

PRIVY COUNCIL.

MOTILAL AND ANOTHER (PLAINTIFFS)

v.

UJIAR SINGH AND ANOTHER (DEFENDANTS).*

1928

March 15.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF THE
CENTRAL PROVINCES.]

*Foreclosure Decree—Code of Civil Procedure (Act V of 1908) Order XXXIV,
r. 3 (2)—Preliminary Foreclosure Decree—Postponement of date for
payment—“ Upon good cause shewn ”.*

Mortgagors against whom a preliminary foreclosure decree under Order XXXIV, r. 2, had been made applied under r. 3 (2) for a postponement of the date fixed for payment. The trial Court dismissed the application holding that there was no “good cause shown”. The Appellate Court, while agreeing with that view, granted 10 days’ further time on the ground that locally payment by a mortgagor on the date fixed was practically unknown and mortgagors were under a misapprehension in the matter.

Held, that the Appellate Court had no jurisdiction to make the order.

Order of the Court of the Judicial Commissioner of the Central Provinces reversed.

APPEAL (No. 61 of 1927) from an order and a decree of the Court of the Judicial Commissioner of the Central Provinces (March 25 and April 8, 1925) reversing an order and decree of the Additional District Judge of Bilaspur.

The appellants having obtained against the respondents a preliminary decree under Order XXXIV, r. 2, in a foreclosure suit, the respondents applied under r. 3 (2) for a postponement of the date for payment. The trial Judge dismissed the application and made a final foreclosure decree. The Appellate Court however extended the time upon the grounds

**Present* : LORD SHAW, LORD CARSON AND SIR LANCELOT SANDERSON.

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stated in the judgment of the Judicial Committee. The respondents paid the money into the Appellate Court within the extended time, and the Appellate Court made an order setting aside the foreclosure decree and declaring the mortgage redeemed.

E. B. Raikes, for the appellants.

Dube, for the respondents, referred to *Buddha Lal Pirmanand Suo v. Baldeo Persad*. (1).

The judgment of their Lordship was delivered by
 March 15. LORD CARSON. This action, in which the appellants are the plaintiffs, was brought for foreclosure of a mortgage dated the 6th March, 1914, and executed by the respondents to secure payment of a sum of Rs. 9,305, with interest at the rate of 7 annas per cent per mensem (the equivalent of 5½ per cent. per annum).

The due date for repayment under the mortgage was the 15th February, 1923, and on the 21st June, 1923, the sum of Rs. 10,155 being overdue, the appellants brought the present suit, claiming foreclosure in default of payment.

On the 24th August, 1923, the suit came before the Court of the Additional District Judge of Bilaspur, who by his judgment of that date states that "the defendants (respondents) admit the mortgage deed and entire claim, but they pray for instalments". He held that the defendants had not proved that they were unable to pay and could not get instalments, and decreed full claim and costs and allowed six months for redemption. He further ordered that if such payment was not made on or before the 24th February, 1924, the defendants should be debarred of all right to redeem the property.

(1) (1890) 9 C. P. L. R. 78.

No payment was made by the said date, and on the 26th February, 1924, the plaintiffs applied that the decree should be made final, and that the property should be delivered to the plaintiffs. On the 5th July, 1924, the learned District Judge made a decree that the defendants should be debarred of all right to redeem the mortgaged property, and should put the plaintiffs in possession thereof. It appears from the record of the proceedings that on the same day the defendants applied for an extension of time for one year, offering to pay Rs. 3,000 if extension was promised, but the learned Judge refused this application, stating the judgment-debtors' application did not disclose any reason for extension and did not state why payment could not be made earlier, and referred to the fact that the judgment-debtors wanted to pay only if extension was promised. The appellants then applied for execution on the decree on the 26th July, 1924, and on the 16th August, 1924, were put into possession. Meanwhile the defendants, on the 24th July, 1924, appealed to the Court of the Judicial Commissioner of the Central Provinces to set aside the order of the Additional District Judge of the 5th July, 1924, refusing to extend the time and confirming the decree. The appeal was heard before the Appellate Court on the 25th March, 1925, and it is from the order made by the Appellate Court on that occasion that the present appeal is taken to His Majesty in Council.

