

APPELLATE CIVIL.

Before Mullick, A. C. J. and Wort, J.

PANCHU SAHU

v.

SHEIKH MUHAMMAD YAKUB.*

1927.

July, 15.

Limitation—Decree directing a thing to be done within a prescribed period—appellate court, confirmation by—period, whether extended ipso facto—terminus a quo.

Where a decree of an inferior court directing something to be done within a prescribed period is confirmed on appeal, the period is not thereby extended, and time is to be reckoned from the date of the original decree unless there is a special direction to the contrary in the appellate court's decree. *Bhola Nath Bhattacharjee v. Kanti Chandra Bhattacharjee* (1), *Basanta Kumar Adak v. Sm. Radha Rani* (2), and *Ramaswami Kone v. Sundara Kone* (3), followed.

Noor Ali Chowdhuri v. Koni Meah (4), *Nam Narain Singh v. Lala Raghunath Sahu* (5) and *Satwaji Balajirav v. Sakhar Lal Atmaram Shet* (6), not followed.

Syed Jowad Hussain v. Gendan Singh (7), *Fitzholmes v. Bank of Upper India, Limited* (8) and *Lala Gobind Prasad v. Lala Jagdip Sahay* (9), distinguished.

Appeal by the decree-holder.

The facts of the case material to this report are stated in the judgment of Mullick, A. C. J.

S. M. Mullick and *Shiveshwar Dayal*, for the appellant.

Khurshaid Husnain and *S. M. Naimatullah*, for the respondents.

*Appeal from Appellate Order no. 39 of 1927, from a decision of R. Ghosh, Esq., District Judge of Purnea, dated the 3rd February, 1927, reversing a decision of Babu Harihar Charan, Subordinate Judge of Purnea, dated the 24th April, 1926.

(1) (1898) I. L. R. 25 Cal. 311.

(5) (1895) I. L. R. 22 Cal. 467.

(2) (1921-22) 26 Cal. W. N. 440.

(6) (1915) I. L. R. 39 Bom. 175.

(3) (1908) I. L. R. 31 Mad. 28.

(7) (1927) I. L. R. 6 Pat. 24 P. C.

(4) (1886) I. L. R. 13 Cal. 13.

(8) (1927) 8 Pat. L. T. 377.

(9) (1925) I. L. R. 4 Pat. 378.

MULLICK, A. C. J.—Gobind Singh, defendant no. 5, and Muluk Singh, the deceased husband of Musammat Basi defendant no. 4, executed a simple mortgage bond in January, 1913, in favour of the plaintiff who on the 18th September, 1920, having obtained a decree for the enforcement thereof, purchased the mortgaged property in execution and obtained a sale certificate on the 15th September, 1293. On the 26th September, 1923, delivery of possession was resisted by the appellants Muhammad Yakub and others, who claimed to have purchased the equity of redemption on the 9th May, 1919, in execution of a money decree. The plaintiff thereupon brought a suit for possession against the appellants and obtained a decree on the 22nd September, 1924, subject to the right of the appellants to redeem the property by the payment of Rs. 3,914-13-3 within six months from the date of the trial Court's decree. An appeal was preferred by the appellants against that decree, but it was dismissed on the 8th January, 1926.

On the 29th January, 1926, the appellants deposited the money, but the plaintiffs objected to the deposit on the ground that it had been made more than six months from the 22nd September, 1924, and asked for delivery of possession.

The Subordinate Judge accepted the objection and on the 24th April, 1926, held that the appellant was not entitled to delivery of possession.

On appeal the District Judge reversed the order of the Subordinate Judge and held that the appellants were entitled to redeem within six months from the 8th January, 1926, which was the date of the appellate Court's decree.

The present second appeal is preferred by the plaintiffs.

Although it is not clear from the records before us whether the order of the 8th January, 1926, was

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one of simple dismissal or one of dismissal accompanied by confirmation of the trial Court's decree of the 22nd September, 1924, I will assume that it was a decree of confirmation. The express provision in the Code of Civil Procedure of 1882 empowering appeal Courts to confirm, vary or reverse the decree of the lower Court is still applicable to proceedings under the Code of 1908, and there is a distinction between an appeal dismissed without hearing and one dismissed after hearing.

But assuming that the decree of the 8th January, 1926, was one of confirmation, the question is whether the extension of time for six months from that date is to be read into it.

The analogy of preliminary decrees in suits for foreclosure, sale and redemption, although not strictly applicable to the present case, may be considered. In these suits there must always be a preliminary decree and a final decree and in suits for foreclosure and redemption there is provision in Order 34, rules 3 and 8, for the enlargement of time before the final decree is made, while there is no provision for the enlargement of time in regard to decrees for sale. If an appeal is preferred against the preliminary decree, the appeal does not ipso facto stay execution and time for the application for a final decree runs from the date of the expiry of the period of grace, but if the appeal is disposed of after hearing the preliminary decree is replaced by the decree of the appeal Court and time runs from the latter date or from the expiry of the new period of grace if any allowed by the appeal Court. In *Syed Jowad Hussain v. Gendan Singh* (1) and *Fitzholmes v. The Bank of Upper India, Limited* (2) the Judicial Committee of the Privy Council declined to accept the view that time ran from the expiry of the period of grace allowed by the preliminary decree.

