

## APPELLATE CIVIL.

*Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.*

1892.  
April 5, 12.

KANARA KURUP (PLAINTIFF), APPELLANT,

v.

GOVINDA KURUP (DEFENDANT), RESPONDENT.\*

*Transfer of Property Act—Act IV of 1882, s. 93—Redemption decree—Appeal—  
Time for redemption.*

In a suit on a kanom or usufructuary mortgage brought by the mortgagor a decree was passed on 16th March 1889, whereby it was only directed that on payment by the plaintiff of a certain sum within six months the defendant should surrender the mortgage premises to him. Against this decree an appeal was filed objecting both to the direction for surrender of the mortgage premises and also to the sum fixed as the amount payable by the mortgagor. On 21st August 1889 the appeal was withdrawn so far as concerned the first of these matters: as to the second the Appellate Court heard the appeal in June 1890 and merely confirmed the original decree. In February 1890 the plaintiff applied for execution and tendered the amount mentioned in the decree stating that he would have paid it before but for the appeal. The Court of First Instance made an order as prayed, and the money was paid to the mortgagees, and the mortgage premises were surrendered to the plaintiff. On appeal by the mortgagees against this order:

*Held*, that the appeal should be dismissed on the grounds that the mortgagees had never obtained an order for sale under Transfer of Property Act, s. 93, and the mortgagor's equity of redemption had not become extinct, and that the necessity for a sale was obviated by payment before any order was made under that section.

APPEAL under Letters Patent, s. 15, against the order of PARKEE, J., on appeal against appellate order No. 59 of 1890, confirming the order of J. P. Fiddian, Acting District Judge of North Malabar, dated 30th July 1890, and made on miscellaneous petition No. 140 of 1890, reversing the order of C. Gopalan Nayar, Subordinate Judge of North Malabar, dated 25th February 1890, and made on execution petitions Nos. 104 and 176 of 1890.

The two petitions in the Subordinate Court were presented by the plaintiff and defendant No. 1 in original suit No. 41 of 1888 on the file of that Court. That suit was brought on a usufructuary mortgage by the mortgagor; and by the decree dated 16th March 1889 it was ordered "that on payment by

\* Letters Patent Appeal No. 59 of 1891.

“plaintiff into Court within six months from this date the sum  
 “of Rs. 1,358-13-5 on account of bal-kanom and of the sum  
 “of Rs. 1,717-4-0 on account of value of improvements payable  
 “to several defendants . . . the defendants do restore  
 “to plaintiff the parambas with their appurtenances ; that of the  
 “sums so deposited, Rs. 1,358-13-5, be paid to first defendant after  
 “three months from date of such deposit, so as to allow time for  
 “the other defendants to establish their claims to the several  
 “amounts of such kanom, &c., payable to defendant and that the  
 “parties do bear their own costs.”

An appeal was preferred against this decree. The appeal in the first instance related both to the direction for the surrender of the land and also to the amount payable on redemption, but so far as it related to the first of these matters it was withdrawn on 21st August 1889. In June 1890 the appeal was disposed of and the Appellate Court hereby confirmed the original decree. The plaintiff put in his petition above referred to on 6th February 1890, by which he applied for execution of the decree and for an extension up to date of the time for payment into Court of the amount mentioned in the decree, which he therewith produced, stating that he would have paid it into Court before but for the appeal. In the petition of defendant No. 1 the right of the plaintiff to the relief claimed by him was denied on the ground, among others, of the expiry of the time fixed for payment.

The Subordinate Judge passed an order as prayed by the plaintiff holding that his right to the relief sought by him could be extinguished only by an order under Transfer of Property Act, s. 93.

The Acting District Judge reversed this order on appeal holding that *Elayadath v. Krishna*(1) was an authority governing the case.

The plaintiff preferred an appeal to the High Court and it came on for disposal before PARKER, J., who dismissed it. He said : “No decree having been passed on appeal there is no possible ground for the contention that time should be reckoned from the date of the final order of the Appellate Court. See *Patloji v. Ganu*(2). The fact that the mortgage is usufructuary does not matter ; the question is one of execution.”

(1) I.L.R., 13 Mad., 267.

(2) I.L.R., 16 Bom., 370.

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The plaintiff preferred this appeal under Letters Patent, s. 15.  
*Sankara Menon* for appellant.

*Sundara Ayyar* for respondent.

BEST, J.—The case is not on all-fours with *Patloji v. Ganu*(1) as supposed by the learned Judge under the mistaken impression that the defendant's appeal was withdrawn on the 21st August 1889. It appears that only so much of the appeal as objected to the surrender of the property was withdrawn; but so far as it related to the amount payable by plaintiff before he could redeem, the appeal was not withdrawn, but it was dismissed and the Lower Court's decree affirmed on the 6th June 1890. The plaintiff's application for execution, which was made on the 10th February 1890, was therefore during the pendency of the appeal. It was, however, after expiry of the six months allowed in the decree then under appeal, the date of which is 16th March 1889.

It has been held by this Court in *Manarikraman v. Unniappan*(2) that the mere pendency of the appeal will not extend the time, and that though the 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 of making payment of the money within the time allowed or getting the time extended under the proviso to section 93 of the Transfer of Property Act.

It has been held in *Elayadath v. Krishna*(3) that this proviso "has no application when the mortgagee does not apply for a foreclosure, or where the original decree does not contain the last clause mentioned in section 92." It is, therefore, inapplicable to the present case.

As was observed, however, in *Manavileraman v. Unniappan*(2) inasmuch as the decree of the Appellate Court becomes the final decree in the suit, section 92 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.

