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SETON-KARR, J.—I am of the same opinion as the learned Chief Justice. Four cases have been quoted as bearing directly on the point referred to us: *Bhubanmayi Debi* v. *A. Mooty* (1), *Thakur Chandra* v. *Chowdhry Choti Sing* (2), *Bisram Sing* v. *Indrajit Kunwar* (3), *Grijanand Upadhya* v. *Rat Raman Upadhya* (4). In the first of these cases, the opinion appears to have been arrived at without argument or discussion. In the next two cases, I was one of the division Bench which passed the orders, which have made this reference necessary. In the first of these cases, the appeal was preferred against an act done by a manager, who had been appointed under section 243, Act VIII. of 1859, and we held that section 11, Act XXIII. of 1861, was not meant to apply to acts done by a person so appointed. In the second case we certainly did hold that an appeal would lie under section 11, but as between parties to the suit and to the execution. The last case quoted is certainly in conflict with our opinion, but looking to the very broad and general terms of section, Act XXIII. of 1861, and also to the hardship which might be caused if there were no redress against unjust or illegal orders passed under section 243 of Act VIII. of 1859, I am of opinion that it was the intention of the Legislature that an appeal should lie.

PHEAR, J.—I agree in the decision of the Chief Justice, and the arguments by which he has supported it.

MACPHERSON, J.—I also concur with the Chief Justice.

Before Sir Barnes Peacock, Kt., Cheif Justice, Mr. Justice Bayley, Mr. Justice L. S. Jackson, Mr. Justice Macpherson, and Mr. Justice Mitter.

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5 B. L. R. 36

Regulation XVII *of* 1806 *Notice of Foreclosure—Year of Grace.*

The year mentioned in section 8 of Regulation XVII. of 1806 is to be reckoned from the date of the service of the notice under that section.

THIS case came before a Division Bench (PEACOCK, C. J., and MITTER, J.) on special appeal from a dscree of the Principal

(1) 1 W. R. (M. A.,) 11.
(2) Mar., 261.
(3) 2 W. R. (M. A.,) 49.
(4) 8 W. R, 136.

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Sudder Ameen of Chittagong. The suit was for possession of mortgaged land after foreclosure. The defendant claimed to be entitled to redeem. She had deposited the mortgage-money on the 9th December 1865. On the plaintiff's own showing, the notice under section 8 of Regulation XVII. of 1806 was not served upon her till the 9th December 1864, but the Judge's perwana was dated 24th November 1864. The question was, whether the deposit by the mortgagor was within the year mentioned in that section. There being a conflict of decisions on the point, the following question was referred for the opinion of a Full Bench:

"From what period is the year mentioned in section 8 of Regulation XVII. of 1806 to be reckoned?"

The question was referred with the following remarks by

PEACOCK, C. J.—According to the plaintiff's own showing, the notice was not served until the 9th of December 1864, and the mortgage-money was deposited on the 9th December 1865. Excluding the alleged day of service, which, according to the authorities, must be excluded, the money was deposited within one year from the date of the service. The perwana of the Judge was dated the 24th of November 1864, and if the year for the deposit of the mortgage-debt is to be calculated from the date of that perwana, and not from the date of service, the deposit was not made in time.

According to the decisions of the late Sudder Court, the year within which the mortgage-money is to be deposited, is to be reckoned from the date of the issue of the perwana; and by a Circular Order of that Court (1), it was ordered that the

(1) *Circular Order of the 9th April* 1817 —"It having come to the knowledge of the Court, that the written notification to the mortgagor, directed in that section (that is section 8 of Regulation XVII. of 1806), instead of being immediately issued, as evidently intended by the express terms of the Regulation, is sometimes delayed, for a month, and upwards, whereby the mortgagee's application for foreclosure is not made known to the mortgagor as early as it ought to be, whilst at the same time the year allowed for redemption must necessarily be calculated, as prescribed, from the date of the notification the Court are of opinion, that whenever a *perwana* to a mortgagor, or his legal representative, containing the notification prescribed in section 8 Regulation XVII. of 1806, may not be issued on the date of its being ordered, it should bear the date on which it may be actually issued, instead of that on which the *perwana* may be ordered; and that the term of one year allowed for redeeming the mortgage should be calculated from the date so inserted.

