APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

1892.
January 27.

SUBHA'NA, (ORIGINAL DEFENDANT), APPELLANT, *v.* KRISHNA, (ORIGINAL PLAINTIFF), RESPONDENT.*

Mortgage—Redemption—Decree for redemption—Foreclosure—Decree directing payment of mortgagee's costs on a certain date, or, in default, foreclosure—Effect of such default—Enlargement of the time fixed for redemption.

In a redemption suit the Court of first instance found that the mortgage-debt had already been paid off out of the rents of the mortgaged property, and it accordingly awarded possession to the plaintiff, directing that each party should bear his own costs. In execution of this decree the mortgagor took possession of the property in dispute. On appeal by the mortgagee the District Court amended the decree by directing the mortgagor to pay the mortgagee's costs of the suit by a certain day, or, in default, to stand for ever foreclosed. The mortgagor failed to pay the costs as directed. Thereupon the mortgagee applied, in execution, to have the property restored to his possession. The Subordinate Judge granted this application. The District Judge, in appeal, held that the decree did not provide for delivery of the property by the mortgagor to the mortgagee. He, however, directed the mortgagor to pay the mortgagee's costs with interest. On appeal to the High Court,

Held, that as the mortgagee's costs, which became a part of the mortgage-debt, were not paid on the due date, the mortgagor was finally foreclosed, and the property thereupon passed to the mortgagee. It was, therefore, not competent to the Court in execution to practically enlarge the time for redemption, by allowing the mortgagor further time to pay the mortgagee's costs.

SECOND appeal from the decision of A. S. Moriarty, Assistant Judge of Sátára, in Appeal No. 329 of 1888 of the District File.

The plaintiff sued to redeem certain land. The Court of first instance found that the mortgage-debt had been paid off out of the rents and profits of the mortgaged property. It, therefore, awarded possession of the property to the plaintiff, directing each party to bear his own costs. This decree was passed on the 10th August, 1886.

On appeal, the District Court amended this decree by directing that "if the plaintiff paid the defendant's costs of the suit as well as of the appeal on or before the 1st April, 1888, the defendant should deliver up the land in suit to the plaintiff, and in case the plaintiff failed to pay the costs as directed, he should be

*Second Appeal No. 880 of 1889.

for ever foreclosed." This decree was dated 24th September, 1887.

Before this decree was passed, the plaintiff had taken possession of the land in suit in execution of the first Court's decree.

The plaintiff failed to pay the defendant's cost on the day fixed in the Appellate Court's decree.

Thereupon the defendant applied to the Court for restoration of the property into his possession, urging that the property had now vested in him by reason of the plaintiff's default in paying his costs on the appointed day.

The Subordinate Judge granted this application.

In appeal, the Assistant Judge was of opinion that the decree did not provide for restoring possession of the property to the defendant. He, therefore, reversed the order of the Subordinate Judge, and directed the plaintiff to pay the defendant's costs, together with interest at 12 per cent. from 1st April, 1888.

Against this decision the defendant appealed to the High Court.

Ghanashám Nilkant for appellant:—The mortgagor not having paid the mortgagee's costs of the suit on the day fixed by the decree, his right of redemption is foreclosed. By reason of such default the mortgagee becomes the absolute owner of the property: see *Ladu Chimáji* v. *Bábaji Khanduji*[1]. The fact that the mortgagor was in possession, is immaterial. The mortgagee is, therefore, entitled to recover possession.

Ganesh K. Deshmukh for respondent:—Under the decree the defendants are not entitled to receive the costs, unless they are ready to deliver possession of the property. The payment of costs and the delivery of possession were to be simultaneous acts. But defendants were not in possession on the day fixed for payment of costs. They were, therefore, not in a position to deliver possession. They cannot, therefore, complain that the costs were not paid, and they have no right to urge that because

(1) I. L. R., 7 Bom., 532.

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they were not paid on the due date, the mortgagor's right of redemption is foreclosed. It was not necessary for us to make the payment when we were already in possession.

BIRDWOOD, J.:—By the final decree, obtained by him in appeal, the plaintiff was bound to pay the costs in his redemption suit to the defendant on or before the 1st April, 1888. No doubt that decree directed also that the mortgagee was to remain in possession till the costs were paid, whereas, as a matter of fact, the plaintiff was actually in possession at the time when the appellate decree was made, he having entered into possession under the redemption decree of the Court of first instance. But the decree of the lower Appellate Court for foreclosure was unaffected by that fact. As the defendant's costs, which became a part of the mortgage-debt, were not paid on the 1st April, 1888, the plaintiff was finally foreclosed. The ownership of the property thereupon passed to the defendant—*Ladu Chimáji* v. *Bábáji Khanduji*[1]—and it was not competent to the lower Appellate Court, in the execution proceedings, to practically enlarge the time for redemption by allowing the plaintiff further time for paying the costs—*Mahant Ishwargar* v. *Chudasama Manábhái*[2]. The Subordinate Judge rightly awarded the defendant possession in execution.

We must reverse the lower Appellate Court's decree in execution, and restore that of the Subordinate Judge, with costs throughout on the respondent.

PARSONS, J.:—I should be glad to adopt the view taken by the Assistant Judge if I could. The decree, however, now under execution is very plain. It distinctly orders that the plaintiff shall be for ever foreclosed if he does not pay the costs of the suit on or before the 1st April. This Court is not in a position to be able to enlarge this time, or in any way to modify the terms of the decree, or relieve against its rigour. The fact relied on by the Assistant Judge, that the plaintiff was in possession at the time the decree was passed, in no way alters the status of the parties. On failure to pay the money within the pre-

(1) I. L. R., 7 Bom., 532. (2) I. L. R., 13 Bom., 106.

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scribed time, the plaintiff became foreclosed and the land passed to the defendant as absolute owner, and the defendant is, therefore, now entitled to the possession thereof—*Ladu Chimáji* v. *Bábáji Khanduji*[1]. The decree in execution of the Assistant Judge must be reversed and that of Subordinate Judge restored, with costs on the respondent throughout.

Order reversed.

(1) I. L. R., 7 Bom., 532.

APPELLATE CIVIL.

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

1891.

January 27.

NA'RA'YANBHAT BIN BA'LAMBHAT AND ANOTHER, (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* DAVLATA BIN MYRALJI AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Landlord and tenant—Tenure in perpetuity, proof of—Long possession at an invariable rent—Local usage.

A tenure in perpetuity cannot be established merely by evidence of long possession at an invariable rent, unless it appears that such tenancy may be so acquired by local usage.

Bábáji v. *Náráyan*(1) referred to.

THIS was a second appeal from the decision of M. H. Scott, District Judge of Sátára.

Suit to recover possession of land with mesne profits.

The plaintiffs Náráyanbhat and Harbhat sought to recover possession of a certain field with mesne profits, alleging that the field belonged to them and was let out to the forefathers of the defendants on condition they should pay two-thirds of the produce thereof on account of rent; that owing to the defendants' neglect the land yielded a smaller amount of produce than it ought to yield; that they had served the defendants with a notice to pay rent at a higher rate, and that the defendants declined to comply with the notice.

The defendants Davlata and Dhondi and others pleaded *(inter alia)* that the land was their *mirás*, and that the plaintiffs had no

* Second Appeal, No. 130 of 1890.

(1) I. L. R., 3 Bom., 340.