1890.

QUEEN-EMPRESS v. BÁLYA SOMYA

The jury found both the accused guilty of the offence charged.

The Sessions Judge, agreeing with the verdict of the jury, convicted the accused under section 411 of the Indian Penal Code and sentenced Bendya to transportation for seven years and Bálya to rigorous imprisonment for three years.

Against these convictions and sentences the accused appealed to the High Court.

There was no appearance for the accused or for the Crown.

PER CURIAM:—The Sessions Judge has misdirected the jury by telling them that it was only necessary for them to decide whether the property was stolen, and whether it was retained by the accused. He should have summed up all the evidence in the case, and directed the jury that before they could find the accused guilty of an offence under section 411 of the Indian Penal Code it was necessary for them to find in the affirmative (1) that the property was stolen, (2) that it was dishonestly retained, and (3) that the accused knew or had reason to believe the same to be stolen property. We reverse the conviction and sentence, and direct the accused to be retried.

Conviction and sentence reversed.

APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

1890.
December 3.

PA'TLOJI BIN BHIWÁJI, (ORIGINAL DEFENDANT), APPELLANT, *v.* GANU BIN RAMJI AND OTHERS, (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Mortgage—Redemption on payment within six months—Non-payment, effect of—Foreclosure—Decree—Final decree—Execution—Time allowed for redemption, computation of—Appeal—Withdrawal of appeal—Effect of—Civil Procedure Code (Act XIV of 1882), Sec. 373—Limitation—Practice—Procedure.

The plaintiffs obtained a decree on the 12th November, 1886, allowing them to redeem on payment of Rs. 168-8-0 within six months. In default of payment within the prescribed time they were to stand for ever foreclosed. Against this decree the defendant appealed to the High Court. On the 10th September, 1888, the High Court passed an order allowing the defendant to withdraw the appeal.

* Second Appeal, No. 979 of 1889.

1890.

PÁTLOJI v. GANU.

On the 17th December, 1888, plaintiffs applied for execution of the decree of the 12th November, 1886. The lower Court, regarding the withdrawal of the second appeal as practically a confirmation of the decree of the 12th November, 1886, computed the six months allowed for redemption from the date of the order of withdrawal (10th September, 1888) and granted the plaintiffs' application. On appeal to the High Court,

Held, reversing the lower Court, that the application was time-barred, and that the plaintiff was foreclosed. The time allowed for redemption was to be computed, not from the date of the High Court's order permitting the withdrawal of the appeal, but from the date of the decree appealed from (*i. e.*, 12th November, 1886). The order of withdrawal was not a decree. The only decree which could be executed was that of the 12th November, 1886. The redemption money not having been paid within six months from that date, the plaintiffs were foreclosed. The Court could not, in execution proceedings, enlarge the time fixed for redemption.

Mahant Ishwargar v. *Chudasama Mánábhái*(1) followed.

Per BIRDWOOD, J.:—It was open to the plaintiffs to apply, if so advised, to the High Court for a review of the order of withdrawal of the 10th September, 1888, with a view to the enlargement of the time of redemption as a condition which might equitably have been permitted when the defendant was allowed to withdraw the second appeal.

SECOND appeal from the decision of Ráo Bahádur C. N. Bhat, First Class Subordinate Judge, A. P., at Poona, in Appeal No. 144 of 1889.

The plaintiffs sued for the redemption of certain property, and obtained a decree, directing redemption on payment of Rs. 577-5-6 within two years, and in case of default their right to redeem to be for ever foreclosed. On 12th November, 1886, the appellate Court amended the first Court's decree by allowing the plaintiffs to redeem on payment of Rs. 168-8-0 within six months, and in case of default, the plaintiffs to stand foreclosed.

The defendant preferred a second appeal against this decree.

On 10th September, 1888, the High Court allowed the defendant to withdraw the second appeal, but without permission to file another appeal.

On the 17th December, 1888, the plaintiffs applied for execution of the appellate Court's decree.

The Subordinate Judge rejected this application, holding that the plaintiff's right was foreclosed, as he had not redeemed within six months from the date of the appellate Court's decree.

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

1890.

PÁTLOJI v. GAND.

Against this order of rejection, the plaintiffs appealed. The appellate Court was of opinion that the time allowed for redemption should be computed from the 10th September, 1888, which was the date of the High Court's order allowing the withdrawal of the second appeal, and that as the present application was made on the 17th December, 1888, it was within time.

The appellate Court, therefore, reversed the order of the Subordinate Judge, and ordered execution to issue.

Against this decision the defendant appealed to the High Court.

