

APPELLATE CIVIL.²1892
June 20.

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

JAI KISHN (DEFENDANT) v. BHOJA NATH AND ANOTHER (PLAINTIFFS).*

Civil Procedure Code s. 214—Pre-emption—Decree for pre-emption conditioned on payment within fixed time—Omission to state consequence of non-payment—Limitation.

Where in a suit for pre-emption the decree, while decreeing the plaintiff's right to pre-emption upon payment of the pre-emptive price within one month from the date of the decree, omitted to state what would be the effect on the plaintiff's suit of non-payment within the prescribed period:—*Held* that the plaintiff, unless he had paid the pre-emptive price before the expiry of the said month, could not enforce his decree for pre-emption. *Kodai Singh v. Jaisri Singh* (1) referred to. *Bandhu Bhagat v. Shah Muhammad Taqi* (2) dissented from.

THE facts of this case sufficiently appear from the Judgment of the Court.

Munshi *Madho Prasad*, for the appellant.

Pandit *Bishambar Nath*, for the respondents.

EDGE, C. J., and TYRRELL, J.—This was a suit to redeem a mortgage. The plaintiffs were assignees of the mortgagor. The defendant set up a defence that the mortgage no longer existed, as he had become, in pursuance of a decree of the Court, the purchaser in pre-emption, pre-emption having arisen on the sale of the equity of redemption. Jai Kishn is the defendant. On the 20th of May, 1887, he got his decree in pre-emption in the Court of the Subordinate Judge subject to his paying the pre-emptive price within one month from the date of the decree. He appealed to the District Judge. The District Judge in appeal varied the decree so far as the price was concerned and fixed one month from the date of his decree for payment. The District Judge did not go on to declare that if the money and costs were not paid within the month, the suit should stand dismissed with costs, and therefore technically his

* First appeal No. 32 of 1892 from an order of M. S. Howell, Esq., District Judge of Sháhjahánpur, dated the 7th December 1891.

(1) I. L. R., 13 All., 376.

(2) Weekly Notes, 1892, p. 40.

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decree was not in complete accordance with s. 214 of the Code of Civil Procedure; but it is quite clear from that decree that Jai Kishn's pre-emptive right could only be enforced under the decree if he made the payment within the month, and that if he failed to make the payment within the month the decree which he had obtained was useless to him, as his right was decreed to be dependent on the payment within the month. Jai Kishn appealed to this Court, and this Court dismissed his appeal and confirmed the decree of the District Judge. When this Court made its decree it did not extend the time for payment of the pre-emptive price. Most probably the Court was not asked to do so. The pre-emptive price was not paid into Court until long after the expiration of the month limited by the decree of the District Judge. Now in this suit Jai Kishn, the defendant, is relying on that decree in his pre-emption suit. The first Court in this suit accepting his contention dismissed the suit. The second Court set aside the decree and passed an order of remand under s. 562 of the Code of Civil Procedure. Jai Kishn has brought this appeal from that order of remand. Mr. *Madho Prasad* has contended that, as the decree of the District Judge in the pre-emption suit, although it fixed one month from the date of the decree for payment of the money and costs, did not declare that if the money and costs were not paid within the month the suit should stand dismissed, the defendant had three years limitation from the date of that decree or from the date of the decree in appeal in this Court to pay in the money. He relied on the case of *Bondku Bhagat v. Shah Muhammad Taqi* (3) in which it was held that where a decree under s. 92 of the Transfer of Property Act did not declare what was to take place if the redemption money was not paid within the period fixed by the decree the mortgagor had three years limitation for the execution of his decree, notwithstanding that he had not paid the money within the time fixed by the decree. Any judgment of the Judge who decided that case is entitled to careful consideration and great weight, but it appears to us that s. 92 of the Transfer of Property Act fixes the outside period of limitation within which a Court may fix a day for the payment of the

(3) Weekly Notes, 1892, p. 40.

money and that outside limit is 6 months and not 3 years. The section also enacts what the decree shall be. Section 93 shows what may take place according to law if the money is paid or is not paid within the period limited by the decree under s. 92. When a decree under the Transfer of Property Act fixes a time within 6 months for the payment of the money, we fail to see how a plaintiff, unless he could get extension of the time, could have a right to make the payment after the time limited had expired. In the case of *Kodai Singh v. Jaisri Singh* (1) three of the Judges concurred in the decision of Mr. Justice Straight, which was not inconsistent with the view which we hold in this case, and two of those three Judges expressly protected themselves from being understood as expressing any opinion on the cases referred to by Mr. Justice Mahmood in his judgment. In our opinion Jai Kishn, not having made the payment within the time limited by the decree, lost the benefits of that pre-emption decree and cannot protect himself under it. The decree of the Judge of Sháhjahánpur was right. We dismiss this appeal with costs.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

FATIMA BIBI (PLAINTIFF), v. ABDUL MAJID (DEFENDANT)*.

Act X of 1877, ss. 45, and 212, 244 clause (a)—Suit for recovery of immoveable property and for mesne profits—Separate trials of the two claims—Transfer of suit by order of High Court, duty of Court to which the transfer is made.

When a suit has been transferred by an order of the High Court from the Court of a Subordinate Judge to the Court of the District Judge for trial, it is the duty of the District Judge to try the suit himself, and he is not competent to transfer the suit back to the Court of the Subordinate Judge.

In a suit on title in which the recovery of immoveable property and mesne profits are claimed the Court may, under s. 45 of the Code of Civil Procedure, order separate trials in respect of the claim for the recovery of the immoveable property and in respect of the claim for mesne profits.

Where under s. 212 of the Code of Civil Procedure a Court in such suit passes a decree for the property and directs an inquiry into the amount of mesne profits the

* First Appeal, No. 218 of 1891, from a decree of Babu Nil Madhab Rai Subordinate Judge of Jaunpur, dated the 2nd June 1890.

(1) I. L. R., 13 All., 376.

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