the result we have decided in favour of the appellant. We have thereby had an advantage which the Court in *Framroz Edulji* v. *Mahomed Essa*[1] and in some other cases did not have, viz., arguments on both sides of the question.

CRUMP, J. :—I agree and have nothing to add.

BLACKWELL, J. :—I agree.

Appeal allowed.

R. R.

APPELLATE CIVIL

Before Sir Amberson Marten, Kt., Chief Justice, and Mr. Justice Crump.

SHRIDHAR SADBA POWAR (ORIGINAL PLAINTIFF), APPELLANT *v.* GANU MAHADU KAVADE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1927
August 30

Transfer of Property Act (IV of 1882), section 60—Civil Procedure Code (Act V of 1908), Order IX, rule 9—Mortgage—Redemption suit dismissed for default—Second redemption suit not barred.

The dismissal of a redemption suit for default does not bar a second suit for redemption.

The general terms of Order IX, rule 9, of the Civil Procedure Code, 1908, do not override the specific directions of section 60 of the Transfer of Property Act, 1882.

Rama Tulsa v. *Bhagchand*,[2] and *Ramchandra* v. *Hanmanta*,[3] followed.

Basangouda v. *Rudrappa*,[4] distinguished.

Thakur Shankar Baksh v. *Dya Shankar*,[5] explained.

SECOND APPEAL from the decision of K. K. Thakor, Assistant Judge of Poona, confirming the decree passed by V. R. Guttikar, Additional Subordinate Judge at Poona.

The facts are sufficiently set forth in the judgment.

H. V. Divatia, for the appellant.

Petkar, with *B. G. Modak*, for respondents Nos. 1 to 3, 6 and 16 to 21.

MARTEN, C. J. :—The question for our determination in this second appeal is whether the present redemption suit which was brought in 1921 for the redemption of the mortgage created in 1867 is barred by reason of the fact that a similar redemption suit was brought in 1894 by

* Second Appeal No. 29 of 1925.

(1) (1925) 50 Bom. 266.
(2) (1914) 39 Bom. 41 ; 16 Bom. L. R. 687.
(3) (1920) 44 Bom. 939 ; 22 Bom. L. R. 939.
(4) (1926) 28 Bom. L. R. 1507.
(5) (1887) L. R. 15 I. A. 66 ; 15 Cal. 422.

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the same plaintiff and was dismissed for default in 1897. The lower Courts held that under Order IX, rule 9, or otherwise the plaintiff is prevented from instituting this second suit.

In our opinion the question turns on the true meaning and effect of section 60 of the Transfer of Property Act, which after setting out what amounts to a right to redeem proceeds :

"Provided that the right conferred by this section has not been extinguished by act of the parties or by order of a Court. The right conferred by this section is called a right to redeem, and a suit to enforce it is called a suit for redemption."

In the view we take, we think this section means that unless the right to redeem is extinguished by act of the parties, as, e.g., by a conveyance of the equity of redemption to the mortgagee, it must be extinguished by an order of the Court expressly directed to the point of extinguishment. For instance under Order XXXIV, rule 7, which provides for the ordinary preliminary decree in a redemption suit, the rule provides that the decree shall direct that, if payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage is simple or usufructuary) be debarred from all right to redeem or (unless the mortgage is by conditional sale) that the mortgaged property be sold. A sale by order of the Court, when carried out, would be another way by which the mortgagor's right to redeem that particular property would be extinguished, for in the hands of the purchaser under the Court sale the land would be free from redemption by the mortgagor.

To my mind, then, a mere dismissal for default, without going in any way into the merits of the case, or perhaps even appreciating that the suit is one for redemption, cannot fairly be said to be an order extinguishing the right of redemption. Indeed the argument to the contrary is only based on a literal application of Order IX, rule 9, without any reference to the specific directions of section 60

of the Transfer of Property Act. But we have to remember that Order IX, rule 9, which directs that where a suit is wholly or partially dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action, is framed in general terms. Accordingly, I think, it would be stretching its operation too far to make it override what one may hold to be specific directions in a particular Act, like those of section 60 of the Transfer of Property Act.

As far as the recent decisions of this Court are concerned they all tend towards this view. In *Rama Tulsa* v. *Bhagchand*,[1] Sir Basil Scott at page 691 appears to have accepted the English rule on the point which is that, though in general the dismissal of a suit for redemption operates as a foreclosure, yet that is not the case where the suit is dismissed merely for default. Sir Basil Scott said (p. 691) :—

"It has been held in England in *Hansard* v. *Hardy*,[2] that a dismissal for want of prosecution of a mortgagor's action for redemption does not prevent him from bringing a fresh suit for redemption. *A fortiori* we think that his failure to pay the amount of the decretal debt within the six months allowed to him cannot, so long as the relationship of mortgagor and mortgagee subsists, prevent him from filing a fresh suit for redemption, subject however to this that he cannot go behind the decree in the mortgagee's suit in so far as it settles the amount of the mortgage-debt up to the date of that decree."

Then in *Ramchandra* v. *Hanmanta*,[3] Sir Norman Macleod stated (p. 940) :—

"The law allows a particular period to the mortgagor within which he can redeem the mortgage. The mere fact that he filed a suit to redeem and then either abandons or withdraws it will not deprive him of his right to redeem. It is only when there has been a decision that there was no mortgage at all that it necessarily follows that the right to redeem which has been set up falls to the ground. The result, therefore, of the decision of both Courts in this case would be that although it has never been decided that the plaintiff is not a mortgagor, still he has no right left in him to redeem the property, and that on general principles must be wrong."

