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powers, in extraordinary cases, although, generally speaking, where the lower appellate Court has thought fit to withdraw a complaint made under section 476, it would be very difficult for this Court to interfere in revision. I think that the question whether a complaint should be made under section 476, Criminal Procedure Code, is almost invariably a matter of discretion, and if the trial Court or a Court to which it is subordinate thinks that no complaint should be made, then it would not be desirable that this Court should interfere. In any event in this case the Sessions Judge has considered that no complaint should be made, and we are not disposed to interfere with that order.

Appeal dismissed.

R. R.

PRIVY COUNCIL.

J. C.*
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March 13.

MAHOMED RAHIMTULLA (DEFENDANT NO. 1), APPELLANT *v.* ESMAIL ALLARAKHIA (CLAIMING UNDER PLAINTIFF), RESPONDENT.

[On Appeal from the High Court at Bombay.]

Payment out of Court—Conditional decree for possession—Payment in by mortgagee not a party to suit—Right of withdrawal—Interests of other persons.

In 1918 the son and daughter of a deceased Mahomedan obtained a decree, conditional upon paying a sum within six months, for possession of immovable property part of their father's estate which their mother had sold in 1907 after his death. The appellant had bought in 1911 from the purchaser. In 1915 the son had mortgaged his interest to D, who was not a party to the suit in which the decree of 1918 was made. Shortly after the decree the respondent bought the entire interest of the plaintiffs, the son and the daughter, excepting a fractional share previously sold. In order to prevent the decree from becoming inoperative D, before the expiration of the six months, paid the money into Court; upon his mortgage being redeemed he applied in October 1918 to withdraw the money. The application was opposed by the appellant.

* *Present.*—Lord Shaw, Lord Blanesburgh, Mr. Ameer Ali and Lord Salvesen.

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Held, (1) that D was entitled to pay the money into Court to protect his interest; to the extent of his mortgage he had acquired the rights of the plaintiffs in the suit, and the mortgage gave him a charge for expenses required for his protection; (2) that D was not entitled to withdraw the money, as the payment inured to the benefit of other persons, including the respondent, interested in the performance of the condition; (3) that D having actually withdrawn the money under an order of the Subordinate Judge, the High Court had ordered rightly, as the only method of doing justice between the parties that the respondent should be allowed to pay the money into Court within a specified short period, and that that payment should be treated as having made within the six months prescribed by the decree of 1918.

Judgment of the High Court[1], affirmed.

APPEAL (No. 81 of 1922) from a decree of the High Court (September 22, 1920) reversing an order of the Subordinate Judge of Thana (October 5, 1918).

In the circumstances stated in the judgment of the Judicial Committee, Dattatraya Gandhi applied on October 3, 1918, to the Subordinate Judge to withdraw from Court the sum of Rs. 4,000 which he had paid in on August 22, 1918, under a decree made in Suit No. 57 of 1914, wherein the appellant was a defendant. The respondent by a counter-application opposed the withdrawal, on the ground that it could not be made in defeasance of his rights; he prayed that he might be brought on the record as a party to the execution proceedings, and offered either to pay the money to the defendant, the present appellant, or to repay it to Dattatraya Gandhi.

The Subordinate Judge made an order giving Dattatraya Gandhi leave to withdraw the money, which he did.

Upon appeal to the High Court (Macleod C. J. and Fawcett J.) the order was reversed, and a decree was made giving the present respondent liberty to deposit the amount previously brought into Court by Dattatraya

[1] 45 Bom. 967.

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Gandhi within eight days from the date when he had notice that the papers had been sent back to the lower Court, and that such payment should be treated as made within six months from the decree made in the suit.

1924, February 14 :—*Sir George Lowndes*, *K. C.* and *E. B. Raikes*, for the appellant.

Dunne, *K. C.* and *G. M. McNair*, for the appellant.

Reference was made to the Code of Civil Procedure, 1908, sections 47, 141, 146, 151 and Order XXI, rule 1(*a*); Transfer of Property Act, 1882, sections 54, 65 ; also to *Badri Narain* v. *Jai Kishen Das*[1], *Sheo Narain* v. *Chunni Lal*[2], *Paramananda Das* v. *Mahabeer Dossji*[3], and *Muhammad Masihullah Khan* v. *Jarao Bai*[4].

March 13 :—The judgment of their Lordships was delivered by

LORD SALVESEN:—This is an appeal from a decree of the High Court of Bombay of 22nd September 1920, which set aside an order of the Subordinate Judge of Thana, dated the 5th October, 1918.

The appellant derives such title as he has to the property in dispute from the widow of Balabhai, a Mahomedan resident in Bombay. When she sold the property, the widow professed to act for herself and as guardian of her minor children. The transaction was, however, challenged by Banemiya, the only son of Balabhai then surviving, and by others representing the rest of the family, by a suit raised in 1914 in the Thana Court, in which they claimed that the sale by the widow should be set aside in so far as the shares of the son and daughters were concerned. In that suit, which ultimately came to depend before the High

(1) (1894) 16 All. 483.
(2) (1900) 22 All. 243.
(3) (1896) 20 Mad. 378.
(4) (1915) 37 All. 226.

Court of Bombay, Banemiya and his co-plaintiffs, on 26th February, 1918, obtained a decree against the appellant which is thus expressed :—

"The plaintiffs will have six months within which to pay their share, *i. e.*, 10/16th of the Rs. 1,250 and the Rs. 1,200, with added interest as directed in the lower Court's judgment.

