may arise which require to be decided before the suit is registered under O. 4, R. 2. Thus, for instance, court-fee stamp may be regarded as insufficient and it may have to be determined whether the plaint is properly stamped. After that question is considered and decided, either the plaintiff would be called upon to pay the deficit court-fees, or if the court-fee paid is found sufficient, the suit may be ordered to be registered. But even if the suit be actually registered long after the plaint was filed, still the suit is to be deemed as instituted on the date on which the plaint was filed and not on the date on which the suit was registered.

Even in the case of an application for permission to sue as a pauper, if that application is rejected, it is not to be deemed as a rejection of the plaint: 62 Cal 711.[4] It is open to the Court to grant permission to the applicant under S. 149, Civil P. C., to pay the deficit court-fees, and the suit may be ordered to be registered when such court-fees are paid. In that case the original application itself will be treated as the plaint and the suit as having been instituted on the date on which the application was presented: 9 Pat 439.[5] The explanation to S. 3, Limitation Act, makes it clear that in the case of a pauper the suit is to be deemed to be instituted on the date on which the application for permission to sue as a pauper is filed. The question as to the date on which the plaint is to be deemed to have been filed when the application to sue in forma pauperis is rejected arose directly in 49 M L J 538.[6] In that case the scale of court-fees was increased between the date on which the application for leave to sue in forma pauperis was filed and the date on which it was rejected, and time was granted for the payment of the requisite court-fees, and it was held that the plaint should be deemed to have been filed when the application for leave to sue as a pauper was filed and that the court-fees should be levied on the scale then existing. I therefore hold that in this case also, the suit should be deemed to have been instituted on 30th March 1935, when the application for leave to sue as a pauper was presented, and that the order of the lower Court is correct. The appeal is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

4. Jagadeshwaree Debee v. Tinkarhi Bibi, (1936) 23 A I R Cal 28=160 I C 586=62 Cal 711.

5. Bank of Bihar Ltd. v. Ramchandraji Maharaj, (1929) 16 A I R Pat 637=118 I C 329=9 Pat 439=11 P L T 55.

6. Kaman Mada v. Malli, (1926) 13 A I R Mad 159=91 I C 302=49 M L J 538.

A. I. R. 1939 Bombay 419

LOKUR J.

Krishna Vitnak Mahar and another, Plaintiffs 1 and 2, and another, Defendant 5 — Appellants.

v.

Shankar Krishna Gandhi and others, Defendants 1 to 4—Respondents.

Second Appeal No. 386 of 1936, Decided on 28th February 1939, from decision of Dist. Judge, Ratnagiri, in Appeal No. 150 of 1934.

Dekkhan Agriculturists' Relief Act (17 of 1879), S. 15-D—Suit for account is not maintainable if it requires setting aside sale of equity of redemption.

A suit for account of a mortgage which requires the setting aside of the sale of equity of redemption is not maintainable under S. 15-D: *9 I C 393 (P C); A I R 1916 Bom 199; A I R 1924 Bom 417; A I R 1925 Bom 514 and A I R 1928 Bom 425, Rel. on; A I R 1933 Bom 306 and A I R 1934 Bom 32, Disting.* [P 420 C 1, 2; P 421 C 1]

B. R. Ambedkar and B. G. Modak — *for Appellants.*

M. G. Chitale — *for Respondents.*

Judgment.—The only question arising in this appeal is whether the plaintiffs' suit for an account of a mortgage under Sec. 15-D, Dekkhan Agriculturists' Relief Act, is maintainable. The plaintiffs' grandfather Yesnak and his three brothers mortgaged their joint family property for a period of twenty years on 11th May 1865, each of the four brothers having a one-fourth share in the property. The plaintiffs' grandfather Yesnak had three sons, Devnak, Vitnak and Ratannak. The plaintiffs and defendant 5, Jiva are the sons of Vitnak, and Gourya is the son of Ratannak. On 2nd July 1901 Devnak, on his own behalf and as guardian of Gourya, passed a sale-deed in favour of the mortgagee, purporting to convey the one-fourth share of Yesnak in the equity of redemption. The plaintiffs and defendant 5 were then minors, but their names were not mentioned in the sale deed (Ex. 47). The plaintiffs therefore brought this suit for an account of the mortgage so far as their one-twelfth share in the property mortgaged was concerned. The trial Court held that the suit was maintainable, and on taking an account, it declared that nothing was due under the suit mortgage. In appeal the learned District Judge, following the principle laid down by the Privy Council in 13 Bom L R

56,[1] held that such a suit which required the setting aside of the sale of the equity of redemption was not maintainable under S. 15-D, Dekkhan Agriculturists' Relief Act.

