

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

1889
December 10.

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

Appeal—Decree conditional upon payment of a certain sum within a specified time—Appeal presented after the expiration of the time so fixed.

The plaintiff in a pre-emption suit obtained a decree in his favour, conditional on payment into Court of a certain sum within a specified time; otherwise his suit was to stand dismissed. He did not comply with the terms of the decree, but, after the expiration of the term mentioned therein, appealed against it.

Held that the appeal would lie both in respect of the sum fixed by the decree to be paid by the plaintiff-appellant, and the discretion of the Court as regards the period allowed for payment.

THIS was a reference to the Full Bench made, on the recommendation of Mahmood, J., under the following circumstances:—

The appellant was plaintiff in a pre-emption suit and had obtained a decree (dated the 28th April 1887) in his favour in the Court of the Munsif of Gorakhpur, which decree provided that the plaintiff should be entitled to recover the property in suit on payment of the sum of Rs. 799; within 15 days from the date of decree. The defendants did not appeal, but the plaintiff appealed in respect of the amount fixed by the Court of first instance as the pre-emptive price, and he also complained that the time allowed for payment was too short. This appeal was presented on the 27th May 1887, and was on the 2nd February 1888 dismissed by the lower appellate Court without inquiry into the merits, that Court holding 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. The plaintiff then appealed to the High Court.

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,

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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 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 case of *Sheo Pershad Lal v. Thakoor Rai* (1) and followed by Pearson and Spankie, J.J., in *Parshadi Lal v. Ram Dial* (2) 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 *Chhidda v. Imdad Husain* (3) 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

(1) N.-W. P. H. C. Rep., 1868, 254. (2) I. L. R., 2 All., 744.

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

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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* (1), 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 executing 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 favour 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 *in rem* 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. Shamsh-ul Jehan* (2), 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

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

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

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immovable property is subjected to conditions. I think it is enough to say, in order not to delay or prolong my judgment, as I have already explained my ruling in *Chhidda v. Imdad Husain* (1) and the ruling in *Rup Chand v. Shams'h-ul-Jehan* (2) that 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 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. Shams'h-ul-Jehan* (3), is a rule which should govern this case, consistent as it is with the principle of the Calcutta Court ruling in *Noor Ali Chowdhuri v. Koni Meah* (4), and the Bombay Court ruling in *Daulat and Jaggivan v. Bhukandus Manek Chand* (5), to both of which I referred in the case. I am also glad that the conclusions arrived at in this case by me 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 these 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.

Appeal decreed.

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

(3) I. L. R., 11 A.L., 346.

(2) I. L. R., 11 A.L. 346.

(4) I. L. R., 13 Calc., 13.

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