

APPELLATE CIVIL.

Before Mr. Justice Gokaran Nath Misra and
Mr. Justice Muhammad Raza.

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May, 8.

ABID ALI KHAN (PLAINTIFF-APPELLANT) v. PANDIT HAR PERSHAD AND ANOTHER (DEFENDANTS-RESPONDENTS).*

Pre-emption—Deposit of money within the time specified in the pre-emption decree—Application that the money be not paid to vendee until disposal of appeal—Deposit, if conditional or invalid—Dismissal of suit, if justified.

Where a pre-emption decree directed a certain amount to be deposited in court within a specified time and the amount was deposited within that time, the fact that the pre-emptor also made an application praying that the amount be not given to the vendee till the disposal of the appeal which he was going to file against the decree did not make the deposit a conditional or invalid deposit so as to justify the dismissal of the suit on the ground that it was not a deposit in terms of the decree.

Mr. K. P. Misra, for the appellant.

Mr. A. P. Sen, for the respondents.

MISRA and RAZA, JJ. :—This is a plaintiff's appeal arising out of a pre-emption suit.

This appeal (No. 101 of 1928) is connected with appeal No. 87 of 1928. Both the appeals arise out of one and the same suit. We are going to dispose of appeal No. 87 of 1928 by a separate judgment.

The facts of the case, so far as it is necessary to state them for the purpose of disposing of this appeal, are as follows :—

Abid Ali Khan brought a suit against Har Prasad, Ganga Sewak (defendants Nos. 1 and 2) and Akhtar Ali (defendant No. 3) to enforce his right of pre-emption in respect of a certain zamindari share which was sold by Akhtar Ali to Har Prasad and

*First Civil Appeal No. 101 of 1928, against the decree of Pandit Sheo Narain Tewari, Subordinate Judge of Unao, dated the 31st of July, 1928.

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Ganga Sewak by a deed, dated the 14th of August, 1926. The price entered in the sale-deed was Rs. 12,500, but the plaintiff alleged that the price was not fixed in good faith, that the property was really sold to the defendants Nos. 1 and 2 for Rs. 8,063-12-0, and that the market value of the property was also the same.

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The claim was resisted by the defendants Nos. 1 and 2 on various grounds.

The learned Subordinate Judge gave the plaintiff a decree on the 15th of May, 1928 for possession of the property in suit, by right of pre-emption, on payment of Rs. 9,150 plus costs. The plaintiff was ordered to pay the amount into court within two months from the date of the decree (i.e. up to the 15th of July, 1928). The decree was to become void in default of payment of the amount as ordered by the court.

The plaintiff deposited the amount in the lower court on the 13th of July, 1928. He did so by making an application to that court. It was stated in the application that the plaintiff was ready and willing to deposit the amount in court for payment to defendants Nos. 1 and 2 as ordered by the court. The plaintiff, however, prayed that the amount might not be given to the defendants Nos. 1 and 2 till the disposal of the appeal which the plaintiff was going to file against the decree of the court. The learned Subordinate Judge passed the following order on the plaintiff's application on the 13th July, 1928 :—

“ According to the decree, the plaintiff should deposit Rs. 9,286-12-0 due to the defendants Nos. 1 and 2 up to the 15th of July, 1928. He wants to deposit it and prays that it should not be given to defendants Nos. 1 and 2 till the

disposal of the appeal which he is about to file.

Ordered, that he should deposit the money and that the money be not paid to opposite party till the appeal is disposed of."

The defendants Nos. 1 and 2 put in an application on the 16th of July, 1928 stating that they would suffer loss of interest if they would not get the money till the disposal of the plaintiff's appeal. They prayed that, if for any reason they were not allowed to get the money deposited by the plaintiff, the latter might be ordered to pay interest till the appeal, which he was going to file, was disposed of. The learned Subordinate Judge passed the following order on the defendants' application on the 17th of July, 1928 :—

"Let the decretal amount be deposited in court, but it shall not be paid to the vendees until disposal of appeal as desired by the plaintiff pre-emptor in his application dated the 13th July, 1928; but the pre-emptor shall be liable to pay interest, at six per cent. per annum on the decretal amount from the due date until disposal of appeal."

