "of such sum."

Power to direct institution of insolvency proceedings: When the sum payable under the decree amounts to fifty rupees or upwards, or when there are other debts due by the debtor which, together with such sum amount to fifty rupees or upwards, the Court, "on application or of its own motion," may direct proceedings to be taken with respect to him as nearly as may be as if he had applied to be declared an insolvent under the provisions hereinafter contained.

20. The Court may at any time direct that the amount of any decree passed, whether before or after this Act comes into force, against an agriculturist, or the portion of the same which it directs under section 19 to be paid, shall be paid by instalments with or without interest.

Power to fix instalments in execution.

Synopsis of the Commentary.

1. Object of this section.

2. Ordinary law.

3. Scope of S. 20.

4. No variation of instalment order allowed.

5. Default Clause.

6. Principle of instalments.

7. At any time.

8. S. 19.

9. Any decree.

10. Decree against an agriculturist.

11. Application of S. 20 to awards and consent-decrees.

1. **Object of this section:**— This section is a recognition to a limited extent of the principle that a necessary condition of securing the proper observance of orders is that the order should be in fact capable of fulfilment. If the judgment-debtor is in a position to discharge the debt in a lump sum he should be made to do so; but if he has not the means of so paying, it is, in the absence of any further provision of the law dealing with such cases, obviously futile to pass a decree for the immediate realization of the whole amount.¹ This section therefore enables

¹ Report of the Commission appointed to enquire into the working of the

D. A. R. Act, 1912.

the Court, at any time after the decree against an agriculturist is passed, to make the decretal amount payable by instalments.

2. Ordinary law :— The ordinary law as laid down in Rule 11, Or, 20 of the Code of Civil Procedure, 1908, recognises this principle to a certain extent. The rule runs :—

(1) Where, and in so far as a decree is for the payment of money, the Court may, for any sufficient reason, at the time of passing the decree, order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

Decree may direct payment by instalments.

(2) After the passing of any such decree the Court may, on the application of the judgment-debtor and with the consent of the decree-holder, order that payment of the amount decreed shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him, or otherwise, as it thinks fit.

Order, after decree, for payment by instalments.

The rule thus gives the Court full powers, *when passing a decree for money*, to order even without the consent of the judgment-creditor that the amount shall be payable by instalments. But once such a decree is passed, the Court has no power to order payment by instalments subsequently, *except with the consent* of the judgment-creditor.

3. Scope of S. 20 :— S. 20 carries the provision of the C. P. Code a step further and dispenses with the consent of the decree-holder. The effect of S. 20 must be taken to be an enlargement of the indulgence granted by S. 210 of the C. P. Code of 1877 (Act X of 1877), (Or. 20, r. 11 of the C.P. Code of 1908) but only in those cases to which the latter section applies. By S. 210 of that Code, the Court may, after the passing of a decree in money suits, order that the amount be paid by instalments provided that the *decree-holder consents*. By S. 20 of this Act, the Court may in the same suit make the same order *without* the consent of the decree-holder.¹

4. No variation of instalment order allowed :— But though it may seem logically to follow that the Court should

¹ Shankarappa v. Dhanappa, (1881) 5 Bom. 604.

have the power to vary the amount of each instalment from time to time according to the circumstances of the judgment-debtor, it was held by West J.¹ that "the Act does not authorize a variation of the order once so made. If this could be done, the decree would be subject to indefinite variation;.....however logical the deduction might be, the legislature has not thought fit to draw it. S. 20 provides for instalment orders in the ordinary way but it has not been held that it authorizes a series of instalment orders each one varying from the preceding one."

Note:—It was however said by the Commission appointed in 1891-92 to enquire into the working of the D. A. R. Act that "the only objection to this section which the Commission can see is that it does not go far enough. The way in which the decree can be satisfied depends on the circumstances of the debtor, and a sufficient change in the circumstances fully justifies an alteration in the terms of the decree. Fixed instalments are only suitable in the case of persons with fixed incomes. But in the case of agriculturists whose income fluctuates from year to year some power to alter instalments on good cause shown is necessary in the interests of justice.....where however, the date of payment is postponed, reasonable interest on the amount should be allowed."

5. Default clauses :—It is the custom with many Courts in the Deccan, when a decree is made payable by instalments, to annex a clause to the decree (which is popularly known as the default clause) that on failure to pay one or more instalments the whole amount due under the decree should be recoverable in one sum. This proviso appears to be totally inconsistent with the principle on which instalments should be granted, namely, the inability of the judgment-debtor to pay the whole amount in one sum, and there seems to be no reason for imposing a punishment for a failure for which in some cases the debtor may not be fairly answerable. For this reason, the Commission appointed in 1891-92 to enquire into the working of the D. A. R. Act recommended that the practice should be forbidden by law, and that the sole consideration which should regulate the award and the amount of instalments should be the circumstances of the debtor.³ See discussion on this subject in commentary on S. 15B.

1 *Balkrishna v. Abaji*, (1887) 12 Bom. 326; *Ramchandra v. Kondaaji*, 22 Bom. 221 = 1896 P. J. 291.

2 Report of the Commission appointed to enquire into the working of the

D. A. R. Act, 1892.

3 See Report of the Commission appointed to enquire into the working of the D. A. R. Act, 1891-92.

6. Principle of instalments:—In deciding the amount of each instalment, the Court should consider the means of the judgment debtor. But at the same time it should take care to see that the judgment-creditor is not put to a loss. The general practice of Courts of refusing any interest after decree is certainly unjust to creditors who trade with borrowed capital. Again it is very often found that in ordering or apportioning instalments, the Courts do not exercise sufficient discretion.¹

The power given to the Court under this section is discretionary and not imperative; but where a Judge purports to exercise the discretion vested in him by law, the presumption is that he has exercised it judicially unless the contrary is made to appear from the record.

7. At any time:—*No bar of res judicata:* The words 'at any time' are very broad and give very wide powers to the Court to make an order of instalments. The judgment-debtor can take the plea even in execution.² And so, the Court can make an order for payment by instalments after the decree is passed though at the time of decree, an issue was raised as to whether the amount should be paid by instalments and the finding of the Court was in the negative. S. 11 of the C. P. Code, 1908, (*res judicata*) from its very terms cannot apply; for, the rule on which it is founded can have no application here. S. 20 of the D. A. R. Act contemplates that even where a decree has been passed which does not allow payment by instalments, the Court shall have the power to allow instalments in execution.³

No limitation:—The words 'at any time' show that instalments can be ordered at any time and the order is not subject to any period of limitation. Art. 175 of the Limitation Act (IX of 1908) does not apply as no application is necessary under this section. The Court can exercise the powers *sou motu*.

8. S. 19:—The reference to S. 19 is made nugatory by the repeal of that Section by Act VI of 1895.

¹ See Report of the Commission appointed to enquire into the working of the D. A. R. Act, 1891-92.

² Pir Abdul Satar Jan v. Firm of Vaparimal, 27 S. L. R. 183=A. I. R.

1933 Sind 331.

³ Bai Diwali v. Patel Girdhar, (1908) 82 Bom. 331=10 Bom. L. R. 577.

⁴ Ibid.

9. **Any decree:**—*refers to money-decree only.*—The words ‘any decree’ in S. 20 are very wide, and at first sight they seem to include mortgage decrees as well as personal decrees. But it is held that they mean “a decree passed against an agriculturist *personally*, and do not include a decree for the recovery of money by the sale of mortgaged property.”¹

Illustration.

S. 20 does not apply to mortgage decrees:—T sued his mortgagor M in the Court of the First Class Sub-Judge at Surat and obtained a decree for the recovery of his debt. He then applied to execute the decree by sale of the mortgaged property. A portion of the property was sold. In the meanwhile this Act was extended to the district of Surat, and M applied for instalments under S. 20. He is not entitled to instalments under this section because S. 20 applies only to money decrees or personal decrees,²

10. **Any decree passed against an agriculturist:**—*Status at the time of decree:*—Under this section the Court can grant instalments if the decree is one which is *passed against an agriculturist*. The material date for the determination of status therefore under this section is the date of decree.³ It is quite clear that S. 20 cannot apply to the case of a person who was not an agriculturist when the decree was obtained, whatever his status may be thereafter when execution comes to be taken against him. Thus, if a judgment-debtor was held to be not an agriculturist when the decree was obtained, he cannot get the benefit of this section, though by discarding trade and limiting himself more exclusively to profits in land, he has become an agriculturist at the time of execution.⁴

Nor can a person claim the benefit of S. 20 in execution, if at the time of the decree it was held by *necessary implication* that he was not an agriculturist. Thus where a person allows an *ex parte* decree to be passed against him on the original side of the High Court, it is not open for him to show in execution proceedings that at that date he was an agriculturist, and therefore entitled to the benefit of S. 20. For, if in fact he had been an agriculturist at the time of suit, where the suit falls under S. 3

1 Shankarappa v. Dhanapa, 5 Bom. 604=1881 P. J. 93; Balkrishna v. Dnyanoba, 1889 P. J. 25.

2 Mancharji v. Thakurdas, (1906) 31 Bom. 120=3 Bom. L. R. 963.

3 Maneklal v. Mahipatram, (1927) 29 Bom. L. R. 1109 (F. B.); Balkrishna v. Sarupchand, (1926) 28 Bom. L. R. 656.

4 Balchand v. Chunilal, (1915) 15 Bom. L. R. 387=37 Bom. 486.

cl. (w), in virtue of S. 11 of the Act, the High Court on the original side would have no jurisdiction to entertain the suit [S. 11 provides that every suit of the description mentioned in S. 3 (w) may be tried where the defendant resides and not elsewhere.] The point therefore whether the defendant was an agriculturist at the time of decree is *necessarily involved* in the suit, and it must be taken to have been decided by *necessary implication* that he is not an agriculturist. Whether such a decision is reached as a result of the contest between the parties, when the allegation is challenged, or whether the allegation of the plaintiff is accepted without any contest, because the defendant does not choose to challenge it, the result is exactly the same so far as the subsequent proceedings are concerned.¹ The result would be the same, if the defendant allows an *ex parte* decree to be passed against him in the Small Causes Court.

But where the defendant's failure to appear would have no such effect (i e. the jurisdiction of the Court would not be ousted even if he is an agriculturist) the defendant can show at the time of execution of an *ex parte* decree that he was an agriculturist at the date of the decree and claim instalments, for such a decree does not necessarily involve the finding that the defendant is not an agriculturist.²

Cases under this section must be distinguished from cases under Ss. 21 and 22. Under the latter sections a person is exempt from arrest and his property is exempt from attachment if he is an agriculturist at the date of the arrest and attachment respectively, though the decree was not passed against him as an agriculturist, and even though it might have been decided that at the time the decree was passed he was not an agriculturist.³

Illustrations.

(1) B obtained a decree against C for Rs. 10,000. He applies now to execute the decree by attaching the immoveable property of C. C contends that he was an agriculturist and prays for instalments. It is found on taking evidence that C is an agriculturist at the date of execution though he was not so at the date of decree. C is not entitled to instalments under S. 20.⁴

1 Mulji v. Goverdandas, (1922) 24 Bom. L. R. 1291; also Hasan Ali v. Sanli Begum, 83 Bom. L. R. 1189.

2 Maneklal v. Mahipatram, and other cases noted above.

3 Balkrishna v. Sarupchand, (1926) 28 Bom. L. R. 656; Maneklal v. Mahipatram, Supra.

4 Maneklal v. Mahipatram, Supra.

(2) G obtained an *ex parte* decree against M on the Original Side of the High Court of Bombay. In the plaint and decree he was described as a trader. The decree was sent for execution to the Court of the Second Class Sub-Judge at Bhivandi. In the course of execution M claimed that he was an agriculturist at the date of the decree and therefore entitled to instalments under S. 20. He is not entitled to do so because it was held by necessary implication that he was not an agriculturist at the date of decree.¹

(3) P sued D an agriculturist and obtained a decree against her. At the date of the decree it was decided that she could not be allowed to pay the money by instalments. After the decree, the D. A. R. Act was extended to the Ahmedabad district and D thereupon applied to be allowed to pay her debt by instalments. She is not prevented from so applying because she was an agriculturist at the date of the decree.²

11. Application of S. 20 to award-decrees:—To be entitled to instalments under this section the decree passed against an agriculturist must be one under this Act. But a decree made in terms of a private award filed in Court on application is not a decree under this Act. The suit in which the decree is passed is a suit to file an award. That is how the suit can be and must be described.³ And where the suit is not of the kind referred to in S. 3, the provisions of this section cannot apply to a decree passed in the suit.⁴

This case of *Laxman v. Ramabai*⁴ where it was held that S. 20 does not apply to award decrees, merely followed the ruling in *Govindrao v. Ambalal*³ which had laid down that S. 15B does not apply to such decrees, and extended the principle laid therein to this section. The latter case relies upon the cases noted below,⁵ and concludes that the scheme and intention of this Act make it clear that such decrees were not intended to be governed by its provisions.

1 *Mulji v. Goverdhandas*, 24 Bom. L. R. 1291; *Hasan Ali v. Sanli Begum*, 83 Bom. L. R. 1139.

2 *Bai Diwali v. Patel Girdhar*, 32 Bom. 391=10 Bom. L. R. 577. Here *Bai Diwali* was an agriculturist under the Act for Ss. 2 and 20 were extended to the whole of the Bombay Presidency in 1903 while the decree was passed in 1905. There is therefore no conflict

between this decision and *Balchand v. Chunnilal*, 37 Bom. 486.

3 *Govind v. Ambalal*, 13 Bom. L. R. 352.

4 (1925) 28 Bom. L. R. 796=50 Bom. 286. Following *Govindrao v. Ambalal*, 13 Bom. L. R. 352 which was a case upon S. 15B.

5 *Mohan v. Tukaram*, 21 Bom. 63; *Gangadhar v. Mahadu*, 8 Bom. 20.

The main reason for thus holding that the provisions of S. 20 do not apply to award decrees lies in the scheme and intention of the Act itself. S. 15 (now repealed) expressly provides for a reference to arbitration in order to settle the amount due in a case which would be ordinarily dealt with under S. 12. S. 12 also preserves the right of the parties to refer their disputes to arbitration. There cannot, therefore, have been any distrust of arbitration as such in the mind of the Legislature while passing the Act.

For a full discussion about the application of this Act to award decrees see comment under this heading in notes on S. 15 B.

21. No agriculturist shall be arrested or imprisoned in execution of a decree for money [a]passed whether before or after this Act comes into force.[a]

Arrest and imprisonment in execution of decrees for money abolished.

Synopsis of the Commentary.

- | | |
|---|--|
| <p>1. Local extent.</p> <p>2. Object of this section.</p> <p>3. Ordinary law.</p> <p>4. Passed before or after force.</p> <p>5. Decree for money.</p> | <p>6. Status as agriculturist.</p> <p>7. Arrest in execution of a compromise decree.</p> <p>8. Arrest of an agriculturist under Co-operative Societies Act.</p> |
|---|--|

1. Local extent:— This section extends to the Province of Sind and all districts of the Bombay Presidency excluding Aden and the City of Bombay.

2. Object of this section:— The Commission appointed to enquire into the causes of the Deccan Riots of 1875 found that the power of arrest for non-payment of debt was grossly abused by the creditors as an engine of extortion. Arrest for non-payment of debt was already abolished by most of the civilized countries; and to protect the agriculturists from undue pressure being brought upon them, and to prevent their separation from

[a—a] These words were added by Act XXII of 1882, s. 3.

the land, as it interferes with good cultivation, this section saves the agriculturists from arrest altogether.¹

2. Ordinary law:— The ordinary law on this subject is contained in Or. 21 r. 40 which runs:—

Where a judgment-debtor appears before the Court in obedience to a notice issued under rule 37, or is brought before the Court after being arrested in execution of a decree for the payment of money, and it appears to the Court that the judgment-debtor is unable from poverty or other sufficient cause to pay the amount of the decree or, if that amount is payable by instalments, the amount of any instalment thereof, the Court may, upon such terms (if any) as it thinks fit, make an order disallowing the application for his arrest and detention, or directing his release, as the case may be.

Proceedings on appearance of judgment debtor in obedience to notice or after arrest.

This rule therefore gives a discretion to the Court in deciding whether the judgment-debtor should be exempted from arrest or not; and in exercising that discretion, the Court is to take into consideration the circumstances mentioned in para 2 of that rule. But S. 21 of the D. A. R. Act is absolute, and under it no agriculturist is to be arrested for non-payment of debt. If he is guilty of any act of bad faith, he may be proceeded with criminally.

4. Passed before or after.....force:— Before these words were incorporated in this section and in section 22, it was held that these sections were inapplicable to decrees made previously to the date on which the Act came into force.² The result of this decision, which was given immediately after the D. A. R. Act, was passed, was to hold these sections inapplicable to the enormous number of old decrees which were then in existence. To make these sections retrospective, the words 'passed whether before or after this Act comes into force' were added to Ss. 21 and 22 by Act XXII of 1882.³

It is clear therefore that the sole object of these words is to make the provisions of Ss. 21 and 22 retrospective, and to make

¹ See the Report of the Deccan Riots Commission 1876, and Hon. Mr. Hope's Speech in introducing the Bill. *Vide* Proceedings in G. G.'s Council vol. XVIII p. 116-153.

² Dipchand v. Gokaldas, 4 Bom. 363.

³ See Mr. Hope's Speech in introducing the amendment to this section. *Vide* Proceedings in the Legislative Council of the Governor General of India, Vol. XXI, pp. 319-391.

them applicable to the cases of agriculturists against whom decrees had been made before November 1879. These words cannot therefore be taken to mean that it is immaterial whether the debtor is an agriculturist at the time of the decree.¹

5. Decree for money:— A decree which directs that the costs of a suit should be paid in a particular manner is a decree for money so far as the award of costs is concerned; and S. 21 applies to such decrees.²

6. Status of agriculturist:—(a) *should be at the date of arrest:*— This section provides that 'no agriculturist shall be arrested or imprisoned in execution of a decree for money.' The question under this section therefore is whether a person sought to be arrested is an agriculturist at the time of the arrest, and if he is, then he is exempt.³ That being so it is not necessary that he should be an agriculturist at the date of the decree.⁴ S. 21 is designed to protect the agriculturist. That is the policy of this Act. It can be read as enabling the agriculturist to claim protection when a judgment creditor seeks to arrest or imprison him in execution of a decree. Hence the party claiming protection must show that he is at the date of the attempted arrest or imprisonment an agriculturist.⁵

It was said by Crump J. in the course of his judgment in the above case that this construction would lead to illogical results. 'The defendant could always claim that at the particular moment of this arrest he was an agriculturist and therefore entitled to have the matter tried. If then he availed himself of the ordinary provisions of appeal, he might possibly put off the

1 Per Crump J. in *Maneklal v. Mahipatram*, (1927) 29 Bom. L. R. 1109. Such an extended meaning to these words was given by Macleod C. J. in *Ambanna v. Kalappa*, (1925) 28 Bom. L. R. 567, and in *Balkrishna v. Sarupchand*, (1926) 28 Bom. L. R. 656. In the former he said that these words 'show that it is not necessary that the defendant should be an agriculturist at the date of the decree' in order

that he may take advantage of the section.

2 *Esu v. Waman*, 1881 P. J. 816.

3 *Hira v. Daula*, 28 Bom. L. R. 539, Macleod C. J.; *Maneklal v. Mahipatram*, (1927) 29 Bom. L. R. 1109 (F.B.).

4 Per Patkar J. in 29 Bom. L. R. 1109.

5 Per Crump J. and Patkar J. in *Maneklal v. Mahipatram*, *Supra*, pp. 1117 and 1123.

evil day of imprisonment for one or two years ; and then at the end of that time once again raise the plea that whatever his status was at the time the *darkhast* was presented, he at any rate has now become a *bona fide* agriculturist.' But it must be pointed out that this will not be allowed. For, as was laid down in *Shamrao v. Malkarjun* (1931) 33 Bom. L. R. 797 ' an order passed in the course of an execution proceeding is binding on the parties at subsequent stages of the same proceeding, even if the proceeding is stayed pending appeal to the High Court which affirms the decree appealed from.' So if it is once held that a party is not an agriculturist, he cannot raise the plea of status again in the same proceeding. That case was based on S. 22 but the same argument would apply to proceedings under S. 21.

(b) *May be an agriculturist under S. 2 (1st) or (2nd)*.—But when a person seeks to show that he was an agriculturist at the date of the attempted arrest or imprisonment, he may be an agriculturist within the general definition contained in S. 2 'first' or he may come under the special and inclusive definition in S. 2 'secondly' which is also applicable as S. 21 forms part of Chapter III. S. 2 'secondly' lays down that "The term 'agriculturist,' when used with reference to any such proceeding, shall include a person, who, when any part of the liability which forms the subject of that suit or proceeding was incurred, was an agriculturist within the meaning of that word as then defined by law." So the judgment-debtor who seeks the protection of S. 21 may show either that he is now within the general definition, or that he was within that definition at the date when the liability was incurred. And the latter date would, in the case of an application for execution be the date of the decree. Such person would be exempt from arrest and imprisonment under S. 21 though he ceased to be an agriculturist thereafter, and a person who was not an agriculturist at the date of the decree, but who was an agriculturist at the date of the arrest would also be equally exempt from arrest.¹

(c) *Even if the decree is ex-parte*.—It is sufficient if the defendant is an agriculturist at the date of the arrest, irrespective

¹ 1 Per Champ J. and Patkar J. in *Bom. L. R. 1109 (F. B.)*, at pp. 1117 and 1123.

of whether he was an agriculturist at the date of the decree. Consequently it is unnecessary to consider whether the decree was *ex parte* or otherwise.¹ So a man who suffers an *ex parte* decree to be passed against him as a non-agriculturist, cannot be precluded from showing that he is within the general definition at the date of the proposed arrest or execution. He can do so, either by proving that his case comes under S. 2 (1st) or (2nd) (i. e., by proving that he was an agriculturist at the time of the arrest, or at the time the liability in question arose, i. e. at the date of the decree), unless the principle of *res judicata* stands in his way. Now a matter in a suit is not heard and finally decided (and so is not *res judicata*) unless there is an actual finding on an issue or unless the decree necessarily involves such a finding. A Court having jurisdiction can make a decree for money, and such a decree does not necessarily involve a finding that the defendant is not an agriculturist unless the existence of that status would oust the Court's jurisdiction. So unless in a case it is suggested that the Court could have no jurisdiction to make a decree for money, against an agriculturist, it is open to the defendant, even in case of an *ex parte* decree to show that he was an agriculturist at the date of the decree, not as a ground for avoiding the decree, but as a ground for establishing his status at the date of the arrest, by virtue of the second and special branch of the description in S. 2.²

Similarly, "where there is no express decision or a finding by necessary implication that the defendant was not an agriculturist, he may be allowed in proceedings in execution of the *ex parte* decree also to prove that he was an agriculturist at the date of the decree."³

(d). *No res judicata*:—If the person is thus an agriculturist at the date of the attempted arrest, he is exempt from arrest, and it is immaterial that the decree is in terms of a compromise, or that he was described as a trader in the compromise. Even if the defendant does not plead that he is an agriculturist when he has a chance at the hearing of the suit, he is not pre-

1 Per Marten C. J. in *Maneklal v. Mahipatram* (1927) 29 Bom. L. R. 1109 (F. B.).

2 Per Crump J. *Ibid* p. 1117-1119.
3 Per Patkar J. *Ibid* p. 1123.

cluded from taking the advantage of S. 21. The principle of *res judicata* cannot be applied to this section. It is positive in its terms. It directs that 'no agriculturist shall be arrested or imprisoned in execution of a decree for money.'¹

The defendant can claim the benefit of this section in a subsequent *darkhast* though he has not claimed it in a previous one.²

Illustrations.

(1) D obtained a money decree against H. D then applied to execute the decree by the arrest of H. H now applies to the Court for exemption from arrest on the ground that he was an agriculturist at the date of the transaction, as also at the date of the arrest. D objects on the ground that H was not an agriculturist at the date of the decree. This objection is not tenable, and if H proves that he is an agriculturist at the date of the attempted arrest he is exempt from arrest.³

(2) K obtained a money decree against A in terms of a compromise. In the suit A was described as a trader. In the execution of the decree K seeks to arrest A. A then for the first time raises the contention that he is an agriculturist, and as such exempt from arrest. A can do so under S. 21.⁴

(3) M obtained an *ex parte* money decree against A. There was an express avowal in the plaint that none of the parties was an agriculturist. M subsequently presented two applications for execution of the decree by attachment of A's property, but the applications were disposed of on A's promise to pay the amount. M now files a fresh application to recover the decretal amount by the arrest of A. Now A appears and contends that he was an agriculturist and so exempt from arrest. S. 21 allows M to prove even at this late stage, that he is an agriculturist.⁵

(4) In all these above cases the defendant may prove his status either by showing that he is an agriculturist at the date of arrest, or by showing that he was an agriculturist when the liability arose i. e. at the time of decree. But he cannot prove the latter fact if the Court trying the suit would have had no jurisdiction to try it if he was an agriculturist.

<p>1 <i>Ambanna v. Kallappa</i>, (1925) 28 Bom. L. R. 567; <i>Mulji v. Goverdandas</i> (1922) 24 Bom. L. R. 1291 which was a case under S. 20, was distinguished.</p> <p>2 Per Marten C. J. in <i>Maneklal v. Mahipatram</i>, (1927) 29 Bom. L. R.</p>	<p>1109 (F.B.).</p> <p>3 <i>Hira v. Daula</i>, 28 Bom. L. R. 539.</p> <p>4 <i>Ambanna v. Kalappa</i>, 28 Bom. L. R. 567.</p> <p>5 <i>Maneklal v. Mahipatram</i>, 29 Bom. L. R. 1109.</p>
--	--

7. Arrest in execution of a compromise decree which provides that the plea of status is given up:—

Where in a compromise decree the defendant agrees that for the purposes of that suit he has given up the plea of status of an agriculturist, and further agrees that he would not raise the plea in execution proceedings of that decree, the question arises whether the plaintiff can execute the decree by arrest of the judgment-debtor, or whether the defendant can, in spite of the decree plead that he is in fact an agriculturist at the date of arrest and so exempt from it under S. 21.

It may be said on behalf of the judgment-debtor that exemption from arrest is a privilege given to an agriculturist by statute, and that there can be no estoppel against the plain provisions of a statute specially intended for the benefit of a particular class. On the other hand it may be contended on behalf of the judgment-creditor that S. 21 confers merely a personal privilege which it is open to an agriculturist to waive, and once he has done it, he cannot go back upon his promise, particularly so when it is an integral consideration which has induced the plaintiff to give up a part of his claim.

There is no decided case on this point; but it is submitted that the defendant should be allowed in such a case to raise the plea of agriculturist at the time of arrest. The only effect of the decree is that the defendant is held to be a non-agriculturist at the time of the decree. That will not estop him from pleading that he is an agriculturist at the time of arrest. Again there can be no estoppel against the plain provisions of a statute. The principle of the case of *Shivayagappa v. Govindappa* (1913) 15 Bom. L. R. 768 = 37 Bom. 614 which lays down that the Court will not interfere with a compromise decree even though it is against the provisions of S. 15B will not apply; for, under S. 15B the Court is given a discretion whether to allow the debt to be paid by instalments or not, while the provision of this section is mandatory. Finally the policy of this Act is to keep the agriculturist out of civil jail even though he does not satisfy the debt when due.

The same argument, it is submitted, will apply when an agriculturist's property is sought to be attached in execution of a compromise decree.

S. Arrest of an agriculturist under the co-operative Societies Act:— Under the Bombay Co-operative Societies Act, 1925, an order for payment of money, if it is not carried out, can be executed,

(a) "on a certificate signed by the Registrar or a liquidator, by any civil Court in the same manner as a decree of such Court,

(b) according to the law and under the rules for the time being in force for the recovery of arrears of land revenue...."

The processes for the recovery of arrears of land revenue are given in S. 150 of the Land Revenue Code 1879, clause (e) of which provides that the arrears of land revenue can be recovered by arrest and imprisonment of the defaulter.

The question then arises whether an agriculturist against whom an order for payment is passed under the Bombay Co-operative Societies Act can be arrested in execution of that order if he does not pay.

S. 74 A of the D. A. R. Act provides that:

"Except Ss. 2 and 21, the provisions of this Act shall not apply to any matter to or in which any society registered under the Co-operative Societies Act, 1904, is a party."

It is thus clear that, though it was the intention of the Legislature to exempt co-operative societies, which are meant for the benefit of the agriculturists themselves, from the provisions of the D. A. R. Act, it at the same time intended that the agriculturists should continue to enjoy the privilege of exemption from arrest; and this exemption extends also to the provisions of the Land Revenue Code which are incorporated by reference in S. 59 of the Co-operative Societies Act. Considering again, the policy of the Legislature it seems improbable that it would have allowed agriculturists to be arrested for payment of their dues under the Co-operative societies Act, when it had already exempted them under the D. A. R. Act.

But the question is not wholly free from difficulty. Under S. 59 (a) An order under the Co-operative Societies Act is to be executed by the Court 'in the same manner as a decree of such Court.' That does not make it a *decree for money*, under S. 21 and hence the provisions of this Act applicable to decrees of a Court will not apply to it. It is on this ground that the Government seem to

be inclined to hold that an agriculturist can be arrested in execution of an order passed by the Co-operative Societies Act.¹ In this connection it may be noted that it was held by the High Court in *Collector of Satara v. Mahadu*² that a warrant for attachment and sale issued by a criminal Court, though transferred to a civil Court for execution under S. 386 C. P. Code *as if it were a decree* of that Court does not make it a decree of the civil Court, and hence the property of the convict would be liable to attachment and sale under S. 22.

22. [a] Immoveable property belonging to an agriculturist [a] shall not be attached or sold [b] in execution of any decree or order [c] passed whether before or after this Act comes into force [e], unless it has been specifically mortgaged for the repayment of the debt to which such decree or order relates and the security still subsists. [d] For the purposes of any such attachment or sale as aforesaid standing crops shall be deemed to be moveable property.[d]

But the Court, [e] on application or of its own motion [e], may, when passing a decree against an agriculturist or [f] in the course of any proceedings under a decree against an agriculturist passed whether before or after this Act comes into force, [f] direct the Collector to take possession, for any period not exceeding seven years, of any such property of the judgment-

[a—a] These words were substituted for the original words by Act XXIII of 1886, s. 7.

[b] Words repealed by Act VI of 1895, s. 10. are omitted.

[c—c] These words were inserted by Act XXII of 1882, s. 9(1)

[d—d] These words were inserted by Act VI of 1895, s. 10.

[a—e] These words were inserted by Act XXII of 1882, s. 9 (2).

[f—f] These words were substituted for the original words by Act XXII of 1882, s. 9 (3).

debtor to the possession of which he is entitled, and which, in the opinion of the Collector, is not required for his support and the support of the members of his family dependant on him, and the Collector shall thereupon take possession of such property and deal with the same for the benefit of the decree-holder in manner provided by section 29.

The provisions of section 31 shall *mutatis mutandis*, apply to any property so dealt with.

Synopsis of the Commentary.

<p>1. Local extent.</p> <p>2. Object of this section.</p> <p>3. Effect of this section.</p> <p>4. Points of enquiry.</p> <p>5. Immoveable property.</p> <p>6. Property belonging to an agriculturist. (a) Status must be at the time of attachment, (b) Status can be proved even in execution Proceedings.</p> <p>7. Application of this clause to legal representatives.</p> <p>8. Liability of a Hindu heir for rent.</p> <p>9. Burden of proof of status.</p> <p>10. Terms of the section are mandatory.</p> <p>11. In execution of any decree or order.</p> <p>12. Passed whether before ...</p>	<p>force.</p> <p>13. 'Specifically' mortgaged.</p> <p>14. 'Mortgage' includes 'charge.'</p> <p>15. Standing crops.</p> <p>16. Procedure for attaching agricultural produce.</p> <p>17. Attachment in execution of a compromise decree.</p> <p>18. Application of this section to awards.</p> <p>19. Clause (2)</p> <p>20. A second application allowed.</p> <p>21. Application of cl. (2) to legal representatives.</p> <p>22. Sind view.</p> <p>23. Decrees to be transferred to the Collector for execution.</p> <p>24. Appeal from an order under S. 22.</p> <p>25. Limitation for appeal against an order under S. 22.</p>
---	--

1. Local extent :— This section extends to the province of Sind and all districts in the Bombay Presidency excluding Aden and the city of Bombay.

2. Object of this section :— It was found by the Deccan Riots Commission, 1875, that every year through Court sales many

lands were passing from the hands of the agriculturists to their creditors. There was danger in this, because loss of land led to discontent, increase in crime, danger of disturbance among the agriculturists, and decrease in the yield from cultivation. This section is, therefore, intended to secure to the agriculturists against their creditors the possession of as much land as is required for their maintenance, and the maintenance of the members of their family. With this object it is here laid down that the immoveable property belonging to an agriculturist shall not be attached or sold in execution of a decree or order unless it has been specifically mortgaged for the repayment of the debt to which such decree or order relates, and the security still subsists. It was pointed out by the Commission that this provision can work no injustice on the creditors, for when the loan is unsecured, the parties provide for a higher rate of interest to cover the risk. "To make land liable for debts not specifically charged upon it is to impart a liability which was not contemplated by the parties, and that at the time he incurs the obligation, a borrower ought to have clearly presented to him the consequences which his act may entail."

3. Effect of this section :— The effect of this section has been that it has become very difficult for the money-lender to recover hand-loans from agriculturist-debtors, and he is required to take security in every case.¹ This has also resulted in diminishing the agriculturist's borrowing power to some extent. This latter result however cannot be said to be an unmixed evil. The agriculturist was so much accustomed to reckless borrowing that this section may be said to have introduced a wholesome check on that tendency.

4. Points of enquiry :— Before making an order for sale under this section, the Court has simply to enquire: Was the property specifically mortgaged for the repayment of debt? Does the decree or order relate to that debt? And does the security still subsist?²

¹ See Report of the Commission appointed to enquire into the working of the D. A. R. Act, 1891-92.

² *Balshet v. Dhondo*, 26 Bom. 33 = 3 Bom. L. R. 545.

5. Immoveable property:— The term has been thus defined in the General Clauses Act [X of 1897, 3(25)].

“ Immoveable property shall include land, benefits to arise out of land, and of things attached to the earth, or permanently fastened to anything attached to the earth.”

The Indian Registration Act (XVI of 1908) defines it thus :

“ Immoveable property includes land, buildings, hereditary allowances, rights to way, lights, fisheries, ferries, or any other benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth but not standing timber, growing crops, nor grass” [S. 2 (6)].

The equity of redemption of a mortgagor in the mortgaged property is his subsisting right title and interest in it.¹ It is immoveable property, and it cannot be attached. If it is attached the attachment is simply inoperative and need not be cancelled.²

6. Property belonging to an agriculturist:— (a) *Status must be at the time of attachment:*— Under this section immoveable property ‘belonging to an agriculturist’ is not to be attached and sold in execution of a decree.....unless it has been specifically mortgaged. The result of the section is that when immoveable property is sought to be attached and it is found that it belongs to an agriculturist, at the time of attachment, then it shall be exempt from attachment. In the absence of any indication to the contrary it would seem that *at the date of the attachment or sale* the property must belong to an agriculturist.³

(b) *Status can be proved even in execution proceedings:*— Under this clause it is however not necessary that the defendant should have been sued as an agriculturist. He can plead exemption from attachment for his immoveable property although the decree was not passed against him as an agriculturist, and even though it might have been decided in the suit that at the time the decree was passed he was not an agriculturist.....It seems obvious that under S. 22 the important question is whether the

1 Narayan v. Gowbai, 37 Bom. 415 = 15 Bom. L. R. 278.

2 Mahalavu v. Kusaji, 18 Bom. 739 = 1899 P. J. 520. See however Narayan v. Gowbai, Supra.

3 Maruti v. Martand, (1922) 24 Bom. L. R. 749. See also Shamrao v. Malkarjun, (1931) 53 Bom. L. R. 797.

property sought to be attached belongs to an agriculturist at the time of the attachment, and then it would be open to the person against whom execution is sought to plead that as he was an agriculturist, the property could not be attached, although at the time the decree was passed nothing was said as regards his status as an agriculturist. The defendant was in this case allowed to prove his status in the execution-proceedings, and the decree was accordingly sent to the Collector for execution.¹ The defendant can prove in execution proceedings either that he was an agriculturist at the time of the decree or that he has *acquired* that status *subsequently*, and in either case his property will be exempt from attachment.² Similarly it was held in a Sind case³ that the ruling in *Maruti v. Martand*⁴ also supports the view that the definition of agriculturist in S. 2 of the Act is not limited to the judgment-debtor being an agriculturist at the date of the suit or of the decree. The rule entitles a judgment-debtor to plead that he is an agriculturist in execution proceedings, though he may not have raised the plea before the passing of the decree or in prior execution proceedings. He can, however, raise this plea only for the purpose of having the decree transferred to the Collector for execution. But an order passed in the course of an execution proceeding is binding on the parties at subsequent stages of the same proceeding, even if the proceeding is stayed pending appeal to the High Court which affirmed the decree appealed from. So if at one stage of the proceeding it is held that a party is a non-agriculturist he cannot raise the same point in the course of the same execution proceeding.⁵

Illustration.

A sued B in the Court of Small Causes at Bombay in respect of trade-debts. B pleaded that he was an agriculturist living at Mirpurkhas in Sind

1 *Balkrishna v. Sarupchand*, (1926) 28 Bom. L. R. 656. It was however pointed out by Crump J. in *Mansklal v. Mahipatram*, 29 Bom. L. R. 1109 that though this decision follows from the plain meaning of the words of the section, it is *obiter* so far as the facts of this case are concerned,

invoked.

2 *Firm of Kodumal Jetharam v. Bulchand*, 119, I. C. 548=A. I. R. 1929 Sind 209.

3 *Hiromal v. Hajarising*, A. I. R. 1925 Sind 49.

4. 47 Bom. 44=24 Bom. L. R. 749.

5 *Shamrao v. Malkarjun*, (1931)

and so the Court had no jurisdiction; B failed to establish his status and a decree followed. The decree was transferred to the Court of Mirpurkhas for execution. B can again raise the plea of agriculturist.¹

7. Application of this clause to a legal representative:— *If he is a non-agriculturist:—* The object of this section is to protect in the hands of an agriculturist immoveable property belonging to him from which he derives the greater part of his income, and the necessity for such protection is at once removed when such property passes into the hands of a person who is not an agriculturist. When the original agriculturist defendant dies the property ceases to belong to him. And though for execution purposes it is treated as the estate of the deceased in the hands of his legal representatives, it must be taken to belong, at the date of the attachment to the legal representative. So unless the legal representative is shown to be an agriculturist, the provisions of S. 22 cannot be held to afford an answer to the application for execution against him.² And if at one stage of the suit it has been held that the legal representative is not an agriculturist, the point is *res judicata* against him and he cannot again raise the same point at a subsequent stage of the same proceeding.³

When the legal representative is an agriculturist:— As the first and the crucial point for consideration under this section is whether at the date of attachment and not at the date of the application for attachment the property belongs to an agriculturist, the property would be exempt from attachment and sale if the legal representative of the judgment-debtor is an agriculturist, even if the property belonged to a non-agriculturist-debtor.⁴ And where the property of a Mahomedan agriculturist-debtor is not liable to attachment because it was not specifically mortgaged, it does not become attachable when the original judgment-debtor dies and the property devolves on his legal representatives who are themselves agriculturists, on the ground that the heirs are

¹ Firm of Kodumal Jetharam v. Bulchand, 119 I. C. 543.

² Maruti v. Martand, (1922) 24 Bom. L. R. 749 = 47 Bom. 44; Shamrao,

³ Shamrao v. Malkarjun, Supra.

⁴ Choitram v. Lalbux, A. I. R. 1921 Sind 29. See Shamrao v. Malkarjun, Supra.

according to Mahomedan law bound to discharge the debts before they distribute the estate among themselves.¹

Illustrations.

(1) Maruti obtained a decree against Narayan, who was an agriculturist. As long as Narayan was living the property could not be attached as it was not specifically mortgaged. On Narayan's death his son Martand succeeds him. Martand is not an agriculturist. The property can be attached in his hands.²

(2) A obtained a decree against B, a Mahomedan, who was an agriculturist. On B's death his property passed into the hands of his heirs who were also agriculturists. This section prohibits A from attaching the property in the hands of the legal representatives.³

8. Liability of a Hindu heir for rent:— The property of a Hindu father devolving on his death on his son who is an agriculturist is not liable to attachment in execution of a decree against the father, if the property is not specifically mortgaged. But the *rent* of that land in the hands of the son can be attached for payment of the father's debts. For under the Hindu Heir's Relief Act, VII of 1866, a son is liable to pay the debts of his father to the extent of the property which has come into his hands. If the land cannot be sold by virtue of S. 22 of the D. A. R. Act, the liability can be enforced out of and to the extent of the land inherited by the son, and to the extent of "the rents arising out of the land." So the son is personally liable to the extent of the property not duly applied by him in payment of his father's debts. Even the separate property of the son can be attached for the satisfaction of the debts of the father on account of his failure so to apply the property inherited by him in satisfaction of the debts.⁴

9. Burden of proof of status:— The ordinary rule as to the liability of property to attachment for the payment of

1 Choitram v. Lalbux, A. I. R. 1921 (Sind) 29. See Shamrao v. Malkarjun, 83 Bom. L. R. 797. See also Showkmal v. Jagatmal, A. I. R. 1930 (Sind) 16.

