

peculiar to Burma and not known in India. The Civil Procedure Code has made no provision for such exigency. Rule 5 of Order XXI says where the Court to which a decree is to be sent for execution is situated within the same district as the Court which passed such decree, such Court shall send the same direct to the former Court. As the two Courts are situated in the same district and if the law, as it stands, is to be literally enforced, the Subdivisional Judge might as well pass the record from one hand to the other. It must be conceded that the omission to make a formal transfer in the present case amounts to an irregularity but in my opinion that irregularity is not a material irregularity affecting the jurisdiction of the Court.

I therefore hold that it is not a fit case to exercise the powers of revision under section 115 seeing that there has been no material irregularity accompanied by substantial failure of justice.

The application is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Mya Bu.

KO BA CHIT AND THREE

v.

KO THAN DAING AND ONE.*

1927

KO SIT
KAUNG
AND ONE
v.
PERIA-
KARUPPAN.
MAUNG BA,
J.

1927

June 28.

Specific performance of contract for sale, decree for—Court's power to fix date for performance and its discretion to extend time—Order granting extension not appealable.

Held, that if no date has been fixed in a decree for specific performance of a contract of sale, such a date may be fixed by the Court which made the decree after the decree has been passed, and that, whether the date is fixed in the decree or in a subsequent order, the Court which made the decree has a discretion to extend the time. Such an order is not appealable.

* Civil First Appeal No. 114 of 1927.

1927

KO BA CHIT
AND THREE

v.

KO THAN
DAING
AND ONE.

Abdul Shaheer v. Abdul Rahiman, 46 Mad. 148; *Rambhatlu v. Amuniabhatlu*, 90 I.C. 605; *Thirukoua v. Nakonda*, 49 Mad. 691—referred to.

Tambe—for Appellants.

Thein Maung—for Respondents.

HEALD, J.—Respondents sued appellants for specific performance of a contract to sell certain lands to them for Rs. 14,380, of which Rs. 700 had already been paid as earnest money. The Court granted them a decree directing that on respondents' paying to the appellants the balance of the purchase money, *viz.* Rs. 13,680, the appellants should convey and transfer the lands in suit to the respondents.

The third appellant then applied to the Court to fix a time within which payment should be made and the Court after hearing both sides said that "by an accidental omission the period within which the purchase price was to be paid had been omitted from the judgment and decree and that under the provisions of section 152 of the Code and by consent of the parties the date is now fixed on the 3rd of January 1927." The decree was amended accordingly.

On the 3rd of January the 1st respondent asked for an extension of the time up to the end of January and after hearing both sides the Court extended the time up to the 24th of January.

On the 24th of January the 1st respondent asked for a further extension of time up to the 31st of January. Appellants did not oppose the extension but left the matter to the Court and the Court granted an extension up to the 31st of January but said that no further time would be granted thereafter.

The money was not paid by the 31st and the Court granted a further extension up to the 1st of March.

On the 14th of February respondents paid the full amount into Court and the Court called on appellants to register the conveyance by the 9th of March.

On the 1st of March the appellants filed the present appeal on the grounds that the Court was wrong in granting any extension, and should have held that the contract was rescinded when respondents failed to pay on the date fixed.

It is clear that the only extension of which appellants could complain was the last, since the extension up to the 31st of January was granted by consent.

The first question which arises is whether or not the learned Judge's order of the 4th of February whereby the last extension of time was granted is appealable.

The powers of the Court which at the instance of the purchaser passes a decree for specific performance of a contract for sale, to fix a time within which the contract should be performed and in its discretion to extend that time were considered in the case of *Abdul Shaker v. Abdul Rahiman* (1), and it was held that decrees for specific performance are anomalous and are in the nature of preliminary decrees, that in the case of such decrees the Court which made them retains control of the suit after the passing of the decree and that the Court has power to fix a date for the performance of the contract and in its discretion to extend that time. In a more recent case in the same High Court, namely, the case of *Thirukona v. Nakonda* (2), it was suggested that the power to extend the time for payment in the case of decrees for specific performance is an inherent power of the Court, and in a still more recent case, *Rambhatlu v. Anuniahbhatlu* (3), which does not seem to have been officially reported, the decision in *Abdul Shaker v. Abdul Rahiman* (1)

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(1) (1922) 46 Mad. 148.

(2) (1926) 49 Mad. 691.

(3) 90 I.C. 605.

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HEALD, J.

was followed. I would therefore hold that if no date has been fixed in the decree for performance of the contract, such a date may be fixed by the Court which made the decree after the decree has been passed, and that, whether the date is fixed in the decree or in a subsequent order, the Court which made the decree has a discretion to extend the time.

The question then arises whether an order granting an extension of time in such a case is appealable. In the case last cited an objection to the trial Court's order refusing an extension of time was taken by way of revision, which suggests that the order was not regarded as being appealable. An order refusing an extension of time for the payment of mortgage money is specially made appealable as an order by Order 43, Rule 1 (o) and that fact seems to show that the Legislature regarded such an order as not being appealable as a decree as being the determination of a question within section 47 of the Code. An order allowing an extension of time for the payment of mortgage money is not specially made appealable as an order and therefore is not appealable at all unless it is appealable as being the determination of a question under section 47 of the Code. But if an order refusing an extension is not such a determination, it would be difficult to hold that an order granting an extension is such a determination, and I have no doubt that an order granting an extension of time in the case of mortgage money is not appealable. But if neither an order refusing an extension of time nor an order granting an extension of time for the payment of mortgage money can be regarded as being the determination of a question under section 47 of the Code, it would clearly be difficult to hold that an order granting or refusing an extension in the case of a decree for specific performance such as that in the present case

is the determination of a question under section 47, and if it is not such a determination it is certainly not appealable. I would therefore hold that the order against which appellants desire to appeal is not appealable.

I may however add that if the order in this case were appealable, or if the present application had been an application for revision, I should still refuse to interfere. The lower Court undoubtedly had a discretion to extend the time for payment and an Appellate Court is always reluctant to interfere with the exercise of discretion by a lower Court unless it is clearly shown that the discretion has been improperly exercised. In this case I see no reason to believe that the lower Court exercised its discretion improperly.

I would accordingly dismiss the appeal with costs.

MYA BU, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Mya Ba.

NABIN CHANDRA DEB

v.

MI ROBEYA AND ONE.*

1927

July 4.

Usury Laws Repeal Act (XXVIII of 1885), s. 2—Usurious Loans Act (X of 1918)—Agreed rate of interest when must be allowed—Harsh and unconscionable bargain—Transaction becoming harsh by debtor's foolishness, effect of.

Under the provisions of the Usury Laws Repeal Act, in any suit in which interest is recoverable the Court is bound to give interest at the rate agreed upon between the parties. In order that the Usurious Loans Act may apply, the terms must be shown to be so harsh and unconscionable as to indicate undue influence. A Mohamedan woman and her son aged 45 gave a bond for Rs. 827 repayable within a year with interest at 25 per cent. per annum, and as security mortgaged their property worth much more than the debt. If the debt was not paid within the year, interest was to be compounded yearly. By non-payment and by not

* Civil First Appeal No. 299 of 1926.

1927
 KO BA CHIT
 AND THREE
v.
 KO THAN
 DAING
 AND ONE.
 HEALD, J.