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THE JUNIOR
SECRETARY
TO THE
BOARD OF
REVENUE,
UNITED
PROVINCES
AT ALLAH-
ABAD. IN
THE MATTER
OF A DEED
EXECUTED BY
ONE THAKUR
LALTA
BAKSH
SINGH.

minority of one in the present Bench, I do not feel sufficiently strong to record my dissent from the decision of the Full Bench of this Court in *Lal Harihar Pratap Bakhsh Singh v. Bisheshwar Bakhsh Singh* (1).

With these remarks I concur in the order proposed by the Hon'ble CHIEF JUDGE.

BY THE COURT:—The answer to the reference is that the bond in question is chargeable with stamp duty under Article 57 of the First Schedule of the Indian Stamp Act, 1899.

(1) (1927) I.L.R., 3 Luck., 298.

APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan, Chief Judge, and Mr. Justice Bisheshwar Nath Srivastava.

SANT BAKHSH AND ANOTHER (PLAINTIFFS-APPELLANTS) v. BHAGWANDIN SINGH APPLICANT AND ANOTHER, (DEFENDANT) (RESPONDENTS.)*

Civil Procedure Code (Act V of 1908), order XXXIV, rules 2(2) and 3(1)—Mortgage—Foreclosure decree in 1897—Defendant allowed to deposit mortgage money within six months and in default plaintiff entitled to apply for final decree—Application for final decree not made by plaintiff—Defendant offering in 1929 to deposit mortgage money and praying for delivery of possession—Application, maintainability of.

Held, that under the old provisions of the Code of Civil Procedure a defendant could ask for extension of time upon good cause being shown in case the plaintiff made an application for a final decree debarring the defendant from all right to redeem, but now, when no such application is made, the defendant can make an application for a final decree in his favour at any time before a decree, debarring him from all right to redeem, is passed.

Where, therefore, a mortgagee obtained a decree for foreclosure in 1897 in terms of section 86 of Act IV of 1882 and under that decree the defendant was allowed to deposit the mortgage money within a period of 6 months and in default

*Second Civil Appeal No. 135 of 1930, against the decree of Pandit Bansidhar Misra, Subordinate Judge of Bara Banki, dated the 10th of March, 1930, reversing the decree of Babu Tirbeni Frasad, Munsif, Fatehpur at Bara Banki, dated the 19th of October, 1929.

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the decree contained the direction that the plaintiff shall be entitled to apply for a final decree but no such application was made by the plaintiff and in 1929 the defendant applied praying for permission to deposit the mortgage money and for recovery of possession of the mortgaged property from the hands of the mortgagee, *held*, that he was entitled to make the payment and to ask for a final decree ordering the plaintiff to deliver up the document referred to in the preliminary decree and also ordering him to retransfer at the cost of the defendant the mortgaged property as directed in the said decree and also ordering him to put the defendant in possession of the property.

Mr. *Ram Bharose Lal*, for the appellants.

Mr. *Ram Charan*, for the respondents.

HASAN, C. J. and SRIVASTAVA, J. :—This is the plaintiff's appeal from the decree of the Subordinate Judge of Bara Banki, dated the 10th of March, 1930, reversing the decree of the Munsif of Fatehpur, dated the 19th of October, 1929.

The plaintiff held a mortgage by way of conditional sale in respect of a plot of land situate in village Sarai Mendoo pargana Sidhaur, in the district of Bara Banki. The defendant's predecessor-in-interest was the mortgagor. In accordance with the terms of the mortgage, the mortgagee entered into possession of the mortgaged property and it is admitted that he is still in possession of the same. In the year 1897 the plaintiff brought a suit on the foot of the mortgage and obtained a decree for foreclosure in terms of section 86 of Act IV of 1882, on the 15th of December, 1897. Under that decree the defendant was allowed to deposit the mortgage money within a period of six months and in default the decree contained the direction that the plaintiff shall be entitled to apply for a final decree. No such application has so far been made by the plaintiff.

On the 4th of May, 1929, the defendant made an application to the court which had passed the decree of the 15th of December, 1897, praying for permission to deposit the mortgage money and for recovery of possession of the mortgaged property from the hands of the

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plaintiff. The court rejected the application on the ground that the time originally fixed by the preliminary decree for payment of the mortgage money had expired. The defendant preferred an appeal from the order of the court of first instance and the learned Subordinate Judge of Bara Banki has reversed the order and allowed the defendant to pay the sum of money specified in the preliminary decree within six weeks of his order, dated the 10th of March, 1930. This order contains also the direction that in case the payment was made a final decree in favour of the defendant shall be made. As stated before, from this decree of the learned Subordinate Judge the present appeal is made to this court by the plaintiff.