It will be noticed there that the learned Judge referred to abandoning the suit as well as to withdrawing it. For a withdrawal, Order XXIII, rule 1, sub-section (3), would

[1] (1914) 16 Bom. L. R. 687; 39 Bom. 41. [2] (1812) 18 Ves. 455 at p. 460.
[3] (1920) 22 Bom. L. R. 939; 44 Bom. 939.

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apply. Abandonment, I take it, refers to a case such as we have here where for default of appearance the suit is dismissed.

Then in *Basangouda* v. *Rudrappa*,[1] Mr. Justice Madgavkar and I had to consider a case of withdrawal, and we there followed the previous Bombay decisions. But a distinction may be drawn between that case and this. There the mortgagor in the second suit was claiming in a different character, which he did not possess at the time of the first suit, viz., as heir-at-law of a particular person who had died after the date of the first suit.

Substantially the argument for the respondents is based on the decision of their Lordships of the Privy Council in *Thakur Shankar Baksh* v. *Dya Shankar*,[2] which was a case from Oudh. There there had been a redemption suit of 1868 which was dismissed for default, and then in 1883 another redemption suit was brought, and it was held barred. It would also appear that in that case various steps had been taken to set aside the order of dismissal in 1868, but that they had failed. We have not got that latter circumstance in the present case; and moreover there is nothing in the arguments or in the judgment of their Lordships to show that the operation of section 60 of the Transfer of Property Act was called in aid. In this connection, as my brother Crump reminds me, it is important to note that the Transfer of Property Act was not in operation at the date when the earlier suit in that case had been dismissed. Further, speaking for myself, the case relates to lands in Oudh, and I am not in a position to say what exactly is the position of the law as regards land tenure in Oudh, though no doubt it is the fact that the Transfer of Property Act came into operation there in 1882 or thereabouts, whereas it did not apply to Bombay until 1891. Speaking, therefore, for myself, I am in a position of some uncertainty

[1] (1926) 28 Bom. L. R. 1507. [2] (1887) L. R. 15 I. A. 66; 15 Cal. 422.

as to whether in any event section 60 of the Transfer of Property Act could have been resorted to in that particular case, and having regard to the fact that the case was before the Privy Council and was argued by eminent counsel, there must, I think, have been some special reason why this particular section was not relied on.

On the other hand, as we have already indicated, we regard section 60 as being the section on which this particular case turns. A somewhat similar view appears to have been taken in the Allahabad High Court by Mr. Justice Griffin in 1909 in the case of *Fateh Chand* v. *Jagan Nath Pershad.*[1] There too the first redemption suit had been dismissed for default, and the above case *Thakur Shankar Baksh* v. *Dya Shankar*[2] was relied on, as here, as barring the second suit. The learned Judge, however, after considering the matter, overruled that contention, and followed the reasoning of the Full Bench case of the Allahabad High Court in *Sita Ram* v. *Madho Lal.*[3]

Under these circumstances I would hold that the decision in *Thakur Shankar Baksh* v. *Dya Shankar*[2] is not a specific decision on the exact point which we have to consider and that accordingly with all respect, it does not apply here so as to bind our decision. Apart from that particular authority, we think that in the present case there was no order extinguishing the right of redemption within the meaning of section 60 of the Transfer of Property Act, and that accordingly this second suit for redemption was not barred.

Under those circumstances the appeal must be allowed, the decrees of the lower Courts set aside, and the case remanded to the trial Court to be dealt with according to law.

This point before us was really raised as a preliminary issue in the trial Court and in the lower appellate Court,

[1] (1909) 2 Ind. Cas. 630. [2] (1887) L. R. 15 I. A. 66; 15 Cal. 422.
[3] (1901) 24 All. 44.

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and no other issues have yet been determined. Accordingly we think the successful party, viz., the plaintiff, must get his costs on this preliminary issue throughout in all Courts. The suit will then be remanded to be heard on the remaining issues in the case.

Appeal allowed.

R. R.

APPELLATE CIVIL

Before Sir Amberson Marten, Kt., Chief Justice, and Mr. Justice Crump

1927
Sept. 29

BHOGILAL PURSHOTTAM SHAH (ORIGINAL OPPONENT NO. 1), APPELLANT *v.* CHIMANLAL AMRITLAL SHAH AND OTHERS (ORIGINAL APPLICANT AND OPPONENTS NOS. 2 AND 3), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), Schedule II, para. 15—Arbitrator—Misconduct—Delay of five years in making award.

The word "misconduct" in paragraph 15 of Schedule II to the Civil Procedure Code, 1908, does not necessarily imply anything in the nature of fraud; but it may include cases where the arbitrator has failed to perform the essential duties which are cast upon him as an arbitrator, e.g., delay of five years in making the award.

Coley v. *DaCosta*,[1] followed.

APPEAL from an order passed by M. G. Mehta, Joint First Class Subordinate Judge at Ahmedabad.

The facts are sufficiently stated in the judgment of the Chief Justice.

R. J. Thakor, for the appellant.

H. V. Divatia, for respondent No. 1.

MARTEN, C. J. :—This is an extraordinary case, and one to which, in the view I take, the learned trial Judge has not given the care which it deserves. The suit is one to have an award in an arbitration out of Court filed and a decree passed thereon. A startling circumstance in the case is that whereas the agreement for reference, Exhibit 28, was on September 11, 1920, the award was not made till after five years afterwards, viz., on October 6, 1925. Nor is there any reasonable excuse for that delay put forward. On the facts it would appear that the arbitrator had

* Appeal No. 41 of 1926 from Order,

[1] (1889) 17 Cal. 200.