

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1891.
September 1.

NARĀYAN GOVIND, (ORIGINAL PLAINTIFF), APPELLANT, v. A'NAND-
RĀM KOJIRĀM, (ORIGINAL DEFENDANT), RESPONDENT.*

Mortgage—Redemption decree—Absence of clause as to time of payment or foreclosure—Execution of the decree after three years—Darakhāsts presented from time to time—Article 179, Schedule II of the Limitation Act (XV of 1877).

Where a redemption decree contained no clause as to the time for payment of the mortgage debt, or foreclosure in default of payment,

Held, that the mortgagor could still, after the expiration of three years from the date of the decree, execute it by paying the mortgage money, having regard to various *darakhāsts* presented by him from time to time, provided the *darakhāsts* complied with the conditions of the Statute of Limitation (Act XV of 1877).

Dicta to the contrary in *Gan Sāvant Bāl Sāvant v. Nārāyan Dhond Sāvant*(1) and *Muloji v. Sageji*(2) disapproved of.

THIS was a second appeal from the decision of M. B. Baker, District Judge of Nāsik.

Nārāyan Govind obtained a redemption decree against Anand-rām Kojirām on the 29th February, 1876. Against the said decree appeals were presented to the District Court, and the High Court, which on the 14th December, 1877, confirmed the decree of the District Court by directing the mortgagor, Nārāyan Govind, to redeem the mortgaged property on payment of Rs. 250 to the mortgagee; but neither the decree of the District Court, nor that of the High Court, made mention of any period for redemption, nor contained any clause as to foreclosure.

While the proceedings in the suit were going on, the mortgagor, Nārāyan Govind, died, and his brother, Bhāorāv Govind, who succeeded him, assigned the decree to one Dhondo Vyankatesh.

A *darakhāst* in execution of the decree was presented on the 11th December, 1880, but it was rejected on the 30th July, 1881, because the mortgagor did not produce a copy of the High Court's decree. A second *darakhāst* was presented on the 22nd January, 1884, which was rejected on the ground that the mortgagor did

* Second Appeal, No. 352 of 1891.

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not pay the money within the four days allowed to him. On the 16th January, 1887 a third *darkhást* was presented; but this *darkhást* was also rejected on the 29th January, 1887, because the money was not paid within the time allowed. On the 14th December, 1889, the *darkhást*, which led to the present second appeal, was presented, and the money was paid into Court. The Subordinate Judge (Ráo Sáheb Pándurang Dhonddeo Gadgil) allowed redemption, on the ground that when the *darkhást* was presented, the period of twelve years during which a decree remains alive had not expired; and also because the mortgagor had sought the execution of the decree by presenting intermediate *darkhást*s under article 179, Schedule II of the Limitation Act (XV of 1877).

Against the order of the Subordinate Judge, Chandammal valad Hindumal, who succeeded as heir to the said Anandram Kojiram, deceased, appealed to the District Court, which held that the *darkhást* was barred by limitation, and reversed the order of the Subordinate Judge.

The District Judge in his judgment observed as follows:—

“ In commenting on the cases of *Gan Sávant Bál Sávant v. Níríngan Dhond Sávant*⁽¹⁾ and *Malaji v. Sagaji*⁽²⁾ the Subordinate Judge says: ‘ From these rulings it appears that the redemption money is to be paid within the period till the expiry of which the decree remains unbarred by limitation. They do not show that three years is the time within which the redemption money must be paid.’ I think that he has not fully understood what was laid down in those decisions. It is true that, under section 230, Civil Procedure Code, a decree can be executed till twelve years from its date, and article 179, Schedule II, of Act XV of 1877 allows for a decree being kept alive by application from time to time for execution. In both these cases no time had been fixed for redemption. In the former it is said: ‘ By reason of the default in payment of the money declared to be due within the time fixed by law for the execution of the decrees the order for redemption must be taken to have operated as a judgment of foreclosure.’ In the latter it is said ‘ No time having been fixed for redemption, the defendants, the

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mortgagors, had, under the Limitation Act, 1877, three years within which they could execute it. If they had not redeemed within that time they would for ever have been foreclosed, as was held in *Gan Sávant v. Náráyan Dhond Sávant*.⁷ In none of the former applications did the mortgagor deposit the money. I gather from the rulings cited above that the mortgagor was bound actually to execute the decree, and this he could only do by paying the money. When a decree-holder has to recover money, it stands to reason that he should not be confined to three years within which he can execute; but when he has, as in the present case, to pay it, it would be inequitable to allow him to keep the decree alive by bare application, and so choose his own time for payment. After three years had expired without payment, the mortgagee might naturally sell the property, and complications would arise. I am of opinion, therefore, that as the money was not paid within three years, the mortgage has been foreclosed.”