2 Maruti v. Martand, 21 Bom. L. R. 743.

3 Choitram v. Lalbux, *Supra*.

4 Anant v. Tukaram, (1928) 31 Bom. L. R. 442 = 53 Bom. 463 = 119 I. C. 179 = A. I. R. 1929 Bom. 233. This decision lays down in short that the land cannot be attached because of S. 22 of this Act, but the Hindu Heir's Relief Act 1866 allows the creditor to attach the rent of the land.

debt is laid down in S. 60 of the C. P. Code, 1908, which enumerates property that is liable to attachment and sale in execution of decrees. This section (S. 22 of the D. A. R. Act) confers upon members of a certain class great privileges in litigation. It confers upon a person who is shown to be a member of the privileged class, the right to resist the attachment or sale of any of his immoveable property. So an agriculturist, in order to resist the application of the general rule (as laid down in S. 60 C. P. Code, 1908) must show that he belongs to the privileged class, so as to render this section applicable to his case. That conclusion seems to follow from the provisions of Ss. 101, 102 and 103 of the Evidence Act. In the absence of such proof it must be presumed that the order for sale passed by a Court was valid.¹

Illustration.

G mortgaged the lands in dispute to N. Subsequently T a creditor of G brought a suit on a money claim against G and obtained a decree against him in the Vinchur Court. In that suit G did not claim to be an agriculturist. In the execution of the decree B's rights in the lands were attached and sold, and were finally purchased by T. G now sues T to redeem the mortgage made to T contending that he being an agriculturist his rights in the land could not under this section be sold in execution of a money decree. G cannot now raise this contention, for, the burden of proving that he was an agriculturist lay upon him, which not being discharged it must be presumed that the order of the Vinchur Court was valid.²

10. Terms of the section mandatory:— This section lays down that the "immoveable property of an agriculturist shall not be attached and sold," etc. The terms of this section being mandatory, if a Court sells the property in contravention of its terms, the sale is void and inoperative.³

Res Judicata:— But if the orders of the Court are valid and are not without jurisdiction, they cannot be challenged. Thus if once the Court holds that the terms of this section do not apply to a case, and if the decision is not appealed against, the order passed is *res judicata* and it cannot be challenged subsequently on the ground that the parties were agriculturists.⁴

¹ Narayan v. Gowbal, 15 Bom. L. R. 278=37 Bom. 415; Pandurang v. Krishnaji, (1903) 28 Bom. 125=5 Bom. L. R. 799 followed.

² Ibid.

³ Mahalavu v. Kusaji, 18 Bom. 799.

⁴ Wadhmal v. Tharo, 38 S. L. R. 131.

Presumption that sale ordered by Court is valid—Similarly when the Court orders the immoveable property of an agriculturist to be sold the presumption is that it has been rightly sold, for the Court cannot be assumed to have acted contrary to law in passing orders for the sale of the judgment-debtor's property; for the maxim of law which must be followed in the absence of evidence is that it must be assumed that everything which ought to have been done was done by the Court.¹

Illustration.

P obtained a money decree against T and D, agriculturists, both personally and as legal representatives of their deceased brother S, and in execution thereof sought to attach and sell agricultural land belonging to the deceased S. T and D who were served with a notice to show cause why the property should not be attached, failed to appear, and the Court, after considering *suo motu* whether the said land was exempt from attachment, came to the conclusion that this section did not apply and ordered the sale of the property. T and D failed to appeal against the decision within the time allowed, and thereafter filed a suit for a declaration that the lands ordered to be sold were exempt from attachment and sale under this section. They cannot now contend that the Court had no jurisdiction for the previous order is *res judicata* against them.²

11. In execution of any decree or order:—Under this section the immoveable property of an agriculturist is not to be attached in execution of any decree or order unless the property has been specifically mortgaged for the repayment of the debt..... etc. This section thus applies to all cases where a decree is sought to be executed by the attachment of property. The word 'debt' here is not confined to contractual debt only. So even if the property is sought to be attached and sold in restitution proceedings under S. 144 of the C.P. Code, 1908, viz. for recovery of money that was paid in satisfaction of a decree which was reversed in appeal, this section will apply. For the true construction of the section is first a general proviso that immoveable property belonging to an agriculturist shall always be immune from sale, and secondly a proviso that this immunity is subject to exception where the two following conditions are both satis-

¹ Narayan v. Gowhai, 15 Bom. L. R. 279. See facts of this case in the illustration to note 'Burden of Proof of

Status.

² Wadhmal v. Tharo, 8 S. L. R. 133

fied that is to say (a) where the decree or order in question relates to the repayment of a debt, and (b) where the agriculturist's property has been specifically mortgaged for the repayment of that debt.¹

The section does not apply to warrant for recovery of fine:— But this section will apply only when the property is sought to be attached in execution of a decree or order. But when an agriculturist is fined by a Criminal Court and a warrant is issued for the recovery of fine, though under S. 386 (3) of the Criminal Procedure Code, it is to be executed by the Civil Court *as if it were a decree*, that does not suffice to make the provisions of S. 22 of the D. A. R. Act applicable to such a warrant. Obviously the section has reference to decrees or orders which are passed in the ordinary way in suits to which an agriculturist is a party falling under the D. A. R. Act. S. 383 (3) of the Cr. P. Code merely provides a means for execution of a warrant of fine through a Civil Court. It remains a warrant of a Criminal Court and does not become a decree of a Civil Court to which the D. A. R. Act will apply. So the property of the convict can be attached and sold in spite of his being an agriculturist.²

Illustrations.

(1) M obtained a decree against R, which directed that R should pay Rs. 550 to M in a lump sum and Rs. 410 by annual instalments of Rs. 100. In pursuance of the decree R paid Rs. 660 in the Court which M withdrew. In the meantime R appealed from the decree of the lower Court. In appeal the decree was set aside. R therefore appealed under S. 144 for restitution and sought to attach the property of M contending that there is no contractual debt in the case, and so S. 22 does not apply. R cannot attach the property of M.³

(2) M was convicted by the Sessions Judge of Satara and sentenced to pay a fine of Rs. 1000. The Sessions Judge issued a warrant for attachment and sale of M's property. The warrant was sent to the Collector of Satara who applied to the Subordinate Judge of Karad to order the sale of M's property under S. 386 (3) Criminal Procedure Code. Here M's property can be attached and S. 22 does not apply because the attachment is not made in pursuance of any decree or order.⁴

1 Mahadeo v. Rama, (1915) 17 Bom. L. R. 962.

2 Collector of Satara v. Mahadu, (1926) 28 Bom. L. R. 1281=50 Bom. 84 4=99 I. C. 810=A. I. R. 1926 Sind

582.

3 Mahadeo v. Rama, *Supra*.

4 Collector of Satara v. Mahadu, 28 Bom. L. R. 1281=50 Bom. 844.

12. Passed whether before...force :— *Retrospectivity of the section* :— These words were inserted in this section and in S. 21 by S. 9(1), Act XXII of 1882. Before these words were incorporated in this section and in S. 21 it was held that these sections were inapplicable to decrees passed previously to the day on which the Act came into force.¹ The result of this decision, which was passed immediately after the D. A. R. Act was passed was to hold these sections inapplicable to the enormous number of old decrees which were then in existence. To make these sections retrospective the above words were added to both of these sections.² The addition of these words, and the substitution of the words "in the course of any proceeding under a decree against an agriculturist passed whether before or after this Act came into force" for the words "at any subsequent time" show in very clear terms the retrospective effect of the section. It is immaterial whether the order of sale is made before or after the Amending Act came into force.³

Similarly, the provisions of this section apply where the decree and the attachment order is made before the coming into operation of Act XXII of 1882, but the order of sale is made after the Act is passed. For, though "the general rule in this connection is that a repealed statute cannot be acted on after it is repealed, but that with regard to all matters that have taken place under it before its repeal, they remain valid,"⁴ and though that principle has been recognized in S. 6 of Act X of 1897 (The General Clauses Act), looking to the general result of the decisions it seems that a new order of a Court, not merely ancillary or provisional but directing a further substantive step in the execution of a decree is a new proceeding. It is clear therefore that an application for an order of sale must be regarded as a new proceeding, not merely as a continuance of one already begun. New substantive orders are required and they must be passed in subjection to the new law in force when they are made. Another principle enunciated by Savigny is applicable to this case. It is

¹ Dipchand v. Gokuldas, (1880) 4 Bom. 863.

² See Mr. Hope's Speech in introducing this amendment.

³ Mahalavu v. Kusaji, 18 Bom. 799.

⁴ Per Lord Campbell in R. V. Denton, L. J. M. C. 208.

that a law passed to promote some important public interest may be given on that account a retrospective operation, if necessary, as a rule against such operation rests itself on such a general public interest, which may under the circumstances be deemed of less importance than the one embodied in the Statute. The purpose of the D. A. R. Act was undoubtedly to shield the property of agriculturists against their creditors and this purpose, we cannot but see, was considered by the Legislature of great public importance.¹

Illustration.

In 1870, S obtained a money decree against K, an agriculturist, and upto 1879 had made five applications for execution. In 1882 he made the present application for recovering the balance by attachment and sale of the lands of the debtors; attachment was made accordingly. But before an order for sale was made, the new Act XXII of 1882 was passed prohibiting the sale of immoveable property of agriculturists unless specifically mortgaged. An order for sale of the property cannot be made after this Act is passed.²

13. 'Specifically' mortgaged:— Where the interest in immoveable property is intended as security for the repayment of debt the mortgage may be said to be specific. The word 'specifically' in this section has no greater force than the word 'specific' in S. 58 of the T. P. Act.³ Under that Act the word specific means described so that it may be readily recognized and identified.⁴ The object of having the property defined specifically is to render the identification as easy as possible, and to shut the door against fraud and controversy.⁵

Illustration.

D borrowed a sum of money from B under a bond whereby he mortgaged his house as security and also covenanted to pay each year to B half the produce of certain land as interest and the other half as reduction of the principal, and in case of default B was to be at liberty to let the land to others and take the profits. This covenant to pay amounts to a specific mortgage of the land, and B can sell the property if D does not pay his debts.⁶

14. 'Mortgage' includes 'charge':—A mortgage is

¹ Per West J. in Shivram v. Kondiba, 8 Bom. 340=1884 P. J. 26.

² Shivram v. Kondiba, *Supra*.

³ Balshet v. Dhondo, 26 Bom. 33=3 Bom. L. R. 545.

⁴ Najibulla v. Nasir, 7 Cal. 195.

⁵ Carpenter v. Deen, 23 Q. B. D. 566
Bhagwandas v. Hathibhai, 4 Bom. 25
followed in Bapuji v. Mahadu, 1892 P. J. 111.

⁶ Balshet v. Dhondo, *Supra*.

the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability (S. 58 T. P. Act).

But the word 'mortgage' is not used in this section in the strict sense of a mortgage within the meaning of the T. P. Act but is used to describe not only what would be technically a mortgage, but also a charge, for the repayment of a debt on the property of the debtor. The D. A. R. Act was enacted in 1879. The distinction between a 'mortgage' and a 'charge' as is now known to us was made for the first time by the T. P. Act which was enacted in 1882, and S. 58, defining a mortgage was extended to this Presidency in 1893. As observed in *Girwar Singh v. Thakur Narain Singh*,¹ in old days these terms were used interchangeably. The result of holding otherwise would be to deprive the agriculturist of the benefit of, say, for instance, Ss. 10 A or 11 or 12 of the D. A. R. Act in cases where he has created only a charge over his property to secure the payment of his debts.²

Illustration.

G sued M to recover Rs. 6000 from him. The suit was compromised between the parties. The compromise decree provided that M should pay G Rs. 5000 with interest. 'The properties mentioned in Ex. 6 are to be security for the said sum, they being *considered as mortgaged*. The said properties are to remain as security until the payment of money. In default of the payment of any one instalment G to recover the whole of the amount then due by sale of the properties mentioned in Ex. 6. *Held*, that the parties intended to create a charge on the properties, and as under S. 22 a mortgage includes a charge G may sell the properties if the amount is not paid.³

Charge may be created by decree:—It need not be antecedent to the decree. For "if the legislature intended that S. 22 should apply only in cases where the lands were mortgaged or charged prior to the decree relating to the debt, and that it should not apply where a charge or a mortgage was created by the decree itself for the first time, the actual language is some—

1 (1887) 14 Cal. 790 (F. B.)

L. R. 588.

2 *Manekchand v. Ganeshlal*, 35 Bom.

3 *Ibid.*

what unfortunate." But the judgment expresses no definite opinion on the point.¹

15. Standing crops :—Under the C.P. Code, 1908, S.2 (3) and under T. P. Act 1882, S. 3, growing crops are moveable property. In the Act as originally passed, standing crops were not mentioned as being moveable property. The High Court therefore held in various cases that standing crops were immoveable property and so not liable to attachment.² The result was that nothing in the hands of the agriculturists was left against which creditors could proceed. This defect was soon detected and the Amending Act VI of 1895 made standing crops liable to attachment.³

Crops raised by legal representatives :— Under this section the standing crops can be attached only if they are raised by the judgment-debtor himself. But if they are raised after his death by his legal representatives, they are not liable to attachment as the property of the judgment-debtor which has come into the hands of his legal representative.⁴

Under S. 2 (6) of this Act "standing crops" shall include crops of all sorts attached to the soil, and leaves, flowers, and fruits upon and juice in trees and shrubs."

16. Procedure for attaching agricultural produce :—Where the property to be attached is agricultural produce, the attachment shall be made by affixing a copy of the warrant of attachment,—

Attachment of agricultural produce.

duce, the attachment shall be made by affixing a copy of the warrant of attachment,—

(a) where such produce is a growing crop, on the land on which such crop has grown, or

(b) where such produce has been cut or gathered, on the threshing-floor or place for treading out grain or the like or fodder-stack on or in which it is deposited and another copy on the outer door or some other conspicuous part of the house in which the judgment-debtor ordinarily resides, or, with the leave of the Court, on the outer door or on some other conspicuous part of the house

¹ Manekchand v. Ganeshlal, (1933) 35 Bom. L. R. 588=145 I.C. 582=A. I. R. 1933 Bom. 298.

² Sadu v. Sambhu, 6 Bom. 562; Ananda v. Mahadu, 1880 P. J. 274; Kirpashankar v. Govinda, 1880 P. J. 329.

³ See Report of the Commission appointed to enquire into the working of the D. A. R. Act, 1892.

⁴ Choitram v. Lalbux, A. I. R. 1921 (Sind) 29=15 S. L. R. 47=63 I. C. 810.

in which he carries on business or personally works for gain or in which he is known to have last resided or carried on business or personally worked for gain; and the produce shall, thereupon be deemed to have passed in the possession of the Court.—*Rule 44 Or. 21 of the Code of Civil Procedure, 1908.*

(1) Where agricultural produce is attached, the Court shall make such arrangements for custody thereof as it may deem sufficient and, for the purpose of enabling the Court to make such arrangements, every application for the attachment of a growing crop shall specify the time at which it is likely to be fit to be cut or gathered.

Agricultural produce under attachment.

(2) Subject to such conditions as may be imposed by the Court in this behalf either in the order of attachment or in any subsequent order, the judgment-debtor may tend, cut, gather and store the produce and do any other act necessary for maturing or preserving it; and if the judgment-debtor fails to do all or any of such acts the decree-holder may, with the permission of the Court and subject to the like conditions, do all or any of them either by himself or by any person appointed by him in this behalf, and the costs incurred by the decree-holder shall be recoverable from the judgment-debtor as if they were included in, or formed part of, the decree.

(3) Agricultural produce attached as a growing crop shall not be deemed to have ceased to be under attachment or to require re-attachment merely because it has been severed from the soil.

(4) Where an order for the attachment of a growing crop has been made at a considerable time before the crop is likely to be fit to be cut or gathered, the Court may suspend the execution of the order for such time as it thinks fit and may, in its discretion, make a further order prohibiting the removal of the crop pending the execution of the order of attachment.

(5) A growing crop which from its nature does not admit of being stored shall not be attached under this rule at any time less than twenty days before the time at which it is likely to be fit to be cut or gathered.—*Rule 45, Or. 21 of the Code of Civil Procedure, 1908.*

17. Attachment of property in execution of a compromise decree which provides that the plea of status is given up:— See note on this subject under S. 21.

18. Application of this section to awards:—The provisions of this section apply to execution proceedings taken for the enforcement of an award under S. 15 of the Arbitration Act; for, when the Court passes an order in the terms of the award, it is an executable order, and the person seeking to execute it must be said to execute the *order* in terms of the award and not the award itself. An award under S. 15 of the Arbitration Act is enforceable.

as a decree and its enforceability would apparently be subject to all limitations imposed by the legislature on the enforcement of decrees. The restriction contained in S. 22 is such a limitation. It cannot be said that though the person in whose favour an order is passed has all the rights, he is not subject to the disabilities of a decree-holder, and such does not appear to have been the intention of the legislature. In spite of the explicit provisions of S. 60 of the C. P. Code, it would be open to the person in whose favour an award is passed to attach and sell the bed of the other party, his tools if he is an artisan, and his impliments of husbandry, cattle and seed grain if he is an agriculturist. It would lead to the anomaly that S. 22 D. A. R. Act would apply when the award is made under Sch. 2 of the C. P. Code but would not apply if the award is made under the arbitration Act. In my opinion, therefore, the successful party to an award under the Arbitration Act is exactly in the same position as a decree holder.¹

19. Clause (2):— Under the first clause of this section the Court cannot attach and sell immoveable property belonging to an agriculturist unless it is specifically mortgaged. But under this clause the Court can direct the Collector to take possession of any immoveable property of the judgment-debtor, to the possession of which he is entitled, and which is not required for his support and the support of the members of his family dependent on him. This clause is based on the principle of 'temporary alienation' which it is believed, adds greatly to the creditor's security, while diminishing the worry and expense both to the creditor and debtor. The Collector is to manage the property in the manner provided by S. 29. During the continuance of the management by the Collector, the judgment-debtor is, under S. 31 of the Act, incompetent to mortgage, charge, lease or alienate the property managed or any part thereof.

¹ Per Wild J.C. in *Devmal Rachandmal v. Firm Salchand A. I. R. 1931 Sind 97 (F. B.)*. This case overruled the contrary decision in *Udhowdas v. Ukamal* 14 S. L. R. 217=60 I. C. 942 (1920). This latter decision was based on the ground that an award under

the Arbitration Act was not a decree though it was enforceable as if it were a decree, and that an application to enforce an award must be considered to be an application to execute the award and not an application to execute the order that the award be filed.

20. A second application under cl. (2) is allowed:—

If an application is once made under this clause, but the Collector finds that the property being unproductive nobody was coming forth to take it on lease, that does not debar the plaintiff from making another application for the same purpose on a subsequent occasion. The Court should give the plaintiff a further opportunity of realising his decretal debt by moving the Collector again in the matter, and the Collector should, if he finds a difficulty in leasing or otherwise managing the property for the decree-holder instead of returning the papers at once, try again the next year and so on until the period of management has expired.¹

Note :—The results of the working of this clause from which so much was expected at one time, are not encouraging. Practically this clause has been a dead letter. This is mainly due to the fact that in the Deccan the majority of the holdings are small, and the ryot has no surplus land above what is required for his support.²

21. Application of cl. (2) to legal representatives:—

Under this clause the Court can direct the Collector to take possession of any property of the judgment-debtor to the possession of which he is entitled and which is not required for his support or for the support of the members of his family etc. But if the judgment-debtor dies, the Court has no jurisdiction to direct the Collector to take possession of the immoveable property which has come into the hands of his heirs. For we cannot read into the section the words 'or his heirs' after the word 'judgment-debtor' with the various alterations which would have to be made in that paragraph.³

The decision that the Court has no jurisdiction to direct the Collector to take possession of the immoveable property in the hands of the heirs of a deceased judgment-debtor can be further supported on two grounds. (i) First, in S. 22 cl.2, reference is made to S. 29 and in the proviso to S. 29 specific reference is made to the representative-in-interest whereas any reference to the representative-in-interest is omitted in the second clause of S. 22. Further, the words 'to the possession of which he is entitled' would not cover the case of deceased judgment-debtor but

¹ Choitram v. Lalbux, A. I. R. 1921 Sind p. 21.

² See Report of the Commission appointed to enquire into the working

of the D. A. R. Act, 1891-92.

³ Hirachand v. Hansabai, (1922) 25 Bom. L. R. 76=47 Bom. 527=72 I. C. 62=A. I. R. 1923 Bom. 190.

would appropriately refer to a judgment-debtor who is living and is entitled to the possession of the property at the date of the passing of the decree.¹

Illustration.

(1) H obtained a money decree against S who was an agriculturist. H died leaving two daughters K and T who took possession of S's property. H then applied to the Court praying that S's immovable property in the hands of K and T should be taken over by the Collector for management under S. 22 (2). The application cannot be granted as clause (2) does not refer to the legal representatives of the original-debtor.²

(Notes :—It was pointed out by Patkar J. in *Mathuradas v. Mahadu* that though the specific remedy provided for by S. 22 (2) of the D. A. R. Act is not granted by the C. P. Code, a similar provision is enacted in that Code Schedule III rule 1 clause (6), and rule 7 clause (1), Sub-clause (6) (1), under Ss. 68-72 of the C. P. Code.

22. Sind Law :—But this view of the Bombay High Court is not accepted in Sind. According to that Court even if the judgment-debtor is dead, S. 22 would be no bar to a Court for appointing a Collector to manage the property in the hands of the legal representatives. It would be only one of the modes of execution to which the judgment-debtor is entitled under S. 50 of the C. P. Code, 1908. The reason of this view is that according to S. 50 of the C. P. Code, read with S. 74 of the D. A. R. Act, the legal representative of a deceased agriculturist is liable for his debts to the extent of the property of the deceased which has come to his hands and has not been duly disposed of. "It seems absurd to suppose that the legislature intended that a decree-holder should be deprived of the limited relief given by para 2 of S. 22 of the D. A. R. Act by the mere death of the judgment-debtor. This would be opposed to the general principles of common law..... Furthermore when the Court acts under para 2 of S. 22, it also acts under S. 51 (d) and (e) of the C. P. Code, and the provisions of S. 50 apply as much as if S. 50 was contained in the D. A. R. Act."³

¹ *Mathuradas v. Mahadu*, (1929) 32 Bom. L. R. 320. Per Parkar J. On these grounds Patkar J. refused to follow *Choitram v. Lalbux*, (1918) 15 S. L. R. 47.

² *Hirachand v. Hansabai*, *Supra*. *Shamrao v. Malkarjun*, (1931) 33 Bom.

L. R. 797.

³ *Choitram v. Lalbux*, A. I. R. 1921 Sind 29=63 I. C. 810. Patkar J. referred to this case in *Mathuradas v. Mahadu*, (1929) 32 Bom. L. R. 320, but refused to follow it.

23. Decree to be transferred to the Collector for execution:—

In exercise of the powers conferred by S. 68 of the Code of Civil Procedure, the Government of Bombay have declared under the Government notifications No. 8600, dated the 24th of May 1880; No. 762, dated the 9th February 1892; No. 8039, dated the 27th November 1900 and No. 5248, dated the 20th September 1907 that decrees of the nature shown against the following districts shall be transferred to the Collector for execution :—

Decrees ordering the sale of any immovable property belonging to a person who is an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act, which has been specifically mortgaged for the repayment of the debt to which any decree relates.

Poona, Satara, Sholapur, Ahmednagar.

(a) Decrees for money in the execution of which a Court has ordered the sale of immovable property belonging to any person who is an agriculturist within the meaning of the D. A. R. Act.

All other Districts.

(b) Decrees ordering the sale of immovable property belonging to any such person in pursuance of a contract specifically affecting the same.

The provision set forth in the third schedule (execution of decrees by Collector) of the Code shall apply to all cases in which the execution of a decree has been transferred under S. 68 of the Code of Civil Procedure, 1908. The Local Government has power to make rules under S. 70 of the Code of Civil Procedure, regulating procedure to be followed in cases in which the execution of a decree has to be so transferred and in exercise of those powers the Governor in Council has prescribed certain rules for which see G. N. J. D. No. 1209, dated 6th February 1920, at p. 469 Bom. G. G. for 1920 pt. 1, and the Manual of Civil Circulars issued by the High Court of Bombay, pp. 102-108 (1925 Ed.),

24. Appeal from an order under S. 22 :—An order in execution of a decree falls under S. 47 of the G. P. Code, and so an appeal lies from such an order. So where the decree-holder applied that a Collector should be appointed to manage the property but the lower Court refused to do so, it was held that an appeal lies from this order.¹

25. Limitation for appeal against an order under S. 22 :—A applied to execute a decree against B by attachment and sale of B's immovable property. This application was disallowed on 2nd October 1915. Before the latter date A applied to the Court that the Collector be appointed under S. 22 (2) to take possession of B's property. The application was dismissed on

¹ Choitram v. Lalbux: A. I. R. | R. 47.
(1921) Sind 29=63 I. C. 810=15 S. L.

29th November 1915. Here though the two orders were separate, yet the two applications ought not to be reckoned independently of the application for attachment of the immoveable property. They were merely ancillary applications made with the object of moving the Court to proceed in the matter of the substantive application already on the record and they were not fresh applications for the execution of the decree. It was only another method of execution that was sought whilst the main application was still pending. Therefore the period of Limitation must be counted in this case from the date of the final order, viz. 29th November 1915.¹

[*]22A. (1) When any immoveable property belonging to an agriculturist has been sold by public auction under the provisions of section 325 of the Code of Civil Procedure,^[b] the sale may within thirty days from the date of the auction be set aside by the Collector, if he considers the price bid by the purchaser to be inadequate.

(2) When the sale is so set aside the purchaser shall be entitled to receive back his deposit or his purchase-money, as the case may be, and the Collector may re-sell the property by public auction or private contract, as he thinks fit. Every such re-sale shall be deemed to be a sale under the provisions of section 325 of the Code of Civil Procedure.^[c]

Commentary.

I. Object of this section :—This section is intended to prevent the agriculturists from being subjected to loss where their

[a] Section 22A was inserted by Bombay Act II of 1907, s. 8.

[b] The reference to the Code of Civil Procedure should now be read as applying to the Code of 1908 (V of 1908).

[c] The reference to the Code of Civil Procedure should now be read as applying to the Code of 1908 (V of 1908).

¹ Chaitram v. Lalbuz, A. I. R., (1911) Sind 29=39 I. C. 910.

lands are sold in auction for very inadequate price as where there are no bidders. The present system under which land in this country is liable to be sold in execution for whatever price it may realise at an auction sale has often been found to be harmful to the interests of the judgment-debtors. The Select Committee appointed to consider the bill to amend the Civil Procedure Code recommended an amendment of the Code to enable the Civil Courts to set aside the auction sales not only on the ground of irregularity or fraud, but also on the ground of the inadequacy of the prices realized. The recommendation was not however carried into effect. Therefore for the benefit of the agricultural classes this desirable change was introduced in this section.¹

2. S. 325 C. P. Code:—This section corresponds with para 10 Schedule III of the C. P. Code (1908). It runs thus:—

Where the Collector sells any property under this Schedule he shall put it up to public auction, in one or more lots, as he thinks fit, and may (a) Fix a reasonable price for each lot;

(b) Adjourn the sale for a reasonable time whenever, for reasons to be recorded, he deems the adjournment necessary for the purpose of obtaining a fair price for the property;

(c) Buy in the property offered for sale, and re-sell the same by public auction or private contract, as he thinks fit.

Rules:— Rules made by the Local Government under S. 70 of the C. P. Code, 1908 regulating the execution of decrees transferred to Collector are given in Appendix.

23. No provision of this chapter shall apply to the proceedings in the Courts of Village-munsifs unless such provision has been specially extended thereto under the power hereinafter conferred.

Chapter not to apply to Village-munsifs' Courts.

¹ Statement of Objects and Reasons Act II of 1907.

CHAPTER IV.^[a]

OF INSOLVENCY.

24. Every Subordinate Judge shall have the powers conferred by sections 344 to 359 (both inclusive) of the Code of Civil Procedure,^[b] as modified by the provisions next hereinafter contained, for the purpose of dealing with applications under the Code of Civil Procedure^[b] or under this Act to have agriculturists residing within the local limits of his ordinary jurisdiction declared insolvent and proceedings taken under orders passed under the second clause of section 19; and, except as provided in Chapter VII of this Act, no such application or proceeding shall be dealt with by any other Court.

Synopsis of the Commentary.

- | | |
|--|---|
| <p>1. Local Extent.</p> <p>2. Object of the Insolvency law.</p> <p>3. Insolvency law of the country.</p> <p>4. Provincial Insolvency Act does not apply.</p> <p>5. Object of this Chapter.</p> <p>6. Privileges given to an agriculturist insolvent by this Act.</p> | <p>7. Civil Procedure Code, 1882.</p> <p>8. Every Subordinate Judge.</p> <p>9. Ss. 344 to 359 of the C. P. Code.</p> <p>10. Second clause of S. 19.</p> <p>11. This Chapter has remained inoperative.</p> |
|--|---|

1. **Local Extent:**— This chapter extends to the districts of Poona, Satara, Sholapur and Ahmednagar. *Vide* the table given under s. 1.

2. **Object of the Insolvency Law:**— Insolvency is a proceeding by which, when a debtor cannot pay his debts or discharge his liabilities, or the persons to whom he owes money or has incurred liabilities cannot obtain satisfaction of their claims, the state, in certain circumstances, takes possession of his pro-

[a] The Provincial Insolvency Act, 1920 (V of 1920), does not apply to cases to which this chapter is applicable ; see s. 82 of that Act.

[b] The reference to the Code of Civil Procedure should now be read as applying to the Code of 1908 (V of 1908).

property by the officer appointed for the purpose, and such property is realised and distributed in equal proportions among the persons to whom the debtor owes money or has incurred pecuniary liabilities. Its aim is twofold, *first* to distribute the debtor's property among the creditors in the most expeditious and economical manner, and *secondly* to give the debtor a new start in life, freed from the demands of his creditors, when he has not been guilty of certain serious offences.

3. Insolvency law of the country :—With this twofold object were enacted the Provincial Insolvency Act, 1920, and the Presidency Towns Insolvency Act, 1909. The former applies to the whole of the British India except the Scheduled Districts and places where the Presidency Towns Insolvency Act applies. The Provincial Insolvency Act was passed in 1920 in supersession of all the previous law on the subject. The latter was passed in 1909, and applies to the Presidency Towns only. It contains certain features that were necessitated by the development of trade and commerce in the Presidency towns.

4. Provincial Insolvency Act does not apply :—So the ordinary insolvency law applicable in the mofussil is the Provincial Insolvency Act, 1920. But where the D. A. R. Act applies, the Provincial Insolvency Act does not apply. It is laid down in S. 82 of the Provincial Insolvency Act which runs thus :—

Saving :—Nothing in this Act shall—

(a) affect the Presidency Towns Insolvency Act, 1909, or S. 8 of the Lower Burma Courts Act, 1900, or

(b) apply to cases to which Chapter IV of the Deccan Agriculturists' Relief Act, 1879, is applicable.

5. Object of this Chapter :—At the time the D. A. R. Act was enacted, there were no special Insolvency Acts in India. The provisions for the insolvent were contained in the C. P. Code, 1878. But these provisions were very crude. No application for insolvency could be made by a debtor until process was issued against him; arrest was retained; and also imprisonment though for a short period; all property, except the move-

1 See Hon. Mr. Hope's Speech in introducing the bill,

ables exempt from sale in execution, had to be surrendered; the debtor could be summarily imprisoned for a year at the instance of any creditor, for concealment or bad faith.....and finally the whole became a farce through the restriction that the Court may not grant a declaration unless it is satisfied that the debtor has not, knowing himself to be unable to pay his debt in full, recklessly contracted debts; as if persons able to pay in full were the usual customers of the money-lender!¹

It was thought that a change was necessary, and that particularly so far as agriculturists were concerned the law should be more simple and very liberal. In connection with the relief of the indebted agriculturists, Sir George Wingate had said, "of all the remedies proposed, I estimate the Insolvency Act as of the highest importance, and as likely to prove most efficacious," and hence one of the four objects of the D. A. R. Act was... "to provide an insolvency proceeding more liberal to the debtor than that of the Code of Civil Procedure."

In discussing the principles on which the insolvency law should be based, Hon. Mr. Hope said "Misfortune has been here made a crime for which life-long slavery might not atone. Surely we must divest ourselves of much confusion of ideas. Whether a man is insolvent or not is a mere question of fact, quite unconnected with the inquiry how he came to be so. How much he *can* repay, without being made a useless or dangerous member of society is a mere matter of calculation, into which the moral aspects of the past conduct cannot enter... To declare an agriculturist insolvent when he is so; to set a reasonable time before him during which he shall work himself free and reserve the means therefor; and eventually to start him afresh with the lesson of experience, seem more sensible than to lock him up for a time while his family are starving, and then to turn him adrift a beggar. To the creditor certainly the former course will be more profitable, as also to society."¹

In accordance with this principle were enacted the provisions of this Chapter; and as special protection to the Deccan Agriculturists was deemed necessary even after the law of insolvency

¹ See Hon. Mr. Hope's Speech in introducing the bill.

was amended and the Provincial Insolvency Act 1920 was passed, they were expressly preserved by the new Act (S. 82 Prov. Ins. Act, 1920).

6. Privileges given to an agriculturist insolvent by the D. A. R. Act:—(1) Every Subordinate Judge within whose jurisdiction the agriculturist resides can declare him an insolvent; no such application or proceeding shall be dealt with by any other Court (S. 24). Under the Provincial Insolvency Act, (S. 8) the insolvency jurisdiction is vested in the District Courts, and such other Subordinate Courts as have been invested with the same by the Local Government.

(2) An agriculturist can apply to have himself declared an insolvent, when his debts amount to fifty rupees or upwards, even though he has not been arrested or imprisoned, and though no order of attachment has been issued against his property in execution of a decree (S. 25). Under the Provincial Insolvency Act (S. 10) a debtor can apply only if he is unable to pay his debts, and they amount to five hundred rupees, or he is under arrest or imprisonment for the non-payment of his debts, or if an order of attachment against his property is subsisting for the same.

(3) The Court can declare an agriculturist insolvent if it is satisfied that he is in insolvent circumstances, and that his application is properly made. But under the Provincial Insolvency Act, the Court can consider if he has continued to trade or has contracted any debt after knowing himself to be in insolvent circumstances; or contributed to his insolvency by rash or hazardous speculation, etc. etc. (See S. 42).

(4) Under this Act in the case of an agriculturist insolvent, no other person than the Nazir of the Court is appointed as Receiver, and no remuneration is given to him (S. 27). Under the Prov. Ins. Act, the Court may appoint any fit person as receiver, and give him proper remuneration out of the insolvent's property, (S. 56 Prov. Ins. Act 1920).

(5) In determining the amount of any claim due by the insolvent agriculturist, the Court is to proceed in the manner prescribed in Ss. 12 to 15 of this Act; it is to go into the history of the transaction, and take accounts in the manner provided by S. 12, (S. 28). These privileges are not given to an insolvent under the Prov. Insol. Act,

(6) The immoveable property of an insolvent does not vest in the Receiver, but the Collector can manage it for the benefit of the creditors (S. 29). Under the Prov. Ins. Act *all* the property of the insolvent whether moveable or immoveable, and also such of which he is the reputed owner, except property which is exempt by the C. P. Code from attachment vests in the Receiver (S. 28).

(7) In the case of property which is mortgaged to secure a debt, the Court can first direct the Collector to raise a premium equal to the amount of the debt by letting the same, and thus try to discharge the debt, and if that is not possible then only to sell the property (S. 30). No such provision is made

under the Prov. Ins. Act, and so the Receiver has to sell all the property, (S. 53. Prov. Ins. Act, 1920).

(8) No appeal lies from the orders passed under this Chapter, except when the order is for punishing the debtor for some offence, (S. 39). Appeals are provided for under S. 75 of the Prov. Ins. Act.

(9) Under the D. A. R. Act, a creditor cannot apply to have an agriculturist declared insolvent. He can do so under the Prov. Ins. Act (S. 9).

7. Civil Procedure Code, 1882:— Throughout this chapter references have been given to the sections from the Civil Procedure Code, 1882, which contained provisions about insolvency. That Code has since been repealed, and substituted by the C. P. Code of 1908; but from the latter Code the provisions regarding insolvency are deleted; and the present law of insolvency (for the *moffussil*) is contained in the Provincial Insolvency Act, 1920. The general rule about construction of repealed enactments is contained in S. 83 of the General Clauses Act (IX of 1897) which runs thus:—

“ Where this Act, or any Act of the Governor-General-in-Council or Regulation made after the enactment of this Act repeals or re-enacts with or without modification any provision of a former enactment, the references in any other enactment or in any instrument of the provision so repealed shall, unless a different intention appears, be construed as references to the provisions so re-enacted.”

The same rule about construing the references to Insolvency in the C. P. Code, 1877, or the C. P. Code, 1882, is laid down in the Provincial Insolvency Act, S. 83 of which runs thus:—

“ Where in an enactment or instrument in force at the date of the commencement of this Act, reference is made to Chapter XX (of Insolvent Judgment-debtors), of the Code of Civil Procedure, 1877, or of the Code of Civil Procedure, 1882, or to any section of either of these Chapters, such reference shall, so far as may be practicable, be construed as applying to this Act or to the corresponding section thereof.”

For the general power to deal with the insolvency petitions, therefore, we will have to refer to the provisions of the Provincial Insolvency Act, so far as they are not affected by the special provisions of this Act.

8. Every Subordinate Judge:— In order to facilitate the making of an insolvency application by an agriculturist, the insolvency jurisdiction under this Act is given to the Subordinate

Judge within whose ordinary jurisdiction the applicant resides. Since such an application is not to be dealt with by any other Court, the District Judge cannot entertain it in the first instance, though in the exercise of his revisional jurisdiction, he may have it transferred to his Court later on (See Ch. VII).

Under the Provincial Insolvency Act, insolvency jurisdiction is vested in the District Judge or in any Court subordinate to the District Judge that has been invested with such power by the Local Government.

9. Ss. 344 to 359 of the C. P. Code as modified by the provisions hereinafter contained :— These sections of the C. P. Code of 1877 related to insolvent Judgment-debtors, and they were reproduced in the C. P. Code of 1882. But they were repealed by and reproduced in the Provincial Insolvency Act of 1907, which in its turn was repealed by the Prov. Ins. Act of 1920. The result is that in Districts to which the D. A. R. Act applies, the provisions in the Prov. Ins. Act, 1920, are applicable, subject to the modifications contained in this chapter with respect to proceedings to have an agriculturist declared insolvent.

10. Second clause of S. 19 :— This section related to the 'Power to discharge judgment-debtors.' The reference to this section is now made nugatory by the repeal of S. 19 by Act VI of 1895.

11. This chapter has remained inoperative :— The provisions of this chapter, though they are intended to relieve the agriculturists from indebtedness, have remained a dead letter. This appears partly due to the fact that the average ryot has no desire to repudiate liability for debts which he does not deny to be due, and has certain sentimental and practical objections to being declared 'nadar'; partly to ignorance or dread of a novel procedure; and partly to the fact that all deeply involved ryots have either sold or mortgaged all or part of their lands, and have practically nothing to gain under the procedure provided in this chapter.¹ Since the enactment of the Provincial Insolvency Act, there is no longer any necessity for the incorporation of clauses

¹ See Report of the Commission | A. R. Act, 1891-2, p. 57.
to enquire into the working of the D.

relating to insolvency in the D. A. R. Act. The ordinary law meets all requirements.¹

25. Any agriculturist whose debts (if any) amount to fifty rupees or upwards may apply to any Subordinate Judge within the local limits of whose ordinary jurisdiction he resides to be declared an insolvent, though he has not been arrested or imprisoned, and though no order of attachment has issued against his property, in execution of a decree.

Agriculturists may apply for adjudication in cases not provided for by Code.

Commentary.

1. **Object of this section** :—The object of this chapter is to provide a very liberal insolvency procedure for the agriculturist debtors. It is necessary to that end, that an agriculturist should be able to extricate himself from all liability whenever he finds that he is unable to pay his debts, though the debts be not very heavy. Hence this section provides that any agriculturist can apply to have himself declared insolvent whenever his debts amount to *fifty rupees*, 'though he has not been arrested or imprisoned and though no order of attachment has issued against his property in execution of a decree.'

2. **Ordinary law** :—These provisions are far more liberal as compared to the ordinary law under which a debtor can present an insolvency petition if he is unable to pay his debts and (a) his debts amount to five hundred rupees; (b) or he is under arrest or imprisonment in execution of a decree of any Court for the payment of money; (c) or an order of attachment in execution of such decree has been made and is subsisting against his property. (S. 10, Prov. Ins. Act, 1920).

3. **Though...not arrested and imprisoned** :—Both these conditions have little occasion under this Act in as much as S. 21 prohibits arrest of a judgment-debtor, and S. 22 disallows attachment of his immoveable property unless specifically pledged.

¹ See Report of the Commission of the D. A. R. Act, 1911-12, appointed to enquire into the working

4. Contents of an Insolvency Petition:—The contents of an insolvency petition under the D. A. R. Act are to be the same as under the Provincial Insolvency Act, 1920. They are laid down in S. 13 of the latter Act which runs thus:—

Contents of Petition:— (1) Every insolvency petition presented by a debtor shall contain the following particulars namely:—

- (a) a statement that the debtor is unable to pay his debt;
- (b) the place where he ordinarily resides or carries on business or personally works for gain or, if he has been arrested or imprisoned, the place where he is in custody;
- (c) the Court (if any) by whose order he has been arrested or imprisoned, or by which an order has been made for the attachment of his property, together with particulars of the decree in respect of which any such order has been made;
- (d) the amount and particulars of all pecuniary claims against him, together with the names and residences of his creditors so far as they are known to, or can by the exercise of reasonable care and diligence be ascertained by him;
- (e) the amount and particulars of all property, together with
 - (i) a specification of the value of all such property not consisting of money;
 - (ii) the place or places at which any such property is to be found; and
 - (iii) a declaration of his willingness to place at the disposal of the Court all such property save in so far as it includes such particulars (not being his books of account) as are exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree;
- (f) a statement whether the debtor has on any previous occasion filed a petition to be adjudged an insolvent, and (where such a petition has been filed)
 - (i) if such petition has been dismissed, the reasons for such dismissal, or
 - (ii) if the debtor has been adjudged an insolvent, concise particulars of the insolvency, including a statement whether any previous adjudication has been annulled and, if so the grounds therefor (S. 13 of the Pro. Ins. Act.).

