

## APPELLATE CIVIL.

*Before Sir J. H. Jenkins, Chief Justice, and Mr. Justice Chandavarkar.*

RANGO AND OTHERS (SONS AND HEIRS OF ORIGINAL DEFENDANT 4),  
APPELLANTS, v. BHOMSHETTI (ORIGINAL PLAINTIFF), RESPONDENT.\*

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August 8.

*Mortgage—Redemption—Period for redemption—Enlargement of time—Order refusing enlargement—Appeal—Civil Procedure Code (XIV of 1882), section 34—Usufructuary mortgage—Foreclosure—Transfer of Property Act (IV of 1882), sections 92 and 93.*

In a suit for redemption of a usufructuary mortgage, the plaintiff on 26th June, 1899, obtained a decree allowing six months for redemption. On the 14th November, 1899, the Appellate Court confirmed the decree, but did not enlarge the time fixed for redemption, which expired on the 26th December, 1899. On the 21st March, 1900, the plaintiff applied for an extension of the time for redemption and on the 5th April, 1900, he applied for execution of the decree. The lower Court rejected both applications, holding that the time allowed by the decree having expired the plaintiff had lost his right to redeem, and on that ground it also refused execution. On appeal by the plaintiff the Judge reversed both orders, remanding the application for extension of time and granting the application for execution, on the ground that the six months for redemption should be computed from the date of the appellate decree. The defendant appealed to the High Court against both orders.

*Held*, that as the plaintiff had not appealed against the order remanding the application for enlargement of the time for redemption the High Court could not reverse that order and enlarge the time, but that the application for execution of the decree might be treated as an application for extension and the order of the District Court might be upheld as one which extended the time by allowing execution. The order of the District Judge allowing execution was therefore confirmed, and the lower Court was directed to treat it as an order enlarging the time and allowing execution.

An application for enlarging the time granted by a decree for redemption may be made after the prescribed time has expired.

An order refusing to enlarge the time prescribed in a decree for redemption is appealable under section 214 of the Civil Procedure Code.

In cases of usufructuary mortgage, decrees for foreclosure should not be made. See sections 92 and 93 of the Transfer of Property Act (IV of 1882).

SECOND appeal from the decision of F. C. O. Beaman, District Judge of Belgaum, in appeal No. 115 of 1900, reversing the order passed by Ráo Bahádur Gangadhar V. Limaye, First Class Subordinate Judge, in execution of a redemption decree in Suit No. 126 of 1898.

\*Second Appeal No. 110 of 1901.

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Suit for redemption and possession of a house.

The plaintiff, Bhomshetti, was the purchaser of the property in question, which was subject to a usufructuary mortgage of Rs. 165 executed to defendant 4. He now sued to redeem it and for possession. Defendants 1 to 3 denied the plaintiff's right and claimed that they were the owners of the equity of redemption.

On the 26th June, 1899, the Subordinate Judge passed a decree for the plaintiff, ordering redemption on payment of Rs. 165 by plaintiff to defendant 4 within six months from that date. His decree was in the following terms :

I order that the plaintiff do redeem and recover possession of the property in dispute from the defendant 4 on payment to him of Rs. 165 within six months from this day ; in default of payment within that time his right of redemption will for ever be foreclosed.

Defendants 1 to 3 appealed, contending that the plaintiff was not the owner of the equity of redemption. They did not make defendant 4 (the mortgagee) a party to the appeal.

On the 14th November, 1899, the District Judge confirmed the decree. His order, however, did not enlarge the time for redemption, which, as originally fixed, expired on the 26th December 1899.

The plaintiff, therefore, on the 21st March, 1900, applied to enlarge the time for redemption, and on the 5th April, 1900, he applied (No. 209 of 1900) for execution of the decree.

The Subordinate Judge rejected both the *darbhāsts* (applications), holding as to the first *darbhāst* that the time allowed by the decree having expired the plaintiff had lost his right of redemption, and on that ground rejecting the second *darbhāst* and refusing the application for execution of the decree. On appeal by the plaintiff the District Judge reversed both the orders of the first Court. The *darbhāst* for extension of time he remanded for final disposal on the merits. The *darbhāst* for execution he granted, holding that the decree of the first Court was merged in that of the Appellate Court and that the six months for redemption should be computed from the date of the appellate decree (14th November, 1899).