Against the order of the District Judge, Dhondo Vináyak, the assignee of the redemption decree, appealed to the High Court.

Mahádeo Chinnúji Apte for the appellant:—So far as the period of twelve years is concerned, we have kept the decree alive by presenting applications for execution within three years from the date of the decree, and within the same period from each of the prior applications. The only thing to be considered in this case is whether our applications for execution had complied with the provisions of the Limitation Act (XV of 1877), art. 179, Sch. II. There was no period mentioned in the decree within which we were bound to redeem. When a decree is silent as to the period of redemption, we contend that the mortgagor can redeem within twelve years, if he has, as in the case of any other decree, taken proper steps to keep the decree alive during that time under section 230 of the Civil Procedure Code (Act XIV of 1882). We further submit that our applications for execution being presented in time, properly stamped, and written in the usual form, were steps in aid of execution. In order that an application should be a step in aid of execution, it is not necessary, as has been held, to pay the process fee.

The two rulings of the Bombay High Court which are relied on by the District Judge, are not applicable to the present case. The remarks quoted by the Judge from those rulings are mere *obiter dicta*, and were not necessary for the adjudication of those cases.

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Máneksháh Jehángirsháh Talejárkhán for the respondent :—The application for execution was rejected by the lower Court because the appellant did not pay the redemption money as directed by the Court on two previous occasions. On account of the failure of the appellant to comply with the order of the Court, his previous applications, as well as the present one, cannot be considered to be steps in aid of execution. The present application cannot be entertained because the orders made on the previous applications rejecting them stand uncanceled; nor were those orders appealed against and set aside. The appellant was bound to pay the redemption money within the time prescribed by the Court on the two previous occasions.

So far as the point of limitation is concerned, it is hard upon a mortgagee to keep a redemption decree hanging over his head for twelve years. The general rule is that a redemption decree which fixes no time for the payment of the mortgage debt should be executed within three years—that is, the mortgagor ought to pay the redemption money within three years from the date of the decree. Under the provisions of the Limitation Act, the period of three years must be imported into a redemption decree which is silent as to the time during which the property should be redeemed. An application for execution of such a decree without payment of the redemption money is not an application according to law. As the appellant failed to redeem within three years from the date of the decree, he is now foreclosed.

Mahádeo Chinnáji Ápte in reply :—An order made on an application for execution of a decree is not *res judicata*—*Delhi and London Bank, Limited, v. Orchard*⁽¹⁾.

SARGENT, C. J. :—In this case the appellant had obtained a decree of this Court for redemption on the 14th December, 1877.

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Neither in the decree of the Court below, nor in that of this Court, is any time mentioned for the payment of the mortgage debt; nor is there any clause of foreclosure in default of payment. The present *darkhāst* for execution was presented by plaintiff on the 14th December, 1889. The Court below has held that, as the mortgage debt was not actually paid within three years from the date of the decree of this Court, the mortgage had become foreclosed, and the decree could not be executed. The Court relies on the judgments in *Gan Śivant Bāl Śivant v. Nārāyan Dhond Śivant*⁽¹⁾ and *Maloji v. Sagaji*⁽²⁾. In the former, *Kemball, J.*, says: "By reason of the default in payment of the money declared to be due within the time prescribed by law for the execution of decrees (no time having been fixed in the decree) the order for redemption must be taken to have operated as a judgment of foreclosure"—and in the latter case the Court says: "If the mortgagors had not redeemed within that time (*i. e.* three years) they would for ever have been foreclosed." It is difficult, I think, to read those passages in any other sense than that which the District Judge has given to them—but they were not necessary for the decision of either case, as it is to be remarked that, in the first, no attempt whatever had been made to execute the decree within the three years, and the question was whether under the circumstances the mortgagor could bring another suit; and, in the second case, the money had been paid before the expiration of the three years, and the question was whether the mortgagee could sue to have the property sold. They cannot, therefore, be regarded as decisions that the mortgage money must be actually paid within three years from the date of the decree to enable the mortgagor to redeem; or as deciding the particular question which arises here, *viz.*, whether the mortgagor can still, after the expiration of the three years, execute his redemption decree by paying the mortgage money, having regard to the several *darkhāsts* which have been presented by him from time to time. I am of opinion that he can do so, provided the *dar-khāsts* comply with the conditions of the statute of limitations. As this does not appear with certainty on the face of the proceedings, we must reverse the order of the Court below, and send

