

ANDERSON
v.
 PERIASAMI. prepare a memorandum of grounds of appeal and make an application to this Court under section 600. We are, therefore, constrained to dismiss this application with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

MANAVIKRAMAN (APPELLANT), APPELLANT,

v.

UNNIAPPAN AND OTHERS (RESPONDENTS), RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, ss. 92, 93—Appeal against a decree for redemption—Time fixed for redemption.

A mortgagor obtained a decree for redemption of his mortgage "within six months from the date of this decree." The mortgagee appealed, but the Appellate Court confirmed the decree. The mortgagor sought to redeem within six months from the date of the appellate decree:

Held, the Court to which the application of the mortgagor was made should, before passing orders on the application, have given the plaintiff time to apply to the District Court to amend the decree under Transfer of Property Act, s. 92.

APPEAL under Letters Patent, section 15, against the judgment of SHEPARD, J., on appeal against order No. 20 of 1889, which was preferred against the order of L. Moore, District Judge of South Malabar, in civil miscellaneous appeal No. 124 of 1889, reversing the order of K. Ramanadha Ayyar, Acting District Munsif of Nedumganad, in civil miscellaneous petitions Nos. 337 and 341 of 1889.

On 9th December 1887 a decree was passed for the redemption of a mortgage within six months from that date. An appeal was preferred against that decree, but it was confirmed on 29th September 1888. The mortgagor deposited in Court the amount due on the mortgage within six months from the date of the decree of the Appellate Court. The mortgagee objected that the equity of redemption had been lost by the efflux of time.

The District Munsif held that the mortgagor was still entitled to redeem. On appeal the District Judge reversed this decision.

* Letters Patent Appeal No. 30 of 1890.

The mortgagor preferred an appeal against the decision of the District Judge which came on for hearing before SHEPHARD, J., who affirmed that decision. The mortgagor now appealed against the judgment of SHEPHARD, J., under Letters Patent, section 15.

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Bhashyam Ayyangar for appellant.

Sundara Ayyar for respondents.

JUDGMENT.—The plaintiff obtained a decree on 19th December 1887 entitling him to redeem certain property on payment of the redemption amount to second defendant within six months from the date of that decree. The second defendant appealed, and the District Court, on 29th September 1888, ordered that the decree of the Lower Court be confirmed and this appeal dismissed. The plaintiff then applied for execution, but was resisted by second defendant under section 92 of the Transfer of Property Act on the ground that as plaintiff had not paid the redemption amount within six months of the original decree, the right to redeem was barred. The District Munsif held, upon the authority of *Noor Ali Chowdhuri v. Koni Meah*(1) and *Daulat and Jagjivan v. Bhukandas Manekchand*(2), that the appeal decree of the District Court incorporated the decree of the first Court and thus became the only decree capable of execution, hence that the petition for execution was not barred. On appeal the District Judge, following *Govindan v. Chapputti*(3), held that the mere fact that an appeal was preferred would not extend the time allowed for payment, and reversed the order of the District Munsif.

The appeal was first heard by a single Judge (Mr. Justice Shephard), who held that he was bound by the decision in *Govindan v. Chapputti*(3). Hence this appeal under the Letters Patent.

We have no doubt that when an appeal has been heard, the decree of the Appellate Court becomes the final decree in the suit, and the only one capable of execution. This doctrine has

(1) I.L.R., 13 Cal., 13.

(2) I.L.R., 11 Bom., 172.

(3) Before *Kernan and Parker*, JJ. Appeal against Appellate Order 23 of 1888. JUDGMENT.—The plaintiff was barred by non-payment at the day fixed. The pendency of the appeal by the defendant could not have the effect of relieving plaintiff from redeeming within the proper time. The appeal is dismissed with costs.

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been recognized in various decided cases—*Arunachellathudayan v. Veludayan*(1), *Muhammad Sulaiman Khan v. Muhammad Yar Khan*(2) and *Noor Ali Chowdhuri v. Koni Meah*(3)—and has been referred to with approval by the Privy Council in *Kistokin-ker Ghose Roy v. Burroaicaunt Singh Roy*(4). Granting, however, that the decree of the Appellate Court is the decree to be executed, the further question arises whether that decree incorporates the original date fixed for payment of the redemption money, or modifies the original decree by prescribing that the money shall be paid within six months of the appellate decree.

As the decree of the Appellate Court is drawn, there is in words no modification of the original order, but the decree of the first Court is simply confirmed as it stands. In *Govindan v. Chapputti*, which has been followed by the District Judge and by the learned Judge in the miscellaneous Court, a date (March 31st, 1887) was actually fixed in words to be the date within which the property must be redeemed. In the case before us the direction is that the plaintiff do pay the money “within six months from the date of this decree,” and the decree is dated December 19th, 1887. The cases are, therefore, not quite parallel, though we doubt whether the fact that January 19th, 1888, is not mentioned in the decree as the date within which redemption must be made can affect the case.

