

APPELLATE CIVIL.

Before Mr. Justice Harrison and Mr. Justice Jai Lal.

RADHA KISHAN AND OTHERS (DEFENDANTS),

Appellants

versus

RADHA KISHAN AND ANOTHER (PLAINTIFFS),

Respondents.

Civil Appeal No. 291 of 1922.

Civil Procedure Code, Act V of 1908, Order XXXIV, rule 8—Redemption-decree—not properly drawn up and no application made by mortgagee under the rule—whether suit by mortgagee for title and possession is competent.

The mortgagor instituted a suit for redemption against the mortgagee and a decree was given directing redemption on payment of Rs. 1,636 (the sum to be paid within five months from November 1916). The money was not paid and no application was made under Order XXXIV, rule 8 of the Code of Civil Procedure. After certain proceedings regarding a claim by the widow of the mortgagor, the mortgagee filed the present suit for a declaration of title and possession of the mortgaged property.

Held, that the suit was not competent as, when a decree for redemption had been given and the provisions of the Code had not been observed and no application had been made under Order XXXIV, rule 8 the mortgage survived, and a second suit for redemption was competent; title did not pass to the mortgagee automatically.

Arura v. Bnr Singh (1), and *Sunka v. Jaru* (2), followed.

Second appeal from the decree of J. K. M. Tapp, Esquire, District Judge, Shahpur, at Sargodha, dated the 29th August 1921, affirming that of Lala Gulwant Rai, Subordinate Judge, 2nd class, Sargodha, dated the 16th October 1920, granting the plaintiffs a declaration as prayed for.

(1) (1924) I. L. R. 5 Lah. 371. (2) (1923) All I. R. (Lah.) 680.

JAGAN NATH, AGGARWAL, for Appellants.

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RAM CHAND, MANCHANDA, and JAGAN NATH, RADHA KISHAN
BHANDARI, for Respondents.

v.
RADHA KISHAN.

The judgment of the Court was delivered by—

HARRISON J.—The relevant facts necessary for the decision of this appeal are that on the 23rd October 1915 Devi Ditta, deceased, the mortgagor of the property, instituted a suit for redemption against the mortgagee and a decree was given on appeal directing redemption on payment of Rs. 1,636. this sum to be paid within five months from November 1916. The money was not paid and no application was made under Order XXXIV, rule 8. Execution for costs was taken and a part of the mortgaged property was attached. An objection regarding this property was made by the widow of the mortgagor and allowed, and a suit was then instituted, which abated on payment of the costs awarded. The mortgagee then filed the present suit for a declaration of title and for possession of that portion of the mortgaged property which had not been transferred to him. His suit has been decreed by the District Judge of Shahpur, and on second appeal counsel urges that the view taken by the learned District Judge regarding the finality of the decree in the redemption suit is not correct. He relies on *Sunka v. Jaru* (1), and *Arura v. Bur Singh* (2), both being judgments of this Court. The question before us is the same question with a slight variation as arose in both those cases, namely, whether when a decree on a redemption suit has been given, and the provisions of the Code have not been observed, and an application under Order XXXIV, rule 8 has not been made, a second suit for redemption is competent or

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whether title passes automatically to the mortgagee. For the reasons given in *Arura v. Bur Singh* (1), it is clear that, as the provisions of the Law have not been complied with, the preliminary decree has not become a final decree and it is still open to the mortgagor to bring a suit for redemption. The only possible distinction between this case and those reported in the above two rulings is that here a period was fixed for payment of the money and the spirit, if not the letter, of Order XXXIV, rule 7 was complied with by the original trial Court. Even so, before the mortgage can come to an end, it is necessary for the mortgagee to take the final step under Order XXXIV, rule 8, and this final step is the most important of all. As he has not seen fit to take the prescribed action the natural consequence follows that the mortgage still survives.

We accept the appeal and dismiss the plaintiffs' suit with costs throughout and leave the parties to take any further action which they may think advisable.

A. N. C.

Appeal accepted.

(1) (1924) I. E. R. 5 Lah. 371.