

## APPELLATE CIVIL.

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

CHUDA'SAMA MANA'BHAI MADATSANG AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, v. MAHANT ISHWARGAR BUDHAGAR, (ORIGINAL DEFENDANT), RESPONDENT.\*

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June 18.

*Mortgage decree for redemption—Payment of the mortgage amount within three months—Absence of foreclosure clause—Appeal by mortgagee—Payment by mortgagor of the decretal amount after the expiration of three months—Withdrawal of the appeal by mortgagee—Order of withdrawal not a decree—Computation of three months from the date of the withdrawal, not allowed.*

In a redemption suit filed by the plaintiffs (the mortgagors), they obtained a decree on the 1st March, 1886, whereby they were directed to pay the defendant (the mortgagee) the sum of Rs. 649-11-0 within three months, whereupon they were to get possession of the mortgaged property. The decree contained no clause of foreclosure in the event of non-payment. On the 19th April, 1886, the defendants appealed to the High Court against the decree. On the 12th October, 1886, long after the expiration of the three months prescribed by the decree, the plaintiff paid Rs. 649-11-0 into the lower Court, and applied for execution of the decree. The Court made an order allowing the payment and granted execution, holding that it had power to extend the time for payment and that there were good grounds for doing so in this case. The defendants appealed and the High Court discharged that order on the ground that the Court executing a decree had no power to enlarge the time. On the 15th July, 1890, the defendant obtained an order from the High Court permitting him to withdraw his appeal. The plaintiff then presented an application for execution of the original decree, contending that the order for withdrawal of the appeal was equivalent to a decree of the Appellate Court, and that where there was an appeal the time prescribed by the original decree ran from the date of the appellate decree. At the date of this application the money which the plaintiff had paid on the 12th October, 1886, was still in Court.

*Held* that the withdrawal of the appeal would not afford a fresh starting point, as the withdrawal rendered it unnecessary for any decree to be drawn up and the only decree which could be executed was that which was passed by the original court in March 1886.

*Quære*—Whether there being no foreclosure clause in the decree, the mortgagor can file another suit to redeem.

THIS was an appeal from order passed by Ráo Bahádur Chúnílál Máneklál, First Class Subordinate Judge of Ahmedabad, in execution of a decree.

\* Appeal, No. 116 of 1890.

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The plaintiffs Chudásama Manábhái Madársang and others sued the defendant Mahant Ishwargar Budhagar in the Court of the First Class Subordinate Judge of Ahmedabad for redemption, and on the 1st March, 1886, a decree was passed directing the plaintiffs to redeem and to take possession of the mortgaged property, namely, the village of Sháhápur in the Dhandhuka Táluka of the Ahmedabad District, on payment of Rs. 649-11-0 to the defendant within three months from that date. The decree contained no foreclosure clause.

The defendant appealed to the High Court on the 19th April, 1886, on the ground that a much larger sum was due to him on the mortgage. On the 12th October, 1886, while that appeal was still pending, but long after the expiration of the three months prescribed by the decree, the plaintiffs paid into the Subordinate Judge's Court the amount awarded by the decree and applied for execution.

On the 17th December, while the application to the Subordinate Judge for execution was pending, the plaintiffs, under section 561 of the Civil Procedure Code (XIV of 1882), filed cross-objections to the decree on the ground that the mortgage-debt had been long paid off and that a large sum was due to them by the defendant, who was in possession of the mortgaged property.

Subsequently to the filing of the cross-objections by the plaintiffs the Subordinate Judge granted their application for the execution of the decree on the ground that though the plaintiffs had not paid the redemption amount within three months from the date of the decree, nevertheless he had jurisdiction to extend the time, and that there were good grounds in this case for his doing so. Against this order of the Subordinate Judge the defendant appealed to the High Court which discharged the order (see I. L. R., 13 Bom., 106).

On the 15th July 1890 the defendant applied to the High Court to withdraw his appeal and the High Court made an order allowing the withdrawal. The appeal being thus withdrawn, the plaintiffs' cross-objections fell to the ground.

On the 26th August, 1890, the plaintiffs again applied to the First Class Subordinate Judge for the execution of the decree, on

the ground that the three months' time granted by the decree for the payment of the Rs. 649-11-0 should be computed from the date of the withdrawal of the appeal by the defendant (15th July, 1890). The Subordinate Judge rejected the application.

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The plaintiffs' appealed to the High Court.

*Latham* (Advocate General with *Shántarám Nārāyan* (Government Pleader) and *Ganpat Sadāshiv Rāo*, for the appellants:— This is an appeal against an order passed by the lower Court refusing execution of our redemption decree. The decree directed us to pay to the respondent Rs. 649 and odd within three months from its date. The defendants appealed and, pending their appeal, we paid the amount into Court, but we did so after the prescribed time had expired. The High Court having held in *Mahant Ishwarrar v. Chudtsama*<sup>(1)</sup> that our decree was then not capable of execution owing to default, the defendant subsequently withdrew his appeal, and with the withdrawal of the appeal our cross-objections fell through.

