

## FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell and Mr. Justice Mahmood.*

KODAI SINGH (PLAINTIFF) v. JAISRI SINGH AND OTHERS (DEFENDANTS).

*Pre-emption—Decree conditional on payment of price stated within a fixed period, otherwise suit to stand dismissed—Non-payment of pre-emptive price—Appeal after expiration of period fixed by decree.*

The plaintiff in a pre-emption suit obtained a decree in his favor for pre-emption of the share in suit on payment of a fixed sum within a period specified in the decree, otherwise his suit was to stand dismissed.

*Held* that such plaintiff could appeal from such decree after the period prescribed therein had elapsed without his paying in the pre-emptive price fixed thereby, both as to the correctness of the pre-emptive price and as to the reasonableness of the time allowed for payment.

THE facts of this case are given in the referring order of Mahmood, J., of the 28th May 1889, which is as follows:—

MAHMOOD, J. This appeal has arisen out of a suit for pre-emption in which the right was sought to be enforced in respect of a sale which took place on the 14th January 1886.

The suit was instituted on the 14th January 1887 and resulted in a decree in favor of the plaintiff passed by the Munsif who presided in the Court of First Instance on the 28th April 1887. By the decree it was found that the real amount of the purchase money was Rs. 799, while the plaintiff had alleged that the real price was only Rs. 700. The time fixed for payment of such money was 15 days from the date of the decree.

From the decree of the Munsif the defendants did not appeal, but the plaintiff appealed only in respect of the sum of Rs. 99, that is to say, the excess over Rs. 700, which the plaintiff had alleged was the right amount of the consideration money. The plaintiff-appellant also complained in the grounds of appeal to the Lower Appellate Court that the time fixed for payment of the consideration money was unreasonably short.

The appeal was presented on the 27th May 1887, and it was decided by the lower Appellate Court on the 2nd February 1888.

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In deciding the appeal, however, the learned Judge of the lower Appellate Court has not gone into the merits of the case as to the amount of the purchase money which the plaintiff alleged was in excess of the real purchase money, but dismissed the appeal before him upon the ground that, the term within which the money was to be paid under the decree of the first court having expired, the plaintiff had no right of appeal. This is practically what the learned Judge has held, and there is no finding in the case as to the sum of money, namely, Rs. 99, as to which the appeal had been preferred to him.

In disposing of the case the learned Judge has relied upon a ruling of my own in *Chhidda v. Imdad Husain* (1). To the views which I expressed in my judgment in that case I still adhere, but I am of opinion that there is nothing in the judgment to have allowed the learned Judge to obviate the necessity of having to try the case upon the merits.

From the decree of the lower Appellate Court this second appeal has been preferred, and Mr. *Jwala Prasad's* argument in support of the appeal seeks that the case should be remanded for trial upon the merits under s. 562 of the Code of Civil Procedure. The argument is, however, resisted by Mr. *Ram Prasad*, who, I think, is entirely within his rights when he relies upon two Division Bench rulings of this Court, one being *Mulu Singh v. Rahim Kuar* (2) in which the learned Chief Justice and my brother Brodhurst concurred, and also upon an unreported ruling of the learned Chief Justice and my brother Tyrrell, in First Appeal No. 25 of 1888, decided on the 8th May 1889. Both of these rulings support the contention of Mr. *Ram Prasad* because at the time when the learned Judge of the lower Appellate Court had to decide the appeal before him, and, indeed, because at the time when the appeal to him had been preferred, the 15 days' period provided by the First Court for payment of the purchase money had expired, there could be no reason for the learned Judge to go into the merits of the case.

(1) Weekly Notes, 1888, p. 4.

(2) Weekly Notes, 1888, p. 22.

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Mr. *Jwala Prasad* for the appellant has argued that, though these cases are opposed to his case, he is prepared to argue the point *de novo*, if I should allow him to open the question, which would require my going behind the conclusions and judgments of the two rulings to which Mr. *Ram Prasad* has referred.

I do not think that I should, sitting here as a single Judge, reopen the question in connection with the two Division Bench rulings; but I feel some difficulty in accepting them, and I think the proper course is to refer the case to a Bench consisting of two Judges, with a further recommendation that the case be laid before the learned Chief Justice for orders as to whether or not, in view of the rulings that I have cited, it is a fit case to be considered by the Full Bench.

The case was accordingly laid before the Full Bench, and the following judgments were delivered :—

STRAIGHT, J.—The learned Judge appears to have refused to enter into the question of price because, the Rs. 799 not having been paid within the time directed by the decree of the First Court, he was of opinion that there was no subsisting decree from which an appeal could be preferred. Strictly speaking, the exact decree which stood at the date of the plaintiff's filing his appeal was that of dismissal of his suit by reason of his having failed to deposit the Rs. 799 within 15 days, and had he appealed it on that footing he might have raised questions as to the propriety of the First Court's finding on the matter of price and the time allowed him within which to pay the amount into Court. I think, therefore, in this case it must be taken that there was a decree from which an appeal could be entertained, and that the plaintiff was entitled to get a determination of the question of price, which when decided might properly guide the Judge's conclusions upon the further point as to whether the time allowed by the First Court was reasonable.

We in no way wish to depart from what was thrown out in the Full Bench ruling of this Court reported in the N.-W. P. Reports for 1868, p. 54, and followed by Pearson and Spankie, J. J., in I. L. R.

2 All., p. 744, that an Appellate Court in its discretion may vary the decree of a first Court in the matter of time for payment, even though such time expired before the appeal was filed.