Ráo Sáheb *Vásudev Jagannáth Kirtikar* for the appellant (defendant) :—The High Court's order permitting the withdrawal of the appeal is not a decree within the meaning of section 2 of the Code of Civil Procedure. When the appeal was withdrawn, it should be treated as if it had not been made—*Hingan Khan* v. *Ganga Parshád*[1]. After the withdrawal of the appeal, the only decree that could be executed was the decree of the lower appellate Court, and the time allowed for redemption should be computed from the date of this decree. *Daulat* v. *Bhukandás*[2] does not apply. In that case the High Court drew up a decree confirming the decree of the lower Court. In the present case no decree has been drawn up. The lower Court was not competent to enlarge the time in execution proceedings—*Mahant Ishwargar* v. *Chudasama Mánábhái*[3].

Shántárám Náráyan for respondents (plaintiffs) :—The lower Court has not passed the final decree for foreclosure as required by Form 129 of the Civil Procedure Code. The mortgagees were bound to come at the end of six months and ask for foreclosure. The Legislature does not contemplate an absolute decree for foreclosure being made at once. The case of *Campbell* v. *Holyland*[4] shows the principle on which Courts of Equity act in enforcing decrees for foreclosure. The withdrawal of an appeal without the permission of the Court is equivalent to a dismissal for default, and such an order of dismissal is a decree—*Noor Ali Chowdhuri* v.

(1) I. L. R., 1 All., 293.
(2) I. L. R., 11 Bom., 172.
(3) I. L. R., 13 Bom., 106.
(4) L. R., 7 Ch. D., 166.

Koni Meah[1]. Moreover, when an appeal is filed, the subject-matter of the suit is re-opened, and becomes *sub judice*, and on the withdrawal of the appeal, the decree appealed from becomes final, and limitation should be computed from that date.

BIRDWOOD, J.:—The plaintiffs obtained in the lower appellate Court, on the 12th November, 1886, a redemption decree, allowing them to redeem the property mortgaged by them to the defendant on payment within six months from that date of the sum of Rs. 168-8-0. In default of payment they were to stand for ever foreclosed. The defendant preferred a second appeal against that decree on the 30th November, 1886; and, on the 10th September, 1888, the High Court allowed the second appeal to be withdrawn, but without permission to the defendant to bring another appeal. The lower appellate Court has regarded the withdrawal of the second appeal as practically a confirmation of the lower appellate Court's decision of the 12th November 1886; and, on the authority of *Daulat* v. *Bhukandás* [2], has computed the period of six months within which the plaintiffs were allowed to redeem from the date of the withdrawal of the second appeal, and has held that the plaintiffs' application of the 17th December, 1888, for the execution of their redemption decree is within time.

We think, however, that the High Court's order of the 10th September, 1888, permitting the withdrawal of the defendant's second appeal, cannot be treated as if it were a decree. It does not fall within the definition of a decree, and it clearly was not a decree. On his withdrawal from the appeal the defendant became liable for such costs as the Court might award, and he was precluded from bringing a fresh appeal for the same matter; but no decree on the merits was then made against him or in favour of the plaintiffs. Although, when an appeal is admitted against the decision of a lower Court, that decision becomes once again *sub judice* (see *Nilvaru* v. *Nilvaru* [3]), yet, if the appeal be withdrawn, without permission to bring a fresh appeal for the same matter, the decree appealed from becomes again

(1) I. L. R., 13 Calc., 13. (2) I. L. R., 11 Bom., 172.
(3) I. L. R., 6 Bom., 110.

1890.

PÁTLOJI v. GANU.

the final decree in the case. In the present case, the only decree which can be executed is that of the lower appellate Court, dated the 12th November, 1886. The redemption money was not paid within six months from that date, and it was not competent to the Court, whose decision is now appealed from, to enlarge the time in the execution proceedings. See *Mahant Ishwargar* v. *Chudasama Mánábhái* (1).

We must, therefore, hold that the plaintiffs are now foreclosed; and the decree of the lower appellate Court is, therefore, reversed and the plaintiffs' application rejected. But as, when the defendant filed his second appeal, the plaintiffs probably supposed that the defendant intended to proceed with that appeal, and as, if the appeal had terminated in the ordinary way in a decree by the High Court, the effect of it would have been to enlarge the time allowed for redemption, we think we may fairly hold that the plaintiffs were misled by the defendant's conduct; and, in the circumstances, we direct each party to bear his own costs throughout. Though our decision is against the plaintiffs, it will be open to them to apply, if so advised, to the High Court for a review of the order of the 10th September, 1888, in Second Appeal No. 644 of 1886, with a view to the enlargement of the time of redemption allowed them by the lower appellate Court on the 12th November, 1886, as a condition which might equitably have been permitted when the defendant was allowed to withdraw from the second appeal.