In 13 Bom L R 56[1] their Lordships of the Privy Council observed that the Dekkhan Agriculturists' Relief Act gave extraordinary reliefs, in certain cases specified under the Act, and that although a suit may in form be a suit for redemption, if in reality it was a suit to recover property of which the rightful owner had been deprived by fraud, a suit under the Dekkhan Agriculturists' Relief Act was not maintainable. In that case a mortgage was executed by three persons named Saindino, Mitho and Sachedino, in favour of two of the respondents, viz. Bickchand and Dipchand, mortgaging 500 acres of land for a sum of Rs. 1700. Subsequently one of the mortgagors Mitho and his brother Mirzan sold 122 acres out of the 500 acres to the mortgagees in satisfaction of the entire mortgage and thereby redeemed the remaining 378 acres of land. Bickchand and Dipchand had thus become the full owners of 122 acres of land and they sold them to one Kherajmal and gave them into his possession. Sachedino and Saindino, who had not joined Mitho in the sale deed, having died, their heirs filed a suit against the original mortgagees and their transferor Kherajmal to redeem the mortgage under the provisions of the Dekkhan Agriculturists' Relief Act, alleging that they were not bound by the sale deed of Mitho and his brother Mirzan. The Privy Council then held that the special relief under the Dekkhan Agriculturists' Relief Act could not be granted in a suit which, though not in form, was in reality a suit to set aside the alienation by two of the mortgagors. This ruling was followed in several cases : 18 Bom L R 763,[2] 26 Bom L R 341,[3] 27 Bom L R 1103[4] and 30 Bom L R 1099.[5] In the last case the suit was filed for the redemption of a mortgage under the special provisions of the Dekkhan Agriculturists' Relief Act, and although it was held on the principle laid down by the Privy Council in 13 Bom L R 56[1] that it was not competent to the plaintiffs to resort to the special provisions of the Dekkhan Agriculturists' Relief Act, still the suit could be treated as one brought in the ordinary way for setting aside the sale by one of the mortgagors and for redeeming the mortgage if the sale be set aside. Such a relief cannot be granted in the present suit since no redemption is claimed but merely an account of the mortgage is asked for under the provisions of S. 15-D, Dekkhan Agriculturists' Relief Act. Such accounts cannot be claimed in an ordinary suit, but they are a special privilege given to an agriculturist by the provisions of Sec. 15-D, Dekkhan Agriculturists' Relief Act, which enables an agriculturist to file a suit valuing his claim even at Rs. 5 only. All the cases above referred to have been summarized by Shingne J. in 35 Bom L R 1123.[6] In that case the mortgage was admitted, but it was alleged that the mortgage had been extinguished by adverse possession, and Shingne J. held that it was permissible to bring a suit for redemption of the mortgage under the provisions of the Dekkhan Agriculturists' Relief Act, although in deciding it the Court had to determine whether the plaintiff's share in the mortgaged property was lost by adverse possession or to determine the extent of his share. In coming to that conclusion he distinguished the ratio decidendi adopted in the previous cases. He observed (p. 1130) :

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

In the present case also, the sale deed executed by Devnak is an impediment in the way of redemption and unless that sale is got rid of, the way to redemption is not clear, but is blocked. This view was taken both in 18 Bom L R 763[2] and 26 Bom L R 341.[3] In 35 Bom L R 604[7] the learned Chief Justice held that an agriculturist mortgagor could sue for an account under S. 15-D, Dekkhan Agriculturists' Relief Act, although the suit might involve a preliminary inquiry whether the transaction in suit was a mortgage or a sale. In that case after the property was mortgaged the equity of redemption had not been extinguished,

1. Mt. Bachi v. Bickchand, (1911) 13 Bom L R 56=9 I C 393 (P C).
2. Chandabhai v. Ganpati, (1916) 3 A I R Bom 199=36 I C 517=18 Bom L R 763.
3. Krishnaji v. Sadanand, (1924) 11 A I R Bom 417=80 I C 763=26 Bom L R 341.
4. Vishvanathbhat v. Mallappa, (1925) 12 A I R Bom 514=92 I C 628=49 Bom 821=27 Bom L R 1103.
5. Chandikaprasad v. Shivappa, (1928) 15 A I R Bom 425=113 I C 381=30 Bom L R 1099.
6. Ganesh v. Rajaram, (1934) 21 A I R Bom 32=148 I C 1145=58 Bom 75=35 Bom L R 1123.
7. Savant v. Bharmappa, (1933) 20 A I R Bom 306=146 I C 165=35 Bom L R 604.