The order of the High Court permitting the withdrawal of the appeal was made on the 15th July, 1890, and we contend that that order is equivalent to a decree made by the appellate Court, and that the time prescribed for redemption in the original decree should run from the date of such appellate decree. The money paid into Court by the plaintiff on the 12th October, 1886, is still lying in the Court and may be taken as paid in under the appellate decree. The plaintiffs are, therefore, entitled to execution. When there is an appeal from a decree for redemption the time prescribed runs from the date of the appellate decree—*Dawlat and Gaggivan v. Bhukandās Mānekchand*<sup>(2)</sup>; *Rupchand v. Shamsh-ul-Jehan*<sup>(3)</sup>. The order allowing withdrawal is a decree. It has been held that an order rejecting an appeal is equivalent to a decree and that time runs from the date of such an order—*Rup-sing v. Mukhrājsingh*<sup>(4)</sup>; *Akshoy Kumār v. Chunder Mohan*<sup>(5)</sup>.

We also contend that as there is no foreclosure clause in the original decree in this case, the plaintiffs cannot be foreclosed by

(1) I. L. R., 13 Bom., 106.

(2) I. L. R., 11 All., 346.

(3) I. L. R., 11 Bom., 172.

(4) I. L. R., 7 All., 887.

(5) I. L. R., 16 Calc., 250.

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non-payment until the expiration of three years from the date of the decree. The relation of mortgagor and mortgagee still exists—*Sami Achari v. Somasundrum Achari*<sup>(1)</sup>; *Periandi v. Angappa*<sup>(2)</sup>; *Karuthasami v. Jagannáth*<sup>(3)</sup>. In this last case the Madras High Court differs from the Bombay High Court.

[BIRWOOD, J.—If there be no time mentioned in the decree for the payment of the mortgage amount, there would be no foreclosure for three years from the date of the decree—*Muloji v. Sagáji*<sup>(4)</sup>; *Gansávant v. Narayan*<sup>(5)</sup>].

Here no foreclosure is ordered in the event of non-payment within three months. Why should the decree be taken to direct something of which it says nothing? Under the Transfer of Property Act (IV of 1882) a mortgagor is allowed to redeem at any time until an absolute order is made under section 87—*Poresk Náth Mojumdar v. Ramjodu Mojumdar*<sup>(6)</sup>.

*Inverarity* (with *Branson* and *Ráo Sáheb Vásudeo Jagannáth Kirtihar*) for the respondent:—The only points which the Court has now to consider are: (1) whether the Court can accept the mortgage amount after the expiration of the time granted by the decree, and (2) whether an order allowing an appeal to be withdrawn is a decree. It is needless now to argue the first point, because when this case was before the Court on a previous occasion (I. L. R., 13 Bom., 106), that point was fully argued and the Court then held that the time could not be extended. With respect to the second point, we contend that an order allowing an appeal to be withdrawn is not a decree because (1) it is not capable of execution, and (2) it does not fall within the definition of 'decree' under section 3 of the Civil Procedure Code—*vide* Second Appeal, No. 673 of 1886, decided on the 2nd October, 1887.

[BIRDWOOD, J.—But the ruling in *Daulat v. Bhukandás*<sup>(7)</sup> states expressly that the time is enlarged from the date of the appellate decree, whether the decree be for dismissal of appeal or otherwise.]

(1) I. L. R., 6 Mad., 119.

(4) I. L. R., 13 Bom., 507.

(2) I. L. R., 7 Mad., 423.

(5) I. L. R., 7 Bom., 467.

(3) 11 I. L. R., 8 Mad., 478.

(6) I. L. R., 16 Cal., 246.

(7) I. L. R., 11 Bom., 172.

We deny that the time granted under the original decree is always extended under the appellate decree. But, further, an order of withdrawal of an appeal is not the same thing as a decree of dismissal. When an appeal is withdrawn and an order to that effect is passed, the parties are relegated to the same position as that in which they were before the appeal was preferred. The appeal has not been opened and argued.

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The Madras High Court has, no doubt, held that when there is no foreclosure clause in a redemption decree the mortgagor is entitled to bring another suit for redemption, but the Bombay High Court has distinctly ruled the other way.

There is a distinction between the case of a mortgagor claiming to redeem and that of a mortgagee seeking to recover his mortgage money and in default foreclosure. For redemption the mortgagor must come forward ready to pay the mortgage amount, while in the case of a suit for foreclosure the mortgagor is forced against his will to find money in default of which his estate may become foreclosed; where this operates inequitably on the mortgagor, Courts of Equity, if a proper case is made out, show him indulgence, but he is entitled to none where he himself files a redemption suit—*Novosielski v. Wakefield*<sup>(1)</sup>; Fisher on Mortgage, page 1002.

SARGENT, C. J.—The question in this appeal arises out of a redemption suit filed by the appellant in which a decree was passed on 1st March, 1886, directing him to pay what was found due on the mortgage within three months, and possession to be given to him in the event of his so paying; but the decree contained no clause of foreclosure in the event of his committing default. The defendant, the mortgagee, appealed against the decree on 19th April, 1886.

The plaintiff paid the mortgage-debt into Court on 12th October, 1886, after the expiration of the three months allowed by the original decree, and asked to have possession given him. This was refused in June, 1888, on appeal to this Court<sup>(2)</sup>, on the ground that the Court executing the decree had no power to enlarge the time. On the 15th July, 1890, the defendant

(1) 17 Ves. Jun., 417.

(2) See I L. R., 13 Bom., 106.