PARSONS, J.:—On the 12th November, 1886, by decree of the appellate Court, the plaintiffs were allowed to redeem on payment of Rs. 168-8-0 within six months; in default of payment within that time they were to stand for ever foreclosed. They did not so pay the money, and the Court in execution rejected their application, made on the 17th December, 1888, to be allowed to pay it. In appeal from this order the Court below allowed redemption on the ground that time should be computed, not from the date of the decree of the appellate Court, but from the 10th September, 1888, which is the date of an order passed by the High Court permitting the defendant to withdraw the

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

1890.

PÁTLOJI v. GANU.

second appeal he had filed, on the 8th December, 1886, against the appellate Court's decree. I am of opinion that time cannot be reckoned from the date of that order. The mere fact that an appeal has been preferred does not stay execution of the decree appealed against, or prevent its being executed, or enlarge the time for its performance—*Mahant Ishvargir* v. *Chudasama Mánábhái* (1). No doubt, as held in *Daulat* v. *Bhukandás* (2), if a decree were made in appeal so that the appellate decree became the one to be executed, time would run from its date and not from the date of the original decree. All the High Courts agree that this is so—*Noor Ali Chowdhri* v. *Koni Meah*(3); *Muhammad Sulaiman Khán* v. *Muhammad Yar Khán*(4); *Rup Chand* v. *Shamsh-ul-Jehan*(5); *A. C. Thudayan* v. *Veludayan*(6). When, however, an appellant withdraws an appeal, whether with or without the permission of the Court under section 373, no decree is made. None is drawn up, and the order of the Court does not come within the definition of the word "decree" given in section 2 of the Code, and has not even the effect of a decree. The litigation commenced with the presentation of the appeal is merely discontinued, and the case remains as if an appeal had never taken place. Accordingly the Madras High Court says in *Vythilinga* v. *Vijayathammal*(7): "When the proceedings in appeal were discontinued, the decree of this Court became final." The Allahabad High Court has taken the same view of the effect of a withdrawal—*Hinganklián* v. *Ganga Parshád*(8). The Judges there say: "What took place in the special appeal did not and could not affect the finality of the Judge's decree. There was no decision after a hearing, but only a withdrawal, by which course the plaintiffs showed the judgment to be not open to revision. So far as affecting the finality of the judgment of the Judge in regular appeal we must look on the proceedings in special appeal as though non-existent." This is undoubtedly the correct view. The plaintiffs have only themselves to blame if they did not within the prescribed time pay the money

(1) I. L. R., 13 Bom., 106.
(2) I. L. R., 11 Bom., 172.
(3) I. L. R., 13 Calc., 13.
(4) I. L. R., 11 All., 267.
(5) I. L. R., 11 All., 346.
(6) 5 Mad. H. C. Rep., 215.
(7) I. L. R., 6 Mad., 43 at page 46.
(8) I. L. R., 1 All., 293.

1890.

PÁTLOJI v. GANU.

they were ordered to pay. They waited the result of the defendant's appeal at their own risk. *Cf. Surbhai* v. *Raghunáthji*(1). I, therefore, concur in reversing the decree appealed against, and restoring that of the original Court, but without costs.

Decree reversed.

(1) 10 Bom. H C. Rep., 397.

ORIGINAL CIVIL.

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

1890. *September* 12.

RALLI BROTHERS, PLAINTIFFS, *v.* GOCULBHA'I MULCHAND, DEFENDANT.*

Small Cause Courts (Presidency) Act XV of 1882, *Sec.* 69—*Case stated for opinion of High Court—Precise question of law or usage must be formulated—Practice—Procedure.*

In a suit brought in the Small Cause Court by the plaintiffs against the defendant for damages from breach of contract to deliver goods, the only dispute was as to the principle on which damages were to be assessed. The defendant paid into Court the sum of Rs. 779-10-0. At the close of the hearing, and before udgment was delivered, the plaintiffs' attorney informed the Chief Judge that he would require a case to be stated for the opinion of the High Court, under section 69 of the Presidency Small Cause Courts Act XV of 1882, unless the decree were in his favour. The Judge thereupon desired him to state the exact question of law he would wish to be referred, but he declared himself unable to do so until after judgment was delivered. He said he could not then say anything more than that he would require a case to be stated for the opinion of the High Court on any question of law that might arise in the case. The Chief Judge thereupon stated the facts to the High Court and referred the following general question for its opinion:—"Whether, on the facts above set forth, the plaintiffs are entitled to recover from the defendant any, and if so what, sum greater than Rs. 779-10-0 paid into Court by the defendant?" On the reference coming before the High Court a preliminary objection was taken as to whether the reference was in proper form, no question of law or usage having the force of law having been formulated for the opinion of the Court.

Held, (FARRAN, J., doubting) that the reference should be sent back to be amended by stating the precise question arising in the case.

THIS was a case stated for the opinion of the High Court, under section 69 of the Presidency Small Cause Courts Act XV

* Small Cause Court Suit, No. 12814 of 1890.