Every insolvency petition shall be in writing and shall be signed and verified in the manner prescribed by the C. P. Code, 1908, for signing and verifying plaints (S. 12 Prov. Ins. Act).

26. Notwithstanding anything contained in section 351 of the Code of civil Procedure^[2] the Court shall declare an agriculturist an insolvent if it is satisfied that he is in

Modification of section 351 of the Code.

[2] The references to the Code of Civil Procedure, 1877, should now be read as applying to the Code of Civil Procedure, 1908 (V of 1908).

insolvent circumstances, and that the application to have him declared an insolvent has been properly made under section 344 of the said Code^[a] or section 25 of this Act.

Commentary.

1. Object of this Section—The object of this section is to ensure an easy discharge for the agriculturist applicant if he *really is in insolvent circumstances*. The underlying principle, as was pointed out by Hon. Mr. Hope in his speech in introducing the D.A.R. Act is this: "Whether a man is insolvent or not is a mere question of fact, quite unconnected with the inquiry how he came to be so. How much he *can* repay, without being made a useless or dangerous member of society is a mere matter of calculation into which the *moral* aspects of his past conduct cannot enter." Following this principle, it has been laid down in this section that if the Court is satisfied that an agriculturist is in insolvent circumstances, and that he has made an application properly (as given above under S. 25: Contents of the application), he should be declared an insolvent *without having regard to any act of bad faith or recklessness on the part of the debtor*. It should be noted however that if the Court is satisfied of the bad faith of the insolvent, it can, after *having granted* his application punish him under S. 69 of the Provincial Insolvency Act 1920.

2. Notwithstanding.....S. 351—This section is now embodied in S. 42 of the Pro. Ins. Act, 1920, which mentions several cases of fraud, bad faith or recklessness, on the proof of any one of which the Court has to refuse to grant an absolute order of discharge to the insolvent. Under this section the Court must declare the applicant to be insolvent irrespective of any such act by the debtor.

3 Under S. 344 C. P. C. or S. 25 of this Act—Neither of these sections gives the contents of the application. In this respect therefore both of them will have to be supplemented by Ss. 345 and 349 of the old C. P. Code (1882) which now correspond to Ss. 12 and 13 respectively of the Provincial Insolvency Act, 1920.

[a] The references to the Code of Civil Procedure, 1877, should now be read as applying to the Code of Civil Procedure, 1908 (V of 1908).

For 'Contents of Petition' see notes under S. 25.

27. No person other than the Nazir of the Court shall be appointed as Receiver, and no Receiver shall be entitled to commission.

Receiver.

Commentary.

Immoveable property of the insolvent does not vest in the Receiver : (See Ss. 29 and 30 and the notes on those sections). Under the Provincial Insolvency Act, 1920 on the making of an order of adjudication, the whole of the property vests in the Court or in the Receiver, (S. 28) and the Court can give due remuneration to the Receiver.

28. In determining under section 352 of the said Code^[a] the amount of any claim of the nature referred to in section 12 of this Act due by an insolvent agriculturist, the Court shall proceed in the manner prescribed by section 12 to 15 of this Act, both inclusive.

Proof of debts.

Commentary.

1. Proof of debts:—In determining the amount of the debt, the Court shall go into the history of the transaction under S. 12, and shall take accounts under S. 13 when the original claim is of the nature mentioned in S. 3 clause (w), (the defendant being an agriculturist), and S. 3 clause (y) and (z).

2. In manner prescribed by Ss. 12 to 15:— S. 14 providing for the interest to be allowed, and S. 15 providing for reference to arbitration in certain cases were repealed by Act VI of 1895. Reference to S. 14 should however be read as reference to S. 71 A, which deals with interest, and which has come in place of S. 14.

29. No immoveable property of the insolvent shall vest in the Receiver; but the Court ^[b] on application or of its own motion, ^[b] may direct the Collector to take into his possession, for any period not exceeding seven

Immoveable property not to vest in Receiver, but may be managed for benefit of creditors.

[a] The references to the Code of Civil Procedure, 1877, should now be read as applying to the Code of Civil Procedure, 1908 (V of 1909).

[b—b] These words were inserted by Act XXII of 1812, s. 10.

years from the date on which the Receiver has been appointed, any immoveable property to the possession of which the insolvent is entitled, and which, in the opinion of the Collector, is not required for the support of the insolvent and the members of his family dependent on him, and, subject to any rules the Local Government may from time to time make in this behalf, to manage the same for the benefit of the creditors by letting it on lease or otherwise :

Provided that, if the insolvent or his representative in interest at any time pays into Court the balance of the scheduled debts then unpaid, he shall, subject to any rights created in favour of other persons by the Collector, be entitled to recover possession of such property.

A Collector managing property under this section shall during the management have all the powers which the owner might as such have legally exercised, and shall receive and recover all rents and profits of such property, and for the purpose of recovering such rents and profits shall have, in addition to any powers possessed by an owner, all powers possessed by a Collector for securing and recovering the land revenue due to Government except the powers mentioned in the Bombay Land Revenue Code, 1879, section 150, clauses (b), (d) and (e).

Nothing in this section shall authorise the Court to direct the Collector to take into his possession any houses or other buildings belonging to and occupied by an agriculturist.

Synopsis of the Commentary.

- | | |
|---|-----------------------------|
| 1. Object of this section. | 3. Powers of management. |
| 2. On application or of its own motion. | 4. Subject to rules. |
| | 5. Powers of the Collector. |

1. Object of this section:—The object of this section and S. 30 is to try to save the property of an agriculturist as far as possible, by the plan of temporary alienation through the Collector for a term of years. The idea is that the Collector should take possession of all such property of the insolvent as is not necessary for the insolvent's support or residence, and manage it for the benefit of the creditors by letting it or otherwise, and paying off the creditors out of the rent or profits. This course adds greatly to the creditor's security and at the same time diminishes the worry and expense to both himself and the debtor.¹

2. On application or of its own motion:—The provisions contained in Ss. 22, 29 and 30 which empower the Court to order the Collector to deal with the immoveable property of the insolvent in certain ways for the benefit of his creditors were intended to enable the Court to act of its own motion; but as the Courts felt some hesitation in taking this view, and the provisions in question were almost likely to prove a dead letter unless the Courts acted upon them of their own motion, the words 'on application or of its own motion' were added to these sections by the Amending Act XXII of 1882.²

3. Powers of management of the Collector:—(1) The Court can under this section direct the Collector to *take into his possession*, for any period not exceeding *seven years*, any immoveable property to which the insolvent is entitled; *except*, (i) property required for the support of the insolvent and the members of his family dependent on him, and (ii) houses and buildings belonging to and occupied by the insolvent agriculturist. (2) The Collector is to *manage* the property by letting it on lease or otherwise. (3) In managing the property the Collector shall have all the *powers of the owner*, and also *all the powers of a Collector* for securing and recovering the land revenue due to Government, *except* the powers of (a) forfeiture of holding or occupancy under S. 153 of the Land Revenue Code, 1879, (b) distraint and sale of defaulter's moveable property under S. 154, and (c) sale of defaulter's immoveable property under S. 155 of the same Code.

¹ See Hon. Mr. Hope's Speech in introducing the Bill,

² Statement of the Objects and Reasons: Amending Act XXII of 1882.

4. Subject to rules:— The rules made by the Local Government in this behalf are given in Appendix.

5. Powers of the Collector:— For recovering arrears of land revenue:— An arrear of land revenue can be recovered (under the Land Revenue Code), by the following processes:—

- (a) by serving a written notice of demand on the defaulter under section 152;
- (b) by forfeiture of the occupancy or alienated holding in respect of which the arrear is due under section 153;
- (c) by distraint and sale of the defaulter's moveable property under section 154;
- (d) by sale of the defaulter's immoveable property under section 155;
- (e) by arrest and imprisonment of the defaulter under sections 157 and 158.
- (f) in the case of alienated holding consisting of entire villages, or shares of villages, by attachment of the said villages or shares of villages under sections 159 to 163 (S. 150, Land Revenue Code, 1879).

Of these powers, as explained above, the Collector cannot exercise the powers given in (b), (c) and (d).

Precautionary processes:— The Collector can also take the following precautionary measures for securing land revenue. He can

- (1) require that crops growing on the land shall not be reaped until notice is given to him;
- (2) direct that crops which have been reaped shall not be removed without his permission;
- (3) place watchmen over such crop to prevent its unlawful reaping or removal (S. 141, Land Revenue Code, 1879).
- (4) He can temporarily attach and take over for management any holding consisting of a village or share of a village if he thinks that the land revenue in respect thereof will not be paid when due (S. 144, Land Revenue Code, 1879).

30. When any scheduled debt is secured by a mortgage of any portion of the insolvent's immoveable property the Court, [a] on application or of its own motion, [a] may direct the Collector if he can obtain a premium equal to the amount of such debt by letting such property for a term not exceeding twenty years, to let such property and, if he cannot so obtain such premium, to sell such

[a—.] These words were inserted by Act XXII of 1882, s. 10.

property under section 325 of the Code of Civil Procedure.[²]

Where property is let under this section the premium shall be applied to the payment of the debt, and the rent, if any, shall for a period of seven years from the date of such letting be paid to the Receiver and thereafter to the insolvent or his representative in interest.

When property is sold under this section, the sale proceeds shall be applied, first, to the payment of the debt, and the balance, if any, shall be paid to the Receiver.

Commentary.

1. Object of this section :— See notes on S. 29 above.

2. On application or of its own motion :— See notes on S. 29 above.

3. Secured debt :— It means a debt for which a person holds a mortgage, charge or lien on the property of the debtor or any part thereof as a security for the debt due to him.¹

4. Subject to S. 325 C. P. Code :— S. 325 C. P. Code, 1882, is incorporated in para 10 of Schedule II of C. P. Code, 1908, which runs thus :—

Where the Collector sells any property under this Schedule, he shall put it up to public auction in one or more lots, as he thinks fit, and may

(a) fix a reasonable reserved price for each lot;

(b) adjourn the same for a reasonable time whenever for reasons to be recorded, he deems the adjournment necessary for the purpose of obtaining a fair price for the property;

(c) bid in the property offered for sale, and resell the same by public auction or private contract, as he thinks fit.

[²] This reference to the Code of Civil Procedure should now be read as applying to the Code of 1908 (V of 1908).

¹ See S. 2 (e) Prov. Ins. Act, 1920.

31. So long as any management under section 29 or letting under section 30 continues, the insolvent and his representative in interest shall be incompetent to mortgage, lease or alienate the property managed or let, or any part thereof.

32. When the balance available for distribution among the scheduled creditors under section 356 of the said Code^[a] has been distributed, the claims of such creditors shall be deemed to have been discharged, except as regards the right to share in the profits of any property managed by the Collector under section 29, or let by him under section 30.

Commentary.

1. **Object of this section** :— If a man's debts are so heavy that he cannot clear them off in the time indicated in the last section, it is better that he should get a discharge for the balance than that he should drag on as a slave without hope of freedom or stimulus to exertion.¹

33. No appeal shall lie from any order passed under this chapter except orders passed in exercise of the power conferred by section 359 of the Code of Civil Procedure.^[a]

Commentary.

1. **Object of this section** :— The object of this section is to save the insolvent from being dragged to the appellate Court and put to unnecessary expense there. But if the Subordinate

[a] The reference to the Code of Civil Procedure, 1877, should now be read as applying to the Code of Civil Procedure, 1908 (V of 1908).

1 Vide Hon. Mr. Hope's Speech:— Vol. XVII, p. 152.
Proceedings in G. G's Council for 1879

Court commits any error or does some injustice, the District Judge can interfere in his revisional jurisdiction under chapter VII.

The Provincial Insolvency Act (1920), allows appeals, and the provisions regarding them are contained in S. 75 of that Act.

2. Except orders under S. 359, C. P. Code :— Under this chapter an appeal is allowed only if the order is passed under S. 359, C. P. Code, 1882. This section, which provided for punishments for offences by the insolvent, corresponds with S. 69 of the Provincial Insolvency Act, 1920, which runs thus :—

“ If a debtor, whether before or after the making of an order of adjudication,—

(a) wilfully fails to perform the duties imposed on him by S. 22 or to deliver up possession of any part of his property which is divisible among his creditors under this Act, and which is for the time being in his possession or under his control to the Court or to any person authorised by the Court to take possession of it, or

(b) fraudulently with intent to conceal the state of his affairs or to defeat the objects of this Act, —

(i) has destroyed or otherwise wilfully prevented or purposely withheld the production of any document relating to such of his affairs as are subject to investigation under this Act, or

(ii) has kept or caused to be kept false books, or

(iii) has made false entries in or withheld entries from or wilfully altered or falsified any document relating to such of his affairs as are subject to investigation under this Act, or

(c) fraudulently, with intent to diminish the sum to be divided among his creditors or to give an undue preference to any of his creditors —

(i) has discharged or concealed any debt due to or from him, or

(ii) had made away with, charged, mortgaged or concealed any part of his property of any kind whatsoever,

he shall be punishable on conviction by the Court with imprisonment which may extend to one year.”

CHAPTER V.
OF VILLAGE-MUNSIFS.

34. The Local Government may, from time to time, appoint any patel of a village or any other person possessing local influence in a village to be a Village-munsif for such village or for such village and for any other villages the sites of which are situate in the same district not more than two miles from the site of such village, and may cancel any such appointment.

Commentary.

1. Object of this chapter.— One of the objects of the Legislature in passing this Act was to save the parties the trouble and expense of litigation. With this view were enacted the provisions about Conciliation by which, whenever a serious misunderstanding arises between the raiyat and the creditor, either party is to apply to a friendly non-judicial authority and to try to get the differences settled amicably if possible. But if unfortunately the mediation is not found successful, and a resort to litigation is found inevitable, it was thought just to "place the Court of law within easier distance from the homes of the people, and to make them more absolute, less technical, less dialatory, and less expensive." In pursuance of this object, chapter V empowers the Local Government to appoint any Patel or any other person of influence in the village to be village munsif for that village and for other villages not more than two miles away from such village (S. 35). Such Village-munsif can try suits of the description mentioned in S. 3 clauses (w) or (x), and no other Court can take cognizance of such suits (S. 36). No appeal lies from the decision of the Village-munsif, though in proper cases the District Judge can exercise a power of revision over the decision of such Village-munsif. (S. 36).

Pleaders are not allowed to appear in cases before Village-munsifs.

In enacting the provisions of this chapter the Madras Village-munsifs' system was taken as the model. The Munsifs

there dispose of a large portion the civil litigation, and the system is found to be very useful there.

The system of Village-munsifs supplies a real want. It enables the petty shop-keepers and labourers to whom a claim of a few rupees is a serious matter, to recover small debts which would otherwise remain unpaid, since they are not worth the trouble and expense of a law suit.

But though these provisions are very beneficial, it does not seem logical to include them in the D. A. R. Act. Indeed the *raison detre* of Village-munsifs is rather for relief of Sub-Judges than for the relief of agriculturists. These provisions should, therefore, be constituted under a separate Act.¹

2. Local extent:—Though the provisions of this chapter have been extended to all the districts in the Bombay Presidency, excluding Aden and the City of Bombay, the appointment of the Village-munsifs rests with the Local Government; and hence the provisions of this Chapter apply obviously only to those places where Village-munsifs have been appointed by the Local Government.

3. Patel ... influence:—The success of the system depends on the local influence of the person appointed as the Village-munsif, and the confidence that is felt about his impartiality. This local administration of justice will be more successful if the Village Panchayat Act (Bom. VI of 1933) is suitably amended, and judicial powers are conferred on the Panchayat.

4. Scope:—The application of this chapter is not confined to cases where agriculturists are parties. It applies even to non-agriculturists provided the conditions laid down in this chapter are satisfied (See S. 35).

35. Every Village-munsif so appointed shall take
Suits triable by cognizance of suits of the description
them. mentioned in section 3, [a]clauses (w)
and (x) [a], when the subject-matter thereof does not

[a—a] These words, letters and brackets were substituted for the original word, letter and brackets " clause (w) " by Bom. Act VII of 1927, s. 2 (a).

¹ See Report of the Commissions of the D. A. R. Act, 1891-92 and 1911-12. appointed to enquire into the working | 12.

exceed [a]twentyfive rupees in amount or value and all the defendants at the time of the commencement of the suit actually and voluntarily reside or carry on business or personally work for gain within the local area for which such Village-munsif is appointed.

Notwithstanding anything hereinbefore contained, Jurisdiction of other Courts excluded. a suit cognizable by a Village-munsif shall not be heard by any other Court :

Provided that the District Judge may, from time to time transfer any suit instituted before a Village-munsif to his own Court or any other Civil Court in the district for trial :
 Proviso.

Provided also that no Village-munsif shall try any suit to or in which he is a party or is personally interested, or shall adjudicate upon any proceeding connected with or arising out of such suit.

Commentary.

1. Amendments :—The scope of this section was much extended by the Amending Act, Bom. VII of 1927 when it was amended in two important particulars in accordance with the recommendations of the Civil Justice Committee. (1) Before that Act, the Munsifs could take cognizance of suit falling under cl. (w) of S. 3 only ; now they can try suits falling under cl. (w) or cl. (x) of S. 3 ; (ii) Before the amending Act was passed, the Munsifs could try suits of the amount of ten rupees only, now they can try suits upto the amount or value of *twenty-five* rupees.

2. Suits triable by Village-munsifs :— In order that a suit should be triable by a Village-munsif the following four conditions must be satisfied :— viz. (1) The suit must be of the description mentioned in clauses (w) or (x) of S. 3 ; (2) The subject-matter of the suit must not exceed twentyfive rupees in amount or value ; (3) All the *defendants* (who need not necessarily be agriculturists) *at the time of the commencement* of the suit must be actually and voluntarily residing or carrying on

[a] This word was substituted for the original word "ten" by Bom. Act VII of 1927, s. 2 (b).

business or personally working for gain within the local area for which such Village-munsif is appointed; (4) The Village-munsif must not be a party to or personally interested in the suit.

If these conditions are satisfied, the suit must be tried by the Village-munsif himself. The jurisdiction of the Village-munsif is *exclusive* and such a suit shall not be heard by any other Court, unless the District Judge transfers the suit to his own Court or to any other civil Court in the district for trial.

The special provisions mentioned in chapter III are not applicable for proceedings in the Courts of the Village-munsifs unless such provisions have been specifically extended thereto (S-23). A Village-munsif, therefore, cannot go behind a document and admit oral evidence in contravention of S. 92 Indian Evidence Act, 1872, in order to determine the real nature of the transaction, nor can he apply the provisions regarding the investigation of the transaction or taking accounts.

3. Reference or review of judgment of Village-munsif:— As the provisions of the Civil Procedure Code, 1908, do not apply to proceedings before a Village-munsif, he has no powers of reference or revision as given by Ss. 113 and 114 C. P. Code, 1908. But if the suit is transferred from the Court of a Village-munsif, to that of a Subordinate Judge, it seems, he will have such power.

4. Court fee and process-fee in suits before a Village-munsif:— No Court-fees have to be paid in respect of documents mentioned in the first and second schedule to the Court Fees Act, 1870, in the case of suits instituted before the Village-munsif;¹ nor has any process-fee to be paid in the case of any process issued by a Village-munsif.²

36. The District Judge may, on a petition being presented within thirty days from the date of any decree or order of a Village-munsif by any party deeming himself aggrieved by such decree or order, set aside such decree or order on

¹ Government Notification No. 590, B. G. G., 22nd Sept. 1920. | ² Manual of High Court Circulars, (1925 ed.) at p. 202.

the ground of corruption, gross partiality or misconduct of the Village-munsif [a] or on the ground that the Village-munsif has exercised a jurisdiction not vested in him by law [a] and pass such other decree or order as he thinks fit.

Except as provided in this Act and in section 622 of the Code of Civil Procedure [b] every decree and order of a Village-munsif shall be final.

Commentary.

1. District Judge's powers :— To save the agriculturist parties to a suit before a Village-munsif the expense of an appeal, as the matter in dispute is a petty one, it has been laid down in this section that every decree or order passed by a Village-munsif shall be final. But for the furtherance of justice, the District Judge has been given the power of interference with the proceedings of the Village-munsif. This can be done under three sections (1). He can transfer suits from the Court of Village-munsif (S. 35); (2) Under his powers of revision he can set aside any decree or order passed by a Village-munsif (s. 36); (3) He can inspect, supervise, and control the proceedings of a Village-munsif (S. 50).

2. District Judge's powers of revision :— The District Judge can exercise his powers of revision, and set aside any decree or order passed by a Village-munsif only (1) if a petition is made by any party who deems himself aggrieved by the decree or order. Since the revisionary powers of a District Judge can be exercised under S. 36, and *not under Chapter VII* the District Judge cannot act *sou motu* as he can do under S. 56;¹ (2) the petition must be made within thirty days from the passing of the order; (3) the decree or the order of the Village-munsif can be set aside on the grounds of corruption, gross partiality, misconduct of the Village-munsif, or on the ground that the Village-munsif has exercised a jurisdiction not vested in him by law.

[a—a] These words were added by Act VI of 1895, s. 11.

[b] The reference to the Code of Civil Procedure should now be read as applying to the Code of 1908 (V of 1908).

¹ Balkrishna v. Mahadeo, (1896), 22 Bom. 520.

3. High Court's powers:— This section leaves the revisory powers of High Court unaffected. S. 622 of the Code of Civil Procedure, 1882, is incorporated in S. 115 of the C. P. Code of 1908 which defines the powers of revision of the High Court thus:

Revision:—The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court, and in which no appeal lies thereto, and if the Subordinate Court appears—

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit.

In the matter of revision, therefore, the powers of the District Judge under S. 36, and of the High Court under S. 622 C. P. Code, 1882 (S. 115, C. P. Code, 1908), are concurrent.

37. The Local Government may, from time to time, by notification in the official Gazette, make rules consistent with this Act for regulating the procedure of Village-munshifs and for conferring on them or any of them all or any of the powers for the trial of suits or the execution of decrees exercised by a Civil Court under the Code of Civil Procedure^[a] or any other enactment for the time being in force.

Power of Local Government to make rules.

Commentary.

Rules:— For rules made by the Local Government under this section for regulating the procedure before the Village-munshifs, see Appendix.

[a] The reference to the Code of Civil Procedure should now be read as applying to the Code of 1908 (V of 1908).

CHAPTER VI.

OF CONCILIATION.

Commentary.

1. Object of this chapter:—As it was found that a good deal of time and money of the agriculturists was unnecessarily wasted in litigation this Act aims at settling the disputes to which agriculturists are parties by conciliation as far as possible. The object of the conciliation provisions was that the agriculturist should have a friend living in the neighbourhood who would be ready to mediate between him and his creditor to get him as favourable terms from the latter as he would get if he went to Court, while saving him the time, trouble and expense involved in the legal proceedings, and to effect a settlement mutually satisfactory to both the parties who would thus part as friends.¹ Hence one of the four objects of this Act was stated to be: "to arrange disputes by conciliation as far as possible."² The idea of conciliation was thus explained by Hon. Mr. Hope in introducing the Bill, "Whenever serious misunderstanding unfortunately arises between money-lender and raiyat, either party should be able to resort to a friendly non-judicial authority bound to use his best offices to reconcile the two, and that no litigation should be commenced without a certificate from a conciliator that his endeavours in this behalf have failed."³ These provisions are made on the lines adopted by the Courts of *Judges de paix* in France where they have attained a great success.

2. Failure of this system:—The scheme of conciliation, though excellent in theory, has failed completely in practice. It was found impossible to find men combining the necessary qualifications who are willing to undertake the task. To be a successful conciliator a man must be fair-minded and disinterested,

¹ See Report of the Commission to enquire into the working of the D. A. R. Act.

² See Statement of Objects and Reasons for Act XVII of 1879.

³ Vide Proceedings in G. G's Council for the purpose of making laws and regulations (for the year 1879) Vol. XVIII.

he must have some slight knowledge of law, he must possess sympathy for the agriculturist, and he must have the moral influence in the neighbourhood which will induce parties to accept his decisions. Retired Government servants of the standing of Sub-Judge or Deputy Collector, Native Officers retired from the army, or independent men known to and respected by the agriculturists of the neighbourhood should make good conciliators. Experience showed however that suitable men were not willing to undertake duties which will take up a good deal of their time and involve considerable trouble; and that the post was only sought by men of lower calibre whose motive was only self-aggrandisement or self interest. Thus it was found that a good many money-lenders were themselves conciliators—an obviously unsuitable arrangement.

In ninety percent of cases no conciliation was effected and the parties were put to useless expense, inconvenience and waste of time in going before a conciliator. It generally came to be regarded simply a means of obtaining a certificate to enable the plaintiff to take proceedings in civil Court. It was found beyond doubt that the conciliators took bribes and illegal fees. Some were prosecuted and others were forced to resign their posts.¹

3 Abolition of the system :— Seeing thus the failure of the system, the Government, in supersession of Government Notification No. 4437 dated 31st July 1911 and all subsequent Notifications on the subject cancelled, with effect from 30th May 1913, the appointments of conciliators in the various districts.²

{ Note :—The abolition of conciliators by the G. R. quoted above renders this chapter inoperative. It is not therefore considered necessary to discuss the case law on this subject.

The system of conciliators having been abolished, the Rules made by the Local Government for the guidance of conciliators are not given in this book.)

¹ See Report of the Commission appointed to enquire into the working of the D. A. R. Act 1911-12 p. 19. See also the Report of the Commission appointed to enquire into the working of the D. A. R. Act, 1891-92 pp. 59-60.

² G. R. No. 3487, of 10th May 1913. Judicial Department.

38. The Local Government may, from time to time, appoint any person other than an ^{Appointment of} officer of Police to be a Conciliator, and ^{Conciliators.} may cancel any such appointment.

Every Conciliator appointed under this section shall be appointed only for a term not exceeding three years, but may, on the expiration of the period for which he has been appointed, be again appointed for a further term not exceeding three years.

Every Conciliator so appointed shall exercise his functions under this Act in respect of matters affecting agriculturists residing within such local area as the Local Government may, from time to time, prescribe.

[*]The expression "officer of Police" in this section shall not be deemed to include a Police patel appointed under Bombay Act VIII of 1867 (*for the Regulation of the Village-police in the Presidency of Bombay*).

39. When any dispute arises as to, or there is a prospect of litigation regarding, any ^{Matters which may be brought before Conciliator.} matter within the cognizance of a Civil Court between two or more parties one of whom is an agriculturist residing within any local area for which a Conciliator has been appointed, or when application for execution of any decree in any suit to which any such agriculturist is a party, and which was passed before the date on which this Act comes into force, is contemplated, any of the parties may apply to such Conciliator to effect an amicable settlement between them.

40. If the application be made by one of the parties only, the Conciliator shall take ^{Procedure there-upon,} down, or cause to be taken down, in

[a] This paragraph was added by Act XXIII of 1891, s. 7.

writing a concise statement of the applicant's case, and shall thereupon, by summons or by such other means as he deems fit, invite the person against whom such application is made to attend before him at a time and place to be fixed for this purpose, and shall direct the applicant also to be present at such time and place.

If such person fails to appear at the time first fixed, the Conciliator may, if he thinks fit, from time to time, extend the period for his appearance.

Day for attendance may from time to time be postponed.

[^a] A Conciliator empowered by the Local Government in this behalf may, instead of inviting, direct the person against whom the application is made to attend at the time and place either first or subsequently fixed.

[^a] If an applicant, or a person against whom an application is made, fails to be present or attend at the time and place specified in a direction proceeding from a Conciliator under this section, he shall be deemed to have committed an offence under section 174 of the Indian Penal Code.

41. Whenever all the parties are present, the Conciliator shall call upon each in turn to explain his case regarding the matter in question, and shall use his best endeavours to induce them to agree to an amicable settlement or to submit such matter to arbitration.

When all parties appear Conciliator to endeavour to reconcile them.

42. The Conciliator shall hear but shall not record the statement of any witness, and shall peruse any book of account or other document produced by the parties, or so much

Conciliator to hear statements of witnesses, etc.

[a] These paragraphs were added by Act XXIII of 1895, s. 8.

thereof as may be necessary, and, if any party or witness consents in writing to affirm any statement upon oath in any form not repugnant to justice or decency and not purporting to affect any third person, shall provide for such oath being duly taken in the presence of all the parties.

43. If on the day on which the case is first heard by the Conciliator, or on any subsequent day to which he may adjourn the hearing, the parties come to any agreement, either finally disposing of the matter or for referring it to arbitration, such agreement shall be forthwith reduced to writing, and shall be read and explained to the parties, and shall be signed or otherwise authenticated by the Conciliator and the parties, respectively.

Explanation:— A Conciliator may be appointed arbitrator under this section.

[^a]44. (1) When the agreement is one finally disposing of the matter, the Conciliator shall forward the same in original to the Court of the Subordinate Judge of lowest grade having jurisdiction in the place where the agriculturist who is a party thereto resides, and shall at the same time deliver to each of the parties a written notice to show cause before such Judge, within one month from the date of such delivery, why such agreement ought not to be filed in such Court.

(2) The Court which receives the agreement shall in all cases scrutinise the same, and if it thinks that

[^a] This section was substituted for the original section 44 by Act VI of 1895, s. 12.

the agreement is a legal and equitable one finally disposing of the matter, and that it has not been made in fraud of the stamp or registration laws it shall, after the expiry of the said period of one month, unless cause has been shown as aforesaid, order such agreement to be filed; and it shall then take effect as if it were a decree of the said Court passed on the day on which it is ordered to be filed and from which no appeal lies.

(3) If the said Court thinks that the agreement is not a legal or equitable one, or that it does not finally dispose of the matter, or that it has been made in fraud of the stamp or registration laws, it shall of its own motion issue process for the attendance of the parties, and if after such inquiry as may be deemed necessary the Court finds that such agreement is a legal and equitable one finally disposing of the matter, and that it has not been made in fraud of the stamp or registration laws, it shall order such agreement to be filed; and it shall then take effect as if it were a decree of the said Court passed on the day on which it is ordered to be filed, and from which no appeal lies.

(4) If, on the other hand, the said Court finds that the agreement does not constitute a legal or equitable agreement, or that it does not finally dispose of the matter, or that it has been made in fraud of the stamp or registration laws, it shall return the said agreement to the Conciliator, and such Conciliator shall thereupon be bound to furnish on demand to the parties or any one of them a certificate under section 46.

(5) The Court may in any case, for reasons to be recorded by it in writing, from time to time extend

the period of one month allowed for showing cause under this section.

45. When the agreement is one for referring the matter to arbitration, the Conciliator shall forward it to the Court having jurisdiction in the matter, and such Court shall cause it to be filed and proceed thereon in manner provided by sections 523 and 524 of the Code of Civil Procedure.^[a]

46. If the person against whom any application is made before a Conciliator cannot after reasonable search be found, or if he refuses or neglects, after a reasonable period has been allowed for his appearance, to appear before the Conciliator, or if he appears but the endeavour to induce the parties to agree to an amicable settlement or to submit the matter in question to arbitration fails, the Conciliator shall, on demand, give to the applicant, or when there are several applicants to each applicant, a certificate under his hand to that effect.

47. No suit, and no application for execution of a decree passed before the date on which this Act comes into force, to which any agriculturist residing within any local area for which a Conciliator has been appointed is a party, shall be entertained by any Civil Court unless the Plaintiff produces ^[b] a certificate in reference thereto obtained by him under section 46 within the year immediately preceding.^[b]

[a] The references to the Code of civil Procedure should now be read as applying to the Code of 1908 (V of 1908).

[b—b] These words were substituted for the original words by Act XXI of 1892, s. 13.

[^a] *Explanation* :—The expression “Civil Court” in this section does not include a Mamlatdar’s Court under Bombay Act No. III of 1876 [^b] (*to consolidate and amend the law relating to the powers and procedure of Mamlatdars’ Courts*).

[^c] 48. In computing the period of limitation prescribed for any such suit or application the time intervening between the application made by the plaintiff under section 39 and the grant of the certificate under section 46 shall be excluded.^[d]

48A. [*Repealed.*] * * * * [^e]

49. The Local Government may from time to time make rules—

- (a) regulating the procedure before Conciliators in matters not provided for by this Act ;
- (b) fixing the charges to be made by Conciliators for anything done by them under this chapter ; and
- (c) determining what record and accounts shall be kept by Conciliators and what returns shall be framed and furnished by them.

[a] This *Explanation* was added by Act XXIII of 1881, s. 2.

[b] This reference to Bombay Act No. III of 1876 should now be read as applying to Bombay Act II of 1906.

[c] This section was substituted for the original section 48 by Act XXIII of 1881, s. 10.

[d] The second paragraph, repealed by Act XII of 1891, is omitted.

[e] Section 48A which was inserted by Bombay Act I of 1910, Serial No. 2 of the First Schedule, was repealed by Bombay Act I of 1912, s. 3.

CHAPTER VII.

SUPERINTENDENCE AND REVISION.

1. Object of this chapter :— One of the objects of the D. A. R. Act is to save the agriculturists the trouble and expense of monied litigation. With this view were enacted Ss. 10, 33, 36 and 54 all of which bar appeals. But at the same time it was thought necessary to provide for a thorough system of supervision and control over the proceedings of the Subordinate Judges so that any irregularities in their proceedings might be brought to light. This chapter is intended to achieve that end. It provides for three special safeguards :¹

(i) *Inspection* :— The District Judge has the power to inspect, supervise and control the proceedings of the Subordinate Judges, under Chapters II, IV and VI, and of the Village-munsifs, and Conciliators, under the Act and see that the principles and policy of the Act are effectively carried out.

(ii) *The Power of revision* vested in the High Court under S. 115 of the Civil P. Code is extended to the District Judge who is enabled to call for and examine the record of any case and correct any failure of justice, as also to deal with cases called for and referred to him by his assistants specially appointed to help him by the Local Government. The powers of the High Court under the same section have remained in tact.

(iii) *Sitting in banco* :— The District Judge and his assistants are enabled to stay the proceedings in any case pending in a Subordinate Court, and to sit with the Judge as a bench to try it.

(For the comparative merits of the system of revision and of appeal see commentary on S. 10.)

As the system of superintendence and revision provided for by this chapter was found to have worked very satisfactorily, it was proposed in 1882 to extend it to cases falling under Chapter

1. See Hon. Mr. Hope's Opening Speech. Proceedings in G. G's Council for the purpose of making laws, pp. 116—153.

III also. But the proposal did not find acceptance in the Supreme Legislative Council and was dropped.

2. Scope of this Chapter :—This Chapter only applies to proceedings under Chapters II, IV and VI. It does not apply to proceedings under Chapter III (See Commentary on S. 54). The chief controlling authority is the District Judge; but with the view of strengthening the machinery for supervision and inspection, provision is made for the appointment of Assistant and Subordinate Judges to work under the control of the District Judges, (S. 52); and of Special Judges to discharge the duties of the District Judges (S. 54). For the advancement of Justice, the District and Special Judges have been given very wide powers of revision, so that they can interfere even with findings of facts by Subordinate Judges (See Comment on S. 53). The procedure of suits is entirely in their own discretion, and they are not fettered by the procedure laid down in the Civil P. Code, 1908 (S. 74).

50. The District Judge shall inspect, supervise and control the proceedings, under [a] Chapter II, Chapter IV and Chapter VI

District Judge to inspect, etc.

[a] of this Act, of all Subordinate Judges and the proceedings of all Village-munsifs and Conciliators.

[b]51 The District Judge may—

(a) transfer any application pending before a Conciliator to the file of any other Conciliator.

(b) [c] transfer from the Court of one Subordinate Judge to another any suit or any agreement pending before a Subordinate Judge under section 44 of this Act; or [c] transfer to his own file any suit or other matter pending before

District Judge may withdraw case from Conciliator or Subordinate Judge.

[a—a] These references were substituted for the original references by Act XXII of 1882, s. 14.

[b] This section was substituted for the original section 51 by Act XXIII of 1881, s. 11.

[c—c] These words were added by Act VI of 1895, s. 13.

the Court of any Subordinate Judge under [a] Chapter II, Chapter IV or Chapter VI[a] of this Act, and may dispose of the same as if he were a Subordinate Judge; or

(o) stay the proceeding in any such suit or matter and sit together with such Judge as a Bench to dispose of such suit or matter in accordance with the provisions of this Act.

or sit with Subordinate Judge as a Bench for trial of any case.

If the members of any Bench sitting under this section differ in opinion, the opinion of the District Judge shall prevail.

Commentary.

This section does not authorise a District Judge to transfer suits proceeding before a Village-munsif; but a provision to that effect is made in S. 35.

[b]52. (1) The Local Government may appoint an Assistant or Subordinate Judge to inspect and supervise, subject to the control of the District Judge, the proceedings of all Subordinate Judges under Chapter II, Chapter IV and Chapter VI of this Act, and of all Village-munsifs and Conciliators in any district or part of a district to which this Act applies:

Appointment of Assistant or Subordinate Judges to aid District Judge.

Provided that, if the Local Government thinks fit, the same Assistant or Subordinate Judge may be so appointed for two or more such districts or parts of districts or districts and parts of districts.

(2) The District Judge may, by order, confer upon any Assistant or Subordinate Judge appointed under

[a—a] These words and figures were substituted for the original words and figures by Act XXII of 1882, s. 14.

[b] This section was substituted for the original section 52 by Act VI of 1895, s. 74.

this section, as regards any district or part of a district for which he is so appointed, all or any of the powers specified in the order which vest in the District Judge under section 51.

53. The District Judge^c may, for the purpose of satisfying himself of the legality or propriety of any decree or order passed by a Subordinate Judge in any suit or other matter under [a]Chapter II, Chapter IV or Chapter VI[a] of this Act, and as to the regularity of the proceedings therein call for and examine the record of such suit or matter, and pass such decree or order thereon as he thinks fit;

and any Assistant Judge or Subordinate Judge appointed by the Local Government under section 52 may similarly, in any district for which he is appointed, call for and examine the record of any such suit or matter, and, if he see cause therefor may refer the same, with his remarks thereon, to the District Judge, and the District Judge may pass such decree or order on the case as he thinks fit:

Provided that no decree or order shall be reversed or altered for any error or defect or otherwise, unless a failure of justice appears to have taken place.

Synopsis of the Commentary.

1. Application of section 53.	8. Notice to parties.
2. Revision under S. 53 and S. 36.	9. Revision on a question of facts.
3. The District Judge.	10. Additional evidence in revision.
4. C. P. C. not applicable.	11. Review.
5. Remand.	12. Withdrawal of suit.
6. Setting aside an ex parte order.	13. High Court does not interfere.
7. Jurisdiction <i>proprio motu</i> .	

[a-a] These words and figures were substituted for the original words and figures by Act XXII of 1882, s. 14.

1. Application of section 53:—The powers of revision conferred on the District Judge by this section can be exercised only in regard to proceedings under Chapters II, IV and VI. They do not extend to proceedings under Chapters III and V. But S. 36 gives the District Judge the power of revising decrees and orders passed by Village-munsifs (See Notes on S. 36).

Whenever the Court formally expresses its opinion on any point so as to constitute that decision an order or a decree (either preliminary or final), the District Judge has the power to entertain revisional jurisdiction in regard to it.¹

To orders in execution:—The word ' order ' in this section must be read with the words ' in any suit or other matter ; ' and the expression " In a suit ... under Chapter II " must be taken to mean " a suit to which Chapter II applies. " Hence an order in execution proceeding of a suit to which Chapter II applies is subject to revision under S. 53.²

To non-agriculturists:—For a suit to fall under S. 3 clauses (w) or (x), as distinguished from clauses (y) and (z) it is not necessary that the parties should be agriculturists. If the value of the subject-matter of the suit is under Rs. 500 or Rs. 100, according to the class of Court in which it is instituted, and if it has arisen in a district to which this Act applies, it is a suit under S. 3 (w) or (x) even though neither of the parties is an agriculturist and no appeal lies therefrom. Hence the decree or order passed in a suit falling under S. 3 (w) or (x) is subject to revision though the parties to the suit are non-agriculturists.³

But a suit for foreclosure, or possession or sale of the mortgaged property does not fall under S. 3 clause (y), unless the defendant or one of the defendants is an agriculturist; and a suit for redemption of the mortgaged property does not fall under S. 3 clause (z), unless the plaintiff or one of the plaintiffs is an agriculturist. And hence if these parties are not agriculturists the suit will not be subject to revision under this Chapter. The expression ' is an agriculturist ' in S. 3 means ' when he is admitted or

1 *Krishnaji v. Maruti*, (1910) 12 Bom. L. R. 762. | 3 *Ganesh v. Krishnaji*, 14 Bom. 387
=1889 P. J. 336 following *Tulshidas v.*
2 *Manohar v. Bhavani*, 1885 P. J. 90. | *Virbasappa*, 4 Bom. 624.

proved to be an agriculturist, ' and not ' when he claims to be an agriculturist.' So directly the Court finds that he is not an agriculturist (and this point if at issue ought to be raised and decided as a preliminary one), the Court has no jurisdiction to proceed under chapter II. If after finding that the party is not an agriculturist, the Court goes on with the trial of the suit, it must be deemed to do so only under its ordinary jurisdiction, and the decrees passed would not be one under chapter II. Such a decree would be appealable and will not be subject to the provisions of S. 53.¹

Other cases :— But where a suit is admittedly within the jurisdiction of the Subordinate Judge it is within the revisional power of the Special Judge, and this is none the less so because the Special Judge incidentally finds that the mortgage sued on does not really exist, and that another one does exist of such an amount that a suit to redeem it would not have been within chapter II of the Act, if from the conduct of the parties he thinks that the first mortgage must be taken to be existing.²

Similarly an application of Chapter II of the Act which would be illegal and wrong if the Subordinate Judge knew that the subject-matter was worth more than Rs. 100 (or Rs. 500, as the case may be) in value, may be sustained if he was led into applying it by honest misinformation. And the proceedings before the Subordinate Judge being thus justified, the Special Judge can revise them and order a new trial. The reason is that where jurisdiction depends upon particular facts stated, the proceeding will not be null through a mere error in stating the facts so as to found jurisdiction.³

Again, if the suit falls under S. 3 (x), it is none the less so though a question of title is incidentally raised and decided in the suit; and so, the provisions of this section will apply and no appeal will be allowed from such a decision.⁴ But where the suit does not fall under S. 3 of this Act, e. g., a suit for the

<p>¹ Lakshman v. Ramchandra, (1898) 23 Bom. 321 = 1898 P. J. 236.</p> <p>² Bhagwant v. Rango, 1884 P. J. 30.</p> <p>³ Kondaji v. Anau, 7 Bom. 448 =</p>	<p>1893 P. J. 234 (See this case under S. 8).</p> <p>⁴ Shidu v. Ganesh, 16 Bom. 128 = 1891 P. J. 114.</p>
--	--

assessment of Jagir lands, this chapter will not apply and the District Judge will have no power of revision over a decree passed in such a case.¹

(As the provisions of this section apply mainly to suits falling under Chapter II, for suits falling under that Chapter see comments on S. 3.)

