

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

KALIAN AND OTHERS (DEPENDANTS) v. SADHO LAL AND OTHERS
(PLAINTIFFS).*

1912
December, 9.

Civil Procedure Code (1908), order XXXIV, rule 8—Execution of decree—Decree for sale on a mortgage conditioned on redemption of prior mortgages—Power of court to extend time for payment of redemption money.

When a suit for sale by a subsequent mortgagee became by reason of the intervention of a prior mortgagee also a suit for redemption of the prior mortgage and a decree was passed accordingly, it was held that the court had power under order XXXIV, rule 8, to extend the time for payment of the sum found necessary to redeem the prior mortgage, the plaintiffs having through a *bona fide* mistake paid into court an insufficient amount.

The facts of this case were, briefly, as follows :—

The plaintiffs, who were subsequent mortgagees, brought a suit for sale upon their mortgage in which they impleaded certain prior mortgagees. The prior mortgagees appeared to answer the suit and claimed to be redeemed, and in the end a decree was passed in favour of the plaintiffs providing for redemption of the prior mortgages as a condition precedent to the sale of the mortgaged property by the plaintiffs. The plaintiffs paid into court within the time limited by the decree what they believed to be a sum sufficient to satisfy it, but, owing to a miscalculation, the sum was as a matter of fact not enough. The court, however, allowed time to the plaintiffs to make good the deficiency. Against this order the prior mortgagees appealed to the High Court.

Babu Sarat Chandra Chaudhri (with him Dr. Satish Chandra Banerji), for the appellants :—

The plaintiffs having failed to deposit the whole money within the time fixed by the decree their suit stood dismissed. Section 148 of the Code of Civil Procedure could not be called in aid as the court had no power to extend the time fixed in the decree for the deposit of the whole amount of mortgage money: *Het Singh v. Tika Ram* (1).

[TUDBALL, J.:—Section 148 of the Code certainly does not apply, but the proviso to order XXXIV, rule 8, would apply because this was a compound suit involving a sale of the property as well as redemption].

* First Appeal No. 129 of 1912, from a decree of Shekhar Nath Banerji, Second Additional Subordinate Judge of Agra, dated the 13th of February, 1912.

(1) (1912) I. L. R., 34 All., 388.

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In order to determine whether the rule in question would apply one has to look to the scope of the suit. The rule speaks of a suit for redemption, pure and simple, whereas the present suit was one for sale. The nature of the suit depends upon the relief asked and redemption was not the relief sought in this case. Therefore the rule would not apply. Even assuming that the rule applied, the court was not entitled to extend the time because no good cause was shown for such extension. The decree provided that the money was to be deposited to the credit of defendants 17, 19, 20 and 21. But the respondents deposited the money to the credit of defendant 17 and one Bidhi Chand, who at the date of the suit possessed no interest in the property. The deposit therefore was made in contravention of the express terms of the decree. The principle of the following case applies to the present case as showing that such a deposit is not valid: *Debendra Mohan v. Rani Sona Kunwar* (1).

The Hon'ble Munshi *Gokul Prasad* (with the Hon'ble Dr. *Sundar Lal*), for the respondents :—

No appeal lay from an order of the lower court granting an extension of time. Order XLIII, rule 1, clause (o) gives a right of appeal from an order *refusing* to extend the time for the payment of mortgage money. The latter order being expressly provided for as appealable, an order like the one now in question cannot form the subject-matter of an appeal, under the provisions of the Code. The mistake in the deposit was a *bona fide* one, because in the decree it was provided that the money should be deposited to the credit of defendant 17 and Bidhi Chand. The respondents were misled by that provision in the decree.

Babu *Surat Chandra Chaudhri*, in reply :—

The order passed in the present case is a decree: *Rahima v. Nepal Rai* (2). According to the appellants' contention the court below had no jurisdiction to extend the time and consequently this Court can deal with the matter in the exercise of its revisional jurisdiction.

TUDBALL and MUHAMMAD RAFIQ J.J. :—This appeal arises out of the following circumstances. The respondents to this appeal brought a suit for sale on the basis of a mortgage. They impleaded

(1) (1904) L. L. B., 26 ALL., 291.