For the appellants we were referred to the decisions in *Noor Ali Chowdhuri v. Koni Meah*(3), *Rup Chand v. Shamsul-jehan*(5), and *Daulat and Jagjivan v. Bhukandas Manekchand*(6). These no doubt support the contention of the appellant, though the Bombay Court recognized the difficulty of holding that a confirmation and incorporation of a decree should be attended with a change of time, though nothing is said to that effect.

In coming to the conclusion referred to above, the different High Courts have not noticed the proviso to section 93 of the Transfer of Property Act, by which it is provided that upon good cause shown, and upon such terms as it thinks fit, a Court may, from time to time, postpone the day fixed under section 92 for payment to the defendant. This provision is in accordance with the practice of English law, and it gives the Court full discre-

(1) 5 M.H.C.R., 215.

(2) I.L.R., 11 All., 267.

(3) I.L.R., 13 Cal., 13.

(4) 10 B.L.R., 101.

(5) I.L.R., 11 All., 346.

(6) I.L.R., 11 Bom., 172.

tionary power to act, from time to time, as circumstances may require.

It is evident that, unless a plaintiff either makes use of this proviso, or applies for execution of the decree, he is liable to find himself deprived of the fruits of his decree by the defendant adopting the simple expedient of first preferring an appeal and then withdrawing it as soon as the time for redemption has expired. An instance of this is the case of *Patloji v. Ganu*(1).

The payment of the redemption money by the plaintiff within the time allowed by the decree is a condition precedent to his being allowed to execute the decree, and though a decree passed on an appeal preferred by the defendant may give plaintiff a fresh starting point of time within which he may execute, it does not necessarily, unless the appeal decree so declares, give him an extension of the time during which he must fulfil the condition precedent. Clearly the mere pendency of the appeal will not extend the time—*Patloji v. Ganu*(1).

When the defendant has preferred an appeal, he will naturally not be willing to accept from plaintiff the redemption amount, and if plaintiff pays it into Court his capital will be idle. The Legislature has, however, provided a remedy (section 93, Transfer of Property Act), and plaintiff can either apply for extension of time during the pendency of the appeal, or, by applying for execution, compel defendant to furnish some adequate security which will protect his interests.

While recognizing, therefore, that the decree of the Appellate Court is the only decree capable of execution, we think it is open to doubt whether that decree, when it simply purports to incorporate and confirm the decree of the Court of first instance, can be held to vary that decree by the grant of further time during which redemption may be made, the time fixed by the original decree having already expired, without express words to that effect.

But, inasmuch as the decree of the Appellate Court becomes the final decree in the suit, we think that section 92 of the Transfer of Property Act imposes upon that Court the duty (if the decree of the first Court has not been executed) of prescribing a date, within six months of the date of that decree, within which plaintiff must pay the redemption money to the defendant or into Court.

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In this respect the decree of the Appellate Court is defective, and we think the proper course would have been to give the plaintiff time before passing orders on the execution petition to apply to the District Court to amend the decree in accordance with the statutory directions contained in section 92 of Act IV of 1882. Taking this view, we set aside the orders that have been passed and remand the application for execution to the Court of first instance, in order that the District Munsif may act in accordance with these directions.

The question not being without difficulty, we shall make no order as to costs.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Handley.

SAMAYYA AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

NAGALINGAM AND OTHERS (DEFENDANTS AND FOURTH DEFENDANT'S REPRESENTATIVES), RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, ss. 67, 68—Usufructuary mortgage—Dispossession of mortgagee—Suit for sale—Costs.

The plaintiff, at the request of the mortgagors, paid off part of the debt due on a usufructuary mortgage to one of two mortgagees thereunder, and was placed by the mortgagors in possession under a usufructuary mortgage of that part of the mortgage premises which has been in the enjoyment of the mortgagee so paid off, who executed a release.

The other mortgagee under the first mortgage obtained a decree for sale on the footing of that instrument, and the mortgage premises were sold "subject to the establishment" of the plaintiff's claim: the decree-holder purchased and afterwards assigned his rights to two of the present defendants who dispossessed the plaintiff. The plaintiff now sued the mortgagors and mortgagees and the defendants above referred to:

Held, the plaintiff was not entitled to a decree for sale.

Semble: the plaintiff might have sued to have the sale, which had taken place at the suit of the first usufructuary mortgagee, declared to be invalid against him.

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 299 of 1889 modifying the

* Second Appeal No. 418 of 1890.