(1), (1927) I. L. R. 6 Pat. 24, P. C.

(2) (1927) 8 Pat. L. T. 377.

Neither of those cases is authority for the proposition that into every appellate decree confirming a preliminary decree the provision for a fresh period of grace must be read as a matter of course. Both the Transfer of Property Act of 1882 and the Civil Procedure Code of 1908 require the Court to fix the day of payment and if the appeal Court is silent it is reasonable to suppose that no enlargement of time is intended.

In some Calcutta cases it has been held that where a decree of an inferior Court directing something to be done within a specified period is confirmed on appeal, the time is to be reckoned from the date of the appeal decree [*Noor Ali Chowdhuri v. Koni Meah* (1) and *Nam Narain Singh v. Lala Raghunath Sahai* (2)]. But in the more recent cases a contrary view has been taken [*Bhola Nath Bhattacharjee v. Kanti Chandra Bhattacharjee* (3), *Basanta Kumar Adak v. Sm. Radha Rani* (4)].

The latter view has also been adopted in *Ramaswami Kone v. Sundara Kone* (5) by the Madras High Court and indeed there seems to be no reason why a frivolous appeal should receive any special encouragement.

The respondents rely on *Satwaji Balajirav v. Sakhar Lal Atmaram Shet* (6). In that case the first appeal Court made a decree against defendants 1 to 6 directing them to deliver up the property in suit to the plaintiff upon the payment of a certain sum of money within six months from the date of the decree. There was a second appeal to the High Court which confirmed the decree of the first appellate Court. Tender of the required sum was made within six months of the High Court's decree and it was held that it was good even though more than six months had expired from the decree of the first appeal Court. This view appears to have been based upon the decision of the Judicial Committee in *Raja Bhup Indar*

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(1) (1886) I. L. R. 13 Cal. 13. (4) (1921-22) 26 Cal. W. N. 440.

(2) (1895) I. L. R. 22 Cal. 467. (5) (1908) I. L. R. 31 Mad. 28.

(3) (1898) I. L. R. 25 Cal. 311. (6) (1915) I. L. R. 30 Bom. 175.

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Bahadur Singh v. Bijai Bahadur Singh (1), but with very great respect that decision does not seem to me to affect the question. The question before the Judicial Committee was whether the plaintiff was entitled to mesne profits up to the expiry of the period of three years from the decree of the trial Court or up to the expiry of three years from the date of the appellate decree of the Judicial Committee; and it was held that the operative decree was the decree of the Privy Council and that in reversing the High Court and restoring the trial Court's decree the Judicial Committee had declared that the decree-holder was entitled to mesne profits for the usual statutory period subsequent to its own decree. The decision in that case was affected by the provisions of the Code of Civil Procedure relating to future mesne profits and I respectfully think that the Privy Council did not lay down the broad proposition that where time is prescribed by the decree of the lower Court for the performance of a condition precedent and the appeal Court simply confirms the decree of the lower Court, it must be assumed that the time for performing the condition has necessarily been enlarged.

The respondents also rely on *Lala Gobind Prasad v. Lala Jagdip Sahay* (2). In that case the plaintiff was declared to be entitled to a conveyance of land upon paying the defendant Rs. 250 within two months of the District Judge's decree in appeal. There was then a second appeal to the High Court followed by a Letters Patent appeal which confirmed the order of the District Judge. Within two months of the decree of the High Court a deposit was made by someone who was not the legal representative of the plaintiff. Then followed some proceedings for the purpose of ascertaining who was entitled to make the deposit and eventually the deposit was made by the plaintiff's pleader long after the period fixed by the District Judge. It was held on the analogy of section 14 of the Indian Limitation Act that the deposit was

(1) (1900) L. R. 27 I. A. 209.

(2) (1925) I. L. R. 4 Pat. 378.

within time. There are observations, however, in the body of the judgment which seem to approve of the decision in *Satwaji Balajirav's* case ⁽¹⁾ but in my opinion they did not affect the applicability of section 14 of the Limitation Act and must be regarded as obiter.

I think, therefore, that if in regard to a preliminary decree for foreclosure no enlargement of time can be made without an express provision to that effect, much less can such a procedure be adopted in regard to a decree which is not a preliminary decree. It is obvious that much hardship or injustice may be caused thereby. The proper course for the defendant in these cases is either to deposit the money in time or ask for an extension of time from the appellate Court.

Here if the view of the learned District Judge is accepted, then the plaintiff for no fault of his own loses the interest on the sum of Rs. 3,914-13-0 from the 22nd March, 1925, till the 29th January, 1926.

Suppose again that the plaintiff had executed this decree immediately after the 22nd September, 1924, while the appeal of the defendant was pending : he was entitled to delivery of possession and would have been put in possession. Would the defendant on depositing the money on the 29th January, 1926, have been entitled to eject the plaintiff? The appeal Court in its decree of the 8th January, 1926, did not provide for any such contingency and it is reasonable to presume that as the time for making the deposit had passed the appeal Court did not contemplate any extension of the time and the complications arising therefrom.

The result is that, in my opinion, the decision of the learned District Judge is wrong and must be set aside. The appeal is decreed with costs.

WORT, J.—I agree.

Appeal decreed.

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(1) (1915) I. L. R. 39 Bom. 175.