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The mortgagee (defendant 4) thereupon presented two appeals to the High Court, (1) against the remand order of the District Judge directing the Subordinate Judge to re-hear the plaintiff's application for enlargement of time (being appeal No. 4 of 1901) and (2) against the order granting execution of the decree (being appeal No. 209 of 1900).

*Shivram V. Bhandarkar* for appellant (defendant 4, the mortgagee):—The plaintiff's application for execution on the 5th April, 1900, was properly rejected by the Subordinate Judge and the District Judge was wrong in reversing the order of rejection on appeal. The six months given by the decree had expired in December, 1899. We were not parties to the appeal, so that, so far as we were concerned, the original decree was still in force. Therefore the time prescribed for redemption by that decree must be observed, and it must be computed from the date of that decree—*Mahant Ishwargar v. Chudasama Manabhai*.<sup>(1)</sup> The appellate decree was not binding on us. The time would run from the date of the appellate decree only as against the parties to the appeal. The plaintiff should have applied for extension of the time for redemption as against us before the six months fixed by the decree had expired. See the proviso to section 93 of the Transfer of Property Act (IV of 1882).

Next, we contend that the order made on the *darkhast* for extension of time was not appealable. It is not an order within section 244 of the Code of Civil Procedure—*Ajudhia Pershad v. Baldeo Singh*<sup>(2)</sup>; *Hulas Rai v. Pirthi Singh*.<sup>(3)</sup>

*Sitaram S. Patkar* for the respondent (plaintiff):—The authorities show that the time dates from the appellate decree.

[JENKINS, C. J.:—We need not hear you on that point.]

Next we submit that the order refusing to grant an extension of time is appealable—*Rahima v. Nepal Rai*<sup>(4)</sup>; *Nandram v. Babaji*.<sup>(5)</sup> The order related to execution and comes within section 244 of the Code.

(1) (1883) 13 Bom. 106.

(3) (1887) 9 All. 500.

(2) (1894) 21 Cal. 818.

(4) (1892) 14 All. 520.

(5) (1897) 22 Bom. 71.

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CHANDAVARKAR, J. :—The facts of this case are as follows :—

One Bhomshetti, claiming to be entitled to the equity of redemption of certain property, brought a suit to redeem and recover possession against the heirs of the original owner of the equity of redemption, the mortgagee then in existence, and, for some reason which we cannot appreciate, a previous mortgagee who had been redeemed. The Subordinate Judge in whose Court the suit was brought passed the following decree on the 26th of June, 1899 :

I order that the plaintiff do redeem and recover possession of the property in dispute from defendant 4 on payment to him of Rs. 185 within six months from this day ; in default of payment within that time his right of redemption will for ever be foreclosed.

From that decree an appeal was preferred to the District Court by the heirs of the original owners of the equity of redemption against the present plaintiff. The contention of those heirs was that they, and not the plaintiff, owned the equity of redemption. That contention was overruled, and the District Court confirmed the decree of the Subordinate Judge, without, however, enlarging the time fixed for redemption by the latter.

More than six months after the first decree, but shortly after the appellate decree, the plaintiff presented to the Subordinate Judge two applications, one for an enlargement of the time and the other for execution of the decree for redemption. The Subordinate Judge rejected both the applications, on the ground that he had no power to enlarge the time and execute the decree after the period fixed had expired.

Against both the orders of the Subordinate Judge appeals were preferred to the District Court, which held that the time fixed for redemption could be enlarged and the decree executed. That Court accordingly remanded to the Subordinate Judge the application for an enlargement of the time, and directed him to dispose of it on the merits. Against both these orders of the District Court the present appeals are preferred.

As to the appeal from order No. 4 of 1901, an objection is raised *in limine* that no appeal lay to the District Court against the order of the Subordinate Judge refusing to enlarge the time. It is contended in support of that objection that, whereas an

order enlarging the period fixed for redemption would be appealable because it varies the original decree and thus becomes a part of it, an order refusing to enlarge it, not being a decree, is merely ministerial and cannot fall within section 244 of the Civil Procedure Code. We see no valid ground, however, for drawing a distinction between an order enlarging time and an order declining to enlarge it, and the decisions in *Nandram v. Babaji*<sup>(1)</sup> and *Rahima v. Nepal Ravi*<sup>(2)</sup> support the view that an order of the latter description is appealable.