but the mortgage was evidenced by a sale deed and the question was whether the transaction represented by that sale deed was really a mortgage or an absolute sale. If the transaction was held to be a mortgage, then there was no impediment in the way of its redemption. Thus the cases which the learned Chief Justice and Shingne J. had to consider in the two rulings reported in 35 Bom L R 1123[6] and 35 Bom L R 604[7] stand on a different footing. The present case is more analogous to the other cases referred to by me where a suit for redemption under S. 15-D, Dekkhan Agriculturists' Relief Act, was held to be not maintainable. I therefore agree with the view taken by the learned District Judge and dismiss the appeal with costs.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1939 Bombay 421

WASSOODEW J.

Suryajirao Ganpatrao Naik Nimbalkar — *Plaintiff* — Appellant.

v.

Shivakacharu Kumbhar and others — *Defendants* — Respondents.

Second Appeal No. 739 of 1936, Decided on 13th February 1939, from decision of Dist. Judge, Jalgaon, in Appeal No. 255 of 1935.

(a) Bombay Land Revenue Code (5 of 1879). S. 83 — Onus to prove right to enhance rent is on landlord.

Under S. 83 the right to enhance rent vests in the landlord "if he have the same either by virtue of agreement, usage, or otherwise." Those words cast the burden primarily on the landlord to establish the right to enhance rent: *AIR 1925 Bom 390, Rel. on.* [P 421 C 2 ; P 422 C 1]

(b) Bombay Land Revenue Code (5 of 1879), S. 83—Term "usage"—Meaning explained.

The term "usage" might imply practice prevailing in a locality or business under uniform or common circumstances and conditions. It is generally qualified by antiquity, as a practice long continued or shown to have existed immemorially. It is therefore reasonable to expect that evidence of usage should be in relation to circumstances which are similar or common prevailing for a long time as opposed to current practice. [P 422 C 1]

(c) Bombay Land Revenue Code (5 of 1879), S. 83 — Words "or otherwise" in saving clause are not ejusdem generis with words "agreement or usage"—Even applying rule of ejusdem generis landlord can prove current usage or prevailing rate if it is just and reasonable — What is just and reasonable rate stated.

The words in a statute are prima facie to be taken in their usual sense unless the reasonable interpretation of the statute requires them to be used in a sense limited to things ejusdem generis with those which have been specifically mentioned before. That case is not the case in the interpretation of the saving clause of S. 83. Hence the words "or otherwise" in the saving clause of S. 83 are not ejusdem generis with the words "agreement or usage." Even upon the application of the rule of ejusdem generis, it is permissible for the landlord to prove current usage or prevailing rate and the tenant is not exempted from yielding to the demand if it is just and reasonable having regard to the prevailing rates, particularly the rates which the landlord has levied for similar class of land let out for similar purpose. The profit obtained by the tenant is not a factor upon which a just and reasonable rate of rent can be based.

[P 422 C 2 ; P 423 C 1 ; P 424 C 1, 2]

P. V. Kane — *for Appellant.*

Y. V. Dixit — *for Respondent 1.*

Judgment.—This is a second appeal from the decision of the District Judge of Jalgaon. The dispute relates to the right of the landlord, who is also an inamdar of the town of Bhusawal, to demand enhanced rent from the defendants who are permanent tenants of the demised property measuring over 10,000 square yards in that town. The rent was recovered from the defendants since 1865 at a uniform rate of Rs. 70 per year with local fund cess in proportion to the assessment fixed on the property. The landlord has now by notice sought to increase the rent, and on refusal to pay he has instituted this action. The Courts below have held that the defendants would have been liable to pay rent if the landlord had established his claim either by virtue of an agreement or usage, and that, in the absence of such evidence, they dismissed the claim. At the same time the lower Appellate Court held that if the landlord is entitled to claim rent on the basis of what is just and reasonable, that rent would be Rs. 250 a year.

The defendants' claim to permanency of tenure, by reason of the presumption under S. 83, Bombay Land Revenue Code, has not been challenged in this appeal by the plaintiff landlord. But it is urged that the onus of proof should be on the tenants to establish that fixity of rent attaches to their tenure, that in the absence of any such proof the landlord is entitled to rent at the market rate prevailing in the locality, and that, alternatively, if the burden were cast on the landlord to establish his right to enhance rent, he is entitled, in the absence of proof of agreement or usage, to claim such rent as is just and reasonable. It is not disputed that the right of the landlord to claim enhanced rent is regulated by the provisions of S. 83, Bombay Land Revenue Code. Upon the plain language of the saving clause of that Section the right