

SAMBASIVA
MUDALIAR
v
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PILLAI.

v. *Kesavaiah*(1), and *Gnanamuthu Upadesi v. Vana Koilpillai Nadan*(2). The short answer to this contention is that inasmuch as an application under section 40 of the Act is an application that the machinery of the Code be put in motion, it is an application within the meaning of article 178. In the cases referred to the application had no reference to the provisions of the Code.

We are of opinion that article 178 applies. This being so, we must allow the appeal with costs throughout, and dismiss the application as time barred.

APPELLATE CIVIL.

Before Mr. Benson and Mr. Justice Wallis.

1907
August 14.
September
10.

RAMASWAMI KONE (PLAINTIFF-PETITIONER), APPELLANT,

SUNDARA KONE (DEFENDANT-COUNTER-PETITIONER),
RESPONDENT.*

Appeal, decree in—When such decree simply confirms decree of lower Court, it does not enlarge the time fixed by the original decree for the performance of conditions precedent.

The decree of the lower Court provided that 'on the plaintiff's paying into Court the balance of consideration, Rs. 10, within a month from this date,' defendant should execute a sale-deed of the suit land. The money was not paid within the month and the defendant preferred an appeal after the expiry of the month. The Appellate Court simply confirmed the decree of the lower Court and dismissed the Appeal. Within a month of the appellate decree the plaintiff deposited Rs. 10: and applied for execution for the decree:

Held, that he was not entitled to execute the decree, as he had not made payment within the time fixed by the original decree and as the appellate decree cannot under the circumstances be held to have enlarged the time fixed by the original decree. The appellate decree simply confirming the original decree cannot be read as giving the plaintiff one month from the date of the decision on appeal. Such an extension can be claimed only if expressly or impliedly given by the Appellate Court.

(1) I. L. R., 8 Mad., 207.

(2) I. L. R., 17 Mad., 379.

* Civil Miscellaneous Second Appeal No. 71 of 1906, presented against the order of Lionel Vibert, Esq., District Judge of Tinnevely, dated 29th March 1906, in Appeal Suit No. 386 of 1905, presented against the order of M. R. Ry. V. K. Desikaehariar, District Munsif of Tinnevely, dated 17th August 1905, in Execution Petition Revision No. 465 of 1905, in Execution Petition No. 1 of 1905 (Original Suit No. 543 of 1903).

Bhup Indar Bahadur Singh v. Eijai Bahadur Singh, (I.L.R., 23 All., 155), RAMASWAMI KONE

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IN this case the plaintiff obtained a decree in the District Munsif's Court, Tinnevely, which provided that "on plaintiff paying into Court the balance of consideration Rs. 10, within a month from this date" the defendant should execute a sale-deed of the suit land in the plaintiff's favour. The amount was not paid into Court within the month and after the expiration of the month the defendant appealed. The Subordinate Judge simply confirmed the decree of the lower Court. The plaintiff then paid the amount into Court and applied for execution of his decree. The application was resisted by the defendant on the ground that the plaintiff had not complied with the terms of the original decree. The objection was upheld by the District Munsif and the petition for execution dismissed. The plaintiff then applied to the Subordinate Court to have the appellate decree modified by introducing a fresh time limit for the payment of Rs. 10. This application was refused. The plaintiff then appealed against the District Munsif's order dismissing his application for execution. This appeal was dismissed. Plaintiff further appealed to the High Court.

The appeal must be dismissed with costs.

The plaintiff appealed to the High Court,

K. Srinivasa Aiyangar for appellant.

V. C. Seshachariar for respondent.

JUDGMENT.—In this case the decree of the District Munsif provided that "on the plaintiff's paying into Court the balance of consideration Rs. 10 within a month from this date" the defendant should execute a sale-deed of the suit land in the plaintiff's favour. The plaintiff did not pay into Court the Rs. 10 within the month, and after the expiration of the month the defendant appealed. The decree of the Appellate Court simply confirmed the decree of the lower Court and dismissed the appeal. Within a month of the date of the appellate decree the decree-holder made the deposit of Rs. 10 and applied for execution of the decree. Both the lower Courts have held that as he did not make the deposit of Rs. 10 within the month fixed by the original decree he is not entitled to execute the decree. In second appeal it is contended for the decree-holder that the appellate decree although simply affirming the decree of the lower Court must be read as giving him a month from the date of the