Dealing, then, with the merits of the appeals before us, we must start with the fact, which is apparent from the description given of it by the Subordinate Judge in his judgment in the redemption suit, that the mortgage in dispute in that suit was usufructuary within the meaning of clause (d) of section 58 of the Transfer of Property Act. The decree passed by the Subordinate Judge, debaring the plaintiff from redemption on the expiry of six months from its date, was therefore not the right decree to pass in such a case. We wish to emphasize this point, for it is essential that Courts which are called upon to pass decrees in suits on mortgages should pay due regard to the provisions of sections 92 and 93 of the Transfer of Property Act, and carefully observe the provisions of that Act, especially as to the forms of decrees. In the case of a usufructuary mortgage, the Transfer of Property Act distinctly requires that a Court should not pass a decree directing that, if the party entitled to redeem does not pay the redemption money within the prescribed period, he shall stand foreclosed. In the present case, however, though the Subordinate Judge passed a wrong decree, it was not appealed against and the form of it cannot be questioned now. But that cannot preclude us from taking into account the fact that an improper decree has been passed, shutting out the plaintiff from his rights, when we are considering the question whether he is by law entitled to have the redemption period fixed by the Subordinate Judge's decree enlarged and whether on the merits he has made out a case for such enlargement.

It is urged by Mr. Shivram Vithal Bhandarkar that under the proviso to section 93 of the Transfer of Property Act the power

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(1) (1897) 22 Bom. 771.

(2) (1892) 14 All. 520.

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to enlarge time can be exercised only before the day fixed for payment by the decree. Some colour is given to this contention by the word "postpone" which is used in the proviso, but we see no valid reason for putting a narrow construction on it merely because of one or two words in it. The language of the whole proviso does not demand that a limited meaning should be attached to it, and as the procedure prescribed by it is borrowed from the practice of the English Courts, we think it but reasonable to construe it by the light of that practice, according to which applications for enlarging the time fixed in the decree for redemption are entertained even after the expiry of the prescribed period: see *Jones v. Creswicke*.<sup>(1)</sup> This construction of the law is also supported by the decision in *Nandram v. Babaji*.<sup>(2)</sup> The District Judge was, therefore, right in the view he took of the Court's power to execute the decree after the expiry of the six months fixed in it after enlarging the time.

The question then is, should we enlarge the time, or, as the District Judge has done, should we leave it to the Subordinate Judge to decide whether on the merits the plaintiff is entitled to have the time enlarged? There is some difficulty in dealing with that question in so far as it is raised by Appeal No. 4. That is an appeal from the District Judge's order directing the Subordinate Judge to re-hear the application for an enlargement of the redemption period. As the plaintiff has not appealed against the District Judge's order we cannot reverse it and ourselves enlarge the time. But we have the other appeal before us, in which the order of the District Judge is that time can be enlarged and the decree executed. Under the proviso to section 93 it is not necessary that a separate and formal application in writing should be presented for the enlargement of the period fixed for redemption. It gives the Court the power of enlarging it "upon good cause shown." The application made by the plaintiff to execute the decree may be treated substantially as an application for such enlargement, and as the District Court granted it, we will deal with and uphold his order as one which extends the time by allowing the execution of the decree for redemption. We give that effect to it, because the proviso to section 93 of the

(1) (1880) 9 Sim. 304.

(2) (1897) 22 Bom. 771.

Transfer of Property Act justifies that and the plaintiff has on the merits a good case for having the time enlarged. According to law, as we have already pointed out, the proper decree which should have been passed has not been passed. This being a usufructuary mortgage, the Subordinate Judge should not have fixed a day for redemption and directed that the plaintiff should stand foreclosed in the event of his failure to pay the redemption money within that time. The plaintiff has been put to the necessity of applying for an enlargement because of the Subordinate Judge's wrong decree. Further, it was not the plaintiff's fault that the mortgagee was not made a party to the appeal lodged in the District Court against the decree. And as a matter of fact the plaintiff has actually paid money into Court.

On these grounds we confirm the order of the District Judge in Second Appeal No. 110 of 1901, treating it as an order enlarging the time and directing the Subordinate Judge to treat it as an order enlarging the time and allowing execution. It will, therefore, be unnecessary for the Subordinate Judge to proceed under the District Judge's order of remand in Appeal No. 4 of 1901 from order. We extend the time for the execution of the redemption decree to a month from this date. Both the appeals are dismissed with costs.

*Appeals dismissed.*

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