(2) (1892) I. L. R., 14 ALL., 520.

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certain persons as subsequent transferees. It appears that there were three prior mortgages, one in favour of Bidhi Chand and two in favour of Kalian. Bidhi Chand sold his rights to Kalian and the other three appellants before us. At the trial of the suit these four persons thought fit to stand upon their rights as prior mortgagees and claimed that the plaintiffs should redeem them before they sold the mortgaged property. The result of this was a compound decree in favour of the plaintiffs to the following effect. The court ordered the original mortgagors to pay up the plaintiffs' debt within three months. It then ordered that if they failed so to pay, the plaintiffs should pay within a further period of one month to the present appellants the sums due on the three prior mortgages, and conditional upon their so doing, the decree gave the plaintiffs power to consolidate the amounts due on all the mortgages and to put the property to sale for the full amount. It went on to say that if the plaintiffs failed to pay off the amounts due on the prior mortgages within the time allowed, the suit should stand dismissed. The original mortgagors failed to pay the money within the time allowed. Therefore the plaintiffs within a further time of one month deposited Rs. 3,690-0-0, stating in their application depositing the money that the amount is due to Bidhi Chand and Kalian. The money was really payable to Kalian and the other three appellants, who had acquired the rights of Bidhi Chand. The sum which ought to have been deposited by the decree-holders really amounted to something over Rs. 4,000-0-0. There had been an error in calculation and therefore after the period of one month Kalian and his co-appellants put in a petition of objection in which they pointed out that the amount deposited was not the full amount and therefore the plaintiffs' claim under the terms of the decree should be dismissed. They made no mention of the error in entering Bidhi Chand's name in the application. The decree-holders in reply pleaded that the deficiency in deposit was due to miscalculation. They also pointed out the error in entering Bidhi Chand's name and asked for further extension of time to make good the deficiency. The court allowed the application. Hence the present appeal.

The argument of the appellants is that the court had no power whatever to extend the time; that section 148 of the Code of Civil

Procedure does not cover the case in which a time is fixed by the decree for the doing of some act mentioned in the decree, and that order XXXIV, rule 8, would not cover the case as the suit was not one for redemption. On behalf of the respondents it is contended that the order being an order extending time, no appeal whatsoever lies, as order XLIII, rule 1, clause (c), only grants appeals when the court refuses to extend time. The reply to this is two-fold, first that the order granting time is a decree within the meaning of section 47 of the Code, and secondly, that even if it be not a decree, the order passed is without jurisdiction and the court has power to set it aside in revision. In our opinion the order passed by the lower court was with jurisdiction and was justified by order XXXIV, rule 8. It is true that in its inception the suit was not a suit for redemption. It was a suit for sale, but directly the present appellants determined to stand upon their prior rights and demanded redemption, the suit became a compound suit and as a matter of fact the decree was both for sale and redemption, and so far as the decree between the present parties is concerned, it is clearly and simply a decree for redemption. In our opinion the proviso to rule 8 of order XXXIV, clearly applies and the lower court had power to pass the order. So far as the merits of the case are concerned we think the order of the court below is correct. The objection taken by the present appellant was simply as to the amount and the court below was satisfied that there was a *bond fide* mistake in calculation. As to the entry of Bidhi Chand's name the error was pointed out by the plaintiffs themselves. The lower court's order has done material justice. We see no reason to interfere and dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Taddall and Mr. Justice Muhammad Rafiq.

SATYA SHANKAR GHOSHAL AND OTHERS (DECREE-HOLDERS) v. MAHARAJ
NARAIN SHEOPURI AND OTHERS (JUDGEMENT-DEBTORS).*

1912,
December, 9.

*Execution of decrees—Stay of execution of decrees under appeal—Jurisdiction—
Procedure.*

Held that the court which passed a decree has no power to stay execution thereof whilst the decree is under appeal; neither has a court which has executed

* First Appeal No. 194 of 1912 from a decree of Srish Chandra Basu, Subordinate Judge of Benares, dated the 25th of April, 1912.