Illustrations.

(1) R sued L to redeem and recover possession of certain lands. L denied the mortgage and pleaded that R was not an agriculturist. The Subordinate Judge held that R was not an agriculturist. However he proceeded with the suit and further held on merits that R was not entitled to redeem. Here as R is not an agriculturist, the suit does not fall under S. 3 (z), and so the District Judge cannot revise the decree.²

(2) G and K were to provide for the worship of an idol in alternate years. K did not so provide for two years and G had to spend Rs. 50 for that purpose. G sued K to recover that amount in the Court of the First Class Subordinate Judge of Satara within whose district this Act extended. Both G and K were non-agriculturists. The suit falls under cl. (w) of S. 3 and hence the District Judge has the power of revising the decree passed in the suit.³

(3) A sued K to redeem a mortgage alleging that the original consideration was Rs. 24 only. The Subordinate Judge relying upon that statement tried the case under the provisions of Chapter II. It was later on found that the original consideration for the mortgage was Rs. 165 which was subsequently reduced to Rs. 24, and this latter amount was acknowledged in a document which formed the basis of the suit. The whole amount was found to be paid off. When the plaintiff brought the suit, he had no knowledge of the existence of the former mortgage. Here as the suit was tried under the provisions of this Act under the honest belief that the consideration was Rs. 24 only, it is governed by Chapter II, and the District Judge has the powers of revision over the same.⁴

(4) G sued S to recover Rs. 80 for two years' local rent and interest on account of a certain piece of land. In support of his claim G relied on his title as a mirasdar of the land. S denied his liability to pay rent, and disputed G's title as mirasdar to recover it. The Subordinate Judge allowed the plaintiff's claim. Here though G's title is incidentally decided, the suit falls under S. 3 (x), and is subject to revision under this section.⁵

2. Revision under S. 53 and S. 36—This section does not give the District Judge a power to revise decrees and orders

¹ Sheikh Gulam v. Keshinath, 25 Bom. 244 = 2 Bom. L. R. 795.
² Laxman v. Ramchandra, (1898) 23 Bom. 321 = 1898 P. J. 236.

³ Ganesh v. Krishnaji, 14 Bom. 397.
⁴ Kondaji v. Anau, 7 Bom. 448 = 1893 P. J. 234.
⁵ Shidu v. Ganesh, 16 Bom. 128.

passed in proceedings before a Village-munsif; but he can revise the proceedings before a Village-munsif under S. 36. His revisional powers under S. 36 are, however, most restricted. The District Judge can act under that section only upon the petition of a party deeming himself aggrieved by a decision or order presented within thirty days from the decree or order. Under this section however the District Judge can act even *proprio motu*.¹

3. The District Judge:—An order under this section can be passed only by a District Judge, or by an Assistant Judge or Sub-ordinate Judge appointed under S. 52. A First Class Subordinate Judge with appellate powers has no jurisdiction in the matter.²

4. C. P. C. not applicable:—There is no provision in this Act itself which lays down the procedure to be followed by the District Judge. S. 74 of the Act provides only that, 'except in so far as it is inconsistent with this Act, the Code of Civil Procedure shall apply to all suits and proceedings before Subordinate Judges under this Act.' It will therefore, be seen that the C. P. Code is not applicable to proceedings before the District Judge or Special Judge under this and the following sections. The conduct of the proceedings must be deemed to be entirely in their own discretion.³

(See Comments on S. 74.)

5. Remand:—Under this section the District Judge when the record is before him, 'may pass such decree or order in the case as he thinks fit.' This includes an order of remand.⁴

6. Setting aside an *ex parte* order:—As stated above the conduct of the proceedings before the Special Judge must be deemed to be in his own discretion. Setting aside an *ex parte* decree or order may well be a most reasonable exercise of discretion on the part of the Court, and the Special Judge has power to review in any special case an *ex parte* order made by him.⁵

1 Balkrishna v. Mahadeo, (1896) 22 Bom. 520.

2 Sitaram v. Shri Khanoba, 16 Bom. L. R. 756=39 Bom. 165.

3 Vishwanath v. Aba, 1886 P. J. 11; Babaji v. Babaji, 15 Bom. 650; Badari-

charya v. Ramchandra, 19 Bom. 119; Ramsing v. Babu Kishansing, 19 Bom. 116; see also cases given under S. 74.

4 Kondumal v. Kaahiba, 1881 P. J. 1.

5 Ramchandra v. Draupadi, 20 Bom. 281=1895 P. J. 18.

7. Jurisdiction proprio motu:—The first rule of adjudication that a Judge shall decide on points alleged by a party does not apply in all its strictness to the District Judge or Special Judge when exercising his revisional powers under this section. His powers are wider than those of other Courts. He is not confined to the grounds alleged by the applicant. He has jurisdiction *proprio motu* to vary the decree under the provisions of this section.¹ But the Special Judge cannot raise a point for which the party had given no evidence before the Subordinate Judge.²

Illustrations.

(1) M sued B to to redeem a mortgage. The mortgage bond was for Rs.150/-. It provided that Rs. 100 should be deemed to be advanced on the security of the mortgaged land, the profits of which were to be taken by the mortgagee in lieu of interest on that sum. The residue of Rs. 50 was made repayable with compound interest at Rs. 1/8 p.c., p. 'm. The Sub-Judge, First Class, found that the mortgage-debt had been paid off out of the profits of the land, and decreed redemption on M paying Rs. 50 with interest which according to the rule of Damdupat amounted to Rs. 100. M applied to the Special Judge to review the case on the ground that he had paid Rs. 50. The Special Judge varied the decree not on that ground but on the ground that the interest on Rs. 50 should be taken to have been paid off out of the profits of the land. He can thus review the case on a ground not urged by the applicant.³

(2) A as the adopted son of S, sued D to redeem S's 1/16th share in certain property which S before his death had mortgaged to D. The Subordinate Judge awarded the claim, but the Special Judge in revision held that as in the deed of adoption S had described his share as being 1/32 of the property, A could sue to redeem 1/32 share only. It was held by the High Court that as D could not have disputed the title of S to redeem the whole property mortgaged to him, he could not dispute the title of A to do so, except by showing that A was not the adopted son and representative of S, which he failed to do, and that therefore the question, whether S was or was not the sole owner of the property mortgaged was not one which could be gone into between A and D, or which the Special Judge could raise *proprio motu*.⁴

S. Notice to parties:—The section does not expressly provide for notice of the application of revision or review being given to the other party, and having regard to the very special nature of the Act, it cannot, in the opinion of a Division Bench of the Bombay High Court, be assumed on general principles that

1 Balkrishna v. Mahadeo, 22 Bom. 520; Ganesh v. Krishnaji, 14 Bom. 387.
2 Aha v. Babya, 1893 P. J. 145.

3 Balkrishna v. Mahadeo, Supra.
4 Aha v. Babya, Supra.

such notice was necessary before the power of revision could be exercised under that section. It is to be remarked that S. 74 only makes the C. P. C. applicable to suits and proceedings before the Subordinate Judges; and in the absence of any rule regarding notice, made by the Local Government under S. 75 of the Act, the conduct of the proceedings before the Special Judge must be deemed to be entirely in his own discretion.¹ But a year after this decision, another Bench of the same High Court held that justice requires that when the plaintiffs are heard against the judgment of the Subordinate Judge, the defendants should be heard in support of it, unless there was a default of attendance on their part. The decree of the Special Judge was set aside, and he was directed to rehear the matter after giving an opportunity to both sides to be heard.² The case of *Vishwanath v. Aba* given above was not referred in this latter case.

It is laid down by the Privy Council that it is an elementary principle which is binding on all persons who exercise judicial or quasi-judicial powers, that an order should not be made against a man's interest without there being given to him an opportunity of being heard.³

The Manual of Civil Circulars provides that in all applications for revision under S. 53 of the D. A. R. Act, the District Judge should issue notice to the parties, and hear them, if they desire to be heard, before passing final orders, whether or not the application has been referred for report to any other Court.⁴

9. Revision on question of fact:— Under the Civil Procedure Code (1908), the Court can interfere in revision only when the lower Court acts without jurisdiction or has exercised its jurisdiction 'illegally or with material irregularity.' The Special Judge under S. 53 of this Act, on the other hand, has a revisory power in all cases where a failure of justice appears to have taken place. It is for him to decide whether a finding on a question of fact by a Subordinate Judge is of that nature, and in doing so he is entirely within his jurisdiction.⁵ Where

¹ *Vishwanath v. Aba*, 1886 P. J. 11.

² *Rupchand v. Balwant*, 11 Bom. 591.

³ *Maharaj Kumar v. Mohan Ganesh*, 8 Bom. L. R. 719.

⁴ Manual of Civil Circulars issued

by the High Court of Bombay, (1925-Ed.) P. 148.

⁵ Per Sergeant C. J. in *Gurubatsaya v. Chanmalappa*, 19 Bom. 286.

1894 P. J. 90.

the Special Judge considers 'his interference in the question of fact involved in the case to be necessary in the interests of justice,' the High Court would not interfere with such decision except in most exceptional circumstances.¹

These cases clearly lay down that the District Judge can in revision enter into questions of fact also; and the High Court does not interfere with the discretion of the District Judge, except in very exceptional cases. So now, the rule laid down by Birdwood J. in *Shidhu v. Bali*² that the 'revisional jurisdiction of the District Judge resembles that possessed by the High Court under the Code of Criminal Procedure, and if it is to be held to include the power of setting aside the decision of the lower Courts on the facts, it must be exercised only in very exceptional cases' is no longer good law; for, as was said by Sergeant C. J. in *Gurubasaya v. Chanmalappa*, the practice of this Court under the Criminal Procedure Code referred to in *Shidhu v. Bali* is determined by our own view of the proper way of exercising our revisionary jurisdiction, but cannot, in the absence of words to that effect, be properly imposed on the Special Judge as a matter of law determining his jurisdiction."

10. Additional evidence in revision:— It is for the District Judge to decide in revision whether the finding on a question of fact is one whereby a failure of justice appears to have taken place; and this implies that the District Judge has all the necessary powers, such as can usually be exercised in a Court of justice, to ascertain whether or not a particular finding is one in regard to which a failure of justice has taken place. He can, if he think it necessary, take additional evidence, and if the parties have notice of the evidence being taken, and have an opportunity of appearing and cross-examining the witnesses, it cannot be said that the District Judge has exercised his jurisdiction illegally or with material irregularity.³

Illustration.

Raghunath sued Raoji to recover a sum of Rs. 150 due on a promissory note, passed by Raoji who was an agriculturist. The note bore a thumb im-

¹ *Usmanbhai v. Imratbhai*, 1893 P. J. 148. See also *Rayachand v. Sultan*, 18 Bom. 347 = 1893 P. J. 188.

² 15 Bom. 180 = 1890 P. J. 160.

³ *Raoji v. Raghunath*, (1928) 30 Bom. L. R. 495 = 52 Bom. 849 = 109 I.C. 711.

pression of Raoji. Raoji denied execution of the note. The Subordinate Judge on comparing Raoji's thumb impression taken in the Court with his thumb impression on the pro-note, came to the conclusion that the note was not executed by Raoji. The District Judge in revision allowed Raghunath to call an expert as witness who deposed that the thumb impression on the note was Raoji's. The District Judge can in revision under this section allow additional evidence to be taken.

11. Review:— As S. 74 of this Act only makes the C. P. Code applicable to suits before the Subordinate Judges, the conduct of proceedings before the Special Judge must be deemed to be in his own discretion. So where the Assistant Judge first held the defendant to be a non-agriculturist, but afterwards granted a review of his judgment on the ground of mistake as to the nature of the defendant's income from the Inam and held him to be an agriculturist, it was held to be a most reasonable exercise of the discretion.¹ But it was held in another case that the Special Judge has no jurisdiction to grant a review of a decree or order once made by him on the ground of the discovery of new evidence.² This decision also proceeded on the ground that under S. 74 the provisions of the Civil Procedure Code are not applicable to proceedings before the Special Judge. In a later Full Bench case,³ Sergeant C. J. while affirming the right of the Special Judge to grant a review of his own decision, left open the point "whether he can grant a review on the ground of the discovery of new evidence." But Parson J. adhered to his decision in *Babaji v. Babaji* and again affirmed that the Court cannot grant a review on the ground of discovery of new evidence.

The Special Judge has the power to revise an *ex parte* decree made by him.³

Illustration.

R sued B and D to recover a sum of money. The subordinate Judge dismissed the suit. R thereupon applied in revision to the Special Judge. Notices were issued but none of the parties appeared on the day of the hearing. The Special Judge decreed R's claim. Later on D who had not been served with the notice issued as above, appeared and applied to the special Judge for a re-

¹ Badaricharya v. Ramchandra, 1891 P. J. 14,
19 Bom. 113=1893 P. J. 35.

² Babaji v. Babaji, 15 Bom. 650=

1891 P. J. 14,
³ Ramchandra v. Draupadi, 20
Bom. 281=1895 P. J. 18.

view of the decrees passed by him. The Special Judge granted his application and on review after a reconsideration of the evidence, confirmed the decree of the Subordinate Judge. It was held by the High Court that in granting a rehearing the Special Judge had exercised a reasonable discretion with which the High Court could not interfere in its extraordinary jurisdiction.¹

12. Withdrawal of suit:— When the Special Judge calls for and examines the record of a suit he can only do so for the purpose of satisfying himself of the legality or propriety of any decree or order passed by a Subordinate Judge under Chapters II IV or VI, and as to the regularity of the proceedings therein. But where a party applies to the Special Judge under S. 53 to review the decree of a Subordinate Judge, and while that application is pending, he makes another application saying that he had "committed some error in the matter of bringing the suit" and asking for permission to withdraw the suit with liberty to bring a new one as it was then too late to amend the plaint, the Special Judge cannot grant the application. For, the applicant in his second application does not complain of any illegality or irregularity in the decree of the Subordinate Judge. He does not say that the Subordinate Judge has wrongly refused to allow him to withdraw the suit. He alleges merely a mistake on his own part in bringing the suit. So the Special Judge can not interfere in such a case and allow the suit to be withdrawn.²

13. High Court does not interfere:— Under this section the District Judge is given a wide power. He can call for the records of any proceedings 'for the purpose of satisfying himself of the legality or propriety of any decree or order.....and as to the regularity of proceedings therein.' He can thus exercise his powers in all cases where a failure of justice appears to have taken place; and the procedure of proceedings before him is entirely in his own discretion.³ Hence when in the interests of justice the Special Judge reverses the decree of a Subordinate Judge on a point of fact, the High Court will not interfere.⁴ And even the possibility that the Special Judge may have decided the question of limitation wrongly by reason of his having present to his mind an earlier decision and not the more recent decision is

¹ Ramsing v. Babu, 19 Bom. 116 = 1893 P. J. 575.

² Muktaji v. Manaji, 12 Bom. 684 = 1888 P. J. 82.

³ Gurubasayya v. Chanmasappa, 19 Bom. 286. See cases referred to

under 'Revision on point of fact' and 'C. P. Code not applicable.'

⁴ Usmanbhai v. Imratbai, 1893 P. J. 148; Rayachand v. Sultan, 18 Bom. 347 = 1893 P. J. 163.

no ground for interference by the High Court in the exercise of an extraordinary jurisdiction under S. 115.¹

Where the revisional powers of the District Judge suffice, the High Court would generally not interfere under S. 115 of the C. P. Code 1908.² But where the High Court finds that there is a case which repeatedly occurs in different parts of the Presidency, and where an authoritative decision would be a matter of importance, the High Court may exercise its jurisdiction.³

54. The Local Government from time to time may, [a] appoint an officer, as Special Judge, to discharge in the place of the District Judge all the functions of the District Judge under this Act in respect of the proceedings of all Subordinate Judges, Village-munsifs and Conciliators, and may cancel any such appointment.

Such Special Judge shall not, without the previous sanction of the [b] Local Government [b] discharge any public function except those which he is empowered by this Act to discharge.

If any conflict of authority arises between the Special Judge and the District Judge, the High Court shall pass such order thereon consistent with this Act as it thinks fit.

No appeal shall lie from any decree or order passed by the District Judge under this chapter, or by the Special Judge, or by an Assistant or Subordinate Judge appointed under section 52, or by a Bench in any suit or proceeding under this Act.

[a] Words repealed by Act XXXVIII of 1920, s. 2, Sch. I, are omitted.

[b—b] The words "Local Government" were substituted for the original words "Government of India" by Act XXXVIII of 1920, s. 2 and Sch. I.

1 Sakharam v. Parvati, 1888 P. J. 274.

2 Sahoo v. Narayanshastri, (1930) 33 Bom. L. R. 476.

3 Ibid.

[^a] But the District Judge or Special Judge, or an Assistant or Subordinate Judge or Bench, may refer to the High Court, under section 617 of the [^b] Code of Civil Procedure, any question of law, or usage having the force of law, or the construction of a document arising in any case pending before him or it under this chapter as if that case were a suit or an appeal pending before him or it; and in respect of every reference so made, sections 618 to 621 of the said [^b] Code, both inclusive, shall apply.

[^c] Provided that no reference shall be made under this section by any Assistant or Subordinate Judge, or by any Bench of which the District Judge or Special Judge is not a member, without the previous sanction of the District Judge or Special Judge, as the case may be.

Commentary.

1. **Special Judges**:— When the D. A. R. Act was passed in 1879 it was thought necessary to strengthen the judiciary by the appointment of some officer for the purpose of supervising the working of the D. A. R. Act. The Special Judgeship was accordingly created in 1879 as a temporary measure. But as the provisions of this Act became more generally known, and as diversities in rulings became few, the Bombay Government by their letter No. 1418 dated 14th March 1906 proposed that the Special Judgeship should be abolished, and that the administration of the Act should be entrusted to the ordinary civil judiciary. The proposal was forwarded by the Governor-General-in-Council by letter No. 201 dated 19th July 1906 to the Secretary of State for India who accordingly sanctioned the abolition of the Special

[^a] This paragraph was added by Act XXXII of 1882, s. 15.

[^b] The reference to the Code of Civil Procedure, 1882 should now be read as applying to the Code of 1908 (V of 1908).

[^c] This paragraph was added by Act XXII of 1882, s. 15.

Judgeship. In order to enable the District Judges to undertake the necessary amount of inspection and to exercise the requisite revision and scrutiny, it was considered necessary that four Subordinate Judges should be appointed to help the District Judges in this work, and the abolition of the Special Judgeship was sanctioned on that condition. The post was accordingly abolished by the Bombay Government by their G. R. No. 666 dated 11th December 1906, with effect from 15th January 1910.

As the Special Judge was to perform the same duties as the District Judge, the reference to the former in the old decisions should be construed to apply to the latter as well.

2. Reference:— Section 54 does not prescribe the conditions under which a reference may be made to the High Court. But a reference to S. 617 of the C. P. Code, 1882 (which corresponds with S. 113 of the new Code of 1908), shows that the reference can only be made when a Judge entertains a reasonable doubt on a question of law or usage having the force of law. A Judge cannot ordinarily entertain a reasonable doubt on a point clearly decided by the rulings of the High Court to which he is subordinate unless the authority of the decision can be questioned by virtue of anything said or decided by the Privy Council.¹ The words 'construction of a document' are mere surplusage in view of the fact that they would be sufficiently covered by the power to refer any question of law.²

3. Proviso:— The proviso to the section has no application to references made under the ordinary provisions of the C. P. Code by a Subordinate Judge not appointed under S. 52 of the Act. In such a case the previous sanction of the Special Judge is not necessary.³

1 Bhanaji v. De Brito, 80 Bom. 226 | Kunwar, 14 Bom. L. R. 1990 (P. C.)
 =7 Bom. L. R. 995. | 8 Rango v. Kalu, 1885 P. J. 221.
 2 Lala Fateh Chand v. Rani Keshen

CHAPTER VIII

REGISTRATION BY VILLAGE-REGISTRARS.

1. Object of this Chapter.—The object of this Chapter is to provide some safeguards against the money-lenders committing frauds in their accounts and obtaining from ignorant peasants bonds for larger amounts than are actually paid to or due from them.¹ In introducing the Bill for the relief of the indebted agriculturists in the Dekkhan, the Hon. Mr. Hope said—

“The first object aimed at is to establish precautions against fraud by either debtors or creditors in their original transactions with each other, and to keep them on good terms and out of Court, as far as possible. The commission thus enumerates the chief frauds which are practised:—

“*By creditors:* (1) forging bonds; (2) withholding the consideration mentioned in bond; (3) obtaining new bond in satisfaction of old bonds and of decrees and nevertheless enforcing the latter; (4) not giving credit for payments; (5) refusing to explain or wrongly representing their accounts to debtors.

“*By debtors:* (6) tendering in evidence false receipts and false evidence of alleged payments; (7) pleading that bonds are false when they are really genuine.

“Chapter VIII of the Bill is intended to meet the first three and the last mentioned kinds of fraud. The reasonableness of such a measure is evidenced by the provisions for notaries in France and most other European countries, and by the penalty in England on unauthorised persons practising as conveyancers. Instruments not so executed will be invalid. By these means every raiyat should at least know what he signs, and both parties should receive due protection.”²

2. Failure and abolition of the system.—The system of Village Registration was intended to prevent forgery of bonds and the repudiation of duly executed instruments by the debtors. It was also thought that false personification would be rendered more dangerous by bringing the registration office nearer to the homes of the people. But it was found that registration afforded no security as to the payment or the nature of the alleged consid-

¹ See Statement of Objects and Reasons.

² Hon. Mr. Hope's speech, proceedings in G. G.'s Legislative Council, 1879, pp. 134-135.

eration. The bulk of the people treated the recital in a bond or a statement to the registrar as to the receipt and nature of the consideration as a matter of form. So far was this carried on that money was sometimes passed before the Registrar only to be returned outside the office. In this respect, registration was positively harmful to the debtor as it raised a strong presumption against him when he disputed the nature or the payment of the consideration. For these among other reasons, the Commission appointed in 1891-92 to enquire into the working of the D. A. R. Act recommended that the system should be abolished.¹ But on the recommendation of some of the officers interested in the Act, a further trial was given to the working of the system. But the personnel was found to be so hopelessly corrupt that registration before the Village Registrar was no protection whatever to the agriculturist, and the abolition of the system was imperatively called for by the low *morale* of the Village Registrars. Again, the reason that led to the introduction of the system, namely, the difficulty to get the agriculturist to travel any distance from his village had under the altered modern conditions ceased to operate; and lastly, the extension of the T. P. Act to the Bombay Presidency in 1893, and its amendment in 1904 had made the registration of sale-deeds and mortgage-bonds of immoveable property valued at more than Rs. 100 compulsory, and thus had secured the agriculturists against frauds in large transactions at least.²

For these reasons the Government by their G. R. No. 9969 of 23 II 1910, (R. D) discontinued the system of Village Registrars, and no new Village Registrars are appointed since then.

3. Its effect :—The effect of the omission to appoint Village Registrars has been to render the Chapter on 'Registration by Village Registrars' inoperative, because special procedure laid down in this Chapter applies only in the area for which a Village Registrar is appointed (S. 56). However, as provided by S. 63A of this Act, the procedure laid down in Ss. 57 and 59 of this Chapter still applies to registration by Sub-Registrars appointed under the Indian Registration Act.

¹ See Report of that Commission.

² See the Report of the Commission appointed to enquire into the working of the D. A. R. Act 1911-12.

55. The Local Government may, from time to time,—
Appointment of Village-registrars. (a) appoint such persons as it thinks fit, whether public officers or not, to be Village-registrars for such local areas as it may, from time to time, prescribe;

(b) direct the Village-registrars for any local area to discharge the functions of a Village-registrar for any other local areas concurrently with the Village-registrars of such other local areas; and

(c) delegate to any person, by name or in virtue of his office, the powers conferred on it by this section; and may cancel any such appointment, direction or delegation.

56. No instrument which purports to create, modify, transfer, evidence or extinguish an obligation for the payment of money or a charge upon any property, or to be a conveyance or lease, and which is executed after this Act comes into force by an agriculturist residing in any local area for which a Village-registrar has been appointed, shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon by any such person or by any public officer, unless such instrument is written by, or under the superintendence of, and is attested by, a Village-registrar:

Provided that nothing herein contained shall prevent the admission of any instrument in evidence in any criminal proceeding, [a] or apply to any instrument

[a—a] These words were added by Act XXIII of 1881, s. 12.

which is executed by an agriculturist merely as a surety,[^a] [^b] or to any instrument required by section 17 of the Indian Registration Act, 1877, to be registered under that Act.[^b]

Synopsis of the Commentary.

- | | |
|--|---|
| <p>1. extent.</p> <p>2. Object of this section.</p> <p>3. Sections 56 and 70.</p> <p>4. Scope of this section.</p> <p>5. Instrument.</p> <p>6. Executed by an agriculturist.</p> | <p>7. Not admitted in evidence for any purpose.</p> <p>8. Proof <i>aliunde</i>.</p> <p>9. Area for which a village registrar is appointed.</p> <p>10. Acted upon.</p> <p>11. The proviso.</p> |
|--|---|

1. Extent:—This section extends to the whole of British India.¹

2. Object of this section:—The intention of the Legislature in enacting this section was to protect agriculturists by requiring their deeds to be executed in a certain formal and public manner and by declaring that deeds not so executed should not only be inadmissible in evidence, but also not capable of being acted upon by Courts and public officers. The section gives cultivators protection against deeds that have not been registered before the Village Registrar.²

3. Sections 56 and 70:—Section 56 only says that unless the instrument of the nature described therein is written and attested according to the provisions of this chapter, it will not be admissible in evidence, nor will it be acted upon by any person authorized to receive evidence or by any Public Officer; but so far as the question of the creation of mortgage, lien or charge of or upon immoveable property belonging to an agriculturist is concerned, S. 70 says that the mortgage, lien or charge shall be invalid, unless created by a written instrument under the

[a—a] These words were added by Act XXIII of 1881, s. 12.

[b—b] This portion was added by Act XXIII of 1886, s. 9. The reference to the Indian Registration Act, 1877, should now be read as applying to the Indian Registration Act, 1908 (XVI of 1908).

¹ See S. 1 of this Act.

² *Javanmal v. Muktabai*, 14 Bom. 510 at p. 524 = 1890 P. J. 83.

hand of the person creating it. No doubt, after the instrument is drawn out, it will not be admitted in evidence unless it is registered under S. 56.¹

4. Scope of this section :— The scope of this section is wider than S. 63A. The latter section requires only those transactions to be registered which are compulsorily registrable under S. 17 of the Indian Registration Act, while this section relates, as is apparent from the words at the end of the proviso, to all documents other than those covered by that section.

In their effects, sections 56 and 63A are a little different. A document coming under S. 63A, but not registered will not be received in evidence only for the purposes given in S. 49 of the Indian Registration Act; while an instrument falling under S. 56, but not written or attested as required by that section shall not be admitted in evidence for "any purpose by any person having by law or consent of parties authority to receive evidence or shall be acted upon by any public officer."

The law applicable to instruments governed by S. 56 is this Act and not the Indian Registration Act. Hence, an instrument that is registered under this section is admissible in evidence though is not registered under Indian Registration Act.²

5. Instrument :— Instrument is a formal legal writing, e. g., a record, charter, deed or written agreement.³

Instrument includes every document by which any right or liability is or purported to be created, transferred, limited, extended, extinguished or recorded.⁴

The words 'instrument and document' are used interchangeably in the Indian Registration Act.⁵

So, a balance of account,⁶ a khata purporting to acknowledge an obligation to pay money,⁷ a receipt,⁸ and a release.⁹

¹ Vide remarks of Ranade, J. in 22 Bom. 788 (at p. 793.)

² Mahadu v. Baysaji, 19 Bom. 239 = 1893 P. J. 596.

³ Wharton's law Lexicon.

⁴ Indian Stamp Act (II of 1899) S. 2 (14).

⁵ Per Telang, J. in Johermal v. Tejram Jagrup, 17 Bom. 235.

⁶ Kanji v. Dhonde, 6 Bom. 729 = 1892 P. J. 10.

⁷ Dinsha v. Hargovindas, 13 Bom. 215.

⁸ Bapuji v. Mahadeo, 1897 P. J. 137.

⁹ Mahadu v. Baysaji, 19 Bom. 239 = 1893 P. J. 596.

are instruments and so they must comply with the provisions of this section. But an agreement to create a mortgage is not an instrument.¹

Wills need not be registered under the provisions of §. 56.²

6. Executed by an agriculturist.—The plain words of this section speak only of the execution by an agriculturist and clearly refer to the *status* of the person who actually executes the document. A document executed by an agriculturist and in his own name and not as the agent of another, is inadmissible in evidence by reason of non-compliance with this section.³

7. Not admitted in evidence for any purpose.—This section provides that no instrument to which this section is applicable 'shall be admitted in evidence for any purpose' unless it is written by or under the superintendence of, and attested by, a village registrar. The use of the words 'for any purpose' shows that the instrument in question could not be admitted in evidence in any case whatsoever, not even to enforce a liability against one who was not an agriculturist.⁴

But where the document in question does not itself create an obligation, but only evidences an intention to create one, it does not fall under this section and so it would be admissible in evidence to prove the contract entered into.⁵

Illustrations.

(1) H sued D and E on a Khata which contained an acknowledgment of liability to pay the amount with interest. The Khata was not registered before the Village Registrar. E was an agriculturist, so his name was struck off the record and the suit was continued against D only who was not an agriculturist. The suit will not lie even against D for the document is not admissible in evidence for any purpose.⁶

(2) M executed a Kabuliyat in favour of N in the following terms: 'I admit Rs. 460 are due from me to N. I also owe him Rs. 485 under a consent decree and Rs. 489 as a fresh advance. I agree to pay this sum with interest. For the same I give in mortgage the property mentioned in the same decree and also my house. If I fail to pay, the property should be sold...' This Kabuliyat

1 Mahadeo v. Mahadu, 22 Bom. 788.

2 Sai Kon Appa v. Nana, 1896 P. J. 707.

3 Bapuji v. Mahadeo, 1897 P. J. 137.

4 Dinsha v. Hargovindas, 13 Bom. 215 = 1888 P. J. 134.

5 Mahadeo v. Mahadu, *Supra*.

6 Dinsha v. Hargovindas, *Supra*.

only evidences an intention to create a mortgage, and hence, though not executed before a village registrar it can be admitted in evidence to show the intention of the parties, and N can obtain a decree directing M to execute a mortgage in terms of the *Kabuliyat*.¹

8. Proof aliunde:—This section does not prevent the defendant from proving the payments by any one of the ordinary legal modes of proof. Illustration (e) to S. 91 of the Evidence Act shows that a payment may be proved otherwise than by a written receipt though such be given.²

9. Area for which a village-registrar is appointed:—This section applies only in an area for which a village registrar is appointed. With the disappearance of the village registrars this section has become inoperative. Now only those documents which are mentioned in S. 17 of the Registration Act ought to be registered. But in doing so, the procedure laid down in S. 63 A has to be observed by the agriculturist executing the document.

10. Acted upon:—When it is said that no Court shall act upon a certain document, something more is dealt with than mere procedure. The words do not deal with a mere matter of evidence, but in substance render the document invalid and inoperative.³ So where the Legislature has prohibited the Court from acting upon any particular document, the prohibition is not avoided merely by an admission of the execution of the deed by the defendant.

11. The proviso:—The general terms of the section are controlled by the proviso which directs that nothing contained in the section shall (1) prevent the admission of any instrument in evidence in any criminal proceeding, or (2) apply to any instrument which is executed by an agriculturist merely as a surety, or to any instrument required by S. 17 of the Registration Act to be registered under that Act. The last clause was added by S. 9 of Act XXIII of 1886 and it has been held that the clause involves not merely a change of procedure but also a change of existing rights, and so is not retrospective in operation.⁴ Before

1 Mahadeo v. Mahadu, 22 Bom. 789 =1897 P. J. 190.

2 Bala v. Shiva, 1897 P. J. 450; Kefari v. Gajal, 18 Bom. 690=1893 P. J. 460.

3 Hicks v. Powell, L. R. 4 Ch. App. 741.

4 Javanmal v. Muktabai, 14 Bom. 516.

this clause was added, the law of registration of all documents executed by the agriculturists was contained in Ss. 56 and 60, and so an instrument registered under these sections was held to be validly registered though it was not registered under the Registration Act.¹

[^a]57. When any persons intend to execute any instrument to which section 56 applies, ^{Such instruments to be written by all such persons shall appear before the or under the superintendence of, Village-registrar appointed for the area a Village-registrar and executed in his presence.} in which the agriculturist, or, when there are several agriculturists intending to execute the instrument, any one of such agriculturists, resides, and such Registrar, after satisfying himself in such manner as he deems fit as to the identity of the intending executants and receiving the fee (if any) prescribed by the Local Government in this behalf, and the stamp (if any) which may be required by law, shall write the instrument, or cause the same to be written under his superintendence; and after reading the same aloud, or causing it to be so read, in the hearing of the intending executants, shall require them to execute it in his presence.

Every instrument so written and executed shall ^{Attestation of such instruments.} at the time of execution be attested by the Village-registrar, and also, if any of the executants thereof is unable to read such instrument, by two respectable witnesses.

For the purposes of this section every executant of any such instrument shall appear in person before the Village-registrar; but every other party thereto

(a) New section 57 was substituted for the original s. 57 by Act XXIII of 1881, s. 13.

¹ Mahadu v. Bayaji, 13 Bom. 239 = 1893 P. J. 596.

may appear either in person or by any agent, being his relative, servant or dependant, whom he has duly furnished with a power-of-attorney,^[a] executed and authenticated in such manner as the Local Government may, from time to time, by rule prescribe,^[a] authorising him to appear and act on his behalf.

Synopsis of the Commentary.

- | | |
|--|---|
| <p>1. Scope of this section.</p> <p>2. Executant shall appear in person.</p> <p>3. Presence of the other party.</p> | <p>4. Power of attorney.</p> <p>5. Village registration rules.</p> <p>6. Attested.</p> |
|--|---|

1. Scope of this section :—This section lays down the special procedure that has to be followed in registering the instruments under S. 63A which are to be compulsorily registered under S. 17 of the Indian Registration Act.¹ The special procedure laid down here is that (1) every executant of every such instrument must appear in person before the village registrar; every other party to the instrument may appear in person or through a duly authorised agent; (2) the registering officer is to satisfy himself of the identity of the person; (3) he is then to write the instrument or cause it to be written under his superintendence; (4) he is to read it or cause it to be read aloud, in the hearing of the intending executants; (5) and after the instrument is executed by the executant, it shall be attested by the registering officer, and if the executant is unable to write, it shall further be attested by two respectable witnesses.

2. Executant shall appear in person :— This section lays down that every executant of any instrument shall appear *in person* before the Village registrar. It allows the other party to appear either in person or by an agent furnished with a power of attorney. But no such option is given to the executant of the instrument. In special cases, the instrument can be prepared at the residence of the executant, and the Village registrar will attend there (See Rule 25 of Village Registration Rules). But it seems to be the intention of the Legislatura that the executant

[a—a] These words were inserted by Act XXII of 1882, s. 16.

1 Shripati v. Balwantrao, (1923) 26 Bom. L. R. 149.

should *himself* execute the document. In a recent case,¹ however, Macleod, C. J. ruled that the special procedure laid down in this section must be followed even if the document is executed by a non-agriculturist holding a power-of-attorney from the agriculturist, implying thereby that an instrument can be validly executed by an agriculturist giving a power-of-attorney to another for the same purpose.

(For further discussion see note under this head given under S. 63A.)

3. Presence of the other party:— Under this section the other party to an instrument may appear either in person or by an agent duly furnished with a power-of-attorney. It seems therefore that the other party must be represented at the time of execution. The words 'may appear,' cannot be interpreted to mean 'may or may not appear,' but only to mean 'may appear in person' or 'by an agent.' But it was laid by Macleod, C. J. in a recent case² "whatever was intended by the provisions of Ss. 57 and 59 of the D. A. R. Act which are incorporated in S. 63A the only persons who are bound to appear before the Registrar are the persons who intend to execute any instrument to which the provisions of the Act are applicable. Though the third para of S. 57 provides that "every executant of any such instrument shall appear in person before the village registrar; but every other party thereto may appear either in person or by an agent being his relative, servant or dependant whom he has duly furnished with a power-of-attorney," if such other party is not bound to be present under the first para of the section, then it cannot be said that the document is not duly registered according to the provisions of the Indian Registration Act, if he does not appear. (For further discussion of this case see note on S. 63A under personal presence of the other party.)

4. Power of Attorney:— The powers of attorney recognizable for purpose of S. 57 are given in Rule 50 of the Village Registration Rules. See Appendix D.

5. Village registration rules:— For details as to the

¹ Bhagu v. Narayan, 28 Bom. L. R. 428 = A. I. R. 1926 Bom, 337 = 34 I. C. 558.

² Shripati v. Balwantrao, 26 Bom. L. R. 149 = A. I. R. 1924 Bom. 345 = 80 I. C. 274.

procedure of registration, etc., see Village Registration Rules given in the Appendix.

6. Attested :— The word is thus defined in the Transfer of Property Act, 1882, S. 3 :—

“ Attested ” in relation to an instrument, means and shall be deemed always to have meant, attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument in his presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person and each of whom has signed the instrument in the presence of the executant, but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary,

58. Every Village-registrar shall keep a register of instrument^s executed before him in such form as shall, from time to time, be prescribed by the Inspector-General of Registration.

As soon as all the^[a] intending executants have executed any instrument^[a] before a Village-registrar, he shall make a copy of it or cause a copy of it to be made in his register, and shall deliver the original instrument to the party entitled to the custody of the same^[b].

Previous to delivery, the original instrument ^[c] shall be endorsed under the Village-registrar's signature, with the date of registration, the name and residence of the Village-registrar, and the volume and page of the register in which the instrument has been registered.

^[c]A certified copy of any entry in the register shall be granted by the Village-registrar, free of charge,

[a—^a] These words were substituted for the original words by Act XXIII of 1881, s. 14.

[b] Words repealed by Act XXIII of 1896, s. 10 (1) and (2), are omitted.

[c] This paragraph was added by Act XXIII of 1890, s. 10 (3).

on the application of any party to the instrument to which the entry relates, or of his agent or representative, and the copy shall be admissible as evidence of the contents of the instrument.

59. In every instrument written by, or under the superintendence of the Village-registrar, the amount and nature of the consideration, if any, shall be fully stated. The Village-registrar, shall also endorse upon the instrument a note under his hand, recording whether or not the transfer of the consideration stated therein or of any part thereof, took place in his presence.

If the instrument modifies, or wholly or partly supersedes, a previous instrument, such previous instrument shall be produced before the Village-registrar and shall be fully described in the instrument to be executed, and shall be marked by the Village-registrar under his hand for identification.

[*] Provided that if it is alleged that any such previous instrument is on the record or otherwise in the custody of a Court, or is lost, or has been destroyed, the Village-registrar, after ascertaining that such previous instrument was duly registered, may permit a certified copy thereof to be produced in lieu of the original; and in every such case the following procedure shall be observed, that is to say :—

(a) the contents of the certified copy shall be fully

[a] This proviso was added by Bom. Act I of 1902, s. 3,

described in the modifying or superseding instrument, and the said copy shall be marked by the Village-registrar under his hand for identification, and shall then be delivered to the person who produced it ;

(b) if the previous instrument is lost, or has been destroyed, and the registered entry thereof is in his custody, the Village-registrar shall endorse on such entry a note under his hand as to the modification or supersession of the said instrument ;

(c) if the previous instrument is in the custody of a Court, or if it is lost, or has been destroyed, and the registered entry thereof is in the custody of another officer, the Village-registrar shall forward a certified copy of the entry in his register relating to the modifying or superseding instrument to such Court or officer, with a report explaining the circumstances, and such Court or officer shall on receipt thereof, endorse on such previous instrument or registered entry, a note as to the modification or supersession of the said instrument.

Object of the Proviso:— Para 3 of S. 59 of the Act requires that the original of any instrument which is to be modified or wholly or partly superseded by a fresh instrument, shall be produced before the Village-registrar. It was found that the absence of any exceptions to provide for cases in which the original might have been lost or destroyed, or was otherwise for good reasons not available, occasionally produced hardship. To remove this hardship, such an exception provided with adequate safeguards against the possibility of its being used as a means of fraud was thought necessary to be embodied in the Act.¹

¹ Vide Statement of Objects and Reasons, (Bom. Act I of 1902).

60. Every instrument executed and registered in accordance with the foregoing provisions shall be deemed to have been duly registered under the provisions of the Indian Registration Act, 1877 [a]; and no instrument which ought to have been executed before a Village-registrar but has been otherwise executed shall be registered by any officer acting under the said Act, or in any public office, or shall be authenticated by any public officer.