Before considering the judgment in the Appellate Court, it is necessary to refer to Order XXXIV, rule 3 (2) of the Code of Civil Procedure (Act V of 1908), under which the order referred to was made by the Court of the Additional District Judge. It is in the following terms :—

“Where such payment is not so made (*i.e.*, the “payment ordered by the preliminary decree), the

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“Court shall, on application made in that behalf by
 “the plaintiff, pass a decree that the defendant and all
 “persons claiming through or under him shall be
 “debarred from all right to redeem the mortgaged
 “property and also, if necessary, ordering the defen-
 “dant to put the plaintiff in possession of the
 “property.”

The order made by the Court of the Additional District Judge, it is to be noted, exactly complies with this rule. Rule 3 (2), however, goes on to provide that the Court may *upon good cause shown* and upon such terms (if any) as it thinks fit from time to time postpone the day fixed for such payment. From an order under the rule quoted, refusing to extend the time for payment, an appeal lies under Order XLIII, rule 1 (o) of the same Act.

Now the Appellate Court, in commenting upon the refusal of the lower Court to extend the time for payment, said:—

“It is also beyond doubt that when the mortgagors
 “asked for an extension of time they had no intention
 “whatever of paying even at the end of the year for
 “which they asked; they proposed to go on getting
 “extensions in one way or another for as long as
 “possible with a distinct hope that if the payment
 “could be postponed long enough it might be avoided
 “altogether. That certainly cannot be called ‘good
 “‘cause shown’ for an extension.”

The Appellate Court thereby confirmed the view held by the lower Court, whose jurisdiction to grant an extension as pointed out rested on good cause shown. The Appellate Court, however, added that payment within the normal course is practically unknown, and mortgagors have become accustomed to this. The Court then expressed the view that the lower Court ought to have allowed the mortgagors a very short

period in which to pay the whole amount "after explaining to them the misconception under which they and most other mortgagors labour". The Court then proceeded to order that the amount stated in the preliminary decree, with interest up to the 25th March, 1925, and costs, should be paid to the appellants or deposited in Court within 10 days. The respondents therefore deposited the sum decreed, and by order of the 8th April, 1925, the Appellate Court ordered this money so deposited to be paid to the plaintiffs, set aside the final decree of the lower Court and substituted for it a declaration that the mortgage had been redeemed.

It is under these circumstances that the present appeal comes before this Board asking that the two orders of the 25th March, and the 8th April, 1925, should be set aside and the final decree of the Additional District Judge of the 26th February, 1924, restored.

Their Lordships cannot agree with the course taken by the Appellate Court. As found by it, there was no "good cause shown" before the lower Court, and without such "good cause shown" it was therefore bound to pass the judgment it did. The Appellate Court do not say that any such "good cause" was shown even before them, and it is difficult to understand, therefore, under what powers they claimed to overrule the lower Court. The only ground they state for the course they have taken is, that the defendants were labouring under misconceptions such as other mortgagors laboured under, and that the lower Court ought to have explained this, and therefore apparently without any good cause shown have granted a short extension of time. Their Lordships point out that so far as appears from the record, no case of misconception of right seems to have been alleged by the

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defendants nor does any application founded thereon appear to have been put forward before the lower Court, and their Lordships cannot find in the reasons referred to any justification for extending the time for payment.

Under the circumstances their Lordships will humbly advise His Majesty that this appeal should be allowed, and that the order and decree of the Court of the Judicial Commissioner of the Central Provinces, dated the 25th March, 1925, and the 8th April, 1925, should be set aside, that the order and decree of the lower Court of the 24th August, 1923, and the 5th July, 1924, should be restored, and that the respondents should pay the costs of this appeal and of the appeal before the Judicial Commissioner.

Solicitors for appellants : *Barrow, Rogers & Nevill.*

Solicitors for respondent : *H. S. L. Polak.*

A. M. T.

CRIMINAL REVISION.

Before Cuming, Graham and Cammiade JJ

AMBAR ALI

v.

PIRAN ALI AND OTHERS*.

1927
 Nov. 29.

Actual Possession—Scope of s. 145 of the Criminal Procedure Code (Act V of 1898) Effect of a Civil Court decree—If a single Judge can make a reference to the Full Bench.

Per CURIAM (GRAHAM J. dissentient). Under s. 145 of the Criminal Procedure Code, what the Magistrate has got to decide is who is in *actual* possession. He is not bound to maintain possession given through the Civil Court, when such possession is merely symbolical.

* Criminal Revision No. 645 of 1927, against the order of J. Sen, Additional Judge, Sylhet, dated May 23, 1927.