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perwana should bear the date on which it should be actually issued, instead of that on which the order was made; and that the time of one year allowed for redeeming the mortgage should be calculated from the date so inserted. There was also a recital in that Circular Order that the year allowed for redemption must necessarily be calculated, as prescribed by the Regulation, from the date of the notification.

If this question were a new one, upon which no decisions had been pronounced, I should have had no doubt whatever that the words, "within one year from the date of the notification," used in section 8 of Regulation XVII. of 1806, meant within one year from the time of the service upon the mortgagor of the perwana containing the notification, and not from the date of the perwana or notification. It is clear that the legislature intended that the mortgagor should not be foreclosed, unless he should fail in redeeming the mortgage within one year from the time of his having notice of the application made by the mortgagee under section 8 of the Regulation, and of its being notified to him that the mortgage would be finally foreclosed, if he should fail to redeem within one year from the time of his receiving the notice. Section 8 directs that the Judge, on receiving such written application from the mortgagee, as specified in that section, shall cause the mortgagor, or his legal representative, to be furnished, as soon as possible, with a copy of it, and shall at the same time, that is, at the time of the mortgagor's being furnished with a copy of the application, notify it by a perwana, under his seal and official signature, that if he shall not redeem the property mortgaged in the manner provided for by the preceding section, within one year from the date of the notification, the mortgage will be finally foreclosed. The Judge is required, at the time of furnishing the mortgagor with a copy of the application, to notify it by a perwana, that if the mortgage shall not be redeemed within one year from the date of the notification, the mortgage will be foreclosed. The year is to be calculated from the date of the notification, not from the date of the perwana and in order to notify by a perwana, I apprehend it is necessary that the perwana should be made known, or served upon the person who is to have the notice. The Judge cannot be said

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to notify by a perwana, so long as the perwana remains in the Judge's Court or with the Nazir. It was evidently intended that the perwana should be served at the time at which a copy of the application is furnished.

The regulation contains a preamble, reciting the grounds upon which it was enacted. The recital applicable to this part of the Regulation is as follows:

"It is further requisite for the purpose of preventing improvident and injurious transfers of landed property at an inadequate price, by the forfeiture of mortgages, accompanied with a condition of sale to the mortgagee, if the amount advanced be not re-paid within a stated period, that an equitable provision should be made for allowing redemption of the estate within a reasonable and limited period, on payment of the principal sum, lent, with interest thereupon, if the mortgagee shall not have been put in possession." But there would be little equity in allowing a mortgagor to redeem his estate within one year from the date of a perwana not served upon him, or of which he should have no notice at all, or no notice until the period of one year from the date of the perwana should have actually expired, or be upon the eve of expiration. I apprehend that the legislature intended that the mortgagor should have one year to redeem from the time at which it should be made known to him that the mortgagee had applied to foreclose.

I cannot consider myself bound by any Circular Order issued by the late Sudder Court. There are several decisions of that Court to the effect, that the year allowed for redemption in section 8 is to be calculated from the issue of the perwana and that the date of it is to be taken as the period of issue. In *Kanhai Lal Thakur* v. *Ras Mani Dasi* (1) the Court say: "The Court on this head observes, that it has been repeatedly held that the date from which the period is to be counted is the date of the notice issued, and the defendant is in error in supposing that it should be counted from the date of service of the notice. This rule has been adopted not only with reference to the terms of the Regulation XVII. of 1806, but also to the principle of the enactment. The one year's

(1) S. D. R. 1846, 282

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grace allowed by law to the borrower, after the period mentioned in his own engagement has expired, being clearly matter of favour; there can be no reason for allowing any further indulgence, and the Act must be construed strictly and to the letter." But what favor or indulgence is there in allowing a man a year to redeem from the date of a notice which may not have been served upon him until after that year has expired, or until the day before it expires, for that is the effect of holding the date of the notice of perwana to be the period for which the year is to be calculated?

A reference was made to Mr. Justice Macpherson's book on mortgages, in which it is said, "so if the notice of foreclosure is not served on the mortgagor until the last day of the year of grace, he will have no time left him for redemption." If the construction contended for is correct, it may be added that, if it is not served on the mortgagor until after the last day of the year of grace, the mortgage may be actually foreclosed before the mortgagor is aware that any proceedings of foreclosure have been taken.