[b] **61.** (1) The Local Government may appoint one or more officers to exercise by themselves or their subordinates a general superintendence over, all Village-registrars, and may either make rules, or empower such officer or officers to make rules, from time to time, consistent with this Act for regulating the proceedings of the Village-registrars and for providing for the custody of their records.

(2) The Local Government may, by order to be published in the *Government Gazette*, declare that any documents other than wills remaining unclaimed in any registration office in any district or part of a district to which this Act applies, for a period exceeding two years, may be destroyed.

62. Nothing in this Act shall be deemed to require any instrument, to which the Government or any officer of Government, in his official capacity [c] is a party, to be executed before a Village-registrar.

[a] The reference to Act III of 1877 should now be read as applying to Act XVI of 1908.

[b] This section was substituted for the original s. 61 by Act VI of 1895, s. 15.

[c] The words and figures "or any society registered under the Co-operative Credit Societies Act, 1904," which were inserted after the word "capacity" by Bombay Act I of 1910, Serial No. 3 of the First Schedule, repealed by Bombay Act I of 1912, s. 3, are omitted.

63. The Local Government may, from time to time, make rules regulating the appointment, suspension, dismissal and remuneration of Village-registrars, and prescribing the fees to be levied by them.

Power of Local Government to make rules.

[^a]CHAPTER VIII-A

REGISTRATION OF INSTRUMENTS REFERRED TO IN
SECTION 17 OF THE INDIAN REGISTRATION
ACT, 1877^[b].¹

63A. (1) When an agriculturist intends to execute any instrument required by section 17 of the Indian Registration Act, 1877, ^[b] to be registered under that Act, he shall appear before the Sub-registrar within whose sub-district the whole or some portion of the property to which the instrument is to relate is situate, and the Sub-registrar shall write the instrument, or cause it to be written, and require it to be executed, and attest it and, if the executant is unable to read the instrument, cause it to be further attested, and otherwise act in accordance with the procedure prescribed for a Village-registrar by sections 57 and 59 of this Act, and shall then register the instrument in accordance with the provisions of the Indian Registration Act, 1877.^[b]

Mode of execution by agriculturists of instruments required to be registered under Act III of 1877.

[a] Chap. VIII-A was inserted by Act XXIII of 1886, s. 11.

[b] The reference to Act III of 1877 should now be read as applying to Act XVI of 1908.

¹ Now Act XVI of 1908.

(2) An instrument to which sub-section (1) applies shall not be effectual for any purpose referred to in section 49 of the Act last-mentioned unless it has been written, executed and attested in the manner provided in that sub-section.^[a]

Synopsis of the Commentary.

<p>1. Local extent.</p> <p>2. Scope of this chapter.</p> <p>3. Old law.</p> <p>4. Introduction of this section.</p> <p>5. A necessary amendment.</p> <p>6. Effect of non-registration.</p> <p>7. Effect of registration.</p> <p>8. The special procedure is</p>	<p>mandatory.</p> <p>9. Personal appearance of the executant.</p> <p>10. Where a decree for execution of a document is passed.</p> <p>11. Personal presence of the other party.</p> <p>12. Attest it.</p>
---	---

1. **Local extent** :— This section extends to the four districts of Poona, Satara, Sholapur and Ahmednagar. *vide* the table given under. S. 1.

2. **Scope of this chapter** :— The documents that require registration under the D. A. R. Act may be divided into (a) document of which registration is compulsory under the Indian Registration Act, 1908, and (b) documents that need not be registered under that Act, but the registration of which is compulsory under this Act as provided by S. 56. Documents falling under (b) are to be registered according to the rules mentioned in Chapter VIII. But now since the abolition of the Village Registrars such documents need not be registered at all. This chapter provides the procedure that has to be followed in registering documents mentioned in class (a). It lays down that in registering such documents, the procedure laid down in Ss. 57 and 59 of this Act has to be followed in addition to the procedure under the Registration Act.

[a] The words, brackets and figures. " sub-section (1) shall not apply to any instrument to which any society registered under the Co-operative Credit Societies Act, 1904 is a party, " which were inserted by Bombay Act I of 1910, Serial No. 4, of the First Schedule, repealed by Bombay Act I of 1912 s. 3 are omitted.

An adoption deed is not compulsorily registrable under S.17 of the Indian Registration Act, and hence it need not be registered under this chapter even though the executant is an agriculturist.¹

[Note:— About this chapter, the Commission appointed in 1911-12 to enquire into the working of the D. A. R. Act, said “ now that chapter VIII has become inoperative, the retention of chapter VIII A containing S. 63A is anomalous. It is proved that the writing of a document by, or under the superintendence of a Village Registrar constitutes no safeguard to the agriculturist; and since the object of this chapter was to bring the procedure regarding instruments executed by agriculturists before sub-registrars in the four districts into line with that regarding those executed before Village Registrars, the principle *raison d'être* has vanished. It is now obviously desirable to maintain a uniform procedure regarding registration by Sub-registrars in the whole Presidency.]

3. Old Law:— Before this chapter was introduced in the D. A. R. Act, (by Act XXIII of 1886), the law of registration of documents by agriculturists was contained in S. 56 of the D. A. R. Act, and all documents by agriculturists, whether coming under (a) or (b), were to be registered according to the provisions of chapter VIII; and when so registered, they were admissible in evidence though not registered under the Registration Act,² Instruments not registered under chapter VIII were not admissible in evidence though registered under the Registration Act.³

4. Introduction of this section:— It was recommended by the special Judge in 1883 that instruments affecting title to immoveable property should be registered before properly qualified Sub-Registrars of Taluka towns, and the Kulkarni (now Talathi) of every village where the land is situate should be furnished with a note of the registration, which he should enter in an index book against the number of the holding referred to. The Local Government accepted this suggestion partially and on their recommendation this chapter was introduced in the Act.⁴

5. A necessary amendment:— The result of the introduction of this chapter, together with the abolition of village registrars is that only those documents that fall under S. 17 of the Registration Act have to be registered; and where the executing party is an agriculturist the provisions of S. 57 and 59 have to be followed. But as under the Registration Act documents less than Rs. 10 0 in value need not be registered, so in the case of agriculturist also, the registration of such documents is not compulsory. But as the Deccan agriculturists

8 Vishwanath v. Rahibai, 55 Bom. 102=32 Bom. L. R. 1885.

2 Mahadu v. Bayaji, 19 Bom. 239=1899 P. J. 596.

3 Javanmal v. Muktabai, 14 Bom.

516=1890 P. J. 33.

4 Selections from the Records of Government of India, Vol. II p. 1. See also Statement of Objects and Reasons of Act XXIII of 1886.

are very poor, they generally enter into transactions of value less than Rs. 100; and again even in transactions of more than Rs. 100 in value, the Registration Act does not prohibit the splitting of the transaction so as to bring each transaction below Rs. 100. The result in either case is that the agriculturist does not get the protection contemplated by this Act. It is, therefore, in the interests of agriculturists to amend S. 63A so as to render compulsory the registration of all transactions relating to immoveable property when the executing party is an agriculturist.

6. Effect of non-registration:— S. 49 of the Registration Act deals with the effect of non-registration of documents required to be registered under S. 17 of that Act or under the Transfer of Property Act. The section runs:—

No document required by section 17 or by any provision of the Transfer of Property Act, 1882 to be registered shall:—

<i>Effect of non-registration of documents required to be registered.</i>	(a) affect any immoveable property comprised there-
	in, or
	(b) confer any power to adopt, or
	(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:

“ Provided that an unregistered document affecting immoveable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under chapter II of the Specific Relief Act, 1877, or as evidence of part performance of a contract for the purpose of Section 53A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument.”¹

7. Effect of registration:— Under S. 48 of the Registration Act, all non-testamentary documents duly registered and relating to any property take effect against any oral agreement or declaration relating to such property except in the case of (i) agreements or declarations accompanied or followed by delivery of possession where the same constitutes a valid transfer under any law for the time being in force; and (ii) except in the case of mortgage by deposit of title deeds as defined in S. 58 of the Transfer of Property Act, 1882.

S. 50 of the same Act provides that certain registered documents relating to land take effect against unregistered documents.

According to the proviso to S. 68 of the Indian Evidence Act, 1872, “it shall not be necessary to call an attesting witness

¹ Added by Act XXI of 1923.

in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied.

8. The special procedure is mandatory.— The special procedure laid down by this section and sections 57 and 59 is mandatory and has to be followed even where a non-agriculturist executes a document for an agriculturist under a power of attorney. For S. 63A was enacted in order to provide protection to agriculturists intending to execute instruments required by S. 17 of the Indian Registration Act to be registered. If it had been intended that this section should not apply in the case of a document executed by an agriculturist through an attorney, then it would have been so stated in the section. It must be remembered that when a party executes a power of attorney enabling the attorney to deal with his property and execute a conveyance on his behalf, he is still the executing party. S. 63A clearly applies to agriculturists who intend to sell or mortgage their properties and the fact that an agriculturist gives a power of attorney to another person to execute a conveyance or mortgage on his behalf cannot prevent the application of the section.¹

Illustration.

The property in dispute belonged to G, an agriculturist, who was convicted of murder and sentenced to death. G gave a power-of-attorney to T, a non-agriculturist, to sell his property and raise money for prosecuting an appeal against the conviction. T sold the property to N. The formalities required by S. 63A were not gone through. The sale-deed is invalid; for though the deed was executed by T, a non-agriculturist, the real executing party must be taken to be G who was an agriculturist.²

9. Personal appearance of the executant.— *He shall appear.*— This case (*Bhagu v. Narayan*) implies that an agriculturist can give a valid power of attorney to another person to execute and have registered a document for him, and that if, the provisions of Ss. 57 and 59 are complied with such registration

¹ Per Macleod C. J. in *Bhagu v. Narayan*, (1925) 28 Bom. L.R. 428.

² *Ibid.*

would be valid. In other words, it lays down that an agriculturist executant need not personally appear before the sub-registrar. With due respect, it may be submitted that it is difficult to accept this view expressed by the learned Chief Justice. Ss. 57 and 59 are incorporated in S. 63A¹ which lays down that the Sub-registrar is to 'act in accordance with the procedure prescribed for a Village-registrar by Ss. 57 and 59 of this Act.' Now S. 57 lays down that 'every executant shall appear in person before the Village-registrar; but every other party thereto may appear either in person or by an agent' etc. This clearly shows that it was the intention of the Legislature that the executant should in every case be made to appear *in person* before the Sub-registrar. Again, Rule 25 provides for special cases when agriculturist executants are unable to attend before the registering officers owing to illness, confinement in jail, etc., in which cases the registering officer is to attend at the residence of any person desiring to have an instrument prepared' (See Rule No. 25 Village Registration Rules, given in the Appendix). So it seems that under this Act each document has to be personally executed by an agriculturist, either by the agriculturist going to the office of the Sub-registrar or the Sub-registrar going to the residence of the agriculturist.

Under the Indian Registration Act, the *personal* appearance of the executant is not peremptory; the document may be presented, under that Act, even by a person holding a power of attorney [S. 32 (c)].

10. Personal presence of the executant when there is a decree for specific performance by execution:— Under this section when an agriculturist intends to execute a document he shall appear before the Sub-Registrar, etc. But a difficulty occurs in a case like the following: A obtains against B, an agriculturist, a decree for specific performance of a contract of sale, directing B to pass a sale deed in his favour. He then files a *darkhast* against B for getting the sale deed executed in his favour. B remains absent in spite of notice of *darkhast* having been served upon him. What is the procedure in such a case? If the *Court*

¹ *Shripati v. Balwantrao*, 26 Bom. L. R. 149.

get the document written in its own office and sends the copy to the Sub-Registrar for registration, will the registration be valid in view of the wording of S. 63A? It may be submitted that such registration will be valid; for, S. 63A does not apply to this case at all. That section applies to a case where an agriculturist *intends* to execute a document. Here the agriculturist does not intend to execute the document, but it is the Court which is executing it, in its power as an executing court. So the execution as described above will be perfectly valid.¹

11. **Personal presence of the other party:**—The party in whose favour a document is executed is *not bound* to appear at the time of the execution before the Sub-registrar. Whatever was intended by the provisions of Ss. 57 and 59 of the D. A. R. Act, which are incorporated in S. 63 A, the only persons who are bound to appear before the Registrar are the persons who intend to execute any instrument to which the provisions of the Act are applicable. Though the third para of S. 57 of the Act provides that "every executant of any such instrument shall appear in person before the Village-registrar; but every other party thereto may appear either in person or by an agent, being his relative, servant or dependant, whom he has duly furnished with a power-of-attorney." if such other party is not bound to be present under the first para of the section, then it cannot be said that the document is not duly registered according to the provisions of the Indian Registration Act, if he does not appear.²

Illustration.

S, an agriculturist, passed a Kabuliyat in favour of G. G was represented before the Sub-registrar by his Vahivatdar R, who was not furnished with a power-of-attorney. R signed the document and the declaration required by rule 23. The deed was challenged on the ground that execution by R was not proper. It was held that the execution is valid, for the executee is not bound to appear at all.³

[*Notes* :— This case seems to have been decided on the ground that under the first para of S. 57, the executee is not at all bound to appear before the Sub-Registrar and hence the execution of the document in his absence cannot be

¹ *Vide* proceedings of the Judicial Conference of the Poona District, 1934.

² Per Macleod, C. J. in *Shripati v. Balwantrao*, 26 Bom. L. R. 149.

³ *Ibid.*

challenged. But, it may be submitted with respect that this interpretation of the section does not seem to be correct. The option given by para 3 of S. 57 cannot be taken to apply to appearance before the registering officer. It only means that the appearance may be either 'in person' or 'through an authorised agent'. For, according to Rule 23 of the Village Registration Rules, which have the force of law, the Registering Officer is bound to inquire, and if the parties answer in the negative he has to endorse on the document, a declaration that the 'instrument does not modify or wholly or partly supersede any previous transaction or instrument,' and obtain thereto the signature of the claiming party or his authorised agent. If the necessary signature and declaration of the claiming party are absent, the document cannot be an instrument which is duly registered according to the special provisions of the D. A. R. Act, and so it would not be effectual for the purposes referred to in S. 42 of the Registration Act according to para 2 of S. 63 A of the D. A. R. Act.¹ The words 'authorised agent' in Rule 23 are very significant. The above declaration is an admission by which the claiming parties enter into an obligation. Now in order to validly bind the parties, such declaration must be made either by the parties or by one who has legal authority to do so. Under these circumstances how can the provisions of Rule 23 be satisfactorily carried out unless the claiming party or his authorised agent appears personally before the Registering Officer?

Again, since the provisions of S. 57 and Rule 23 are intended for protecting the interests of agriculturists, the word 'may' must be taken to have a compulsory force. For the rule of interpretation in such cases is thus laid down or Maxwell: "Statutes which authorise persons to do acts for the benefit of others, or, as it is sometimes said, for the public good or the advancement of justice, have often given rise to controversy when conferring the authority in terms simply enabling and not mandatory. In enacting that they 'may' or 'shall if they think fit,' or 'shall have power,' or, that 'it shall be lawful' for them to do such acts, a statute appears to use the language of mere permission, but it has been so often decided as to have become an axiom, that in such cases, such expression may have—to say the least—a compulsory force.² The reason is that when a donee of the power has his own interests or convenience to consult, the word 'may' is plainly permissive only and a mere privilege or license is conferred which he may exercise or not at pleasure. But when a duty is at the same time cast upon the persons empowered then the intent of the Legislature is to make the exercise of such power compulsory."³

For these reasons, it seems that this decision shall have to be reconsidered when an occasion arises for the same.

12. Attest it:— When an instrument which an agriculturist intends to execute is prepared, and executed by the agricultu-

¹ See the Judgment of the Subordinate Judge in the above case.

² See Maxwell, Interpretation of

Statutes, p. 424, 5 Ed. (1912).

³ See Maxwell: interpretation of Statutes, pp. 296-37, 5 rd. (1912).

rist it is to be attested by the Sub-registrar, and if the executant is unable to read the instrument, it is to be further attested in the manner given in S. 57, i. e. by two respectable witnesses.

This attestation under the D. A. R. Act is necessary in the case of all documents executed by agriculturists whether required by law to be attested or not. But the only effect of such attestation will be that the document will be held to be properly executed. It will not be sufficient to effect a transfer of property unless the document is validly executed and attested in the manner required by the T. P. Act. Thus S. 59 of the T. P. Act lays down that when the principal money secured by a mortgage is one hundred rupees or upwards the mortgage must be effected only by a registered instrument signed by a mortgagor and attested by at least two witnesses. Hence a mortgage for more than Rs. 100 executed by an agriculturist must be signed by two independent witnesses in order that there should be a valid transfer of interest to the mortgagee. If it is signed by one witness only there will be no valid mortgage.¹

Illustration.

R purported to mortgage his property to L to secure repayment of Rs.1400. The mortgage was attested by the Sub-registrar who was bound to attest it under this section, and the writer of the deed had in concluding the writing of the body of the document, stated that it was written by him. Here as the writer's name appears before the names of the executing parties he cannot be said to have attested the document. So there is no valid attestation by two witnesses as required by the T. P. Act, S. 59.²

Note :—Where mortgage deeds are presented, Sub-registrars should be careful to see that the provisions of S. 59 of the Transfer of Property Act, regarding attestation by two witnesses, are invariably complied with. The attention of the parties should be drawn to the above provisions if the deed fails to comply with them. Attention should be given to the same provisions in drawing up mortgage deeds under S. 68A of the D. A. R. Act.³

¹ Ranu v. Laxmanrao, 33 Bom. 24 = 10 Bom. L. R. 249.

² Ibid.

³ Order No. 177 of the Code of Standing Orders of the Registration department; p. 38 (1925 Ed.).

CHAPTER IX

OF RECEIPTS AND STATEMENTS OF ACCOUNT.

The Commission appointed to enquire into the causes of the Deccan Riots of 1875 found that one of the causes of the agriculturists being perpetually in debt, and of the relations between them and the Sawkars being so much strained was the fraud practised by the Sawkars on their debtors. The Sawkars generally (a) gave no credit to the debtors for the payments made by them; and (b) refused to explain or wrongly represented their accounts to the debtors.¹ This chapter was enacted to provide safeguards to the agriculturists against such frauds as these.² It makes compulsory for the Sawkar (i) to give written receipt to the debtor for any payment made by him (S. 64); (ii) to give him an annual statement of account (S. 65); and (iii) to have the account made up from time to time in a pass-book (S. 66). The receipt for any payment made must be given whether the debtor demands the same or not, but the statement of account and the pass-book have to be given only if the agriculturist demands the same. If the creditor refuses or neglects to tender the receipt or statement or pass-book, he is to be punished with a fine (S. 67).

The provisions of this chapter, theoretically unobjectionable, have practically proved inoperative, though receipts under S. 64 are at times given. In order to bring these beneficial provisions into general use it may be suggested (i) that the making up of an annual statement of account, and the giving of a pass-book should be made compulsory in each case; for it is not possible for an ignorant agriculturist who depends on the goodwill of his Sawkar to insist on getting the same. Secondly, the co-operation of the criminal courts should be secured, and a breach of any of these rules should be punished in each case; and thirdly steps may be

¹ See Report of the Deccan Riots Commission of 1875.

² See Hon. Mr. Hope's Speech in introducing the Bill. Vide proceedings in G. G.'s Council for the purpose

of making laws and regulations, Vol. XVIII pp. 116 and 153. See also Statement of Objects and Reasons of Act XVII of 1873.

taken to make the provisions of this chapter more widely known.¹
 "It must be made in the interest of the money-lender to keep proper books of accounts and this can be done in a simple manner by refusing him the aid of the Courts of law if he fails to do so."²

64. The person to whom any agriculturist makes any payment of money in liquidation of a debt shall, at the time of such payment, tender to such agriculturist, whether he demand the same or not, a written receipt for the amount of such payment.

Agriculturists
 entitled to written
 receipts.

If such payment is made under any instrument executed before a Village-registrar, the receipt shall, if the agriculturist so require be endorsed on the copy of the instrument furnished to him under section 58.

Commentary.

1. **Receipt:**—Under S. 30 of the Stamp Act a duly stamped receipt has to be given only when the amount or value received exceeds twenty rupees (S. 30). But under this chapter a written receipt must be given by the creditor in every case, whatever be the amount of the payment received by him. This chapter, however, does not alter the stamp law of the country; so the amount of the stamp duty payable for the receipt must be governed by the Stamp Act only.

2. **Money:**—The word money has been defined in this Act as including 'agricultural produce, implements and stock [S. 2(4)]. So where a creditor purchases bullocks from an agriculturist debtor, he receives 'money' and must pass a receipt for the same, failing which he is liable to conviction.³

3. **Payment may be proved under the ordinary law:**—Though it is made compulsory by this section to give a receipt in each case, it does not mean that the receipt is the only admis-

¹ See Reports of the Commission appointed to enquire into the working of the D. A. R. Act, 1891-92 and 1911-12.

² Ibid.

³ Emperor v. Govind, (1914.) 16 Bom. L. R. 689.

sible evidence of the fact of payment; so where the receipt is not given or is not found, any other evidence may be given to prove the fact of payment [See S. 92 Indian Evidence Act, Illus. (e)]. So where in the proceedings for the execution of a decree which awarded possession in case of non-payment of rent, evidence other than receipt was allowed to prove the payment, it was held that neither S. 56 nor S. 64 shuts out such evidence.¹

4. Shall:—The receipt under this section has to be given whether the agriculturist demands the same or not; but the annual statement, and pass-book is to be given only if the agriculturist demands the same.

65. Any agriculturist by whom any money is due under an instrument shall, on such date to annual statements of accounts. in each year as the Local Government, having regard to local custom, may from time to time, by notification in the official Gazette, fix, be entitled to receive, on demand, from the person claiming under such instrument, a statement up to that date of his account under such instrument.

Commentary.

1. The object of this section is to enable the agriculturist to know from time to time his exact position with relation to the debt. If his property is mortgaged, an agriculturist can even sue for an account of the debt, without asking for any other relief (S. 15D).

2. The day of the Diwali festival is fixed as the date on which agriculturists shall be entitled to receive on demand, from their creditors statements upto that date of their accounts.²

66. Any agriculturist in whose name an account is kept by any trader or money-lender shall be entitled to receive from such trader or money-lender, on demand, a pass-book; and to require, from time to

¹ Bala v. Shiva, 1897 P. J. 450. See also Kedari v. Gajai, 1898 P. J. 460. = 18 Bom. 690.

² B. G. G. for 1879 Pt. I p. 334. Notification No. 7058.

time, that his account up to date be written therein and authenticated by the signature or mark of the said trader or money-lender.

An entry so made in any such pass-book of any payment made to the trader or money-lender shall be deemed to be equivalent, for the purposes of section 64, to the grant of a receipt for the amount so entered.

No person whose account has been written in a pass-book as required by this section shall be entitled also to demand an account under section 65.

67. Any person who, in contravention of sections 64, 65 or 66, refuses or neglects to tender a receipt, or a statement of account or a pass-book, or to write or cause to be written, any account or any part of an account in a pass-book, or to attest the same when so written, shall be punished for each such offence with fine which may extend to one hundred rupees.

Penalty for contravention of section 64 to 66.

Commentary.

The punishment under S. 65 of the Stamp Act for not giving a duly stamped receipt as required under S. 30 of that Act is fine extending to one hundred rupees. This Act being intended to safeguard the interests of the agriculturists provides for a higher punishment.

CHAPTER X.

LEGAL PRACTITIONERS.

[^a]68. No pleader, vakil or mukhtar, and no advocate or attorney of a High Court, shall be permitted to appear on behalf of any party to any case before a Conciliator or a Village-munsif^[b] :

Pleaders, etc., excluded in certain cases.

Provided that any party to any such case may be permitted, on reasonable cause being shown to the satisfaction of the Conciliator or Village-munsif, to employ any relative, servant or dependant who is not and has not previously been, a pleader, vakil or mukhtar, or an advocate or attorney of a High Court, to appear either conjointly with, or in lieu of, such party.

When a relative, servant or dependant appears in lieu of a party, he shall be furnished by him with a power-of-attorney defining the extent to which he is empowered to act.

Commentary.

1. **Object of the chapter:**— One of the four objects of the D. A. R. Act was "to arrange disputes by conciliation as far as possible; and to simplify and cheapen the administration of justice." (1) With this view were introduced the Chapters 'On Conciliation' and 'Village-munsifs.' But to their successful working it is necessary that skilled advocacy should be excluded from such Courts; because as Mr. Hope put it "though at times a case involving a small amount may be intricate, and a competent pleader may be of use therein, it must be admitted that a pleader

[a] This section was substituted for the original s. 68 by Act XXIII of 1881, s. 15.

[b] Words repealed by Act XXII of 1883, s. 17, are omitted.

is a weapon at the command of the rich alone; that in simple suits a pleader can often add nothing of value to what is in evidence, but only wastes time and introduces confusion; and that the presence of pleaders pre-disposes some judges to decide on what counsel put before them instead of going independently into merits." At the time of conciliation, it is always necessary that the parties should be brought face to face, to enable them to come to an understanding. On these considerations effect was given to the suggestion of the Secretary of State that professional pleaders should be excluded from the Courts with summary jurisdiction and without appeal upto a limited amount. The model taken for this purpose was the *judges de paix* in France where all pleaders are excluded both in conciliation and trial of suits; and also of the Madras Regulation for Village-munsifs which excluded all professionals, but allows the deputation of a relative, servant or friend.¹

2. Old Law:— Section 68 of Act XVII of 1879 was:—

No pleader, vakil or mukhtar, and no advocate or attorney of a High Court shall be permitted to appear on behalf of any party to any case before a Conciliator or a Village-munsif, or to any case cognizable by a Subordinate Judge under this Act, the subject-matter whereof does not exceed in amount or value one hundred rupees :

Provided that any party to any such case may be permitted, on reasonable cause being shown to the satisfaction of the Conciliator, Village-munsif or Subordinate Judge, to employ any relative, servant or dependant who is not and has not previously been a pleader, vakil or mukhtar, or an advocate or attorney of a High Court, to appear either conjointly with, or in lieu of such party.

Provided also that a Subordinate Judge may permit a pleader, vakil or mukhtar, or an advocate or attorney of a High Court, to appear before him on behalf of any party to any case of the description aforesaid in which, for reasons to be recorded by him in writing, he deems it desirable that the party should have such assistance.

When a relative, servant, or dependant, appears in lieu of a party, he shall be furnished by him with a power of attorney defining the extent to which he is empowered to act.

See Hon. Mr. Hope's Speech in introducing the Bill.

69. When in any suit or proceeding before a Subordinate Judge under this Act to which an agriculturist is a party, any pleader, vakil or mukhtar, or any advocate or attorney of a High Court, appears on behalf of any party opposed to such agriculturist, the Subordinate Judge, if he is of opinion that such agriculturist has not the means of obtaining proper professional assistance may, with the consent of such agriculturist, direct the Government pleader or any other fit person (who is willing so to do) to appear on his behalf.

Power of Court to appoint pleader for agriculturists.

Commentary.

Object:—S. 69 empowers the Court to direct the Government pleader to appear on behalf of a rayat when he is unable to engage the service of a professional advocate and the opposite side is represented by a pleader.¹

CHAPTER XI.

MISCELLANEOUS.

70. No mortgage, lien or charge of or upon any immoveable property belonging to an agriculturist shall be valid unless it is created by an instrument in writing under the hand of the person creating such mortgage, lien or charge.

Mortgages, etc., to be valid only when written.

Nothing in this section shall apply to any mortgage, lien or charge created by mere operation of law,

¹ Statement of Objects and Reasons Act XVIII of 1879.

or in favour of the Government or of any officer of the Government in his official capacity.

Commentary.

1. Object of this section:— In order to provide some safeguard in the interest of agriculturist debtors, this section is intended to invalidate all mortgages etc. created by an agriculturist otherwise than by a written instrument.¹

2. Mortgage charge or lien:— (a) *Mortgage*:— A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability (S. 58 T. P. Act.)

(b) *Charge*:—When immoveable property of one person is, by act of parties or by operation of law, made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is to have a charge on the property (S. 100 T. P. Act).

(c) *Lien*:—Lien is an obligation which by implication of law and not by express condition, binds real or personal estate for the discharge of a debt or engagement, but does not pass any property in the subject of the lien.²

3. Ordinary law:— Under the ordinary law, a charge and a lien can be created without any writing; and in the case of a mortgage, where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title deeds, can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. But where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument signed and attested as aforesaid or (except in the case of a simple mortgage) by delivery of the property.³

Under this section every charge and lien, and every mortgage, irrespective of its value, created by an agriculturist upon his immoveable property must be created only by an instrument in writing under the hands of the person creating it.

¹ See statement of objects and reasons, Act XVII of 1879.

² Fisher on Mortgages.

³ See Transfer of Property Act, S.

4. No mortgage, shall be valid.— See note under S. 56.

5. Section does not apply to agreements.—Under this section a mortgage etc., shall not be valid unless it is created by an instrument in writing under the hand of the person creating it. But when the writing between the parties constitutes only an *agreement* to create a mortgage, etc., it does not fall within the terms of either S. 56 or S. 70 of this Act and it is admissible in evidence to prove the intention of the parties, and the contract they had agreed to enter into. The Court can in such a case order the defendant to pass a mortgage in terms of the agreement.¹

Illustration.

A executed before a Conciliator a *kabulayat* to the following effect: I admit Rs. 460 are due from me to B (under a mortgage). I also owe him Rs. 485 under a consent decree. I agree to pay on this sum interest at 13 p. c. p. a. For the same, I give in mortgage the property mentioned in the said decree, and also my house at Junnar. I will repay the said money in four years. If I fail, the property should be sold and the money should be recovered therefrom. Should the sale proceed fall short, I will personally pay the deficiency.....The Village Conciliator forwarded this *kabulayat* to the Sub-Judge under S. 44 of this Act who refused to file it. The plaintiff thereupon filed the present suit for recovery of the mortgage-debt by sale of the property or in the alternative for an order directing the defendant to execute a mortgage in terms of *kabulayat*. *Held*, that the *kabulayat* did not create a mortgage but only evidenced the intention of the parties to create one. It did not therefore fall under s. 56 of this Act and was admissible in evidence to prove the contract entered into. *Held* also that the plaintiff was entitled to a decree directing the defendant to execute a mortgage in terms of the *kabulayat*.

[^a]71. The last clause of section 258 of the Code of Civil Procedure[^b] shall not apply to payments out of Court made in any proceeding under this Act, in any case

Bar of application
of section 258 Act
XIV of 1882.

[a] Section 71 was inserted by Act VI of 1895, s. 16.

[b] The reference to the Code of Civil Procedure, 1882, should now be read as applying to the Code of 1908 (V of 1908).

where an acknowledgment by the judgment-creditor for the same is produced, or when payment is either admitted by him or proved.

Commentary.

1. Last clause of S. 258.—The last clause of S. 258 of the C. P. Code of 1882 corresponds with cl. 3 of rule 2, Or. 21 of the C. P. Code, 1909, which runs thus: "A payment or adjustment, which has not been certified or recorded as aforesaid (i. e. as given in cl. 1 and cl. 2 of that rule), shall not be recognized by any Court executing the decree."

So under the ordinary law an uncertified payment made out of Court shall not be recognized by the Court executing the decree. But under this section a payment made out of Court in any proceeding under this Act can be proved.

2. Uncertified payment is recognized.—As the clause given above does not apply when the payment is made in any proceeding under this Act, the executing Court will recognize a payment though it is not certified in the manner given in r. 2, Or. 21.

Illustration.

In April 1915, K obtained a decree against C directing payment of Rs. 652 in annual instalments of Rs. 60 each. In Oct. 1915, K died leaving a widow and a minor son. C who was an agriculturist, compromised the decretal debt for Rs. 350 with G and paid the amount. This compromise was not certified by the Court. In 1916, G and the Nazir of the Court who was appointed guardian of the property of the minor son sued C to recover the amount of the first instalment. The compromise was set aside by the Court as not being in the interest of the minor. But the amount of Rs. 350 paid by C to G will be recognised by the Court though it is not certified.

3. Payment in proceedings under this Act.—*The section does not apply to awards:* Under this section, the Court will recognize an uncertified payment only when it is made in any proceeding under this Act. But when the payment is made in any proceeding which is not a proceeding under this Act, *viz.*

1 Chhagarmal v. Farasram, (1921) 29 Bom. L. R. 479 = 45 Bom. 1128.

in a proceeding under an award, the Court will not recognize such a payment; for, a suit to file an award is not a suit of the description mentioned in S. 3, and hence a proceeding in execution of a decree passed in such a suit is not a proceeding under this Act.¹

[^a]71A. In taking an account under section 13 or in any suit under this Act where interest is chargeable, such interest shall be awarded at the following rates :—

(a) the rate, if any, agreed upon between the parties or the persons (if any) through whom they claim, unless such rate is deemed by the Court to be unreasonable; or

(b) if such rate is deemed by the Court unreasonable, or if no rate was agreed upon, or, when any agreement between the parties or the persons (if any) through whom they claim, to set off profits against interest and assessment and similar charges without an account has been set aside by the Court, such rate as the Court may deem reasonable.

Synopsis of the Commentary.

- | | |
|--|---|
| <p>1. Object of this section.</p> <p>2. Power of Court to allow interest.</p> <p>3. Excessive rate of interest.</p> <p>4. Ordinary law. Right to interest.</p> | <p>5. Interest in suits for enforcement of mortgages.</p> <p>6. Higher rate of interest cannot be awarded.</p> <p>7. Calculation of interest.</p> |
|--|---|

1. Object of this section :— This section was added by Act VI of 1895 which Act repealed S. 14 as it stood in Ch. III of the Act. S. 14 was repealed only because it gains a wider

[a] Section 71A was inserted by Act VI of 1895, s. 17.

1 Laxman v. Ramabai, (1925) 28 Bom. L. R. 736=50 Bom. 236; Soj. Sind 10. hro v. Changomal, A. I. R. 1921.

application by being transferred to Ch. XI.¹ The object aimed at by the legislature was to make the provisions applicable not only to S. 13, but to the whole of this Act.

2. Power of Court to allow interest:— The power is given to the Court by S. 1 Interest Act, 1839, which runs thus:—

Upon all debts or sums certain, payable at a certain time or otherwise, the Court before which such debts or sums may be recorded may, if it thinks fit allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand for payment shall have been made in writing so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment; provided that interest shall be payable in all cases in which it is now payable by law.²

3. Excessive rate of interest:—The word "excessive" is thus defined in the Usurious Loans Act, 1918 [Act X of 1918]:—

2 (a) In this section "excessive" means in excess of that which the Court deems to be reasonable having regard to the risk incurred as it appeared or must be taken to have appeared, to the creditor at the date of the loan.

(b) In considering whether interest is excessive under this section, the Court shall take into account any amounts charged or paid, whether in money or in kind, for expenses, enquiries, fines, bonuses, premia, rewards or any other charges, and if compound interest is charged, the periods at which it is calculated, and the total advantage which may reasonably be taken to have been expected from the transaction.

(c) In considering the question of risk, the Court shall take into account the presence or absence of security and the value thereof, the financial condition of the debtor, and the result of any previous transactions of the debtor, by way of loan, so far as the same were known or must be taken to have been known to the creditor.

(d) In considering whether a transaction was substantively unfair, the Court shall take into account all circumstances materially affecting the relations of the parties at the time of the loan or tending to show that the transaction was unfair, including the necessities or supposed necessities of the debtor, at the time of the loan so far as the same were known, or must be taken to have been known, to the creditor (s. 3).

¹ See Statement Objects and Reasons, Amending Act VI of 1895.

² S. 1, Interest Act, 1839 (XXXII of 1839).

4. Ordinary Law. Right to interest:—The ordinary Law about the right of a plaintiff to receive interest when the decree is for payment of money is contained in S. 34 of the C. P. Code, 1908; the right to receive interest prior to the date of suit may be considered under two heads (a) where there is a stipulation for the payment of interest at a fixed rate; (b) where there is no stipulation, at all, for the payment of interest.

(a) *Where payment is stipulated for:*—If the rate of interest is stipulated, the Court must allow that rate upto the date of suit, however high it may be [Usury Laws Repeal Act 28 of 1855 S. 2.]. But if the rate is penal, the Court may award interest at such rate as it deems reasonable [Indian Contract Act 1872, S. 74.]. Even if the rate is not penal the Court may reduce it if the interest is excessive and transaction was substantially unfair.

(b) *Where no rate is stipulated for:*— If there is no express stipulation for payment of interest, the plaintiff is not entitled to interest except in the following cases:—

(i) *Mercantile usage:*— Where it is allowed by mercantile usage.

(ii) *Statutory right:*— Interest is payable where a right to, or an authority for its allowance or payment is conferred by statute. It has thus been provided by the Negotiable Instruments Act XXXI of 1881 that where no rate of interest is specified in a promissory note or bill of exchange, the court may award interest at the rate of 6 p.c., p. a. from the date on which the amount claimed became due and payable (p. 80). Similar provision is made by the Interest Act given above in note 2.

(iii) *Implied agreement:*— Where an agreement to pay interest can be implied from the course of dealings between the parties.

Interest from date of suit to date of decree and from date of decree to date of payment is in the discretion of the Court.

5. Interest in suits for enforcement of mortgages:— The rules given above do not apply to a decree for the enforce-

1 For further discussion See Mulla's | s. 34.
Commentary on Civil Procedure Code, |

ment of a mortgage or charge. Where such a decree is passed the Court is *bound* to award to the mortgagee:—

(i) Interest on the principal *prior* to the date of the suit at the rate provided for by the mortgage [Usury Laws Repeal Act S. 2], unless the rate is penal, in which case the Court may award such rate as it deems proper [S. 74 Contract Act]; or if the interest is excessive and the transaction was substantially unfair, in which case the Court may reduce it [Usurious Loans Act S. 3]; and,

(ii) interest on the principal from the date of the suit up to the date fixed by the Court for the payment of the mortgage, unless the rate is penal or excessive in which case the Court may reduce it as given in (i) above.

(iii) Where the decree is for the sale of the mortgaged property, the Court *may* in its discretion award interest on the aggregate amount of principal, interest and costs from the date fixed for the payment of the mortgage-debt upto the date of realization or actual payment at such rate as the Court deems proper.¹

6. Court cannot award a higher rate of interest:—This section read with S. 13 (e) makes it clear that the Court has to award interest at the rate agreed upon, unless the court considers it to be unreasonable. But this provision does not authorise the Court to enhance the rate agreed upon. The Act was passed, as the Preamble shows, to "relieve" the agriculturist and in his interest. What these provisions contemplate is, that in cases where the court finds that the interest charged is unreasonable or extortionate, it should substitute a reasonable rate of interest, that is the rate which is generally known as the mercantile rate of interest. It is difficult to see how a Court can award to the creditor anything more than he bargains for.²

Illustration.

R (grandfather of S, the plff.) passed a mortgage in favour of the ancestors of the defendant on Feb. 18, 1857. It was for Rs. 201, secured by mortgage of a house, and it was agreed that the amount should be repaid after

1 For further details see Mulla's Commentary on the Civil Procedure Code, s. 34.

2 Shridhar v. Ramchandra, 35 Bom. L. R. 573.

twenty-five years. Only Rs. 100 were then paid in cash to the mortgagor, which under the terms of the deed, was to carry interest at 6 p. c., p. a. Out of the remaining consideration, Rs. 76 were paid nearly three months after the date of the deed. The deed provided that the mortgagee was to go into possession of the house, and pay himself out of the rent. He was placed in possession accordingly. On August 24, 1922 the plaintiff sued to redeem the mortgage. Accounts were taken under s. 13. The lower Court thought that the rate of interest awarded was too low, and hence it awarded interest at 12 p. c., p. a. The Court cannot thus award a higher rate of interest.¹

7. **Calculation of interest:**— See notes 12 and 13 given under S. 13.

[a]72. In any suit^[b] of the description mentioned in section 3, clause (w)^[b], for the recovery of money from a person^[c] who at the time when the cause of action arose was an agriculturist^[d] in any of the districts of Poona, Satara, Sholapur and Ahmednagar^[d] the following periods of limitation shall be deemed to be substituted for those prescribed in the second column of the second schedule annexed to the Indian Limitation Act, 1877^[e] (that is to say):—

(a) when such suit is founded on a written instrument registered under this Act or any law in force at the date of execution of such instrument, — twelve years;

(b) in any other case, — six years :

[a] This Section was substituted for the original s. 72 by Act XXIII of 1881, s. 17.

[b—b] These words were substituted for the original words "under this Act" by Act XXIII of 1886, s. 12 (1).

[c] Words repealed by Act XXIII of 1886, s. 12 (2), are omitted.

[d—d] These words were added by Act VI of 1895, s. 18.

[e] The reference to Act XV of 1877 should now be read as applying to Act IX of 1908.

¹ Shridhar v. Ramchandra, 35 Bom. L. R. 573.

[a] Provided that nothing in this section shall—

(i) apply to a suit for the recovery of money from a person who is a surety merely of the principal debtor if the principal debtor was not, at the time when the cause of action arose, an agriculturist^[b] in any of the districts aforesaid^[b], or

(ii) revive the right to bring any suit, which would have been barred by limitation if it had been instituted immediately before this Act comes into force.

Synopsis of the Commentary.

1. Old law.	tioned in S. 3 (w).
2. Object of this section.	5. In any of the four districts.
3. Conditions of applicability.	6. A written instrument.
4. Suits of the description men-	7. Person.

1. **Old law** :— This section has been amended from time to time. S. 72 of Act XVII of 1879 was :—

In any suit against an agriculturist under this Act for the recovery of money, the following periods of limitation shall be deemed to be substituted for those prescribed in the second column of the second schedule annexed to the Indian Limitation Act, 1877 (that is to say) :—

(a) when such suit is based on a written instrument registered under this Act, or any law in force at the date of the execution of such instrument, twelve years;

(b) in any other case, six years; provided that nothing herein contained shall revive the right to bring any suit which would have been barred by limitation if it had been instituted immediately before this Act comes into force,

For this section was substituted the following section by Act XXIII of 1881 :—

In any suit *under this Act* for the recovery of money from a person *not being merely a surety for the principal debtor*, who at the time when the cause of action arose was an agriculturist, the following periods of limitation shall be deemed to be substituted for those prescribed in the second column of the second schedule annexed to the Indian Limitation Act, 1877 (that is to say) :—

[a] This proviso was substituted for the original proviso by Act XXII of 1886, s. 12 (3).