"If within six months the plaintiffs pay the sums due from them they are to recover possession of the land in suit. But if within that time the plaintiffs do not pay the sums due from them then the suit to stand dismissed with costs."

Prior to the date of this decree Banemiya had, on 21st July, 1915, mortgaged his share of the property to one, Dattatraya R. Gandhi, for Rs. 2,000. On 15th September, 1916, he had sold a five annas share to Narayan, a brother of Gandhi, who in turn transferred it to one Motilal Ratansi. Subsequent to the decree Banemiya contracted, on 10th June 1918, to sell to the respondent all his remaining interest in the property and undertook to obtain an assignment in his favour of the right, title and interest of the heirs of his sister who had died. By these transactions Banemiya, for himself and the other plaintiffs (assuming he was authorised to act for them), deprived himself of all interest in the conditional decree of 26th February, 1918. In these circumstances the mortgagee, Dattatraya R. Gandhi, realising that the security which he held over the property would become valueless if the condition specified in the decree was not purified, on 22nd August, 1918, or four days before the money fell to be paid, presented an application in which on the narrative that Banemiya had failed to pay the sum required and that he estimated the sum at less than Rs. 4,000, prayed that the said amount might be ordered to be received for payment to the appellant according to the High Court decree and paid to him. The money was duly deposited in Court and a notice to this effect was signed by Mr. R. B. Gogte, Sub-Judge.

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No question has been raised as to the sufficiency of the amount to satisfy the appellant's claim nor is it open to doubt that the appellant would have been entitled to uplift the whole sum of Rs. 4,000 or as much of it as represented the Rs. 1,250 and Rs. 1,200 with added interest which formed a first charge on the shares of Banemiya and his sister.

The appellant, however, made no application for payment to him of the sum deposited. Instead of doing so he entered into an agreement, dated 3rd October 1918, with the two brothers Gandhi, the substance of which was that in consideration of Rs. 5,000 paid by the appellant to them, they agreed to withdraw the application under which the Rs. 4,000 had been deposited and to claim the return of the said sum to the depositor. In terms of this agreement, an application in the name of Gandhi was duly lodged on 4th October 1918, in the Court of the First Class Sub-Judge at Thana. The applicant prayed for the return of the deposit made by him on the ostensible ground that as the amount of his mortgage had been repaid there was now no possibility of his being involved in loss. The application was opposed by the respondent. He maintained that the payment made by Gandhi had fulfilled the condition in the decree, and offered to pay the amount of Rs. 4,000 to the appellant on the footing that such payment should be treated as equivalent to the payment made by Gandhi. The Sub-Judge overruled the respondent's contentions and allowed Gandhi to take back the money and it was, in fact, uplifted by him. The respondent thereupon appealed to the High Court, which set aside the order granting leave to Gandhi to take back his money and allowed respondent an opportunity of paying the money within a specified short period such payment to be treated as within the period of six months allowed by the decree of 26th February, 1918.

Various contentions were put forward by the appellant in support of his appeal from this order: (1) He contended that on a sound construction of the decree the sum that was provided to be paid by the plaintiffs in that suit fell to be paid to the appellant and that a deposit in Court did not satisfy the condition in the decree. Their Lordships are clearly of opinion that while the condition would have been satisfied by a payment to the appellant in person, which he accepted, it was equally satisfied by a payment into Court, and that the latter was, in the circumstances, the appropriate mode of satisfying the condition. (2) It was contended that a deposit made by another than a party to the suit did not satisfy the condition, and that the mortgagee, who was not a party, had no right in a question with the appellant to make the deposit. Their Lordships agree with the learned Judges of the High Court in rejecting this argument for the reasons they state. They are further of opinion that the mortgagee had an absolute right in the protection of his own property to make the deposit and so prevent his security from becoming valueless. To the extent of the value of his mortgage granted by the plaintiffs in his favour he had acquired their rights, and the mortgage deed expressly authorises him to charge on the mortgaged property any expenses which the mortgagee might be required to make for his protection.

(3) Lastly, it was contended that the mortgagee had an absolute right to withdraw the deposit. If no other interests were in question but those of the mortgagee and the appellant this would no doubt have been the case. But it cannot be overlooked that the real object of the application for the withdrawal was to defeat the claims of the respondent who was the only other person that had an interest in the condition expressed in the decree being satisfied. Their Lordships think that the

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benefit of the deposit having been made before the expiry of the time limit necessarily inured to all parties having an interest in the condition being purified. The legitimate interest of the appellant was to obtain payment of the sums to which he was preferably entitled and this was secured to him by the deposit. Just as the plaintiffs' suit would have stood dismissed if the deposit had not been made, so equally the decree provided that if the sums in question were paid the plaintiffs were to recover possession of the land in suit. The respondent in virtue of the agreement of 10th June, 1918, of which he subsequently obtained a decree of specific implement, is now in right of this decree and entitled to enforce it against the appellant. As, however, the money deposited by Dattatraya had been actually uplifted by him before the order of the High Court was made, the condition which the Court imposed on the respondent appeared to be the only method by which the position which had been inverted by the appellant's action could be restored so as to do justice between the parties. Their Lordships are accordingly of opinion that the decision of the High Court was right and they will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for respondent: Messrs. *Ashuret, Morris & Co.*

A. M. T.