The effect of this view upon the present appeal is that it will be decreed and the appeal be remanded to the Court of the Judge of Gorakhpur for restoration to his file of pending appeals and disposal in ordinary course as an appeal upon the pleas, including that of time, taken by the plaintiff-appellant. Costs hitherto incurred will follow the result.

MAHMOOD, J.—This case has arisen out of a reference made by me, and the circumstances which gave rise to the reference are stated in my order of reference, dated the 28th May 1889, and I do not wish to repeat the circumstances of the case further than saying that my judgment in this case depends on, and refers to, that order and the facts stated therein for the consideration of the question of law which arises here. This being so, it is, I think, important for me specially, as the referring Judge in the case, to explain that my ruling in *Chhidra v. Imdad Husain* (1) is not inconsistent with the view expressed in the judgment which has just been delivered. That was not a case of a regular pre-emption decree which was the subject of appeal, but the appeal related to the execution of such a decree which fixed one month as the time for payment of price. That decree had become final by being affirmed by the appellate Court on the 15th January 1885, without any alteration as to the term of one month; but the deposit of the purchase money was not made till the 16th February 1885, that is, after the fixed period of one month, even as calculated from the appellate decree of the 15th January 1885. The Appellate Court in that case in passing its decree of the 15th January 1885 had, no doubt, power to decline to extend the period, as was held by the Full Bench in *Sheo Pershad Lal v. Thakoor Rai* (2), to which I referred, and, as a Court executing a decree, declined either to hold that the decree in fixing a period for payment of price was illegal or that the period of one month which it prescribed could be extended by the Court execut-

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(1) Weekly Notes, 1888, p. 4.

(2) N.-W. P. H. C. Rep., 1868, p. 254.

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ing the decree. The argument that the period of one month should be calculated from the final appellate decree of the 15th January 1885 could not very well be pressed in that case (as indeed it was not pressed) in favor of the pre-emptor, decree-holder, because, as I have already said, even upon that calculation his deposit of the price on the 16th February 1885 was beyond time. The case is therefore distinguishable from the present case. The real difficulty in connection with pre-emption decrees, and specially with reference to the point which has given rise to this reference, arises in considering whether such decrees, which are usually passed, or which purport to be passed, under s. 214 of the Code of Civil Procedure, are decrees in the nature of decrees *nisi* or decrees absolute in the same manner as in any other class of cases where the decrees may, by force of equity, be subjected to considerations and limitations of amount or time as to payment of money as a condition precedent to the recovery of possession, or subjected to other restrictions which the Court may deem fit to impose. This is a matter which I had to bear in mind in *Rup Chand v. Shamsul-Jehan* (1), and I dealt with the matter in a suit for pre-emption itself, dealing with it much upon the same principles as those governing other conditional decrees passed in suits where the possession of immovable property is subjected to conditions. I think it is enough to say, in order not to delay or prolong my judgment, that, as I have already explained, between my ruling in *Chhidda v. Imdad Husain* (2), and the ruling in *Rup Chand v. Shamsul-Jehan* (1) no distinction of principle really exists, and it is only because the learned Judge of the lower Appellate Court misapplied the former ruling that he considered that the ruling relieved him of the duty of trying the suit upon the merits. I think the rule which was laid down in *Rup Chand v. Shamsul-Jehan* (1) is a rule which should govern this case, consistent as it is with the principle of the Calcutta Court in *Noor Ali Chandhuri v. Koni Meah* (3) and the Bombay Court ruling in *Daulat and Jagjivan v. Bhukandas Manekchand* (4), to both of which I referred in the case. I am also glad that the con-

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

(2) Weekly Notes 1888 p. 4.

(3) I. L. R. 13 Calc. 13.

(4) I. L. R. 11 Bom. 172.

clusions arrived at by me in this case are wholly consistent with those arrived at in the judgment which has just been delivered. I therefore agree in the order which has been made in the case by my brother Straight.

EDGE, C. J.—In concurring with the judgment which has been delivered by my brother Straight, I should say that I understand that judgment to be in no way based upon any cases referred to in the judgment just delivered by my brother Mahmood. As to those cases and the inferences to be drawn from them I decline to express any opinion. I am of the same opinion as my brother Straight.

BRODHURST J.—I concur with my brother Straight.

TYRRELL, J.—I also concur with my brother Straight without expressing any opinion on the cases just referred to in his judgment by my brother Mahmood.

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## APPELLATE CIVIL.

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*Before Mr. Justice Mahmood.*

BANSIDHAR AND ANOTHER (JUDGMENT-DEBTORS) v. SITA RAM  
(DECREE-HOLDER).\*

*Second Appeal—Plea sought to be raised which was not taken in the memorandum of appeal—Civil Procedure Code, s. 542.*

Section 542 of the Code of Civil Procedure was intended to confer upon the Court a power exercisable by it alone; it was not intended to enable an appellant to take the respondent by surprise by urging matter of which he had no notice.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

Maulvi *Ghulam Muftaba*, for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondent.

MAHMOOD, J.—This is a second appeal, and was admitted by my late Honorable colleague Mr. Justice Brodhurst by his order, dated the 10th January 1890.

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\* Second appeal No. 36 of 1890 from a decree of A. Sells, Esq., District Judge of Meerut, dated the 26th November 1889, reversing a decree of Maulvi Ahmad Ali, Munsif of Bulandshahr, dated the 6th April 1889.

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*April 22.*