[b—b] These words were added by Act VI of 1895, s. 18.

(a) when such suit is founded on a written instrument registered under this Act, or any law in force at the date of the execution of this instrument: twelve years;

(b) in any other case: six years.

Proviso:—as in the old section of 1879.

By Act XXIII of 1886 for the words "*under this Act*" above, were substituted the following:—

"Of the description mentioned in S. 3" clause (w). The words from the above section:—"Not being merely a surety for the principal debtor" were repealed by Act XXIII of 1886, S. 12.

S. 11 of Act XXII of 1882 introduced the following as a modifying clause to the section amended as above:

Notwithstanding anything contained in the foregoing sections of this Act the period of limitation for any suit instituted within two years from the day on which this Act came into force, and to which, if this Act had not been passed, S. 72 of the D. A. R. Act, 1879 would have applied, shall be the period prescribed by that section.

2. Object of this section:— This section extending the period of limitation in suits instituted against agriculturists has been introduced in this Act, for there appears to be a pretty general consensus of opinion to the effect that the difficulties of the raiyat are much aggravated by the present law of limitation which compels the money-lenders at very short intervals to sue him or take a fresh bond, either of which steps commonly entails considerable addition to the debt.¹

In introducing the Bill which afterwards was passed as the D. A. R. Act, the Hon. Mr. Hope said regarding s. 72, "There is almost a universal consensus of opinion that, as the Commission² say 'the reduction of the period of limitation has been the cause of considerable hardship to the debtor.' Under the old law,³ the debtor was rarely sued or called upon to renew the bond till nearly the expiration of twelve years, and then he was at most sued under the provision of *damdapat* for twice the principal sum lent. But under the law since 1859,⁴ the creditor is forced within every three years either to sue the

¹ See Statement of Objects and Reasons, Act XVII of 1879.

² The Deccan Riots Commission, 1875.

³ Bombay Regulation V of 1827 which fixed twelve years in the case of

debts supported by a bond, and six years in the case of debts not so supported.

⁴ Act XIV of 1859 by which the periods were reduced to six and three years respectively.

debtor, or to obtain from him a fresh bond for principal and any accumulated interest. In practice he does so nearly every two years, in order to make sure of not missing the period through any accident or default.....The debtor thus suffers the cost of writing and stamping a new bond, is charged compound interest instead of simple, often has to bear the expenses of a suit, and finally, is frequently obliged also to submit to a nominal increase of the principal, as the price of the creditor's forbearing to sell him entirely up.

3. Conditions of applicability.—The following conditions must be fulfilled before this section can be applicable:—

(1) The suit must be of the description mentioned in S. 3 (w).

(2) The debtor must have been an agriculturist at the time when the cause of action arose.

(3) He must have been an agriculturist in any of the four districts of Poona, Satara, Sholapur or Ahmednagar.

(4) If the person sued is a surety merely of the principal debtor, the principal debtor must have been an agriculturist in any of the four districts when the cause of action arose.

4. Suits of the description mentioned in S. 3 (w).—

This reference was substituted for the words 'suits under this Act' because there are no suits properly speaking under this Act. This clause, viz. 'suits of the description mentioned in S. 3 (w)' is intended to include, 'all suits on bonds, khatas, written acknowledgments, and the like,' and would exclude, 'suits for rent, suits for damages etc.' to which there is no necessity of applying a special law of limitation.¹

5. In any of the four districts.—The application of this section was thus limited to the four districts by Act VI of 1895. The select committee observed "It is not expedient to extend the special limitation period in force in four districts, to any other district or part of a district to which the Act may be extended and in which the ordinary law of limitation will run."

6. A written instrument.—For the meaning of the word instrument, see note under S. 56.

Illustration.

R passed a receipt to V in the following terms: 'I have borrowed Rs. 1045 from you from time to time for my private expenses; I have passed you no bond for this money. To-day I have taken Rs. 390 more, making Rs. 1435 in all. For that I will give you a bond fifteen days hence; held on a construction of the above writing, that it was not a mere acknowledgment but was an

¹ Statement of Objects and Reasons, Bill No. 18 of 1886.

agreement founded on an old debt, and a new loan covered by it, and it contained a distinct undertaking that the debtor would pass a bond after 15 days. That the suit must therefore be regarded as based on a written instrument and that it would fall within the provision of S. 72.¹

7. Person:—Status when the cause of action arose:—Under this section, the special period of limitation applies if the person sued was an agriculturist, at the time when the cause of action arose. But if he was thus an agriculturist, but dies before the extended period of limitation is over, leaving minor sons, the latter can be sued for the sum due. The minor sons cannot plead that they were not agriculturists when the cause of action arose, not even being born then. For, it must be taken that the word 'person' in S. 72 is equivalent to the word 'defendant' which occurs in S. 3 Cl. (w), that Clause being referred to in the section.²

Illustration.

M an agriculturist, father of P, executed a bond in favour of A on 19th July 1900. It was registered. The money became payable under the bond on 21st March 1901. The suit was filed in June 1912 against P, the son of M who was dead. The suit is in time because it is governed by S. 72.³

73. [Decision as to whether person is an agriculturist, final.] Repealed by Act VI of 1895, s. 3.

Commentary.

1. Old Law:—The repealed section ran thus:—

Decision as to whether person is an agriculturist final:—

The decision of any Court of first instance that any person is or is not an agriculturist shall, for the purposes of this Act, be final.

2. Effect of repeal of this section:—The repeal of S. 73 opens to revision a decision as to status and leaves it to judicial determination in the same way as any other question of fact.³

[*]73A. When the Collector has taken any immovable property of a judgment-debtor or insolvent into his possession under section 22 or section 59, he may, by an order, exempt from attachment, etc. certain agricultural produce.

[a] Section 73A was inserted by Act XXII of 1882, s. 18.

1 Vasudeo v. Ramkrishna, (1900) 24 Bom. 324=2 Bom. L. R. 122.
2 Pirappa v. Annaji, 17 Bom. L.R. 974.

3 Proceedings of the Supreme Legislature Council for the year 1895, Vol. IV.

order in writing, direct that any other such property not so taken shall be deemed to be reserved for the support of the judgment-debtor or insolvent and the members of his family dependant on him, and may rescind that order.

While any such order continues in force in respect of any immoveable property, agricultural produce grown on that property shall not be attached or sold in execution of a decree passed whether before or after this Act comes into force, and shall not vest in the receiver appointed in any insolvency-proceedings.

Commentary.

1. **Object of this section:**— Ss. 22 and 29 of the principal Act are framed so as to secure to the agriculturist against his creditors the possession of as much of his land as is required for his support and the support of the members of his family who are dependent upon him; but this, it has been represented, is of no avail if the crop he grows on that land is liable to be siezed at the instance of his creditors. To prevent this, this section is inserted in the Act (based on S. 30 of the Ajmere Courts Regulations, 1877) which will exempt from attachment in execution such agricultural produce as may be required for the subsistence of the debtor and his family and as seeds or as fodder for cattle used for agricultural purposes, and provision is also made here to prevent such produce vesting in the receiver in case of insolvency.¹

74. Except in so far as it is inconsistent with this Act, the Code of Civil Procedure^[a] shall apply in all suits and proceedings before Subordinate Judges under this Act.

[a] The reference to the Code of Civil Procedure should now be read as applying to the Code of 1908 (V of 1908).

1 Statement of Objects and reasons for Act XXII of 1882.

Commentary.

1. Application of this section:—*To Subordinate Judges only.*—This section provides that except in so far as it is inconsistent with this Act, the Code of Civil Procedure shall apply in all cases and proceedings before Subordinate Judges under this Act.¹ So if the provisions of this Act are inconsistent with the provisions of the C. P. Code, the latter will, to that extent, be inapplicable. Thus Ss. 7 and 12 of the Act make the examination of the defendant and the investigation into the history of the transaction compulsory. So the Court will have to examine the defendant and his witnesses though they do not appear on the day fixed in the summons and an *ex parte* order is passed against the defendant, but he appears later on when a witness summons is issued for his examination under S. 7.²

This Section does not apply to Assistant and District Judges.—But this section does not say anything about the procedure in proceedings before the Assistant and District Judges. So the procedure in proceedings before a District or an Assistant Judge must be deemed to be in his own discretion and he is not governed by the rules of the C. P. Code.¹ Thus he has a revisionary power in all cases where a failure of justice appears to have taken place. So he can interfere with findings of facts by the Subordinate Judges if he thinks such interference necessary in the interest of justice;³ he can take additional evidence in revision;⁴ he can review his own judgment on the ground of mistake;⁵ he can review an *ex parte* order made by him;⁶ he can remand a case,⁷ etc. and the High Court will not interfere with the discretion of the District or Assistant Judge in such cases.

[See all cases referred here discussed under S. 52.]

1 Vishwanath v. Aba, 1886 P. J. 11; Babaji v. Babaji, 15 Bom. 650; Badaricharya v. Ramchandra, 19 Bom. 113; Ramsing v. Babu Kisansing, 19 Bom. 116.

2 Dulichand v. Dhondi, (1880) 5 Bom. 184.

3 Gurubasaya v. Chanmalappa, 13 Bom. 286=1894 P. J. 20; Umanbhai v. Imratbhai, 1893 P. J. 148; Rayachand

v. Sultan, 18 Bom. 347=1893 P. J. 188.

4 Raoji v. Raghunath, 30 Bom. L. R. 495=52 Bom. 349.

5 Badaricharya v. Ramchandra, 19 Bom. 113; Ramsing v. Babu, 19 Bom. 116 (F. B.)=1893 P. J. 575.

6 Ramchandra v. Draupadi, 20 Bom. 281=1895 P. J. 18.

7 Kondumal v. Kashiba, 1881 P. J. 1.

[a] 74A. Except section 2 and section 21, the provisions of this Act shall not apply to any matter to or in which any society registered under the Co-operative Credit Societies Act, 1904, [b] is a party.

Commentary.

1. **Object of this section.**—The object of this section is to exempt Co-operative Credit Societies registered under the Co-operative Credit Societies' Act from the disabilities imposed upon creditors of agriculturists by the D. A. R. Act. As the object of the Co-operative Credit Societies is to free agriculturists from their old debts, they are bodies working in the best interests of the cultivating classes themselves, so that their object is the same as that of the D. A. R. Act. There is always a guarantee that the interest charged by these bodies will not be unreasonable or exorbitant. While therefore, on the one hand, agriculturists do not require to be protected from the registered societies, on the other hand these societies were fairly entitled to every assistance in the recovery of their just dues. For these reasons, this section exempts all transactions between the societies and their members from all provisions of the D. A. R. Act, except the beneficent provisions of S. 21 which prevents agriculturists from being arrested and imprisoned in execution of money decrees passed against them.

2. **Arrest of agriculturists under the Co-operative Societies Act.**—See note on this subject given under S. 21.

75. The Local Government may, from time to time, make all such rules as it may deem necessary for carrying out the provisions herein contained.

Additional power to make rules.

Commentary.

The rules framed by the Local Government are printed in the Appendices.

[a] Section 74A was inserted by Bombay Act I of 1912, s. 1.

[b] The reference to Act X of 1904 should now be read as applying to Bom. Act VII of 1925.

76. All rules made by the Local Government under this Act shall be published in the official Gazette, and shall thereupon, in so far as they are consistent with this Act, have the force of law.

Appendix A.

Directions to the Court trying Suits under the D. A. R. Act.*

1. To distinguish cases dealt with under the Dekkhan Agriculturists' Relief Act from others, and to facilitate the work of inspecting officers, as well as the compilations of special statistics in districts in which chapter III and not the whole of chapter II is in force, the following abbreviations should be used in the column 'No. of Suit' in the Register of Suits:—

(a) the letter D should be used to signify that the case is dealt with under the Dekkhan Agriculturists' Relief Act;

(b) the letters W, X, Y or Z should be inserted after D in order to show whether the suit is of the description mentioned in clauses W, X, Y or Z of section 3 of the Dekkhan Agriculturists' Relief Act;

(c) the letter P should be inserted after any of the above letters whenever the past history is investigated under sections 12, 13 and 71A;

(d) whenever relief is granted under sections 15A, 15B, 15C, 15D, 16, 17 and 20, such section should also be quoted in the said column.

In the Register of Suits such officer of the Court as the Court may direct, should insert the abbreviations specified in (a) and (b) after the number of the suit in the plaint. In the heading of every judgment in such case the same abbreviations should also occur after the number of the suit; and after a case is decided such officer of the Court as the Court may direct, should add to them the abbreviations specified in (c) and (d) if action has been taken under the sections referred to. If action is taken in execution proceedings, the letter E should be added after the section, and the section should also be specified in the Register of Applications for Execution (Form No. 1 appended to chapter II) in the column "Orders of the Court."

2. The form of summons laid down (see Form No. 1 appended to this chapter) expressly applies to suits of a simple character, which can be at once fixed for final disposal at the first hearing. They are suits against poor debtors who are agriculturists resident within the local jurisdiction of the Court.

The provisions of section 7 of Act XVII of 1879 give ample discretion to the Courts to decide in each case whether the summons should or should not be issued for the final disposal of the suit at the first hearing, and there is no particular reason why such summons should be issued in redemption and account suits. If the summons be not for final disposal, the form prescribed has no application, and no difficulty need arise. (The form of summons is given under S. 7).

* See Manul of Circulars issued by the High Court of Ecmtay for the guidance of the Civil Courts (1925) pp. 146-148.

3. The following instructions issued by a District Judge may be found to be generally useful and are therefore re-issued here though they are not intended to be imperative:—

(i) In suits under the Dekkhan Agriculturists' Relief Act the provisions of sections 7 and 12 should be first complied with and then issues framed. It is not right first to frame an issue like the following: "Was the bond sued on passed for cash payment as alleged by the plaintiff," and then examine the parties. The object of section 12 is that the Court should do its best to discover whether there is any defence on the ground of fraud, mistake, accident, undue influence or otherwise, and issues are to be framed after this duty is discharged, and not before it is discharged.

(ii) The discretion given by various sections of the Dekkhan Agriculturists' Relief Act is to be exercised judicially and not arbitrarily. One Subordinate Judge allows interest only at 9 per cent., in mortgage cases, and at 12 per cent. in other cases. He has never dealt with the question mentioned in section 13 (d) of the Dekkhan Agriculturists' Relief Act, as he takes it for granted that compound interest can in no case be allowed. Again, though in mortgage cases he allows payment by instalments, he awards no interest after the date of the decree, and in the case of simple money decrees, he allows it only if the plaintiff has not received interest at more than 9 per cent., and if the loan is not an old one. Again, if no accounts are forthcoming, he does not proceed as directed in I. L. R. VII Cal. 428—432. There ought to be no hard-and-fast rules, and every effort should be made to do substantial justice and not to follow out and dried methods or invent technicalities.

(iii) Instead of issuing costly commissions, the ordinary practice under section 13 of the Dekkhan Agriculturists' Relief Act ought to be as follows:—

(a) The Subordinate Judge should settle all questions regarding the valuation of grain advances and the allowing of *watav* in cases of difference of currency, etc., and the rate of interest and the allowing of compound interest (clause d), and then call upon the plaintiff to file a statement in the following form with an affidavit as to its correctness within a particular period.

(b) He should then call upon the defendant's pleader (if the defendant has a pleader) to verify the statement, and file his objections, with an affidavit in their support, within a fixed period. If the defendant has no pleader, the Subordinate Judge should tell off a careful karkun to do the verification.

(c) The Subordinate Judge should then himself take a test of the work done and satisfy himself that the bonds and Samadaskhats and the accounts are properly linked, and then frame issues as to the points on which there is any dispute and examine the plaintiff and the defendant or the karkun regarding them. In many cases it may not be found necessary to take any further evidence.

(d) The Subordinate Judge should make the fullest use of section 65(g) of the Evidence Act.

Form of Statement mentioned in paragraph 3(iii) (a) above.

Consecutive No.	Amount of item of principal.	Date of item of principal.	Date of item of payment by debtor.	Amount of interest at from the date in col. 3 to the date in col. 4.	Amount of payment.	Balance in favour of plaintiff.		Balance, if any, in favour of defendant.		Remarks.
						Principal.	Interest.	Principal.	Interest.	
1	2	3	4	5	6	7	8	9	10	11

4. Whenever the status of a party is in question there should be a preliminary issue on the point. The finding on this issue should afterwards be stated in the decree. A party found to be an agriculturist should not be described in the decree as a non-agriculturist or *vice versa*.

5. Where in execution--proceedings, a decree is converted into an instalment decree, the order directing payment of the decretal amount by instalments should be endorsed on the original decree and on the copy thereof, if any, filed with the darkhast; and the fact should be noted in the Register of Suits and the Register of Applications for Execution.

6. In all applications for revision under section 53 of the Dekkhan Agriculturists' Relief Act the District Judge should issue notice to the parties, and hear them, if they desire to be heard, before passing final orders, whether or not the application has been referred for report to any other Court.

(Vide Bombay Government Gazette, Part I, for 1918, page 642.)

7. A Register of Conciliation Agreements under sections 44 and 45 of the Act should be kept in Form No. 2 appended to this Chapter.

8. The District Judges should insert a paragraph on the working of the Dekkhan Agriculturists' Relief Act in the Annual Reports on the Administration of Civil Justice which are submitted by them to the High Court, so that the necessary information regarding it may be embodied by the High Court in the Administration Report annually submitted to the Government of India. The Bombay Government no longer desire a separate and more detailed report for their own information.

Appendix B

Execution by the Collector.

[For the Presidency of Bombay]

90. The law on this subject is contained in sections 68 to 72 of the Code and in the Third Schedule.¹

- No. 3600, Dated the 24th May 1880.* Under the Government Notifications shown in the margin decrees of the nature shown against the following districts shall be transferred to the Collector for execution :—
- No. 762, dated the 9th February 1892.*
- No. 8039, dated the 27 November 1900.*
- No. 5248, dated the 20th September 1907.*

Decrees ordering the sale of any immoveable property belonging to a person who is an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act, which has been specifically mortgaged for the repayment of the debt to which any such decree relates.

Poona.
Satara.
Sholapur.
Ahmednagar.

(a) Decrees for money in the execution of which a Court has ordered the sale of immoveable property belonging to any person who is an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act.

All other Districts.

(b) Decrees ordering the sale of immoveable property belonging to any such person in pursuance of a contract specifically affecting the same.

(1) *S. 68, C. P. Code* :—Under this section the Local Government is given the power to prescribe rules for transferring to Collector execution of certain decrees.

S. 69, C. P. Code :—This section provides that provisions of the third para shall apply to decrees transferred to the Collector.

S. 70, C. P. Code :—This section gives the Local Government power to make rules for the above purpose.

S. 71, C. P. Code :—This section lays down that the Collector acting under these sections shall be held to be acting judicially.

The third Schedule :—The Third Schedule gives the powers of the Collector in execution, and the procedure that he has to follow in such cases.

**Rules prescribed by the Local Government for
regulating the execution of decrees transferred
to the Collector.**

In exercise of the powers conferred by sub-section 1 of S. 70 of the Code of Civil Procedure, 1908 (V of 1908), hereinafter referred to as the said Code, and in supercession of the rules published in Government Notification in the Judicial Department No. 199, dated 24th January 1880, as subsequently amended, the Governor in Council is pleased to prescribe the following rules, regulating the execution of decrees transferred to the Collector for execution under provisions of S. 68 of the said Code in regard to:—

(a) The transmission of such decrees from the Court to the Collector, the procedure of the Collector and his subordinates in executing the same, and the return of such decrees by the Collector to the Court ;

(b) The conferring upon the Collector or any gazetted subordinate of the Collector certain powers, which the Court might have exercised in the execution of such decrees if the execution thereof had not been transferred to the Collector.

(c) Appeals against certain orders passed by officers Subordinate to the Collector.

(1) (a) Transmission of decree to the Collector :—If the Court is satisfied that the decree is one to which this notification applies, it shall cause a copy thereof to be forwarded to the Collector by post, or in such other manner as shall be most convenient.

(b) Along with the said copy the Court shall send—

(i) a statement showing clearly the extent, if any, to which the decree has been already executed, and the portion of the decree still to be executed ;

(ii) a copy of the application for execution of the decree, and of the order for sale, if any, made thereon ;

(iii) any extracts from the record of rights or register of mutations relating to the property that have been furnished to the Court.

*Notes :—*Copy of the judgment should be sent only on the requisition of the executing authority in any particular case or class of cases.

(c) The aforesaid documents shall be prepared at the cost of the parties.

(Vide Government Notification, Home Department, No. 1315, dated 13th June 1924, at page 1433, Bombay Government Gazette for 1924, Part I.)

(2) Transfer of decree by Collector to subordinate officer :—On receipt of the decree and of the other documents mentioned in rule 1, the

Collector may either proceed to execute it himself, or may transfer it for execution, subject to his supervision and control, to any of his subordinates not lower in rank than a Mahalkari.

(3) Hearing of parties ; Notice of hearing ; Production of documents ; Order for execution :— The Collector, or the officer to whom the Collector so transfers the decree, shall without delay appoint a day for hearing any representation which the parties or any of them may desire to make, as to the manner in which the decree should be executed; and shall cause a written notice to be served on each of the parties to the decree of the day so fixed; and shall also require the judgment-debtor to produce all title-deeds and other documents affecting the property in question which may be in his possession or power; and shall, after such enquiry as he considers necessary, proceed according to the methods prescribed in the Third Schedule to the said Code, as may be appropriate in the circumstances of the case.

(4) Further attendance of parties :— The Collector or other officer aforesaid may, from time to time, by similar written notice, require the attendance of the parties to the decree, or any of them, for the purpose of ascertaining their wishes, or of obtaining any information which he may consider necessary to enable him to provide satisfactorily for the execution of the decree; and if any party does not attend in pursuance of any such notice, the Collector or other officer aforesaid shall decide the matter in his absence, and the party so failing to attend shall not afterwards be entitled to be heard with respect to such matter.

(5) Service of notice :—(a) Every such notice, and every notice which the Collector shall issue under paragraph 8 of the Third Schedule to the said Code to the judgment-debtor or his representative, may be served in the manner prescribed by section 191 of the Bombay Land Revenue Code, 1879, or by forwarding the same to the Court to be served upon the pleader, if any, of the party to whom such notice is addressed.

(b) Except as otherwise provided, every other notice issued under these rules shall served in the manner prescribed by section 191 of the Bombay Land Revenue Code, 1879.

(6) Form of orders in execution : diary of Proceedings :— All orders which the Collector or other officer aforesaid shall pass in respect of the execution of the decree, or of the management or sale of the immoveable property of the judgment-debtor, shall be made in writing, and shall be dated and signed by such officer, and a diary of the proceedings shall be kept in the language of the district and in conformity with the instructions¹ relating thereto.

¹ Form No. 9 appended to Chapter I of the Manual of Circulars issued by the High Court of Bombay for the guidance of Civil Courts and officers subordinate to it (p. 53).

(7) Public notice prior to sale to claimants to property :

production of documents :—(a) Previous to proceedings to sell any property, the Collector or other officer aforesaid shall, unless he has already proceeded under paragraph 3 or paragraph 5 of the Third Schedule to the said Code, publish a notice in the language of the district, calling upon all persons having rights in or charges on or claims to the said property or any part thereof, to submit on or before a date, which shall be stated in such notice and which shall not be less than six weeks after the date of such notice, a statement of such right, charge or claim, and to produce the documents, if any, on which such rights, etc., is based.

(b) Such notice shall be published in the manner prescribed in sub-paragraph (2) of paragraph 3 of the Third Schedule to the said Code,

(c) If in the opinion of the Collector or other officer aforesaid any statement so produced is not sufficiently precise or clear, or if it shall appear to the Collector or such other officer that all the documents in the claimant's possession or power relating to the property to be sold have not been produced, he may refuse to receive such statement, and may give or refuse, as he deems fit, time for the production of a fresh statement.

(8) Documents to be treated as confidential and returned :—

The Collector or other officer aforesaid shall peruse the documents of title which any such claimant produces; but such documents shall not, without a special order the reasons for which must be recorded, be handed for perusal to any other person than the Collector or other officer aforesaid, and his clerk, reader or interpreter; and they shall, after such perusal, be restored to the persons who have produced them with an endorsement, signed by the Collector or other officer aforesaid on each, of the date on which and the purpose for which they were presented, and of the date of return and of the person to whom they are returned.

(9) Procedure on sale :—(a) Every sale of property shall be held before the Collector or other officer aforesaid, or before any revenue officer not lower in rank than a Mahalkari's first karkun specially nominated by the Collector or other officer aforesaid in this behalf.

(b) Except as is otherwise provided by the said Code every such sale shall be proclaimed and held in the manner prescribed by the rules for the time being in force relating to the sale of immoveable property in realization of arrears of land revenue.

(c) Every proclamation of any such sale shall contain, in addition to the particulars required by the said rules,

(i) a list of all claims of which statements have been drawn up under paragraph 4 or 5 of the Third Schedule to the said Code or have been

duly submitted to and accepted by the Collector or other officer aforesaid under rule 7 and which shall appear to the Collector or such other officer to be *prima facie* honest and reasonable;

(ii) a list of all claims appearing in the record of rights or the register of mutations;

(iii) a caution that no guarantee is given either of the judgment-debtor's title or of the validity of any claims preferred by third parties,

(10) **Title-deeds of judgment-debtor:**—The Collector or other officer aforesaid shall retain the title-deeds and other documents produced by the judgment-debtor under rule 3, and if the whole of the property to which they relate is sold, shall hand them over to the purchaser.

(11) **Decree-holder not to bid at sale:**—No holder of a decree in execution of which property is sold shall, without the express permission of the Collector or other officer aforesaid, being a gazetted officer, bid for or purchase the property.

(12) **Certificate of sale:**—When any sale has been finally completed, the Collector or other officer aforesaid shall give to the purchaser a certificate of sale in Form No. 38 of Appendix E to the First Schedule to the said Code *mutatis mutandis*.

(13) **Delivery of possession to purchaser at sale:**—When the property sold is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequent to the attachment of such property or of a tenant or other person entitled to occupy the same and a certificate in respect thereof has been granted under the last preceding rule, the Collector or other officer aforesaid shall, on application by the purchaser, order delivery to be made by putting the purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, by proclaiming to the occupant by beat of drum or in such other manner as may be customary at some convenient place that the interest of the judgment-debtor has been transferred to the purchaser, and, unless the occupant is a tenant or other person entitled to occupy the property, if need be, by removing any person who refuses to vacate the property.

(13A) **Resistance or obstruction to possession of immovable property:**—(i) where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Collector complaining of such resistance or obstruction,

(ii) The collector shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same,

(13B) Resistance or obstruction by judgment-debtor :—

Where the Collector is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation, he shall direct that the applicant be put into possession of the property and where the applicant is still resisted or obstructed in obtaining possession the Collector may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation, to be detained in the civil prison for a term which may extend to thirty days.

(13C) Resistance or obstruction by 'bona fide' claimant :—

Where the Collector is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Collector shall make an order dismissing the application.

(13D) Dispossession by decree-holder or purchaser :—(1)

Where any person other than the judgment-debtor is dispossessed of immoveable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Collector complaining of such dispossession.

(ii) The Collector shall fix a day for investigating the matter and shall summon the party against whom the application is made, to appear and answer the same.

(13E) 'Bona fide' claimant to be restored to possession :—

Where the Collector is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment-debtor, he shall direct that the applicant be put into possession of the property.

(13F) Rules not applicable to transferee 'lite pendente' :—

Nothing in rules (13C) and (13D) shall apply to resistance or obstruction in execution of a decree for the possession of immoveable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.

(13G) Order conclusive subject to regular suit :— Any party not being a judgment-debtor against whom an order is made under rule (13B)

rule (13C) or rule (13E) may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit (if any), the order shall be conclusive.

(Vide Government Notification, No. 9851 dated the 19th February 1926 at pages 512-519, Bom. G. G. for 1926, Part I.)

(14) Return of decree to Court :—When execution of the decree has been as far as possible completed and the balance, if any, of all monies which have come to his hands disposed of in accordance with paragraph 9 of the Third Schedule to the said Code, the Collector shall return the papers received by him under rule 1 together with the execution proceedings to the Court by post or in such other manner as shall be most convenient.

(15) Powers of executing officer :—The following powers are conferred on Collectors and on gazetted officers subordinate to a Collector to whom a decree is transferred under rule 2:—

(a) the power specified in sub-rule (1) of rule 72 of Order XXI of the First Schedule to the said Code : Provided that the Collector or other officer aforesaid, to whom an application for such permission may be made, shall not grant such permission unless the decree holder—

- (i) satisfies him that the application is made in good faith, and that the judgment-debtor is not a minor;
- (ii) undertakes that he will not himself or through any other person bid or purchase for a sum less than such amount as the Collector or other officer granting the permission, having regard to the fair market value of the interest to be sold may determine, and that the permission shall be subject to this condition.
- (iii) agrees that if the decree-holder or any one on his behalf becomes the purchaser, the purchase money shall be paid to the Collector or other officer executing the decree unless the decree-holder has obtained an order from the Civil Court that the amount due on the decree or any part thereof should be set off against the purchase-money (Vide Government Notification, Home Department No. 11530, dated 8th December 1920, at page 3429, Bombay Government Gazette for 1920, Part I.).

(b) the powers specified in rules 88 and 86 and sub-rule (1) or rule 92 of Order XXI of the First Schedule to the said Code.

(16) Application to set aside sale :—If any application to set aside the sale under Order XXI rules 89, 90 or 91 of the Civil Procedure Code, and in the case of an application under rule 89, the deposit as required by the

rule be made within the time limited by law to the Collector or the officer aforesaid; he shall accept such application and deposit, and forward such application and the deposit, if any, to the Civil Court and inform the applicant accordingly. (*Vide* B. G. G. for 1925, Pt. I. p. 917.)

(17) Appeals :—An appeal shall lie to the Collector against any order passed under paragraphs 7, 8 and 10(a) and (c) of the Third Schedule to the said Code, and Rules, 11, 13 and 15 of these rules by an officer subordinate to the Collector; subject to this provision, no appeal shall lie against any order passed under the provisions of the Third Schedule to the said Code or of these rules.

(*Vide* Government Notification, Judicial Department, No. 1203, dated 6th February 1920, at page 469, Bombay Government Gazette for 1920, Part I.)

92. As there is apt to be good deal of delay in the execution of decrees by Collectors, a memorandum book or register should be kept showing all decrees transferred to the Collector for execution with the date of transfer. This memorandum book or register should be inspected at intervals and the attention of the Collector should be drawn to all cases of serious delay.

93. It is desirable that a date should be fixed (six months from the date of the transfer) for the return of every darkhast transferred for execution to the Collector under section 68 of the Code of Civil Procedure, and that reminders, fixing further time, be sent, if, on the date first fixed, no return is made by the Collector. The memorandum book or register indicated above will enable the Judge to see that no case of serious delay remains unnoticed.

94. Great delay has also occurred in some Courts in preparing the documents for transfer to the Collector. Care should be taken that such delay does not occur.

95. The sale proceeds of property attached by Collectors in the execution of Civil Court decrees will be transferred by the Mamlatdar or other officer by whom the sale was conducted from " Revenue Deposits " to " Civil Court Deposits " immediately upon the receipt of confirmation of the sale by the Collector. On the same day the Subordinate Judge concerned will be informed of the transfer, and all the papers in the case will be forwarded at the same time to him, or, if for any reason the papers cannot be forwarded, the particulars noted below will be supplied :—

(1) Number of darkhast.

(2) Names of parties.

(3) Description of the property sold,

(4) Amount realized.

(5) Number and dates of Collector's order confirming sale.

(Vide Government Resolution, Judicial Department, No. 7447, dated 23rd November 1917.)

Immediately upon the receipt of such information the Subordinate Judge concerned should take the necessary steps so that particular judgment creditor's application may be disposed of as soon as possible.

(Vide Bombay Government Gazette for 1917, Part I, page 2734.)

96. The orders contained in paragraph 95 are applicable also to those cases in which the full amount specified for recovery in the darkhast is deposited before the sale of the property with the Mamlatdar or other officer entrusted with the sale. The amount should, however, be immediately credited to Civil Court Deposits, without in the first instance being credited to Revenue Deposits.

(Vide Government Resolution, Judicial Department, No. 2100 dated the 15th March 1919.)

(Vide Bombay Government Gazette for 1919, Part I, page 1017.)

Collector not to recover the expenses of sale:— In modification of G. R. No. 4603 H. D. dated 8rd April 1924 it is hereby directed that the Collectors should not recover the expenses of the sale in cases of Civil Court decrees transferred to them for execution since the Civil Courts recover poundage on the case at the scale laid down in the High Court Civil Circulars, G. R. 4603 of 21-3-27.

1. Notice to be served on the parties to a decree under rule 5, P. 341.

In the Court of _____ At _____
 Civil suit No. _____ of 193 .
 A. B. _____
 against _____
 C. D. _____
 Claim... .. Rs.
 A. B. (or C. D), resident of _____
 in the _____
 taluka of the _____ District.
 Whereas the execution of the decree passed by the _____
 Court _____ in the above
 suit on the _____ day of _____ 193 , has been transferred by the
 Court _____ to the
 Collector of _____ by whom the same has been referred
 to me.¹

¹ This must be varied, if the Collector himself executes the decree and issues the notice.

You are hereby informed that I have appointed _____ day
 the _____ day of _____ 193 , at _____ o'clock
 of the _____ noon, for hearing in my office (or camp)
 at _____ in the _____ taluka of _____
 the _____ district any representations which the
 parties, or any of them, may desire to make to me as to the manner in which
 the said decree should be executed.

And you are hereby required to produce before me at the above-named
 time and place all title deeds and other documents in your possession or power
 affecting the below-mentioned property, which is ordered by the said decree to
 be sold (or which the Court has ordered to be sold in execution of the said de-
 cree, or otherwise, as the case may be).

Details of the property above referred to—

Dated this _____ day of _____ 193 .



(Signed)

Designation of officer.

(2) Notice issuable to the parties to a decree at any time under rule 6
 (see p. 356).

**2. Notice issuable to the parties to a decree at any time
 under rule 6 (see p. 341).**

In the Court of _____ at _____
 Civil suit No. _____ of 193 .
 A. B.
 against
 C. D.

Claim... .. Rs.

To,

A. B. (or C. D.), resident of _____
 In the _____ taluka of the
 District.

Whereas the execution of the decree passed by the
 Court of _____

In the above suit on the _____ day of _____ 193 .
 has been transferred by the Court to the Collector of _____
 by whom the same has been referred to me :

1 This provision is to be added only when the notice is to be served upon
 the judgment-debtor.

2 This must be varied, if the Collector himself executes the decree and
 issues the notice.

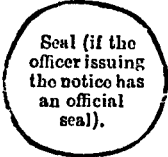
EXECUTION BY THE COLLECTOR

349

You are hereby required to attend before me on
day, the day of 193 , at
o'clock of the noon, at my office (or camp) at
in the taluka of the
district for the purpose of

If you fail to attend at the above-named time and place in pursuance of
this notice, the above-mentioned matter will be decided upon in your absence,
and you will not afterwards be entitled to be heard with respect thereto.

Dated this day of



(Signed)

Designation of officer.

3. Public Notice to be issued under rule 9 (see p. 342).

In the Court of at
Civil suit No. of 193 .
A. B.
against
C. D.

Claim Rs.

The property specified in the schedule hereunto annexed having been
attached in execution of the decree passed in the above suit, notice is hereby
given to all persons, having rights in or charge or claims on the said property
or any part thereof, that they should, on or before day, the
day of 193 , submit to the
undersigned by whom the said decree is being executed at his office (or camp)
at in the

Taluka of the

district a statement of the right, charge or interest which they respectively
claim, and produce the documents, if any, on which they base their claims.

Schedule (See next page.)

Dated this day of 193 .



(Signed)

Designation of Officer.

(Schedule.)

Immoveable property (see p. 342).

1	2	3	4	5	6	7	8	9
Lot Number.	Description of lot including local situation, supposed or estimated rent or annual value : and if leased, for how long, on what terms and to whom.	Survey No. Municipal No. and other fiscal designation.	Govt. revenue including any local cess, and any other known fiscal charge resting on the lot.	Present occupant.	Here enter any other particulars the Collector may see fit.			Here enter the additional particulars required in rule 11 (a),

N. B. :— No guarantee is given of the title of the said interest claimed by third parties.

or of the validity of any of the rights, charges or

Collector.

Appendix C.

Execution of decree by the Collector in the Province of Sind.

Execution of decrees by Collector:—(See the revised manual of the Commissioner in Sind's special circulars, pp. 23-39).

Under Government Notification No. 5249, dated the 20th September 1907 the Government in Council was pleased with the sanction of Governor General in Council, to declare that in Sind the execution of decrees ordering the attachment or sale of immoveable property shall be transferred to the Collector of the district in cases where such property belongs to a person who is an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act, 1879, and has been specifically mortgaged for the repayment of the debt to which the decree relates, and the security still subsists.

2 *Note* :—The rules framed by the Bombay Government under which such decrees are to be executed are applicable. They are given under the head "Rules prescribed by Local Government under S. 70 of Civil P. C. regulating execution of decrees transferred to Collector" in Appendix B above and therefore they are not reproduced here.

3. The first step to be taken by the Collector (or other officer entrusted with the execution of a decree) is, immediately on receipt thereof, to issue the notice prescribed by rule 5 calling upon the parties to appear before him within a certain period, which should not ordinarily exceed six weeks, the judgment-debtor being specifically called upon to produce a complete statement of his immoveable property other than that affected by the decree.

4. Notice should at the same time be issued under rule 9 calling upon all persons having rights in, or charges on, the property to be sold, so that if subsequently the sale of the land is decided on, complete statements of claims may be readily available for inclusion in the proclamation.

5. Simultaneously with the issue of notices under rules 5 and 9 the *tapadar* should be called upon to submit immediately (a) a statement of the judgment debtor's property other than that affected by the decree, and (b) a report as to whether he knows of any persons other than the judgment-debtor who have any right, charge, or interest in the land. The former will be of help in the consideration of the arrangements to be made under paras 7 and 8 below, and the report referred to in (b) will be useful in scrutinizing the statements of claims produced under rule 9.

6. When the parties are present in pursuance of the notices issued under rule 5 and the information called for from the judgment-debtor under paragraph 3 and from the *tapadar* under (a) of para 5 has been received, the Collector

should consider the desirability of applying to the Court, under s. 15B of the D. A. R. Act for an order for the repayment of the amount of the decree by instalments. Whenever it appears that there is a reasonable probability of the judgment-debtor being able to repay the amount in this manner, application should invariably be made to the Court unless the judgment-debtor himself prefers to make the payment in a lump by raising the amount as hereinafter provided, or unless it appears from the papers received that an opportunity of paying the amount by instalments has already been given by the Court to the judgment-debtor but has not been utilized.

7. If an application for payment by instalments is not made or if the Court refuses to fix instalments on an application made under the last preceding paragraph, the Collector should proceed to act under rule 83 (1) of Or. XXI of the First Schedule to the Civil P. C. by calling upon the judgment-debtor to state whether he can raise the whole amount due under the decree by mortgage, lease or private sale of the whole or part of his property, including the property affected by the decree.

8. If after hearing the judgment-debtor, the Collector is satisfied that there is a reasonable probability of the judgment-debtor being able to make the necessary arrangement, he should grant him, as required by clause (2) of the above quoted rule, a certificate authorizing him to make a mortgage, lease or private sale within a reasonable specified period which should not ordinarily exceed 4 months from the date of the certificate. The Collector should at the same time keep in view the possibility of having himself to arrange for a lease or mortgage of the whole or any part of the property affected by the decree under rule (b) of the third Schedule of the Civil Procedure Code.

9. If the judgment-debtor expresses his inability to raise the amount of the decree in the manner laid down in rule 83 of Order XXI of the first Schedule or finds it impossible to do so after the grant of the certificate referred to in paragraph 8, the Collector should proceed under rule (b) of the third Schedule, if he has reason to believe that the requisite arrangement can be made. Such an arrangement can, however, only be made with respect to the property ordered to be sold; if this is not possible, action should be taken without delay towards the sale of the mortgaged property under rule 11.

10. When the sale is decided on, the Collector should (1) issue careful instructions as to the amount of property to be sold taking care that it is no more than is likely, if purchased at a fair price, to be required to satisfy the decree, and (2) fix an upset price, which must be announced before the commencement of the auction. The fact that such an announcement will be made should be specified in the proclamation of sale. It is not intended to enjoin a rigid observance of this procedure which might check biddings of sales. But it should as a rule be adopted except where there is a certainty of brisk bidding at the auction.

11. The sale must be proclaimed and conducted in accordance with the rules relating to the sale of immoveable property in realization of arrears of land revenue and the provisions of sections 165 and 166 of the Land Revenue Code should, therefore, be carefully attended to. The Mukhtiarkar or other officer conducting the sale should also see that statements of claims admitted under rule 10 are duly noted in column 9 of the proclamation. At the time of sale, the Mukhtiarkar must read and carefully explain the proclamation, especially the matters mentioned in clauses (a) and (b) of rule 11, and he must at the same time notify that the sale is subject to the confirmation of the Collector and that it is only the right, title and interest of the judgment-debtor that are being sold.

12. Attention is invited to s. 22A of the D. A. R. Act which has been extended to Sind, and under which the sale may, within thirty days from the date of the auction be set aside by the Collector, if he considers the final bid inadequate. The result of the sale should therefore be communicated to the Collector, with the least possible delay, with an opinion as to the adequacy of the price.