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the case back for a fresh decision, having regard to the above remarks. Costs to abide the result.

BIRDWOOD, J.—The decree for redemption of his mortgaged property, which the plaintiff obtained in the High Court on the 14th December, 1877, contained no direction as to the period within which the mortgage debt was to be paid, or as to foreclosure. During the period of twelve years which followed that decree, several applications for execution were presented, and the Subordinate Judge found that none of these was barred by article 179 of Schedule II of the Limitation Act of 1877. As the decree was held to have been thus kept alive, and was not barred by section 230 of the Code of Civil Procedure, and as, with the last of his applications, the plaintiff paid the mortgage debt into Court, on the 14th December, 1889, the Subordinate Judge allowed redemption. His order in execution has been reversed by the District Judge, and redemption refused, because the mortgage debt was not paid within three years from the date of the High Court's decree.

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The District Judge relies on *Malaji v. Sagaji*⁽¹⁾; but the opinion there expressed to the effect that a mortgagor has a period of three years for redemption in cases where no period is fixed by the decree, and is for ever foreclosed if he does not redeem within that time, must be understood as being strictly correct only in cases where no application for execution has been made within that period. If no application is made, execution is barred entirely after three years. As it becomes impossible for the plaintiff to redeem in such a case, the decree practically operates as a foreclosure decree after that period. The reason for the decision is thus stated:—"No time having been fixed for redemption, the * * mortgagors * * had, under the Limitation Act, 1877, three years within which they could execute it." But obviously, under article 179 of Schedule II of the Limitation Act, a decree-holder has more than three years wherein to execute his decree if he keeps it alive by successive valid applications for execution, made according to law within the prescribed periods; and the construction put by the Subordinate Judge on the remarks of this Court in *Gan Savant Bal Savant v. Narayan*

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Dhond Savant⁽¹⁾ and *Maloji v. Sagaji*⁽²⁾ is, therefore, in my opinion, the right construction. If the decree in the present case was so kept alive,—and this is a point on which the District Judge has recorded no finding,—then the plaintiff was entitled to redeem his property when he finally paid the mortgage debt; for, the payment having been made within twelve years from the date of the decree, execution could not have been barred by section 230 of the Code of Civil Procedure.

The dates of the several applications for execution, as given in the District Judge's judgment, do not show that the decree was kept alive till the 14th December, 1889. It is possible that the District Judge does not refer to all the applications made by the plaintiff. On the view he took of the law applicable to the case it was not necessary for him to enquire particularly into this point, or into the further question whether the applications were valid. Nor does the Subordinate Judge's judgment state the facts in sufficient detail to enable us to deal with these questions ourselves. We must, therefore, reverse the District Judge's order and remand the appeal to the lower appellate Court for a rehearing.

Order reversed and case sent back.

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APPELLATE CIVIL

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

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September 14.

DA'DOBA' ARJUNJI, (ORIGINAL PLAINTIFF), APPELLANT, v. DA'MODAR RAGHUNATH AND OTHERS, (ORIGINAL DEPENDANTS), RESPONDENTS.*

Mortgage—Decree for sale—Interest acquired by purchaser—Previous sale in execution of a money decree—Suit to recover possession by mortgagee purchaser—Right of previous purchaser to redeem.

A purchaser at a sale in execution of a decree on a mortgage acquires the estate of the mortgagor as it existed when he executed the mortgage.

K. and others mortgaged a certain property to D. A. and V.

Subsequent to the mortgage the property was sold in execution of a money-decree, and was purchased by D. R. and others, who were put in possession.

* Second Appeal, No. 359 of 1890.