We are of opinion that the appeal fails. The lower courts have treated the question as if it were governed by sub-rule 2 of rule 2 of order XXXIV of the Code of Civil Procedure. That rule is as follows:—

“The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.”

The trial court was of opinion that no good cause was shown for extending the time fixed by the preliminary decree for payment of the sum of money specified therein. The lower appellate court is of opinion that the defendant is entitled to an extension on grounds of equity, justice and good conscience. We think that the case is not governed by sub-rule 2 of rule 2 of order XXXIV, above referred to. It clearly falls within sub-rule 1 of rule 3 of order XXXIV. That rule is as follows:—

“Where, before a final decree debarring the defendant from all right to redeem the mortgaged property has been passed, the defendant

makes payment into court of all amounts due from him under sub-rule (1) of rule 2, the Court shall on application made by the defendant in this behalf pass a final decree."

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We have already stated that no final decree debarring the defendant from the right to redeem the mortgaged property has yet been passed. The defendant is therefore entitled to make the payment and to ask for a final decree ordering the plaintiff to deliver up the document referred to in the preliminary decree and also ordering him to retransfer at the cost of the defendant the mortgaged property as directed in the said decree and also ordering him to put the defendant in possession of the property.

On behalf of the plaintiff, Mr. *Ram Bharose Lal*, advocate, cited the decision of their Lordships of the Judicial Committee in the case of *Motilal v. Ujar Singh* (1). That was a case which fell within sub-rule 2 of rule 3 as it then stood and their Lordships of the Judicial Committee held that no good cause having been shown, there was no jurisdiction in the court to extend the time specified in the preliminary decree for payment of the mortgage money. Since the date of that decision, the rule of procedure has materially been altered. The rule now is, as we have already stated, that the defendant can make payment at any time before the final decree, debarring him from the right to redeem, is passed. Formerly sub-rule 2 of rule 2 was a part of the old rule 3 and the old rule 3 sub-rule 1 was that where on or before the day fixed, the defendant pays into court the amount declared due as aforesaid, the Court shall pass a decree ordering the plaintiff ; and sub-rule 2 was that where such payment is not so made, the Court shall on application made in that behalf by the plaintiff, pass a decree that the defendant be debarred from all right to redeem the mortgaged property, provided that the court may, upon good cause shown and upon such

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terms (if any) as it thinks fit from time to time postpone the day fixed for such payment.

From the foregoing analysis, it is clear that under the old provisions of the Code, a defendant could ask for extension of time upon good cause being shown in case the plaintiff made an application for a final decree debarring the defendant from all right to redeem, but now, when no such application is made, the defendant can make an application for a final decree in his favour at any time before a decree, debarring him from all right to redeem, is passed.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

MISCELLANEOUS CIVIL.

*Before Mr. Justice Bisheshwar Nath Srivastava, and
Mr. Justice A. G. P. Pullan.*

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ABDUL HASSAN KHAN AND ANOTHER (OBJECTORS APPELLANTS) v. B. RAJBIR PRASAD AND ANOTHER (OPPOSITE PARTY-RESPONDENTS.)*

*Provincial Insolvency Act (V of 1920), sections 4 and 53—
waqf deed executed by insolvent more than two years
before adjudication, alleged to be fictitious—Insolvency
court's power to decide the question of its being ficti-
tious.*

Held, that the Insolvency court under section 4 of the Provincial Insolvency Act (V of 1920) has full power to decide that a *waqf* alleged to have been executed by the insolvent was fictitious. Under that section the Insolvency court can decide all questions of title to any property which appears to belong to the insolvent and section 53 of that Act would apply to actual transfers. *Amjad Ali v. Nand Lal Tandon* (1) distinguished. *Anwar Khan v. Mohammad Khan* (2), *Hinga Lal v. Jwala Prasad* (3) and *Abadi Begam v. Kaniz Zainabi* (4), referred to.

*Miscellaneous Appeal No. 22 of 1930 against the order of K. G. Harper, District Judge of Sitapur, dated the 27th of February, 1930.

(1) (1930) 7 O.W.N., 377.

(2) (1929) I.L.R., 51 All., 550.

(3) (1928) 5 O.W.N., 964.

(4) (1926) L.R., 54 I.A., 33.