13. The forms of notices to be issued under rules 5, 6 and 9 and of the proclamation are given in Appendix C above. The form of certificate of sale should be the same as given in form No. 38 of Appendix E to the first Schedule to Civil P. Code, 1908.

14. Collectors and Assistant Collectors should see, when the papers are returned to them, that a full and clear diary (see rule 8) has been kept (The form of the diary is prescribed in Appendix C. See p. 40 of the Revised Manual of the Commissioner in Sind's special circular. It is not reproduced here).

15. Under the orders contained in G. R. No. 1612, dated the 11th March 1881, quoted at p. 459 of the compilation of General Rules in force in the R. D. "no fees for the service and execution of processes issued by the Collectors in the exercise of powers under S. 68 of the Civil Procedure Code are leviable." Regarding fees for issuing proclamations and necessary expenses of sale, attention is invited to G. R. No. 4892, dated the 16th July 1900 J. D. under which only the actual expenses are chargeable as far as they can be ascertained. Such expenses are recoverable *after*, not *before* the sale. But now G. R. No. 4603 dated 21st March 1927 quoted at p. 347 states that the Collector should not recover expenses of sale. See the G. R. under the head "Collector not to recover expenses of sale" at p. 347.

16. It occasionally happens that decrees in respect of fallow forfeited survey numbers are transferred to the Collector for execution although Government have not been made parties to the suit and the Collector should not recognize such decrees. Fallow forfeited survey numbers are the absolute property of Government, and the person from whom such survey numbers are forfeited, has no right in law to have them restored to him. The discretion of Government in respect of their disposal is unfettered notwithstanding the fact

that the present policy in most cases is to restore such survey numbers under certain conditions to their former occupants. It follows therefore that the Civil Courts cannot dispose of such survey numbers behind the back of the Collector, i. e. without Government being made a party to the suit.

17. It also occasionally happens that a Civil Court in partitioning an estate passes a decree in respect of survey numbers held on the restricted tenure without either making the Collector a party to the suit or obtaining his permission to the alienation of such survey numbers. Such a decree is in no way binding on the Revenue authorities, and the Collector should not hold himself bound by it unless he has independent reasons for assenting to it.

Appendix D.

Procedure before Village-munsifs.

The following rules are made by the Governor of Bombay in Council under section 37 of the Dekkhan Agriculturists' Relief Act for regulating the procedure of Village-munsifs:—

1. Every suit in a Village-munsif's Court shall be instituted by presenting to the Village-munsif in person a written plaint in the vernacular language of the district, which should contain the following particulars:—

- (a) The name, religion, caste, profession and place of abode of the plaintiff.
- (b) The name, religion, caste, profession and place of abode of the defendant.
- (c) A statement of the circumstances which have led to the institution of the suit.
- (d) A list of the plaintiff's documents, if any, and of his witnesses, and whether he requires the Village-munsif's assistance to procure their attendance or whether he will produce them himself on the day to be appointed under rule 5.

2. If the plaintiff sues upon a document in his possession or power he must produce it with his plaint.

3. The Village-munsif shall reject the plaint at once in the following cases:—

- (a) If it appears to the Village-munsif that the subject of the plaint is not within his jurisdiction.
- (b) If it appears to him after questioning the plaintiff that the suit is barred by the Limitation Law.

4 If the Village-munsif admits the plaint, he shall number and register it in a Register to be kept for the purpose in the following form :—

Date of presentation.	No. of suit.	Plaintiff's name, caste and residence.	Defendant's name, caste and residence.	Nature of claim.	Final order and date thereof.	How executed.
1	2	3	4	5	6	7

5. When he admits a plaint, he shall fix a convenient day, if possible within seven days from its institution, for the trial of the suit, and he shall require the plaintiff to appear with his documents and witnesses, if any, on the day so appointed. He shall also forthwith, with the least practicable delay, send for the defendant and personally explain to him the nature of the claim, informing him of the day fixed for the trial and requiring him to be present in person on that day, unless the defendant admits the correctness of the claim and his own liability, in which case the Village-munsif shall record the admission in full and require the defendant to sign or put his mark to the same and shall also sign it himself.

6. If the defendant does not admit the claim, the Village-munsif shall require him to name his witnesses, if any, and to state whether he will himself produce them or require the assistance of the Court to procure their attendance, and shall warn him to be present in person with his documents and witnesses, if any, upon the appointed day.

7. Whenever it is necessary to procure the attendance of any defendant or witness, the Village-munsif may require any village-officers to produce such person before him; and it shall be the duty of the village-officers to obey the requisition of the Village-munsif.

Any Village-munsif specially authorized in this behalf by the District or Special Judge may, in cases where other means fail, exercise the powers of a Civil Court for the purpose of enforcing the attendance of defendants and witnesses.

8. On the day appointed for the trial, unless the defendant has previously admitted the claim under rule 5, in which case he may at once pass a final order, the Village-munsif shall first of all examine the parties, or the persons if any, permitted to appear for them under section 68 of the Act, and shall peruse the documents, if any, produced on either side, in order to ascertain the point or points in issue, and whether the defendant has any just answer or defence to the suit; and shall then, if necessary, examine the witnesses on either side; and may also send for and examine any other person who may appear to him likely to be able to give useful evidence as to the matters in dispute; and shall

then proceed, at once, if possible, to record his final order in accordance with the just merits of the case.

9. If the plaintiff fails without reasonable excuse to attend with his proofs or omits without reasonable excuse to adopt measures to procure the attendance of his witnesses, the Village-munsif shall reject the plaint.

10. If the defendant fails to appear, the Village-munsif shall adjourn the trial to an early day to be fixed by him, and shall meantime take all the measures in his power, with the assistance of the village-officers, to procure the attendance of the defendant on such adjourned date; he shall not decide the suit without examining the defendant, unless for special reasons to be recorded by him in writing in his final order.

11. If the witnesses on either side or any of them fail to attend on the appointed day, the Village-munsif may, after taking the evidence of those that are present, if he considers it necessary for the purpose of justice and for arriving at a satisfactory decision, adjourn the trial for such period as may be necessary to procure their attendance.

12. The Village-munsif shall examine the parties and their witnesses, if any, orally and it shall not be necessary for him to take down their evidence in writing or make notes thereof; but if he does not do so, he shall embody in his final order the substance of the evidence, together with the points in dispute, and his decision thereon, specifying the amount, if any, awarded to the plaintiff. Such final order shall be deemed to be the decree.

13. If his decision is in favour of the plaintiff, either wholly or in part he may direct the defendant to pay the amount found due, by instalments not extending over a longer period than twelve months.

14. In no case shall he award more than seems to him, on a full consideration of all the circumstances and past history of the debt, to be justly and equitably due.

15. The final order shall be written in column 6 of the Register mentioned in rule 4; and the Village-munsif shall give a copy thereof, under his signature, to either party asking for the same.

16. Every order whether rejecting a plaint or allowing or disallowing a claim shall be endorsed briefly by the Village-munsif on the plaint.

17. If the decision awards the plaintiff's claim in whole or part, the defendant may pay the money due by him under the decree into the Village-munsif's Court and in such case shall be given a receipt for the same, and it shall be the duty of the Village-munsif to cause such money to be paid over to the plaintiff.

PROCEDURE BEFORE VILLAGE-MUNSIFS

3357

and to require his receipt for the same and to enter the fact of such payment in the last column of the Register.

18. If the decree is satisfied in whole or in part out of Court, it shall be the duty of the plaintiff to certify the fact to the Village-munsif, and when he fails to do so, the defendant may apply to the Village-munsif, who shall then make inquiries and if he finds it proved that the decree has been so satisfied, shall refuse to execute it further. The necessary entry to denote satisfaction under this rule shall be made in the Register.

19. The decree-holder may, at any time within the period allowed by the Limitation law, apply to Village-munsif for execution of his decree or such portion of it as may remain unsatisfied. Such application must be in writing and must state that the decree of which execution is sought has remained unsatisfied, in whole or in part, as the case may be.

20. In the case of decrees which allows payment by instalments, any default by the judgment-debtor entitles the decree-holder to apply for execution.

20A. If the Village-munsif receives such an application as is mentioned in rules 19 and 20 from a decree-holder, he shall number and register it in a Register to be kept for the purpose in the following form:—

Register of applications for execution of decrees in the Court of the Village-munsif of _____ in the Taluka _____ of the District _____ during the year _____

1. Serial number.	5 of 1898.
2. Date on which the application for execution was presented.	10th July 1898.
3. Names of the parties and the No. of the suit.	No. 76 of 1897, A. B. Vs. C. D.
4. Name of the party or other person presenting the application for execution, caste, age, occupation and residence.	Plaintiff A. B., marwadi, 39; Trader, Bhingar.
5. Name of the person or persons against whom execution is sought, caste, age, occupation and residence.	Defendant C. D., Maratha, 33, Weaver, Bhingar.

6. Date of decree.	10th December 1897.
7. Amount awarded in the decree.	Rs. 8-4-3.
8. Payment made through Court or privately after decree.	None.
9. Amount claimed on the present application for execution.	Rs. 2-4-3.
10. Date on which the warrant of attachment was sent to the Nazir or Village-officers for execution.	12th July 1898.
11. Date fixed for the return of warrant.	28th July 1898.
12. Amount realized, if any.	Rs. 1-4-3.
13. Result of execution in short.	The Court's warrant was executed on the 17th July 1898.
14. Remarks.	

21. On application as aforesaid by the decree-holder the Village-munsif may, after making such inquiry as he deems necessary cause the decree to be executed by the attachment and sale of any moveable property within the local area of his jurisdiction belonging to and in the possession of the judgment-debtor, except such property as is mentioned in the proviso to section 266 of the Civil Procedure Code. Attachment shall be effected by actual seizure and the property so attached shall be kept in safe custody in or near the village-chavdi. Provided that no more property shall be attached under this rule than shall seem to the Village-munsif reasonably sufficient at a fair valuation to cover the amount of the decree remaining unsatisfied.

The Village-munsif may also, if he thinks fit, but subject to the provisions of clause (h) of the proviso to section 266 of the Code of Civil procedure, cause the decree to be executed by attachment of the whole or part of the salary of the judgment debtor if he be in the receipt of a salary. In such case the attachment shall be made by a written order addressed to the officer or person who disburses the salary, requiring him to withhold every month such portion

as the Village-munsif may direct and to pay the same to the judgment-creditor. Such order may be issued by the Village-munsif, whether the officer or person who disburses the salary is resident and the salary is payable within his local jurisdiction or not.

21A. Any decree passed by a Village-munsif may, on the application of the decree-holder, be forwarded to the District Judge or Special Judge as the case may be, who may transmit it for execution to the Court of any Village-munsif or any other Civil Court having jurisdiction in any place where the judgment-debtor is represented to have moveable property; and such Court shall, subject to the provisions of rule 21, proceed as if the decree was passed by itself.

22. All claims to attached property shall be inquired into without delay and summarily determined by the Village-munsif after hearing such evidence as may be tendered by the claimant and the decree-holder respectively, and after examining, if necessary, the judgment-debtor.

23. If the attached property is subject to speedy and natural decay or when the expense of keeping it in custody shall exceed its value, it may be sold at once by order of the Village-munsif.

24. In all other cases, if the judgment-debtor does not tender the amount of the decree within three days from the date of attachment, the Village-munsif shall issue a notice of the sale of the property, to be posted up in a conspicuous place in the chavdi where the property is kept, specifying the property to be sold, the amount for which the sale is ordered, and the day and hour of sale.

25. Except in the case mentioned in rule 22 no sale shall take place till after the expiration of at least ten days from the date on which the notice has been posted up on the chavdi.

26. If the Village-munsif is himself an officiating Patel and if the property is within the limits of his jurisdiction as such, he shall himself order and superintend the attachment and the conduct of the sale. In any other case, the Village-munsif shall direct his orders for the attachment and sale to an officiating Patel in whose jurisdiction as such, the property is, and it shall be the duty of such Patel to carry out the execution under the orders of the Village-munsif.

In towns which are the head-quarters of a Civil Court, the Village-munsif may, when so authorized by the District or Special Judge, direct his orders to the Nazir of such Court, whose duty it will be to execute such orders accordingly.

27. The officer conducting the sale may in his discretion, for sufficient reason, adjourn the sale, reporting the fact to the Village-munsif, who may pass such orders as may seem just as to the renewal of the sale.

28. The proceeds of the sale shall be made over by the Village-munsif to the decree-holder to the extent necessary to satisfy his decree, any surplus being handed over to the judgment-debtor. Receipts shall be taken for any payment made under this rule; and the necessary entry as to satisfaction shall be made in the Register.

29. The Village-munsif shall be entitled to employ the agency of the inferior village-servants for carrying out his orders in any suit or execution matter pending before him under the Act; and it shall be the duty of the Revenue and Police Patels and Kulkarnis throughout the local area of his jurisdiction to render him all the assistance in their power in connection with the discharge of his duties under the Act.

30. No costs shall be awarded by any Village-munsif.

31. The Village-munsif shall be entitled to hold his Court in the village *chavdi*.

(Vide Government Notification No. 7635 at pp. 1001-1002 of the Bombay Government Gazette for 1879.)

(Vide Government Notification No. 5585 at pp. 708-709 of the Bombay Government Gazette for 1880.)

(Vide Government Notification No. 6545A at p. 894 of the Bombay Government Gazette for 1898.)

(Vide Government Notification No. 8634 at p. 859 of the Bombay Government Gazette for 1903.)

(Vide Government Notification No. 4431 at p. 1009 of the Bombay Government Gazette for 1903.)

Appendix E.

Village Registration Rules

Rules made by the Inspector General of Registration, empowered by and with the previous sanction of the Governor of Bombay in Council, under the provisions of S. 61 of the D. A. R. Act, 1879 to 1895, for regulating the proceedings of Village Registrars and for providing for the custody of their records, in supersession of all previous rules on the same subject.

[Note:—Chapter VIII has now become inoperative, since all the appointments of the village registrars have been abolished [Vide G. N. No. 9969 dated

3rd No. 1910]. But Chapter VIII A containing S. 63A which provides for registration of instruments where agriculturists are parties, incorporates by reference the provisions of Ss. 57 and 59. Hence only these rules which lay down the procedure for registering instalments under Ss. 57 and 59 are reproduced below.]

20. Village-registrars shall duly satisfy themselves of the identity of each executant and shall receive the fee for registration before the instrument is written. They shall also satisfy themselves that no agriculturist purporting to be an executant is a lunatic, an idiot or a minor and shall pay careful attention to the requirements of the Stamp Act and the rules issued under it.

Preliminary measures to be taken before an instrument is written.

21. Every Village-registrar shall be provided under the order of the Registrar with specimen forms of all instruments to which agriculturists are ordinarily parties. In drafting an instrument, care must be taken to follow the best obtainable form and while fully expressing the intentions of the parties, to avoid repetition and prolixity.

Preparation of instrument.

Above all, the language employed shall be simple and clear, and the description of immoveable property, if any, which has to be mentioned in the instrument, shall be such as to enable the property to be unmistakably identified. When the instrument relates to land to which a survey has been extended, the survey numbers shall be set forth.

The Village-registrar shall ordinarily draw up the instrument himself, and shall only employ another person to do so under his superintendence when he is himself prevented by an exceptional press of work or other unavoidable cause from drawing up the instrument himself. When the instrument is not drawn up by the Village-registrar himself, but under his superintendence, the person drawing up the instrument shall be chosen by the Village-Registrar, and in no case to be remunerated by the parties themselves but by the Village-registrar from his percentage fees.

22. When the instrument has been written, it shall be read out to all the parties by the Village-registrar and executed as provided in section 57 of the Act.

Endorsement to be made on the instrument after its execution.

The Village-registrar shall then endorse upon the instrument a note in the following form :—

	Rs.	A.	p.
" Fees received for preparation and registration etc., etc.	0	0	0
Total	0	0	0

Immediately below this note shall appear the endorsement of attestation required by paragraph 2 of Section 57 of the Act in the following form :—

" This instrument written by me (or under my superintendence), has been executed in my presence, this day, by A. B. of C. D., whom I know (or of whose identity I have duly satisfied myself)."

If a witness is examined as to identity, his signature and place of residence shall be taken in the following form, viz. :—

" I, E. F. of G. H. identify A. B. (signature or mark of E. F.)."

The endorsement shall be signed and dated by the Village-registrar; and if any of the parties to the instrument is unable to read it, the attestation of two respectable witnesses shall immediately follow that of the Village-registrar in the following form :—

" We, I. J. of K. L. and M. N. of O. P., have witnessed the execution this day, of this instrument by A. B. of C. D. "

(Signature or mark of I. J. of K. L.)

(Signature or mark of M. N. of O. P.)

The Village-registrar shall next endorse upon the instrument the note required by paragraph 2 of section 59 of the Act as to whether or not the transfer of the consideration named therein or of any part thereof took place in his presence. This note shall be in one or other of the following forms as the case may be :

" A. B. of C. D. has in my presence, this day, received from Q. R. of S. T. the sum of Rs. (to be entered both in figures and words) the contract of this matter is not clear. Is it so stated in the notification (the following articles, viz.) being the whole (or part) of the consideration stated in this instrument ; " or

" No portion of the consideration stated in this instrument has been paid in my presence to A. B. of C. D. "

The endorsement shall be signed by the Village-registrar.

Immediately below such declaration shall be endorsed a further note showing the number of the instrument and the page and volume of the Register Book in which it is registered.

Finally, at the foot of all these endorsements shall be affixed the Village-registrar's signature with his official designation " Village-registrar of, " and the date of such signature.

23. It shall be the duty of the Village-registrar to inquire whether the instrument about to be executed will modify or wholly or partly supercede any previous instrument; and if the parties answer in the negative, the following declaration shall be endorsed on the instrument and signed by the claiming party or parties or by his or their authorized agent,

" I (or We) hereby declare that this instrument does not modify or wholly or partly supersede any previous transactions or instruments."

24. When a previous instrument, which is to be modified or wholly or partly superseded by a new instrument, is produced in accordance with the third paragraph of Section 59 of the Act, the Village-registrar shall write upon such previous instrument the following note:—

" This instrument has been modified (or wholly or partly superseded) by instrument No. _____ of 189 _____, executed in my presence by A. B. of C. D. in favour of Q. R. of S. T. and attested by me this day."

On the new instrument which modifies or supersedes the previous instrument, the Village-registrar shall write at the top of the document immediately over the stamp-impression, if there be any, the following note :

" The instrument dated _____ executed by A. B. in favour of Q. R., which this instrument modifies (supersedes) has been produced this day, and a note of such modification (supersession) has been endorsed by me thereon. "

Provided that the writing of this note shall not dispense with the necessity of a full description of the old instrument being contained in the new one as required by Section 59 of the Act.

Proviso:— When it is alleged that any such previous instrument is on the record or otherwise in the custody of a Court or is lost, or has been destroyed, the Village-registrar, after ascertaining that such previous instrument was duly registered, may permit a certified copy thereof to be produced in lieu of the original; and in every such case the following procedure shall be observed :

A. The contents of the certified copy shall be fully described in the modifying or superseding instrument and the said copy shall be marked by the Village-registrar under his hand for identification with the words " The instrument of which this is a certified copy has been modified (or wholly or partly superseded) by instrument No. _____ of _____ executed in favour of Q. R. of S. T. and attested by me this day, " and shall then be dated and delivered to the person who produced it.

B. If the previous instrument is lost, or has been destroyed and the registered entry thereof is in the Village-registrar's custody, he shall endorse on such entry a note under his hand as to the modification or supersession of the said instrument, to the following effect :

" The instrument of which this is a copy has been modified (wholly or partly superseded) by instrument serial No., dated and executed in my presence by A. B. of C. D. in favour of Q. R. of S. T. "

C. If the previous instrument is in the custody of a Court, or if it is lost, or has been destroyed, and the registered entry thereof is in the custody of another officer, the Village-registrar shall forward a certified copy of the entry in

his Register relating to the modifying or superseding instrument to such Court or Officer, after writing an endorsement of the despatch of such copy below the registered entry in column 8 of the Register book, with a report explaining the circumstances. If the officer be a Village-registrar, he shall, on receipt of such a report endorse on the registered entry a note under his hand as to the modification or supersession of the instrument in the form prescribed in clause B above.

Note :— All notes under paras 1 and 2 of rule 24 and under the Clauses A, B and C above shall be signed and dated by the Village-registrar.

In the Sholapur Taluka of the Sholapur District, it shall not be necessary for a person to produce either a certified copy of the destroyed instrument or an extract from the register of suits unless such copy is in such person's possession.¹

25. In ordinary cases all instruments shall be drawn up and registered at the office of the Village-registrar authorised to prepare the same. But on special cause being shown, such officer may attend at the residence of any person desiring to have any instrument prepared and shall charge an additional fee laid down in the Fee Table prescribed under Section 69 of the Act. A Village Registrar receiving batta under Article V of the Fee Table for attendance at a private residence for the preparation of the instrument, or for the attestation of a power-of-attorney, shall grant a receipt in writing for the money so received by him to the party on whose application he proceeds to the private residence.

Rules for carrying out the provisions of this Act.

Vide Notification No. 7183, B, dated 11th September 1896 B, G. G. for 1898 pt. I p. 974.

"The Act" means the Deccan Agriculturists' Relief Act, 1879, as amended by subsequent enactments.

48. No Village-registrar shall prepare or register any instrument under the provision of the Act to which he or any member of his family is a party. For the preparation or registration of any such instrument the parties shall be referred to the Taluka or Petha Village-registrar who has concurrent jurisdiction.

1. Notification No. 8576-2 dated 27-3-31 issued to remove the difficulty felt on account of the previous instruments having been destroyed by the burning of the Civil Courts buildings at Sholapur in 1930.

49. No Village-registrar shall prepare or register any instrument under the provisions of the Act unless it shall be stated in the body of such instrument whether the consideration mentioned in the instrument has already been paid or is to be paid hereafter, and if it has been paid, the manner in which such payment was made shall be fully set forth.

50. For the purpose of section 57 of the Act, the powers-of-attorney next hereinafter mentioned shall alone be recognized (that is to say)—

- (a) if the party executing a power-of-attorney at the time of executing the same resides in any district in which the Act is for the time being in force, a power-of-attorney executed before and authenticated by the Registrar or Sub-Registrar or Village-registrar within whose district, sub-district or village such party resides ;
- (b) if the party at the time aforesaid resides in British India, but not in any district in which the Act is for the time being in force, a power-of-attorney executed before and authenticated by any Magistrate, Registrar or Sub-Registrar ;
- (c) if the party at the time aforesaid does not reside in British-India, a power-of-attorney executed before and authenticated by a Notary Public, or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of her Majesty or of the Government of India.

In authenticating or attesting a power-of-attorney the following form of endorsement shall be adopted by Village-registrars :

Executed by A. B. of C. D. in my presence on the (date) He is identified by E. F. of G. H.

These endorsements shall be signed by the Village-registrar attesting the power-of-attorney.

Appendix F.

XIV.—Registration under Section 63-A, D. A. R. Act.

58. In respect of the registration of any instrument which has been executed by an agriculturist under S. 63A of the D. A. R. Act 1879, Nos. 34, 36, 38, 40, 50, 51, 55, 56, 57, 71 and 74 of these rules¹ shall be deemed inapplicable, and the following special provisions shall apply, namely:—

" (1) An endorsement in the following form shall be substituted for that prescribed by Rule 30, " viz. :—

¹ Rules made by the Inspector General of Registration and approved by the Governor in Council in accordance with the provisions of S. 69 of the Indian Registration Act 1908.

" Prepared at the office of the Sub-Registrar of _____, (or at the house of _____, as the case may be) between the hours of _____ and on the _____ 19 . "

" (2) Rule 44 shall be read as if for the second and fourth items therein specified the following were, respectively substituted, viz :—

" (2nd) the presentation endorsement referred to in rule 30, as modified by Rule 53, clause (I) : "

" (4th) the endorsements made under Nos. 22, 23 and 24 of the Rules made under S. 61 of the D. A. R. Act, 1879, and the certificate required by S. 60 of the Act, 1908, in the order in which they occur on the instrument. "

" (3) Rule 73 (I) shall be read as if for the first sentence thereof down to and inclusive of the word ' same ' the following were substituted, " viz,—

"If for any class an instrument is not completely executed and registered after the fee for the same has been paid, one-half of such fees and all the copying fee shall be refunded to the person who paid the same." (See rule 53 p. 17 of the Bombay Registration Manual 1925.)

Appendix G.

Reductions and remissions of stamp duty :—F. D. No. 3616-Exc., dated 16th July 1909. In exercise of the powers conferred by s. 9, c, (a), of the Indian Stamp Act, 1899 (11 of 1899) and in supersession of all previous notifications issued from time to time under the said clause of the said section the Governor-General in Council is pleased to reduce to the extent set forth in each case the duties chargeable under the said Act in respect of the instruments hereinafter described under Nos. 2 and 3 and to remit the duties so chargeable in respect of the instruments hereinafter described :—

1. Agreement of the kind described in D. A. R. Act 1879 (XVII of 1879) s. 43.

2. Promissory note payable on demand to a certain person; and not to order or bearer, when such note is executed by an agriculturist, and is attested at the time of execution by a Village-Registrar, under s. 57 of the D. A. R. Act, 1879 (XVII of 1879).—Duty reduced to one anna.

3. Promissory note payable otherwise than on demand, and not payable at more than one year after date or sight, to a certain person, and not to order or bearer, when such note is executed by an agriculturist and is attested at the time of execution by a Village-Registrar under s. 57 of the D. A. R. Act, 1879 (XVII of 1879)—Duty reduced to the amount chargeable under Article

No. 18 (b) of Schedule I of the Stamp Act, 1899, on a bill of exchange for the same amount.

4. Power-of-attorney furnished to a relative, servant or dependant under the D. A. R. Act, 1879 (XVII of 1879) s. 68.

5. Copy of an instrument which a Village-Registrar has to deliver to a party under the D. A. R. Act, 1879 (XVII of 1879), s. 58.

Appendix H.

Remission of Court Fees :— The Government of Bombay Notification No. 590 dated 16th September, 1921, published in the Bombay G. G. dt. 22nd Sept. 1921 No. 590. In exercise of the powers conferred by s. 35 of the Court Fees Act, 1870 (VII of 1870) as amended by Act XXXVIII of 1920 and in supersession of so much of all previous notifications under that section issued by the Governor-General in Council as relates to the reduction or remission of all or any of the fees mentioned in the first and second Schedules to the said Act, in the territories under the administrations of the Government of Bombay, the Governor in Council is pleased—

“ to remit the fees chargeable in respect of the documents specified in the First or Second Schedule to the Court Fees Act, 1870 in the case of suits instituted before Village-munsif under chapter V of the D. A. R. Act, 1879. ”

Cancellation of exemption of Court fees :— In exercise of the powers conferred by s. 35 of Court Fees Act, 1870 the Governor-General in Council is pleased to cancel (i) clauses 28 to 30 inclusive of the notification of the Government of India in the Department of Finances and Commerce No. 4650, dated 10th September 1889, and (ii) notifications of the Finance Department No. 2844 S. P. and 4415-Exc., dated respectively 23rd May 1902 and the 22nd August 1910.

Appendix I.

Process fee not leviable :— Nothing contained in the rules made by the High Court under s. 20 of the Court Fees Act, 1870 (or in any rules heretofore made by the High Court under s. 20 of the Court Fees Act (VII of 1870) shall apply to process issued by a Village-munsif under chapter V of the D. A. R. Act 1879.—See *Manual of Circulars issued by the High Court of Bombay (1925 Ed.)*

GENERAL INDEX.

	Page
Accounts—	
agreement to pay more money than is due is not allowed in, 148, 149.	
aggregate amount of interest not to exceed the principal in, 152.	
agriculturist can sue for accounts only, 199, 202.	
agriculturist entitled to annual statement of, 315.	
agreement to set off profits in lieu of interest not allowed in taking, 147.	
aid of arbitrators can be taken in, 151.	
annual rest to be allowed in, 147.	
appeals in suits for, 202.	
claim for overpayment in, 153, 154, 155.	
claim for refund in, 154-155.	
contract merged in decree cannot to opened in taking, 129.	
conversion of interest into principal, 149, 152.	
conversion of suit for—into suit for foreclosure, redemption or for sale, 202.	
destroyed or not kept, 120.	
directions for taking, 159.	
from the commencement, 146.	
future interest not disallowed, 152.	
interest upon interest not allowed in, 149.	
if Court finds amount due on taking—second suit for redemption does not lie, 201.	
in case of several mortgages, 195.	
keeping—suggested to be made compulsory, 120.	
mode of taking of, 142-144. s. 13.	

	Page
Accounts—Continued.	
money actually received to be allowed in taking, 147-148.	
money due on taking—must be paid, 156-157.	
mortgage of which—is asked may not be admitted, 197.	
mortgagor may sue for, 191.	
mortgagor can recover overpaid amount, 193-194.	
no presumption in—that old bond is made up of half principal and half interest, 147.	
non-production of books of, 125.	
no suit for—against co-mortgagor who redeems whole mortgage, 138.	
of interest how made up, 151.	
of mortgage transactions to be kept distinct from account of money transactions, 194.	
of principal and interest to be kept separate throughout, 147, 149.	
of several mortgage bonds must be taken in same suit, 195.	
overpayment found in taking, 153-155.	
part owner can sue for—of all mortgages, 198.	
presumptions play an important part in, 125.	
profits in lieu of interest, 146, 151.	
rate of interest on taking, 150, 228.	
redemption by a stranger and suit for, 199.	
rent may be charged in lieu of profits, 158.	
retrospectivity of the provisions for, 205.	
right of taking—cannot be waived, 75.	

Page	Page
<p>Accounts—Continued. rules for determining, 193. rule of damdupat applied in taking, 152. separate—when taken, 126. separate of principal and interest, 146-147, 128, 130. suit for—can be converted into suit for redemption, 193, 200. suit for—by an agriculturist, 56, 194, 204, Ss. 3, 15D and 16. suit for—can be treated as suit for setting aside sale, 196. suit for, does not bar separate suit for redemption, 200. to be taken between the parties, 132. to be taken up to the date of instituting suit, 152. to be traced to the commencement, 126, 146. when interest is allowed mortgagor is bound to render, 171. where mortgage is denied, 196. where some substantive relief is necessary in order to get, 196-197.</p> <p>Account Suit— no—against a co-mortgagor who redeems, 198. by an agriculturist, Ss. 3, 15D and 16. can be converted into suit for redemption, 193, 200. can be treated as suit for setting aside sale, 196. conversion of—into suits for redemption etc. 200 in case of several mortgages, 195 ordinary law as to, 193.</p> <p>Act— amending Acts, list of, 12, 13, badly drafted, 3, 8. beneficial construction where possible, 7, 161. benefits non-agriculturist, and agriculturists not indebted, 6, 139.</p>	<p>Act—Continued. benefit under—need not be claimed, 7. change of law pendente lite: effect of, 5. compromise or award contravening the provisions of the—allowed, 7. constructions of; s. 2. does not distinguish between rich and poor agriculturists, 111. goes beyond preamble, 6. Government attitude regarding amending, 13. has no application to the rights, already decreed, 117. how to interpret 3 (f. n.), 4. illogical and inequitable results of the provisions of, 11, 12. illustrations help the interpretation, 4, 3. literal construction of—when language is plain, 8. local extent of the, 10, 11, 12. marginal notes, 4. object of the, 1-3, 10. parties settling their dispute out of Court are not bound by the provisions of, 52. preamble of the—and construction; 5. previous history of—and construction, 5. proviso and construction of, 4. proceedings of the legislature, 5. provisions of the— must be applied, 51. protects bona fide agriculturists only, 30. purpose of various amendments of, 17. remedial measure—is, 115. repealing and amending Acts, list of, 12, 13. retrospective operation of, 5, 9, 115</p>

	Page		Page
Act—Continued.		Agricultural income—Continued;	
rules of interpretation and construction of the, 3, 6.		what is —	
tendency of—to bar appeals, 80.		income from—	
'this Act' meaning of, 29, 80.		grass produced on leased land,	27.
title of—and construction, 5.		juice of toddy trees, 27, 28.	
		produce from other trees, 27.	
Admission—		betal leaves, indigo etc. 28.	
by some of the defendants only, 134.		what is not —	
compromise is not, 136.		income from —	
Court cannot disregard—entirely,	133.	districts where this Act does	not apply, 29.
must be true and with knowledge		ginning cotton, 28.	
of the rights, 134, 139.		grinding grain, 28.	
of claim, effect of, 108, 133, 134.		Jagir lands, 35.	
Adoption deed—		making mattresses out of grass,	28.
need not be registered under the		manufacturing indigo cakes, 28.	
D. A. R. Act, 306.		selling agricultural produce, 28.	
Advocate—		tenants derived by Inamdars, 35.	
excluded in certain cases, 3, 7.			
Agreement—		Agricultural labour—	
Court's power to admit evidence of	oral, 83.	for a portion of a day sufficient, 35.	
in variance of s. 15A to be disregarded,	164.	one should have engaged in — for at	least one agricultural season, 32.
to lease, 89.		tests to decide whether a person	ordinarily engages in, 31, 32.
to set off profits in lieu of interest,	146.		
Agricultural implements—		Agricultural produce—	
want—is not conclusive against	status, 32.	certain — exempt from attachment	331, 332.
Agricultural income—		money deemed to include, 15.	
actual income only to be taken into	consideration, 25.	procedure for attaching, 236-37.	
includes income from mango-fruit,	27.	under the T. P. Act, 27, 28.	
includes income from toddy-juice,	27.	Agriculture—	
income from districts to which this	Act is not extended is not, 29.	defined, 26.	
must not only be sufficient but must	also exceed other incomes, 25, 21.	includes cultivation for any useful	purpose, 28.
presumption as regards sources of	income, 25.	includes cereculture, horticulture,	arboticulture, silviculture etc. 27.
		Agriculturist—	
		assignee can sue under s. 9 (y) or (z)	64.
		assignee, 113.	
		as defined by this Act, 18.	

Page

Agriculturist—Continued.
 agricultural labour for a portion of the day sufficient to make a person, 32.
 as defined by old law, 17.
 as then defined by law, 37, 88, 114.
 assignee entitled to the benefits of this Act, 7, 113, 132.
 assignee of—as such is not, 40.
 assignee of Govt. assessment as such is not, 17.
 at different stages of the suit, 47
 at the time of decree, 170.
 at the time of transaction, 86, 90, 99, 100.
 at the time the liability arose, 194.
 before but not after the passing of the Act is not benefited, 37.
 bona-fide—alone protected, 30, 32.
 compromise decree giving up status as, 221.
 co-parceners in a joint Hindu family whether, 23.
 debtor may sue for accounts, 193, 202.
 definition of the words, 14, 15, 17.
 definition of — is exhaustive, 13.
 definition for purpose of chapters II, III, IV, VI, etc. 15, 36, 30.
 definition of, explained, 18.
 dependences upon, can not make, 21.
 earns his livelihood by agricultural labour 21,
 exempt from arrest, 215, s. 21.
 for the purpose of s. 15B., 48, 173-175.
 for the purpose of s. 20, 49, 212-214.
 firm as an 19, 20.
 for the purposes of s. 21, 49, 217-220.
 for the purposes of s. 22, 50., 226-228.
 following two occupations, 33.
 in a district where this Act does not extend, 88.
 Inamdar as such is not, 35.
 income from agriculture carried on in a district where this Act does

Page

Agriculturist—Continued.
 not extend, does not make one an, 29.
 Jagirdar is not as such an, 35.
 Joint family, the status of the members of as, 26.
 Livelihood of, 25.
 middleman is not, 30, 52,
 minor depending on guardian for livelihood is not, 23.
 minor whose property is managed by Court as, 24.
 minor son of — as, 23.
 minimum period to be an, 32.
 mortgagee from — is not an, 34.
 need not cultivate land all by himself, 32.
 object of the 2nd., special definition of, 36.
 party must be admitted or proved to be an, 67.
 party must be an — to be able to give evidence under s. 10A, 89-90.
 prevented from continuing as such by age, bodily infirmity etc., 34.
 privileges of — are personal, 23, 40.
 privileges of — do not pass by a dissolution or assignment — 40,
 plea of status of — must be enquired into, 51.
 plea of status of — raised first in appeal, 51.
 question of status must be tried by the Court itself, 45.
 second, special definition of, 36.
 status of — no limitation to prove, 174.
 status of — as a preliminary decree, 41.
 status of — raised first in appeal, 51,
 status of — must be tried by the Court, 45.
 status of — should be at the date of arrest or of decree, 217-218.
 status of — as res judicata, 219.

	Page		Page
Agriculturist—Continued.		Appeal—Continued.	
status of — under s. 22, 226.		limitation for — against order under	
status of — under s. 20, 212.		s. 22, 241-2.	
student deriving income from scho-		in account suits, 202.	
larship is not, 22.		no appeal from decision of Village-	
to be sued where he resides, 101.		munsifs, 260.	
want of bullocks and implements is		no appeal from order passed under	
not conclusive against, 82.		Ch. IV, 258.	
wealth or social position of — is		no reference can lie where — lies, 81,	
immaterial, 30, 31.		no appeal from decree or order under	
what must be proved to establish		Ch. II, 71, 79, 80.	
status of, 18, 30.		on the ground that enquiry under	
when ceases to be an — without in-		s. 12 was not made, 121.	
tention of changing his status, 34.		order refusing appointment of Col-	
when party is an — history of tran-		lector under s. 22 is subject to,	
saction to be investigated, 107.		241.	
when party is an — oral evidence to		plea of bar of — can be taken for the	
be admitted, 83.		first time in second — 81.	
wife depending on — is not an — 23.		question of status raised first in, 51.	
when deemed an — though when the		revision and—compared, 274.	
cause of action arose is not an—34.		second appeal, 86, 89, 121.	
when the cause of action arose, 36.		tendency of Act to bar appeal, 80.	
when the liability was incurred, 36.		under Provincial insolvency Act,	
when the suit is instituted, 36.		259.	
works, himself or by servants or			
tenants, 20.		Application—	
Amount—		of the Act to non-agriculturists, 6,	
to be allowed on taking accounts —		55,	
142.		of S. 3, 55.	
Amount due—		of S. 11 to the whole of Br. India ;	
in suits for redemption is the amount		its effect, 107.	
found due after taking accounts		of Ss. 12 and 13, 111-114.	
156-157.		of S. 15 B, 170.	
Annual rest—147.		for making a decree final not neces-	
Any other law—		sary under the D. A. R. Act, 183.	
for the time being in force; meaning		limitation for application to extend	
of, 92, 99.		time for payment of mortgage	
Any suit—		debt, 187.	
in s. 10A, meaning of, 88, 91.		period of limitation for—for sale of	
Appeal—		property under S. 15B, 187.	
advantages of — over revision, 80.		to modify consent decree cannot lie,	
barred by, Ss. 10, 33, 36, 54 ... 274.		180.	

Page	Page
Arbitration —	Assignee — <i>Continued.</i>
Act does not disallow, 109, 135, 136, 140, 159.	of an agriculturist as such is not an agriculturist, 40.
reference to—must be bona fide, 141.	of Govt. assessment is not as such an agriculturist, 15, 84.
compromise and, 135.	
reference to—old law, 159.	At any stage —
Arboriculture —	meaning of, 81.
included in agriculture, 27.	Attached to the earth —
Arrest and Imprisonment —	as defined in the T. P. Act, 39.
agriculturist—at the time of—is exempt from, 217	Attachment and sale —223.
agriculturist exempt where decree is for awarding costs, 217.	certain agricultural produce exempt from, 331, 336.
exemption form—can be claimed in a subsequent dakhast though it was not claimed in a previous one, 220.	crops raised by legal representatives of judgment-debtor not subject to, 236.
ex parte decree and, 218-219.	date of—to be considered, not of sale, 238.
in execution of a compromise decree, 221.	effect of exemption from, 225.
in execution of a decree for money abolished, 216.	for recovery of the fine levied by a Criminal Court, 232.
ordinary law, 216.	immoveable property of an agriculturist exempt from, 223, 230, S. 22.
privilege of exemption from—whether can be waived, 221.	in execution of a compromise decree, 237.
retrospective operation of the provisions about, 217.	legal representative if non-agriculturist cannot take benefit of S. 22 228.
status of agriculturist for exemption from, 217.	liability of Hindu heir for, 229.
under the Bom. Co-operative Societies Act, 222, 223, 334.	limitation for appeal against, 241-242.
Assistant Judge —	management by Collector, 238, 239, 240.
powers of revision : 217. S. 53.	object of exemption of agricultural produce from, 225.
provisions of Ch. II do not apply to suits tried by, 55.	of property in the hands of agriculturist legal representatives, 228.
As then defined by law —	order under S. 22 is appealable, 241.
86, 87, 90.	of property belonging to agriculturist, 220.
Assignee —	points of enquiry when property is claimed to be exempt from, 225.
accounts to be taken from, 132.	presumption that Court's order about—is valid, 231.
application of Ss. 12 and 13 to, 113.	
if agriculturist, can sue under clause (y) or (z), 64.	