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appellate decree to make the deposit. The point is one of some difficulty as to which there has been a conflict of decisions. *Rup Chand v. Shamsh-ul-Jehan*(1), *Noor Ali Chawdnhar v. Koni Meah*(2), and *Daulat and Jagjivan v. Bhukandas Manekehand*(3) are authorities for holding that a decree of the Appellate Court affirming that the decree of the lower Court must be held to give the decree-holder an additional period of time for complying with the conditions of the decree. A contrary view was taken by Kernan and Parker, JJ., in this Court in *Govindan v. Chapputti*(4) an unreported case referred to in *Manavikraman v. Unniappan*(5). In the latter case it was observed by the Court that though a decree passed on an appeal preferred by the defendant may give the plaintiff a fresh starting point within which to execute, it does not necessarily, unless the appeal decree so declares, give him an extension of time during which he may fulfil the condition precedent. They accordingly held that the appellate decree had not given further time, but as they considered that in a suit for redemption the Appellate Court was bound under section 92 of the Transfer of Property Act to prescribe a date within six months of the appellate decree for payment of the redemption money, they remanded the case for that purpose. This latter point does not arise here. Subsequently a Full Bench of the Allahabad High Court in *Jaggar Nath Panie v. Jokhu Tewari*(6) held overruling the case in *Rup Chand v. Shamsh-ul-Jehan*(1) that in a suit for redemption where the defendant appeals and the decree of the lower Court is affirmed the time limited by the original decree for payment of the purchase money is not extended. A similar opinion was expressed by Banerji, J., in *Bhola Nath Bhattacharjee v. Kanti Chundra Bhattacharjee*(7), but Maclean, C.J., preferred to rest his decision on another ground. We may also refer to *Pattoji v. Ganu*(8), in which it was held that the defendant by appealing did not extend the time given by the plaintiff for performing conditions precedent to execution imposed by the decree. Such an extension could only be effected expressly or impliedly by the appellate decree. To sum up, the decisions of this Court and the balance of authority in the other High Courts support the view

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

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

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

(4) A.A.A.O. No. 23 of 1888 (unreported).

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

(6) I. L. R., 18 All., 223.

(7) I. L. R., 25 Cal., 311.

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

that a merely affirming appellate decree does not give the plaintiff fresh time for performing a condition.

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The appellant, however, has relied strongly on a later decision of the Privy Council in *Bhup Indur Bahadur Singh v. Bijai Bahadur Singh*(1) as settling the point the other way. In that case the District Court gave the plaintiff a decree dated the 12th November 1887 for possession of the suit land "with future profits." Applying the provisions of section 211 of the Code of Civil Procedure the original decree entitled the plaintiff to recover mesne profits from the date of instituting the suit until delivery of possession or until the expiration of three years from the date of the decree, the 12th November 1887, whichever event should first happen. This decree was reversed by the High Court but restored by an order of the Queen in Council dated the 11th May 1895. It was subsequently contended in execution proceedings that as the judgment of the Court of final appeal had merely restored the decree of the Court of first instance, the plaintiff was not entitled to recover mesne profits for more than three years from the date of the original decree. Their Lordships in rejecting this contention observed that the appellate decree by affirming the decree of the lower Court had adopted its terms and carried on their effect down to a later date. All they had to do was to construe the appellate decree and carry it into execution. The original decree for future mesne profits signified profits future to the date of the decree, the 12th November 1887. The appellate decree speaking with the language of the decree of 1887 clearly carried all profits up to its own date 11th May 1895. Section 211 would prevent future mesne profits being recovered for more than three years from the date of the appellate decree, but to call it into operation with reference to the earlier decree would be to deprive the appellate decree of its obvious meaning. On the construction of the appellate decree then it was held that the plaintiff was entitled to mesne profits until delivery of possession or three years from the date of the appellate decree.

As regards this case we think the observation that the appellate decree by affirming the decree of the lower Court had adopted its terms and carried on their effect to a later date must be taken to have been made with reference to the terms of the particular

(1) I. L. R., 23 All., 152.

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decree for future mesne profits, and that it cannot be treated as applicable to the facts of the present case. The question as to the effect of an affirming appellate decree in enlarging the time imposed by the original decrees or the performance of conditions precedent did not arise for consideration nor were any of the Indian cases on the point referred to. The question before us is as to the construction of the appellate decree, and apart from the authority of decided cases it would, we think, be going too far to hold that an appellate decree affirming an original decree has in all cases the effect of enlarging the time limited by the original decree for the performance of conditions. Nor is it, we think, open to us to construe such a decree, as we were invited to do, in one way when the condition is imposed as here on the respondent in the appeal and in another way when it is imposed upon the appellant merely because the respondent in such a case would have a better claim to extension of time than the appellant. On the whole we are of opinion that the lower Courts were right and that the appeal must be dismissed with costs.

In future cases it is, we think, desirable that Appellate Courts should frame their decrees in such a manner as to leave no doubt as to whether it is intended to extend the time for performing conditions precedent prescribed by the original decree.
