

APPELLATE CIVIL.

*Before Sir Lallubhai Shah, Kt., Acting Chief Justice,
and Mr. Justice Kemp.*

1923.

July 23.

DATTATRAYA VITHAL GARWARE (ORIGINAL APPLICANT), APPELLANT
v. WASUDEO ANANT GARGATE AND OTHERS (ORIGINAL OPPONENTS).
RESPONDENTS^o.

*Civil Procedure Code (Act V of 1908), Order XLI, Rule 11—Appeal—
Summary dismissal—Time for payment fixed in decree—Extension of time.*

The summary dismissal of an appeal under Order XLI, Rule 11, Civil Procedure Code, 1908, cannot have the effect of extending the time fixed for payment under the decree appealed from.

SECOND appeal against the decision of P. E. Percival, District Judge of Satara, confirming the decree passed by V. V. Bapat, Subordinate Judge at Karad.

Proceedings in execution.

On November 17, 1917, a decree was passed by the District Court, Poona, under which the mortgagor-plaintiff was allowed to redeem on payment of a certain sum within six months, and in the event of his failure to pay he was to be debarred from redeeming. That time expired on May 27, 1918.

Meanwhile on March 12, 1918, the mortgagor preferred a second appeal to the High Court from the District Court's decree but it was dismissed under Order XLI, Rule 11, on July 9, 1918.

On October 3, 1918, the decree was made absolute on the application of the mortgagee, after notice to the mortgagor.

On October 23, 1918, the mortgagor tendered the money payable under the decree of November 27, 1917 and made an application for execution of the decree claiming redemption and also prayed for extension of time under Order XXXIV, Rule 8.

^o Second Appeal No. 709 of 1922.

The Subordinate Judge rejected the application holding that the period of six months could not be counted from the date of dismissal of second appeal as it was dismissed under Order XLI, Rule 11 and that an extension of time under Rule 8 of Order XXXIV could not be granted as that rule was applicable only before passing the final decree and not after.

On appeal, the District Judge confirmed the order.

The mortgagor applied to the High Court.

Y. N. Nadkarni, for *K. H. Kelkar*, for the appellant.

M. V. Bhat, for respondent No. 1.

SHAH, AG. C. J. :—In this case the few material facts are these. A decree was passed by the lower appellate Court on the 27th November 1917 under which the mortgagor was to pay a certain sum within six months, and in the event of his failure to pay he was to be debarred from redeeming. That time expired on the 27th May 1918. In the meanwhile the mortgagor preferred a second appeal to this Court from that decree on the 12th March 1918, which was dismissed under Order XLI, Rule 11, on the 9th July 1918. On the application of the mortgagee the decree was made absolute on the 3rd October 1918, after notice to the mortgagor. The mortgagor tendered the money payable under the decree passed on the 27th November 1917 in Court on the 23rd October 1918, and made an application for execution of the decree claiming redemption. But his application was rejected, and his further prayer for extension of time under Order XXXIV, Rule 8, also was disallowed.

From this order of the Subordinate Judge rejecting his application he appealed to the District Court, and the learned District Judge of Satara dismissed his appeal with costs, accepting the view taken by the Court of first instance on both the points.

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From that decree the applicant has appealed to this Court, and it is urged by way of preliminary objection that the appeal, so far as it relates to the prayer for extension of time under Order XXXIV, Rule 8, is not competent because the order refusing to extend time is appealable as an order under Order XLIII, Rule 1 (o), and that no further appeal is allowed from an order made in appeal. Section 104, sub-section (2) of the Civil Procedure Code, is clear on the point. The preliminary objection seems to be good so far.

But the real point that the appellant urges in support of his appeal is that the time for payment must be taken to run from the date on which his appeal was dismissed by this Court. So far as that contention is concerned his application was an ordinary application for execution of the decree, and the second appeal would be competent. We have, therefore, heard the learned pleader in support of the appeal on this point.

The question that has been argued is whether the effect of the dismissal of the appeal preferred to this Court under Order XLI, Rule 11 is to extend the time fixed under the decree of the lower appellate Court which was passed on the 27th November 1917. It is clear that the tender of the money under the decree on the 23rd October 1918 would be in time if the time is calculated from the date of the summary dismissal of the appeal by this Court.

No authority has been cited in support of the proposition that the time fixed under a decree appealed from is extended by such dismissal. There are decisions to the effect that where the appeal is admitted and heard on the merits, and where ultimately the decree appealed from is confirmed, it has the effect of extending the time fixed under the decree thus confirmed in appeal, and in such a case the time would run from the date of the decree confirming it. It will

be enough to refer to the decision of this Court in *Satwaji Balajirav v. Sakharlal Atmaramshet*⁽¹⁾. Several decisions have been referred to in the judgment of the learned Chief Justice in that case, but there is not a single one in which the summary dismissal of an appeal is held to have the effect which the appellant in this case contends for. The decision in *Bhola Nath Bhuttacharjee v. Kanti Chundra Bhuttacharjee*⁽²⁾ is against the contention of the appellant: and the observations in *Bapu v. Vajir*⁽³⁾ also go to show that the dismissal of an appeal under Order XLI, Rule 11 cannot have the effect of extending the time as argued on behalf of the appellant. Speaking with reference to the dismissal under section 551 of the Civil Procedure Code of 1882, Farran C. J. observes (p. 551):—

“The change of language made in 1888 in that section by the Legislature shows, we think, that it was intended that there should be a difference between the results of a dismissal under it and of a confirmation under section 577; as, indeed, we think, there must be. Dismissing an appeal is, we think, refusing to entertain it as in the case of an appeal dismissed as being time-barred. Where an appeal is dismissed under section 551, there is no decree of the High Court which can be executed, and the reasoning in the cases to which we have been referred does not apply.”

The rule as to the extension of time has been held to apply where the decree under which the time is fixed is confirmed in appeal. Where it is dismissed under Order XLI, Rule 11, the decree appealed from cannot be taken to have been confirmed under Rule 32. The dismissal of the appeal leaves that decree untouched.

We must, therefore, confirm the decree of the lower appellate Court and dismiss the appeal with costs.

Decree confirmed.

J. G. R.

⁽¹⁾ (1914) 39 Bom. 175.

⁽²⁾ (1897) 25 Cal. 311.

⁽³⁾ (1896) 21 Bom. 548.

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