It should be noted that the plaintiff had already deposited the money in court. It should also be noted that the plaintiff filed his appeal in this court against the decree, dated the 15th of May., 1928, on the 31st of July, 1928.

The defendants Nos. 1 and 2 filed another application in the lower court on the 23rd of July, 1928 contending that the deposit which was made by the plaintiff on the 13th of July, 1928 was not in accordance with the conditions of the decree dated the 15th

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of May, 1928, and that it was not a valid deposit, and should not be treated as such. They asked the court to dismiss the suit as the plaintiff had failed to comply with the terms of the decree.

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The plaintiff also filed an application in the lower court on the 31st of July, 1928 informing the court that he had filed his appeal in the Chief Court and questioning the correctness of the order of the lower court as to payment of interest on the money deposited in court.

The learned Subordinate Judge disposed of these applications on the 31st of July, 1928. He rejected the plaintiff's application holding that he had no jurisdiction to set aside his order regarding interest. He, however, granted the defendants' application and passed the following order:—

“ Now I take up the question of conditional deposit taken on behalf of the defendants vendees. The pre-emption decree required unconditional payment of Rs. 9,286 by the pre-emptor to the vendees within two months' time, and the plaintiff obviously made a conditional deposit as stated above; hence this deposit should be treated as no deposit at all in terms of the decree. I therefore dismiss plaintiff's suit for pre-emption with costs, if any, to defendants Nos. 1 and 2, including costs, if any, of the present proceedings, because I uphold the objections raised by the defendants Nos. 1 and 2.”

The plaintiff has filed this appeal (No. 101 of 1928) against the order quoted above.

We think this appeal should be allowed.

We have considered the plaintiff's application dated the 13th of July, 1928 carefully. In our opinion the plaintiff never meant to make a conditional deposit, and the deposit made by him was in compliance with the decree of the court. Under the decree he had to pay the amount into court on or before the 15th of July, 1928. He paid the amount into court on the 13th of July and thus complied with the decree dated the 15th of May, 1928. The mere fact that his application contained this prayer also that the amount might not be given to the defendants Nos. 1 and 2 till the disposal of the appeal, which he was going to file against that decree, does not make the deposit a conditional or invalid deposit. He had made a prayer, and it was for the court to refuse or grant it. The money was deposited under the order of the learned Subordinate Judge and he took it to be a valid deposit. The contesting defendants also raised no objection to the validity or legality of the deposit and asked the court to allow them to draw the money or to require the plaintiff to pay interest on the amount deposited. Thus neither the court nor the contesting defendants thought before the 23rd of July, 1928 that the deposit in question was a conditional or invalid deposit.

The respondents' learned Counsel has referred to some old rulings in mortgage suits dealing with the question of the validity or legality of the tender of mortgage money. We do not think it necessary to discuss those cases. They differ materially from the present case in their facts and do not help the defendants in this case. The respondent's learned Counsel has referred to these cases in support of his argument that the tender must be unconditional. We agree with him on that point; but the question is:—Was the deposit made by the plaintiff in this case conditional? We hold that it was not

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conditional and was never meant to be conditional. The plaintiff deposited the money in compliance with the decree which was passed in his favour on the 15th of May, 1928, and the lower court was wrong in dismissing his suit on the 31st of July, 1928 under the circumstances mentioned above. It appears that the learned Subordinate Judge was under the wrong impression that he had to pass or that he could pass a final decree or order in the pre-emption suit after he had disposed of the suit on the 15th of May, 1928. He was under the wrong impression that there must be a preliminary decree and then a final decree in all cases in which pre-emption decrees are passed embodying the condition that if the pre-emption money be not paid within the time fixed by the court, the suit shall stand dismissed. He was clearly wrong in passing the order in question when the plaintiff had filed his appeal against the decree dated the 15th of May, 1928 in this Court. Once an appeal is preferred from a decree, the appellate court becomes seized of the entire proceedings and becomes vested with the jurisdiction of confirming, varying or reversing the decree from which the appeal is preferred (see Order XLI rules 32 and 33, C. P. C.).

Hence we allow this appeal and set aside the order of the lower court dated the 31st of July, 1928. The appellant will get his costs from the contesting respondents (i.e., respondents Nos. 1 and 2) in this Court and also in the lower court (so far as the proceeding in which the order in question was passed is concerned).

Appeal allowed.