The course adopted in that case was to set aside the orders theretofore passed and to remand the application for execution to

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(1) I.L.R., 15 Bom., 370. (2) I.L.R., 15 Mad., 170. (3) I.R.R., 18 Mad., 267.

the Court of First Instance, "for disposal after giving plaintiff "time to apply to the District Court (which passed the final decree "in the suit) for amendment of the decree in accordance with the "statutory directions contained in section 92."

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In the present case, I do not think it necessary to adopt that course, because defendants have accepted the money paid by the plaintiff, and the latter is already in possession of the land. By accepting the money tendered by the plaintiff, the defendants must be held to have waived their right to object to the same as paid out of time.

I would, therefore, set aside the orders of the District Judge and also that of the learned Judge of this Court confirming the same, and direct each party to bear his own costs in this Court and in Lower Appellate Court.

MUTTUSAMI AYYAR, J.—I am also of opinion that the order appealed against cannot be supported. The decree sought to be executed was passed in original suit No. 41 of 1888 for the redemption of a kanom or an usufructuary mortgage. It directed surrender of the property demised on kanom upon payment of the kanom amount and the value of improvements within six months from the date on which it was passed, viz., the 16th March 1889. It did not, however, contain a direction, as required by section 92 of the Transfer of Property Act, that on default of payment on or before the day fixed by the Court, the property should be sold. The defendants (mortgagees) appealed from the decree so far as it directed surrender of the kanom property and related to the amount payable to them prior to redemption. In August 1889, they waived the objection they took against the direction to surrender and to that extent withdrew their appeal. The remainder of the appeal was heard and the original decree was confirmed in June 1890. Though the six months fixed by that decree had then expired, the Appellate Court did not direct that the period be computed from the date on which the appellate decree was passed. Nor did it add to the original decree with reference to the last clause of section 92 that "on default of payment within six "months the kanom property be sold." In February 1890 when the appeal was pending, the mortgagor applied for execution of the original decree producing in Court the amount which he had to pay under it prior to redemption and alleging that he had not tendered payment within six months from the date of the original

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decree, as the defendants had appealed against it, and praying that, if necessary, the said period of six months be extended and the decree executed. The defendants opposed this application and objected to the extension of time. The Subordinate Judge who passed the original decree held that, if necessary, it was competent to him to extend the time, but that the plaintiff's right to execute the decree continued to subsist notwithstanding the expiration of six months until, after default, the defendants applied for sale and an order was made for sale under section 93 of Act IV of 1882. On this view, he held that the original decree might be executed if the kanom amount and the value of improvements were deposited in Court by 3 o'clock P.M. next day. The amount was accordingly deposited and paid out to the defendants and the kanom property was placed by process of Court in plaintiff's possession. Though the defendants received the kanom amount yet they appealed to the District Court against the order of the Subordinate Judge. In July 1870, the District Judge set aside the order on the ground that a Court executing its decree was bound to construe it strictly and was not justified in extending the time fixed therein. The plaintiff appealed to the High Court against this order, and Mr. Justice Parker dismissed the appeal. The learned Judge observed that the appeal preferred against the original decree having been withdrawn and no decree having been passed on the appeal, there was no ground for the contention that six months should be reckoned from the date of the final order of the Appellate Court. Hence this appeal under the Letters Patent. It seems to me that the real question for determination is whether on the expiration of six months, the right of redemption became extinct under Act IV of 1882.

The mortgage of which redemption was decreed was a kanom or an usufructuary mortgage and under section 92, the decree could only direct the sale of the kanom property on default of payment within the time fixed by the decree. Such being the case, the mortgagee could only claim, on default, an order under section 93 that the property should be sold. It is no doubt true that according to the former practice in England, the decree for redemption directed that on failure of the plaintiff to pay the amount on the due date, the suit do stand dismissed and that such dismissal was held to operate as a judgment of foreclosure. But under the Conveyancing and Law of Property Act, 1881, 44 and

45 Vict., Cap. XLI, s. 25, the Court was at liberty to order a sale in a suit for redemption and the provision for sale contained in section 92 is apparently taken from the last-mentioned statute.

Thus the scheme of the Transfer of Property Act appears to be this : where the mortgage decreed to be redeemed is an usufructuary mortgage, the Court is to fix a time for payment of the mortgage debt, and make an order under section 92 for the sale of the mortgaged property in default of payment on the due date ; the mortgagee is to obtain an order under section 93 on default being made that the property be sold ; and the mortgagor's right of redemption is to cease then to be enforceable. Before however the property is actually sold, it will still be open to him, as judgment-debtor if not as mortgagor, to obviate the necessity for the sale by paying what is due in Court. In the case before us, the mortgagee never obtained an order for sale under section 93 and the mortgagor's right of redemption never became extinct, and the necessity for the sale was obviated by payment before any order was made under section 93. It must also be remembered that all that the mortgagee could claim by reason of the sale, permitted by Act IV of 1882, s. 92, is so much of the sale-proceeds as is sufficient to pay what is due to him. The District Judge is in error in not taking the whole scheme of the Transfer of Property Act into his consideration. The order made by Mr. Justice PARKER proceeds on the view that the appeal preferred from the original decree was wholly withdrawn and that there was no appeal decree at all, whilst in fact there was an appeal decree and that decree simply confirmed the original decree as in the case cited before us (*Manavikraman v. Unniappan*(1)).

The order of the Subordinate Judge appears to me to be correct even on the view that he could not extend the time. On this ground I concur in the order proposed by my learned colleague.

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(1) I.L.R., 15 Mad., 170.

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