

1928

LAKHPAT RAI  
v.  
DURG  
PRASAD.

We are of opinion that the view taken by the learned District Judge is correct and this application is dismissed with costs to be paid by the applicant personally.

*Before Mr. Justice Mukerji and Mr. Justice Banerji.*

1928

May, 23.

NARSINGH PRASAD SINGH AND OTHERS (DEFENDANTS)  
v. PARTAP SINGH AND OTHERS (PLAINTIFFS).\*

*Civil Procedure Code, order XXXIV, rule 8—Mortgage by conditional sale—Execution of decree—Power of court to extend time for payment.*

The proviso to rule 8 of order XXXIV of the Code of Civil Procedure applies to the whole of the rule and not merely to sub-rule (4). A court, therefore, has power to extend the time for payment in a suit for redemption of a mortgage by conditional sale, just as in the case of any other kind of mortgage.

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

Munshi Kamala Kant Verma, for the applicants.

Munshi Gadadhar Prasad, for the opposite parties.

MUKERJI and BANERJI, JJ. :—This is an application inviting us to revise an order of the 21st of May, 1927, by which the learned Munsif of Benares purported to extend the time, originally limited by a decree for redemption, to pay up.

The suit out of which this application has arisen was one for the redemption of the mortgage, the nature of which we have not been told. The decree, however, that was passed indicates that the mortgage was one by conditional sale, for we find that the decree directed that in case of non-payment of the mortgage money the plaintiffs' right of redemption would be

\*Civil Revision No. 150 of 1927.

barred. We have assumed, therefore, that the mortgage was one by conditional sale and that the decree in those terms was rightly passed. The last date on which the payment could be made was the 30th of April, 1927. On the 29th of April, 1927, the plaintiffs came into court with an application for extension of time. The learned Munsif has extended the time by 15 days by the order complained of. In this Court it has been contended that this order was passed without jurisdiction, inasmuch as order XXXIV, rule 8, of the Code of Civil Procedure did not authorize the Munsif to extend time in a case of a decree for redemption of a mortgage by conditional Sale.

The contention of the learned counsel for the applicants is that the proviso to rule 8 is a part of sub-rule (4) alone and does not govern the entire rule 8.

We are of opinion that this contention is not sound. Our opinion is that the proviso governs not only sub-rule (4) but also sub-rule (2). A date for payment has to be fixed in a suit for redemption, in the case of mortgages of all classes. There is, therefore, no reason why the provision for postponement of the date of payment should be read as confined to the case of some classes of mortgages, to the exclusion of others. Sub-rule (2) deals with the case of the redemption of a mortgage by conditional sale. It is in those cases that an extension of time is at all material. In the case of a decree for redemption of a simple mortgage or a usufructuary mortgage, the preliminary decree directs that in case of non-payment of the mortgage money the property shall be sold. The procedure for sale must necessarily be the procedure laid down in order XXI of the Code of Civil Procedure. In the process of the sale, the plaintiff mortgagor takes up the position of a judgement-debtor

1928

---

NARSINGH  
PRASAD  
SINGH  
2.  
PARTAP  
SINGH.

1923

NARSINGH  
PRASAD  
SINGH  
v.  
PARTAP  
SINGH.

and he would be entitled to pay the mortgage money till the property is sold, and perhaps after the sale within 30 days limited for payment. There would be no sense in refusing to accept his money and yet selling the property, although the sale may not fetch the full value offered by the plaintiff mortgagor.

We are fortified in our opinion by the fact that a proviso similar to the proviso to be found in rule 8 is to be found in the case of a preliminary decree to be passed in the case of a foreclosure suit, in rule 3 of order XXXIV. On the other hand a similar proviso for extending time is not to be found in the case of a preliminary decree in a suit for sale, which is provided for in rule 4 of order XXXIV. In this Court it was held under the Transfer of Property Act, before it was amended by Act V of 1908, that the right of payment of a foreclosure decree remained existent till a final decree was passed. We need not consider whether that rule of law still holds good under the Code of Civil Procedure, but we take it that the legislature was aware of such a view being held by this High Court.

Holding the view we do hold of rule 8 of order XXXIV, we are of opinion that the Munsif was authorized to extend the time.

Mr. *Verma* invited us to consider whether the discretion was properly used by the lower court in extending the time. In revision we are not prepared to interfere with the exercise of a discretion which was undoubtedly vested in the court below.

The application is dismissed with costs.