	Page
Attachment and sale—Continued.	
procedure for — of agricultural produce, 236-237.	
provisions about — apply to awards, 237-248.	
standing crops are liable to 236.	
status for exemption from — can be proved in execution proceedings 226.	
status for exemption from — must be at the time of attachment, 226*	
temporary alienation, 238-240.	
Attestation— 297, 299, 311.	
Attorney—	
excluded in certain cases, 317.	
Award—	
application of s. 22 to, 237.	
application to file is not a suit, 65, 141, 178, 214, 323.	
award decree and instalments, 214.	
bona-fide reference to, 141.	
decree on — is not subject to s. 20, 214.	
enquiry before filing, 141.	
executing Court cannot interfere with 180-181.	
fraudulent — should not be filed, 141, 142.	
is enforceable as a decree, 238.	
points to be considered before filing an award, 142.	
suit to file an award is not a suit under s. 3, 65, 141.	
not subject to s. 15B, 177, 181.	
Bar—	
plea of — of appeal is a point of law, 81.	
Bench—	
District Judge sitting as a Bench with the Sub-Judge, 80, 276, s. 51.	
Benamidar—	
application of Ss. 12 and 13 to, 112, 132.	
Benamidar—Continued.	
as an agriculturist, 40.	
Benefit—	
is given of this Act to non-agriculturists in certain cases, 6.	
of the Act is personal, 113.	
Beneficial Construction—	
of this Act, 7, 161.	
Between the parties—	
accounts to be taken only, 132.	
Bhatta—	
burden of — of the defendant is not to be thrown on the plff., 77.	
Bona-fide—	
agriculturists alone protected, 80, 82.	
transferee for value without notice when protected, 101.	
Bonds—	
if several mortgage — accounts of all must be taken in the same suit, 195.	
accounts where bonds are old, 125.	
Bounties—	
and other uncertain incomes are not earnings, 21, 26.	
British India—	
defined, 10.	
what is within 10.	
what is not within, 10-11.	
Bullocks—	
want of— or other agricultural implements is not conclusive, 32.	
Burden of proof— 135.	
as to whether income from agriculture exceeds other income, 25.	
is upon the person who sets up the plea of status, 45, 46, 118, 119.	
no fixed rules about—in taking accounts, 120.	
of status, 229-230.	

Page	Page
<p>By servant or by tenant— whether the phrase includes relatives or friends, 20, 21.</p> <p>Cereculture— included in agriculture, 26.</p> <p>Civil Procedure Code— applies to proceedings before Sub-Judges, 333. District and Assistant Judge not governed by 281, 333. uncertified payments under, 322, S. 257A of, 148.</p> <p>Civil Court— does not include Mamlatdars' Court, 273. adjudication by, 122, 130.</p> <p>Charge— defined, 320. may be created by a decree, 235. mortgage includes, 235. valid only when in writing, 313.</p> <p>Change in Law— effect of pendante lite. 5, 9, 13, 115.</p> <p>Claim— admission of — effect of, 132, 134. disputed — meaning of, 118. for overpayment, 153. for set off, 155. for refund, 154.</p> <p>Collector— can set aside sale on ground of price being inadequate, 242. decree for sale of immoveable property transferred for execution to, 241, s. 22A. execution by 339, Appendix B. and C. not to recover expenses of sale. See Appendix B, 347. order of lower Court refusing appointment of Collector for the management of property is appealable, 241. power of — to manage property, 238, 255.</p>	<p>Collector—<i>Continued.</i> power of — to recover arrears of land revenue, 256. precautionary processes by, 256. temporary alienation to, 238.</p> <p>Commencement— history of transaction to be enquired from, 108, 126. meaning of, 126. accounts to be taken from, 146.</p> <p>Compound Interest— may be allowed in certain cases, 150—s. 13(d).</p> <p>Compromise— admission is not, 136. and arbitration, 135, 177, 181. by pleader, effect of, 137. before filing — Court can go behind— 138 (Sind view 133). can be entered into, 136, 137, 179. decree cannot be re-opened, 140. entered into by parties should be given effect to, 177, 179, 181. giving up status of agriculturist, 221, 237. how far against public policy, 136—137. meaning of, 136.</p> <p>Conciliation— abolition of the system, 267. appointment of conciliators, 268. certificate to be given under, 272. District Judge may withdraw cases from, 275 failure of the system of, 266-267. matters that may be brought before, 268. object of, 266. policy of this Act to encourage reference of disputes to, 141. procedure to be followed in, 268-272.</p>

	Page		Page
Consent decree — 179.		Court — <i>Continued.</i>	
cannot be modified by Court, 180.		bound to examine parties and enquire into the history of the transaction 120.	
executing Court will not interfere with, 180, 189.		can dispense with examination of parties, 125.	
Sind view about, 181.		can go behind the document to understand the real nature of the transaction, 86, 92.	
Construction —		cannot disregard an admission entirely, 134.	
beneficial — to be given if possible, 7, 161.		cannot direct Collector to take possession of immoveable property of legal representatives, 239, 240.	
general rules of, 3, 115, 233, 248.		can order payment by instalments, 190, 167, 192, 205, 208.	
illustrations help, 4.		can direct Collector to take possession of Judgment-debtor's immoveable property, 238.	
literal — 3, 8, 64.		cannot vary an instalment order, 210.	
marginal notes and, 4.		deposit in, 206, 207.	
preamble and, 5.		duty of, to examine history and merits of case, 119.	
previous history of law and, 5.		executing not to interfere with consent decree or award, 180, 181, 189 in S. 12 means the Court mentioned in S. 11, 118.	
proceeding of the legislature and, 5.		mortgage with sanction of, 131.	
proviso and, 4.		not to go behind decree, 131, 150.	
rules of, 13, s. 2.		pecuniary jurisdiction given to— by consent cannot be withdrawn, 57, 58.	
reasonable, 3.		power of Court to order only a portion of the mortgaged property to be sold, 168.	
retrospective operation, 5.		power of Court to continue mortgagee in possession, 168, 189, 190, 191.	
title of the Act and, 5.		power of—in making enquiry under S. 12, 192, 193.	
Co-operative Credit Societies —		power of—to name some future date for payment of mortgaged money, 165.	
334.			
arrest of agriculturists under, 334.			
entitled to assistance in the recovery of their debts, 334.			
exempted from disabilities of this Act, 334.			
object of, 334.			
Co-parcener in a joint Hindu family —			
minor is not an agriculturist, 23.			
member when an agriculturist, 26.			
Cotton —			
income from ginning — is not agricultural income, 28.			
Counterpart —			
is included in lease, 15.			
Court —			
assuming pecuniary jurisdiction through honest misinformation, 57.			
before filing compromise can go behind it, 138.			

Page	Page
Court—Continued.	Decree—Continued,
power of, to make enquiry before filing awards, 141.	'any decree' in s. 20 means money decree, 212.
sanction by—under S. 257A of C. P. Code cannot have effect of a decree, 131.	application of Act to rights already created by, 117.
—sitting in banco, 80.	agriculturist at the time of, 170.
'the Court' in s. 11 means the Court of lowest grade, 105, 106.	compromise, 177.
'the Court' in s. 13 is the Court within the local limits of whose jurisdiction the defendant resides 118.	compromise—cannot be opened, 140.
to find out money received by the debtor from time to time, 119.	compromise—giving up the status as an agriculturist, 221.
which Court can pass instalment decree, 120.	contract merged in—cannot be opened, 140.
when to make enquiry <i>sou motu</i> 50, 121.	consent decree, 179.
when can exercise revisional jurisdiction 277. s. 53.	Court cannot go behind; 123, 130, 150.
Court-fee—	default clause, 188, 210.
in suits by agriculturist, 201.	definition of, 41.
see also Appendix H.	effect of, 164.
Crops—	<i>ex parte</i> —and <i>res judicata</i> , 219.
of all sorts included in standing, 15, 39.	failure of justice the only ground on which decree is reversed, 277.
Damdapat—	for sale to be transferred to the Collector for execution, 241.
inference from Hindu rule of, 147, 150.	for foreclosure can be converted into one for continuing mortgages in possession, 189.
operation of rule of—when begins, 152.	for redemption must award possession to the mortgagee, 163.
Debt—	in s. 15B means decree nisi as well as decree absolute, 182.
The word not confined to contractual debt, 231.	instalment— which Court can pass 170.
limitation for application to extend time for payment of, 187.	in suits for accounts may order instalments, 206.
proof of, in insolvency, 253.	in terms of award and instalments, 179.
scheduled debts, 258.	Judgment-debtor cannot set off overpayment in one transaction against sum due under decree, 117.
secured debts, 257.	limitation when instalment— is appealed from, 187.
Decree—	may be directed to be paid by instalments, 169.
awarding costs is money decree, 217.	

Page	Page
Decree—Continued.	Deposit in Court— 206, 207.
mortgagor can obtain redemption— before time fixed has expired, 159, 160.	Dependance—
no appeal lies from— or order to which Chapter II applies, 79, s. 10.	for maintenance upon agriculturist cannot make one an agriculturist, 21.
or order of Village-munsif can be set aside, 263.	is not earning, 21, 22.
payments towards— though uncerti- fied is recognized, 322.	Devasthan—
period of not less than six months from date of, allowed for payment, 166.	as an agriculturist, 20.
proceeding in execution of a—passed in a suit on an award, 323.	Disputed claim—
sanction of Court under s. 257 of C. P. C. cannot have effect of, 131.	108, 118.
status at passing of, 173, 174.	District—
status at preliminary, —173.	agriculturist must carry on his work in a—to which this Act applies, 23.
under s. 15B need not be made abso- lute, 183, 184.	District Judge—
Default clause—	and Assistant Judge not governed by the provisions of C. P. Code, 333.
in instalment decree, 189-190.	can interfere with findings of facts, 333, 293.
Defendant—	can remand a case, 333.
applies to agriculturist and non-agri- culturist, 75.	can allow additional evidence in revision, 284.
agriculturist, 104.	can revise order or decree of a Sub- Judge, 333.
burden of defendant's bhatta not to be thrown upon plaintiff, 77.	and Village-munsifs, 277, 278, 281.
burden of proof may be thrown on, 120.	can transfer to his Court a case tri- able by a Village-munsif, 263.
examination of — is mandatory, 73, 75.	can set aside the decree or order of Village-munsif, 264.
giving of written statement is not sufficient for exempting from per- sonal appearance, 76.	can not allow withdrawal of a suit, 286.
may be exempted from personal appearance, 76.	C. P. Code not applicable to pro- ceedings before, 333.
reasons for exempting — from appear- ance must be recorded in writing, 76.	has revisionary powers in all cases of failure of justice, 333.
residence of and place of suing, 105	High Court will not interfere with the discretion of, 333.
under s. 11 means defendant at the time of suit, 104, 105.	jurisdiction to revise proprio motu, 282.
	may set aside an ex-parte order made by himself, 333, 291, 295.

Page

District Judge—Continued,
 may review his own judgment, 277.
 273, 333, S. 53.
 may inspect, supervise and control
 the proceedings of Village-munsifs,
 264, 275.
 may sit with Subordinate Judge as
 a Bench, 276.
 may withdraw case from a Conci-
 liator or Subordinate Judge, 275.
 no power to allow withdrawal of
 suit, 286.
 power to remand a case, 281.
 powers of, under S. 36 and S. 53, 280.
 Subordinate Judge or Assistant
 Judge may refer a case to, 277.
 where members of a Bench differ,
 the opinion of—to prevail, 276.

Document—
 must speak for itself, 92.
 oral evidence of the contents of, can
 be given, 92, 93, 94.

Earns principally— 25.

Earning—
 dependence is not, 21.
 does not include mere bounties,
 22, 26.

Earns his livelihood—
 actual income at the time to be
 considered, 21.
 agriculturist to be deemed to reside
 where he, 15.
 dependence is not earning, 21.
 meaning of, 21.
 principally by earning, 21.

Effect of repeal—
 13, 14.

Estoppel—
 description in the instrument as a
 non-agriculturist does not amount
 to, 46.

Evidence—
 additional—in revision, 281.

Page

Evidence—Continued.
 admission of instrument in crimi-
 nal proceedings 292, 296.
 and Registration Act, 93.
 oral, 7, 83.
 oral—when allowed, 83, 86, 92, 135,
 See 'oral evidence.'
 review can be granted on ground of
 discovery of new, 285.
 unregistered document not admitt-
 ed in 295-96.

Examination—
 necessary even where defendant ad-
 mits the claim, 122.
 of defendant as a witness, 74.
 of parties mandatory, 108, 120-123,
 125.

Execution—
 legal representative and proof of sta-
 tus of agriculturist in, 174.
 status of agriculturist can be proved
 in, 173, 174.
 status of agriculturist can be proved
 in execution of ex-parte decree
 173.
 meaning of, 170.
 and status of party, 227, 217.
 by Collector, 241, 331. See Appendix
 B and C.
 proof of status as agriculturist by
 legal representatives in, 174.
 status as agriculturist can be proved
 in execution, 174.
 orders in — proceedings and revision
 278.

Ex parte decree—
 can be reviewed, 281, 285.
 where — is pass status can be proved
 in execution, 173, 174.

Firm—
 as agriculturist, 19, 105.
 as person, 19.

	Page		Page
Firm — <i>Continued.</i>		History —	
as defined in Indian Partnership Act		enquiry into nature of, 123-125.	
19.		necessity of investigating — of	
as a legal entity, 19.		transactions, 109, 110.	
place of suing, 105.		no presumption if previous—cannot	
status of partners constituting, 20.		be traced, 124-125.	
suit against, 105.		of transactions to be investigated from	
Flowers —		commencement, 107, 109, 111, 126.	
standing crops include, 15.		when investigation into — not neces-	
Following two occupations — 33.		sory, 125.	
Fraud —		Holder of land —	
by creditors and debtors, 123.		under grant whether assignee of	
Friends —		Government revenue, 35.	
relatives and — includes in 'by		Horticulture —	
servant or tenants,' 20-21.		included in agriculture, 27.	
Fruit —		Illustrations — 4, 9, 88.	
income from preserving not agricul-		Immoveable property —	
tural income, 28.		defined, 226.	
standing crops to include, 15.		equity of redemption is, 226.	
Gosawis —		in the hands of heirs of agriculturists	
presumption of occupation of, 33-34.		not to be attached, 239, 223.	
Ginning —		of an agriculturist — exempt from	
income from — cotton is not agricul-		attachment, 223 s. 22.	
tural, 28.		of insolvent to be managed by Col-	
Grass —		lector, 255.	
income from — is agricultural in-		status at the time of attachment of,	
come, 27.		226.	
Government —		Imprisonment — s. 21.	
attitude of, forwards amending the		see arrest.	
Act. 13.		Implements —	
Hearing of suit —		want of agricultural—not conclusive,	
and status of agriculturist, 47-50.		32.	
High Court —		Inamdar —	
Instructions of, for guidance of Sub-		as such is not an agriculturist, 35,	
ordinate Courts, 336.		when can be an agriculturist, 35.	
will not interfere in revision, 286,		Income —	
333.		derived from a place where this Act	
Hindu joint family —		does not apply is not agricultural,	
coparceners in, whether agricultu-		29.	
rists 22.			
status of, 26.			

Page	Page
<p>Income—Continued. from non-agricultural sources may exceed income from agricultural sources provided a man works personally on land, 83. presumption as regards sources of, 25, 83. sources of — when several, agriculturist must earn his income principally from agriculture, 25. what — is agricultural, 27. what — is not agricultural, 28. derived from jagirdar's tenant's is non-agricultural, 85.</p> <p>Indebtedness— means — existing at the passing of the Act as well as future,—117.</p> <p>Inquiry— into the nature of the transaction 133. object of 108, 124. mandatory, 120, 121, 122. nature of, 123, 124, 125. power of Court in making, 132, 133 s. 12.</p> <p>Insolvency— appeal does not lie from an order passed in, 258. appeal under Prov. I. Act, 259. agriculturist when can apply for, 250. arrest, imprisonment, etc. not necessary for application for, 250. chapter on—has remained inoperative, 249-250. Collector may be directed to take possession of property in, 254. contents of application for, 251. District Judge's power in, 249, Ss. 50, 58 and 55. fraud, bad faith etc. no grounds for refusing—application, 252. immoveable property does not vest in the receiver in, 253.</p>	<p>Insolvency—Continued. insolvent cannot deal with his property, 258. inspection, District Judge's power of, in—proceedings, S. 50. law of the country about, 245. Nazir alone can be appointed receiver in, 253. object of, 245-247, 250. ordinary law about, 250. power of management of the Collector, 255-6. power to direct institution of—proceedings, 208. privileges given to an agriculturist in, 247. proof of debts in, 253. Prov. Inso. Act does not apply, 245. receiver is not entitled to commission 253. revision, District Judge's power in—proceedings, s. 53. Subordinate Judges to have jurisdiction, 244. secured debts and—proceedings. 256-7.</p> <p>Insolvent agriculturist— cannot sell etc. his immoveable property, s. 31.</p> <p>Inspection— District Judge's power of, 274, 275.</p> <p>Instalments— Ss. 15B, 15C, 15D, and 20. award decrees and, 177-179, 214. consent of decree holder not necessary for, 209. Court can make the mortgage amount payable by, 201. Court can order payment by — in suits for possession of mortgaged property, 190. decree in terms of award and, 177, 179, 214.</p>

- | Page | Page |
|--|--|
| Instalments—Continued. | Interest— s. 13, s. 73. |
| decretal amount can be made payable by, 167-169, 203-209, Ss. 15B s. 20. | Court to grant agreed rate when it is reasonable, 323. |
| default clause in — decrees, 188, 210. | excessive rate of, 324. |
| in respect of unsecured debts, 205-6. | future interest not allowed, 152. |
| interest on — may be allowed, 171. | if no rate of—agreed upon Court's discretion in granting, 323. |
| limitation when — decree is appealed from, 187. | in suit for enforcement of mortgage, 325. |
| no variation of — order allowed, 172 209, 210. | mercantile usage about, 325. |
| order for can be made even <i>sou motu</i> , 181. | monthly simple—may be allowed, 150. |
| order for — can be passed after an order absolute for sale is made, 181-182. | on instalments allowed, 171. |
| order for — cannot be made after foreclosure, 182. | on interest not generally allowed, 149. |
| order for — when can be passed, 181. | payment to be first set off against, 151. |
| order not subject to limitation, 181. | power of Court to allow, 324. |
| principal of, —211. | principles to find out amounts of principal and, 146-147. |
| res judicata not applicable to, 211. | profit in lieu of, 146, 151, 323. |
| status of agriculturist for instalments, 173, 174, 211. | rate of—in taking accounts, 150, 151, 158, 323. |
| what Court can order, 170. | right to—ordinary law, 325. |
| where <i>ex parte</i> decree is passed, 173, 174. | separate account of principal and, 146, 147. |
| wide power of Court in allowing, 211. | stipulation to pay—not conclusive proof of transaction being mortgage, 96. |
| Instituted— | where rate of is not stipulated, 325. |
| does not mean heard and decided, 70. | statutory right for, 325. |
| Instrument— | when can Court reduce—; ordinary law, 325. |
| defined, 294. | Interpretation— |
| what is, 294-5. | general rules of, 3-6. |
| written, 330. | Jagirdar— |
| Interest— | income of is not agricultural, 35. |
| account of how made up, 151. | when is an agriculturist, 35. |
| aggregate amount of — not to exceed the principal, 152. | when to be deemed Sub-Judge, 52 S. 2A. |
| calculation of, 327. | Joint family— |
| conversion of — into principal, 149, 152. | status of, 26. |
| Court cannot award higher rate than agreed upon, 151, 325-7. | |

Page	Page
Joint family—Continued.	Legal practitioner—
joint income of all member to be considered in determining status, 25.	not allowed to appear in certain cases, 317.
minor coparcener in—is not agriculturist, 23.	object of excluding, 317, 318.
Judgment-debtor—	old law about, 318.
legal representative of — may plead status, 174, 228.	where—appears for a party, Court can appoint a pleader for an agriculturist, 319.
property in the hands of heirs—cannot be attached, 239.	Legal representative—
cannot set off overpayment in one transaction against sum due under a decree, 117.	application of s. 22 to—228, 233, 240.
Jurisdiction—	of deceased judgment-debtor can prove his status under s. 15B, 174.
of Sub-Judges to hear suits, 53, 56, 59.	Limitation— s. 72.
partners of firm and—of Court, 105, s. 11.	allowance to be made in period of under Conciliation, 273.
pecuniary—assumed through honest misinformation, 57.	conditions of applicability of provisions about, 330.
pecuniary, given by consent, 57, 58.	for appeal under s. 22, 241.
Kabulayat —	for application to extend time for payment of mortgage debt, 187.
included in lease, 15.	object of provisions about, 330.
Land Revenue—	power to grant instalments not subject to, 174.
suit for does not fall under, s. 3, 62.	no — to prove status under s. 15B, 174.
powers of Collector for securing, 256.	when instalment decree is appealed from, 187.
Lease—	special law of — applicable only to four districts, 331.
agreement to, 39.	Local extent —
defined, 15, 39.	of this Act, 10, 13, s. 1.
includes counterpart, 15.	of the various sections, see notes under those sections.
oral evidence admissible to prove sale was really, 88.	Local Government—
Leaves—	power to make rules s. 37, s. 75.
standing crops include, 15.	Mango fruit—
Lein—	income — from is an agricultural income, 27.
defined, 320.	marginal notes and construction, 4.
valid when written, 319; s. 70.	Mesne profits—
	claim for, 155.

	Page		Page
Middleman —		Mortgage — <i>Continued.</i>	
is not an agriculturist, 52.		word applies only to immovable property, 63.	
Minor —		with Court's sanction, 131-132.	
depending on guardian for livelihood is not an agriculturist, 23, 24.		Mortgage bond —	
is an agriculturist if his property is managed by Collector, 24.		construction of — and intention of parties, 161.	
Money —		sum in excess of — allowed on taking accounts, 156.	
due on taking account, 156.		Mortgage decree —	
includes cattle, 38, 314.		s. 20 does not apply to, 212.	
meaning of, 15, 314.		Mortgaged property —	
used in a broad sense, 38.		expression applies only to immovable property, 50, 53, 63-64, 66, 67.	
suit for — cognizable by local Courts only, 101, s. 11.		expression does not mean admittedly mortgaged property, 63.	
Mortgage —		redemption of portion of — is not allowed, 163.	
accounts in case of several, 128, 135.		suit to recover leased property does not fall under cl. (y) of s. 3, 66.	
account when mortgage is denied, 196.		Mortgagee —	
Court can name some future day for payment of, 165.		as such is not an agriculturist, 15, 34, 35.	
decree upon — need not be made absolute, 183.		put in possession and asked to redeem himself out of profits, 164.	
defined, 63, 95, 294-295, 320.		power of Court to continue — in possession, 189, 190.	
does not mean admitted, 67.		If put in possession for a specified period cannot be redeemed before time, 190.	
executed in form of sale, 65, 95.		in suit by a benamidar, real — should be examined, 112.	
intention of parties to be considered in determining whether a transaction amounts to, 161.		when interest is allowed — bound to account, 171.	
lien or charge valid only when in writing, 310, 320.		where is in possession, redemption may be without sale, 189.	
ordinary law about creation of, 320 or sale, 63, 96.		Mortgagor —	
in the nature of sale, 65, 98.		agriculturist assignee of — can claim privileges of this Act, 64.	
rate of interest in suit for enforcement of, 325.		can redeem before time fixed, 159-160.	
rules for determining whether a transaction amounts to — or sale, 38.		can sue for accounts, 191, 193.	
stipulation to pay interest is not proof of, 96.		Court can name some future day for payment by, 165.	
suit not necessary to set aside alleged, 99.			
word — not used in a technical sense, 69, 161.			

Page	Page
Mortgagor—Continued.	Parties—
cannot redeem before time fixed if mortgagee is in possession under a decree, 190.	account to be taken between, 132.
cannot recover overpaid amount, 153.	examination of parties mandatory, 120-123.
no suit for account against co-mortgagor who redeems, 138-139.	intention of parties to transaction, 133.
Mukhtyar—	may refer disputes to arbitration, 140.
excluded in some cases, 317.	contract between—made subject of adjudication cannot be investigated by Court, 131.
Notice—	rights of—how affected by change of status pendente lite, 114.
bona fide transferee for value without—when protected, 89, 100.	status of and applicability of s. 10A, 89.
to parties before exercising powers of revision, 282-283.	Party—
Non-agriculturist—	cannot waive the right of examination or accounts, 75.
is sometimes benefited by this Act, 6.	claiming through an agriculturist must be an agriculturist, 100.
at preliminary decree does not get the advantages of s. 15B even if he becomes agriculturist at final decree, 173.	Pass book—
Ordinarily—	agriculturist entitled to have his accounts entered in a, 315.
means regularly and habitually, 31, 33.	Patel—
Object of the act— 1-2.	may be appointed Village-munsif, 260.
Oral evidence—	Payment—
agriculturist can claim to give at any stages, 89.	court may fix some future date for, by mortgagor, 165.
can be admitted in evidence of transactions triable under Ch. III, 83.	may be proved by ordinary legal modes, 314.
can be given only when an agriculturist is a party, 89, 99-100.	time fixed for—immaterial, 159.
can be given notwithstanding the provisions of the Indian Evidence Act 92-94.	first set off against interest, 144, 151.
Overpayment—	Pendente lite—
claim for—after taking accounts, 153-155.	change of law, 13-14.
Partners of a firm—	change of status, 114.
as agriculturist, 19, 20.	Person—
	definition of, 18.
	through whom agriculturist claims, 132.
	firm as a person, 18.
	Personally works— 20, 32, 33.

	Page		Page
Plaintiff—		Principally—	
admission by, 133.		actual earning to be considered, 25.	
Court shall examine—and defendant, 108, 122, 123.		Privileges—	
suit to set aside sale not necessary if -- admits transaction as real but sets up mortgage, 99.		given to agriculturists in insolvency proceedings, 247.	
Plender—		of an agriculturist are personal, 23-40.	
excluded in certain cases, 317.		Printed form—	16.
Power of attorney—		Proceeding—	45.
for purposes of Registration Act, 298-299, 365, Appendix E.		on award is not under this Act, 322.	
persons holding-- from agriculturists to follow the procedure mentioned in this Act, 308.		Process Fee—	
to relatives, servants or dependents, to appear before Village-munsifs, 317.		no -- before Village-munsif, 263, 267.	
Preamble—		Profits--	
Act goes beyond, 6.		in lieu of interest, s. 13, 146.	
and construction of the Act, 5.		mesne, 155.	
Preliminary decree—		rent in lieu of, 158, s. 13A.	
omission to draw -- effect of, 44.		Proof --	
status of agriculturist as a. 41-47.		burden of.	
status must be at—for s. 15B, 173.		See Burden of proof.	
Presumption—		Property—	
in taking accounts plays an important part, 125.		redemption to be of entire, 163-164.	
no—that one half of a bond is for principal and other half for interest, 124, 127.		equity of redemption is immoveable, 226.	
that income from agriculture is less than other income, 25, 33.		Proviso—	
where an agriculturist follows two occupations, 33.		and rule of construction, 4.	
when sale of property is ordered by Court, 231.		Receiver—	
Principal—		immoveable property of agriculturist not to vest in, 253 s. 29.	
how to ascertain in taking accounts 142, 146-9, s. 13.		only Nazir appointed as—in insolvency, 253, s. 27.	
no presumption that half of a bond represents — and half interest, 147		Receipt—	313-316.
		agriculturist entitled to, 315.	
		not the only admissible evidence, 314-315.	
		penalty for not giving, 316.	
		Redemption—	
		account of all mortgages when taken together in suit for, 127, 128, 132.	
		allowed before stipulated period, 152-160.	

Page	Page
Redemption—Continued.	Reference—Continued.
by a mortgagor bars a further suit, 139.	no—can be made where appeal lies, 82.
by a stranger and suit for accounts or redemption, 199.	previous sanction of Special Judges, 283.
decree for -- must allow possession also, 163.	Refund—
effect of decree for, 164.	claim for—of overpaid amount, 154.
if Court finds account due and orders payment by instalments no suit for -- can lie, 201.	Registration —
part owner can sue for redemption of the whole property, 198.	consideration to be fully stated in, 301.
possession of mortgagee in -- suit to be for a specified period, 190.	documents of which—is compulsory under the Registration Act, 296, 305.
right of -- when status changes pendente lite, 114.	documents of which—is compulsory under this Act, 305.
suit for accounts can be converted into suit for, 193, 200.	effect of abolition of village,—291.
second suit for -- when allowed, 185, 186, 187.	effect of, 307-308.
subsequent suit for, 134.	effect of non—, 293, 294, 307.
suit for account does not bar a separate suit for redemption, 200.	executant of instrument to appear in person for, 298, 308-9.
suit for—in form and reality, 136-197.	of document to which Government or officer of Government is a party, 303.
suit not maintainable where mortgage is superceded by consent decree, 201.	of adoption deed not necessary, 306.
time fixed for, 162.	of wills, 295.
to be of entire property, 163, 164.	Indian Registration Act how far applicable for—under this Act 294.
valuation of suit for, 58.	of instruments executed by agriculturists, 295.
where mortgagee is in possession redemption may be allowed without sale, 189.	of instruments executed by agriculturist as surety, 296.
though suit for—is dismissed another suit for specific performance is allowed, 99.	Local Govt. to appoint Village Registrars for, 292.
suit for—can lie before time stipulated for payment of principal or before debt due is discharged, 159, 160.	mode of—of documents required to be registered by the Registration Act, 304, s. 63A.
Reference—	of instruments by Village Registrars, 300, s. 58.
to High Court, 289, 82.	old law of, 306.
	object of the system for, 290.
	power of attorney for, 299.
	present law about, 305, 308.

	Page		Page
Registration—Continued.		Revision—Continued.	
presence of the other party for, 299, 310, 311.		ex parte order can be set aside in, 281.	
provisions of s. 63 A are mandatory, 308.		First Class Sub-Judge with appellate powers has no jurisdiction for, 281.	
under this Act to be deemed equivalent to—under the Reg. Act, 303.		High Court does not interfere in, 286.	
special procedure about, 298.		jurisdiction in—proprio motu, 282.	
village—rules, 299. See Appendix E. 360-365.		of decision of question of fact, 283-284.	
Relative—		on ground of failure of justice, 277.	
or friend included in ' by servant or by tenant ', 20, 21.		of orders in execution proceedings, 278.	
may appear before Village-munsif. 317.		notice to parties of, 282-283.	
Res Judicata—		power of District Judge of, 274.	
and application of s. 22, 280.		parties need not be agriculturists for, 278.	
ex parte decree and, 218.		suits falling under Ch. II and, 278-279.	
legal representative and, 228.		under Ss. 36 and 53, 280, 281.	
no res judicata under s. 21, 219-220.		withdrawal suit not allowed in, 286.	
decision on question of status is not—under the provisions of this Act, 46.		power special Judge in, 287 s. 54.	
Retrospective operation—		Remand— 281	
of new Acts, 13-14.		Rule—	
of s. 10A, 86.		making power of Local Government, 265, 273, 304, 334.	
of s. 15B, 169.		Rules—	
of s. 22, 233.		to be published, 335.	
of s. 16, 205.		See Appendices.	
of Ss. 12 and 13, 115, 116.		for deciding whether a person is an agriculturist, 81.	
to an Act when given, 5, 9, 13, 86, 115.		Rights—	
Review— 285		of parties and change of status, 9.	
discovery of new evidence and, 285.		where already decided by decree, this Act has no application, 117.	
of ex parte decree or order, 281.		Sale—	
Revision—		agricultural produce when exempt from, 331. s. 73A.	
additional evidence in, 284.		Collector can set aside—if price is inadequate, 242.	
and appeal, comparative merits, 80.		Court to make out and out sale under s. 15 B, 183.	
application of s. 63 (Of Revision) 278.			
by District Judge of the proceedings of Sub-Judges, 79.			

Page	Page
Sale—Continued.	Silviculture—
Court can order—of only a portion of the property, 168.	is included in agriculture, 27.
decree or order for—of immoveable property to be transferred to Collector, 241.	Sitting in Banco— 80, 274, 276.
definition of, 95.	Social position—
distinction between sale and mortgage, 95-96.	of agriculturist immaterial, 30.
facts guiding Court in deciding whether sale or mortgage, 96-98.	Special Judge— 288-289, s. 54.
mortgage in the nature of, 65, 95.	reference and previous sanction of, 289.
of immoveable property of agriculturist not allowed, 222 s. 22.	Sou motu—
in contravention of s. 22 is void, 230.	Court must make enquiry—under s. 12, 120-122.
onerous nature of terms of mortgage does not prove the transaction to be a, 97.	Court to Act, 121.
or mortgage by conditional sale, 98.	Specifically—
ostensible—why money lenders resort to, 165.	meaning of, 234
period for making an application for sale of property under s. 15B, 187.	Service or other advantage—
proceeds of,—how applied, 257.	giving credit for, while taking account, 144, 151.
suit to set aside—not necessary, 99.	Standing crops—
tests for deciding sale or mortgage, 96-98.	are liable to attachment, 236.
Scholarship—	are moveable property, 39.
is not earning, 22.	defined, 15, 33.
Second appeal— 86, 89.	include leaves, flowers, fruit etc., 15.
Servant—	meaning of, 236.
can appear before Village-munsif, 317.	Statement of accounts—
works himself or by, 20.	agriculturist is entitled to, 313-315.
Set-off—	Step-in-aid—
claim for, 155, 156.	application for making decree for sale absolute is at best a — 184.
Secured debt—	Status—
meaning of, 257.	and res judicata, 46.
procedure adopted by Collector in case of, 256, s. 30.	as preliminary decree, 41-46.
	burden of proof of, 46, 223.
	effect of change of, 9, 114.
	change of—at different stages, 47-50.
	farming for one agricultural season necessary to acquire status of, 30.
	of debtor himself must be considered 174, 175.
	of joint family how to be determined, 26.

Page	Page
Status—Continued.	Suit—Continued.
of parties and applicability of s. 10A 89.	account—under Ss. 15D and 16, 204. Act not limited to suits of small amount, 111.
of partners constituting a firm, 19.	against a co-mortgagor for account, 198.
no limitation to prove, 174.	against agriculturist firm, 105.
plea of—must be enquired into, 45, 51.	appeals in account—, 202.
plea of—cannot be raised first in appeal, 65.	application to file award is not, 65, 178.
the term suit includes, 65.	change of status pending, 114.
under s. 15B, 173, 175.	change in law pending, 13.
under s. 20, 212.	Court can order payment by instal- ments in— for possession of mort- gaged property, 190.
under s. 21, 217-220.	directions to Courts trying— under D. A. R. Act, 336, 338.
under s. 22, 226-228.	falling under cl. (w), 59, 60, 62.
Subordinate Judge—	falling under cl. (x), 59, 61, 62.
assuming jurisdiction through mis- take, 57.	falling under cl. (y), 62, 66.
alone has jurisdiction in insolvency, 244, s. 24.	falling under cl. (z), 62, 67.
C. P. Code applied to, 332, s. 74.	for accounts, 53, 56.
hearing of suits by, 53, 69.	for account does not bar a separate suit for redemption, 200.
instructions of High Court to, 336.	filed in wrong Court, 106.
Jagirdars as, 52.	for interest upon interest, 149.
jurisdiction of—and Small Cause Court, 71.	for account, can be converted into suit for redemption, etc., 193, 200.
may appoint pleader for agricultu- rist, 319.	for land revenue does not fall under s. 3, 62.
not to act as Judges of Small Cause Courts, 70.	for setting aside sale not necessary, 99.
pecuniary jurisdiction of, 56.	interest from date of—to realization 150, 152.
Stock—	if dismissed, another suit on differ- ent cause of action can lie, 99.
includes cattle, 38.	"in every suit" meaning of, 74.
Student—	includes status of parties under s. 15B, 65, 170, 173, 176.
receiving income from scholarships is not an agriculturist, 22.	if Court finds account due and orders instalments, no - suit for redemp- tion can lie, 201.
Sub-registrars—	on mortgage, 128.
instruments drawn up on printed form by—deemed as written by, 16.	— or proceeding to which an agri- culturist is a party, 89.
to follow procedure prescribed for Village-registrars, 304, s. 63A.	
Suit—	
accounts to be taken up to the date of, 144, 151.	

	Page		Page
Suit—Continued.		Suit for possession—	
oral evidence is admissible in suits by agriculturists, 83, s. 10A.		does not come under s. 3 (w) if rightful owner is deprived by fraud, 67.	
no— for account against co-mortgagor, 198.		Summons—	
parties to, may come to compromise, 186, 187.		for final disposal of suit, 73, 77.	
redemption by stranger and— for accounts, 199.		form of, 77-78.	
second—for redemption when allowed, 185-6.		to witnesses of defendant in disputed cases, 122.	
second—for redemption when barred, 187.		Supervision—	
to file award is not a—under this Act, 323.		by District Judge of proceedings of Sub-Judges, 79, 275.	
S. 15 B applicable to—only when— tried by a Court to which this Act applies, 175.		Surety—	
the term includes status of parties, 65, 169.		limitation in case of agriculturist, 327, s. 72.	
transfer of, 107.		suit against agriculturist surety where to be lodged, 105.	
triable under Ch. III, 81.		sum paid by agriculturist surety to be taken as principal, 129.	
transactions out of which suit has arisen, 127.		Temporary alienation— 238	
valuation of—for redemption, 58.		This Act—	
to be instituted where defendant resides, 102, 105, S. 11.		meaning of the words, 29, 30.	
withdrawal of—and revision, 285.		Title—	
to recover pleader's fees, 61.		of the Act, 5, 9.	
to recover mortgaged property leased to mortgagee, 66.		of the person in possession may be determined in account suit, 133.	
to recover rents, 61.		Toddy Juice—	
to recover share of vatan money, 61.		income from is agricultural income, 28.	
to redeem pledge, 61.		Transaction—	
Suit for account— 53, 56, Ss. 3, 15D and 16.		application of S. 12 in regard to taking history of—not limited to suits mentioned in Ch. II, 111.	
no bar to redemption suit, 193-194.		agriculturist at the time of, 37.	
in—court may determine the title of the person in possession, 194.		Court can go behind the document to understand the nature of, 83, 86, 92.	
Suit for redemption—		history of to be taken from commencement, 126.	
second—when not maintainable, 185.		history of—to be investigated, 107, 108, 111.	
second—when allowed, 186.		meaning of 'same—', 127.	
valuation of, 58.			

	Page		Page
Transaction—Continued.		Village-munsif—Continued.	
inquiry into the nature of, 133.		Court fee in suit before, 263, Appendix H.	
intention of parties to, 133.		High Court's power of revision of, 265.	
necessity of investigating history of, 109, 110.		inspection by District Judge of proceedings before, 274.	
oral evidence allowed to determine real nature of, 83, 10A.		Jurisdiction of — is exclusive, 262.	
out of which suit has arisen, 127.		Madras — system taken as model, 260.	
real nature of, and oral evidence, 85-87, 92.		no appeal from decision of, 260.	
right of taking past history of—cannot be waived, 121.		not governed by C. P. Code, 263.	
several—when treated as distinct, 128.		not to try suit to which he is a party, 262.	
several dealings when treated as one, 127.		Patel, appointment of, as, 260-261.	
same, 127.		pleaders not allowed to appear before, 260.	
status of agriculturist for s. 10A must be at the time of, 99.		procedure before Village-munsif, 354, App. D.	
where—are distinct accounts to be taken separately, 128.		reference or review of — judgments of — 263.	
Transfer—		suits triable by, 260-262.	
of suits, 107.		supervision etc., by District Judge, 274.	
power of District Judge to, 275.		supplies a real need, 261.	
Transferee—		system how far successful, 261.	
bona-fide—for value when protected, 100.		when decree or order of can be set aside, 264.	
Vakil—		Village registrar—	
excluded in certain cases, 317.		appointment of, 292, s. 55.	
Valuation—		attestation of instruments to be executed before, s. 57, 297.	
of suit for redemption, 58.		consideration to be fully stated by, 301.	
Vatandar—		every executant of instruments to appear before, 298, 308, 309.	
as such is not an agriculturist, 34.		instruments to be executed by agriculturists must be executed before, 292.	
Uncertified payment—		effect of non-registration, 295.	
not recognized in case of awards, 322.		instruments to be executed by or under the superintendence of, 297.	
recognized, under this Act, 322.		personal presence of the other party, 298, 310, 311.	
Undertaking to cultivate— 89.			
Village-munsif— and revision, 264.			
appointment of, 260.			
chapter III not applicable to, 243.			

Page	Page
Village-registrar—Continued.	Waiver—Continued.
procedure for registration, 300-302, Ss. 57, 59.	no, of right of defendant being exam- ined and his accounts and past transactions being gone into, 121.
registration by, 300.	Wealth—
registration before — deemed to be registration under the Registration Act, 303.	or social position of agriculturist— immaterial, 30.
rules, 360-365, App. E.	Wife—
superintendence of — and custody of records, 303.	of an agriculturist is not necessarily an agriculturist, 23, 24.
Waive—	Witness—
the party cannot waive the right of being examined or of taking accounts, 75.	Court to examine defendant as, 73, s.7 expenses of agriculturist defendant— summoned as, 76.
Waiver—	Written statement—
by party for whose benefit Act is passed is no ground for not apply- ing it, 50.	filing of—by defendant is no ground for exempting him for personal appearance, 76. admission by defendant in, 133.



CHECKED
2003-04

(The latest and the best book on the subject).

The Mamltdars' Courts Act

(Bom. Act II of 1906)

BY

D. B. GODBOLE, M. A., LL. M.,

Professor, Law College, Poona, Pleader, Poona,

AND

D. H. CHAUDHARI, B. SC., LL. B., *Pleader.*

This is an exhaustive commentary on an Act that is almost daily required by the legal practitioners and the Mamltdars. The following are some of the special features of the book:—

1. The commentary freely and fully discusses the law and explains the principles underlying it. It is not simply a collection of lengthy, unconnected and ill-digested extracts from various books and Law Reports.
2. All important topics like the nature and history of possession, the relations of landlord and tenant, the principles, nature and variety of leases, etc. have been fully and lucidly discussed.
3. An exhaustive introduction traces the history and growth of the Mamltdar's jurisdiction, and fully discusses the object, scope, importance and utility of the Mamltdars' Courts.
4. To make the book complete, exhaustive and self-contained, relevant portions from all allied enactments dealing with Court fee, Stamp, Limitation, Pleadings, Procedure, etc. have been included.
5. The powers and duties of the Mamltdars and Collectors have been exhaustively discussed.
6. Facts of all leading cases have been so stated as to bring out very clearly the main points involved therein.
7. The commentary is methodically arranged and presented in a masterly manner in various suitable paragraphs. For ease of reference, synopsis of commentary has also been given under each section.
8. An exhaustive General Index enables the reader to find out any point at a glance. Parallel references to all cases referred to in the book have been given.

1935 Ed.

Price Rs 4/8