There was another case of the late Sudder Court on the 19th of June 1847. No. 152 of 1845, in which that Court held, that the year was to be reckoned from the date of the notice and not from the time of service, and they reversed the decision of the Judge who found that it was the custom in his district to calculate the period from the date of service of notice; and they said, "we are of opinion that a local custom cannot be pleaded against the law as established by Regulation, Circular Order, and Precedent." I have already stated that, in my opinion, the law that the period was to be reckoned from the date of the notice, and not from the date of service, was not established by Regulation. It could not be established by Circular Order; and I believe, that up to that date, it had not been established by precedent. In reversing the decision of the Judge, Mr. Tucker, in admitting the Special Appeal, quoted as a precedent the case of *Hossain Ali Khan* v. *Mussamut Phull* of *Kunwar* (1). But it is evident that he could no and in or the case in detail, and that he formed his opinion of that the p the person wh

(1) Sel. S. D. R, 1825, 5.

the effect of the decision merely from the marginal note of the report. He said, "the Circular Order dated the 9th of April 1817, was issued for the guidance of the Courts in this matter; and it seems to call for explanation why a custom opposed to that Circular is still allowed to prevail and to overrule what has been dclared to be law upon the subject." Now, I have read in detail the case cited, and have formed my opinion of the effect of that decision not merely from the marginal note. In that case, the Officiating Chief Judge, Mr. Harrington, held, that as the borrower had been ordered by the notice to pay the principal sum within one year from the receipt of it, and as it was proved that he had done so, he had saved his right of redemption, although he had not redeemed within the period of one year from the date of the notice. The second Judge also held expressly, that the year commenced from the date of notice. But he added, that if the date from which the term of one year was to commence, was held to be the date of the issue of the notice, it would appear that the full period of one year had not elapsed; for it might be presumed that the notice had not been given to the Peada who was to serve it before the 19th of September 1814, the date on which notice was issued, and that the money was paid into the Treasury before the close of the 19th of September 1815 But the notice itself was dated the 28th of June 1814, and it was clear that the money had not been paid into Court within one year from that date. He held that the right of the borrower was reserved under the section above quoted, even as contended by the Court's Circular Order of the 19th of April 1817. But he added that the Circular was not passed, when the transaction to which the case referred occurred; and the borrower was then guided by a precedent laid down by Mr. James Stuart, former third Judge of the Court, on the 24th of July 1813, in the case of Lutchput Rai, petitioner, wherein it was laid down that the term of one year was to be reckoned from the day on which the notice was served on the borrower.

This case shows that at a period antecedent to the Circular Order of 1817, and much nearer to the time when the Regulation

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was passed than the year 1846, the date of the decision to which I have already referred, it was held by the late Sudder Court, that the period of one year was to be reckoned from the time of the service, and not from the date of the notice. The Judges of that day must have had quite as good, if not better, means of knowing what was the intention of the legislature than the Judges who issued the Circular Order in 1817, and those who seemed to consider that explanation was necessary why the Judges should act in opposition to that Circular.

There has, therefore, been no uniform course of decisions from the time when the Regulation was passed to the present, that the period is to be reckoned from the date of the notice. Further, the case of *Hossein Ali Khan* v. *Phublas Kunwar* (1) is important as shewing that the perwana at that time directed that the payment was to be made within one year from the receipt of it, and not from the date of the perwana itself. That, and the custom upon which the Judge acted in the case cited from the decisions of 1847, lead me to think that it is not improbable that in the perwanas issued up to the date of the Circular of 1817, it was notified to the mortgagors that the estate would be foreclosed, unless redeemed within one year from the receipt of the perwana.

In the present case, the notification mentions the period of one year, without expressly stating from what period that year is to be reckoned. Not saying that it was to be reckoned from the date of the perwana, the borrower would naturally and reasonably conclude that the time was to be reckoned from the time at which he received the perwana, and not from the date of it, and he did redeem within that period. If that be the true construction of the perwana, the case falls expressly within the authority to which I have referred from the 4th volume of the Sudder Dewanny Reports. But as the decisions of 1846 and 1847 were followed by *Abdul Hamid* v. *Sahaon nisa Bibi* (2), and two of the Judges of the High Court have held that they considered themselves bound by the decisions in which they had reluctantly acquiesced in a former

(1) Sel. S. D. R., 1825, 5. (2) S. D. R., 1858, 1477.

case, I do not think it right to decide this case without reference to a Full Bench.

The reasons given by the Judges of the Division Bench in *Sarup Chandra Nag* v. *Banamali Pandit* (1), to which I have referred, are very strong to show that the time ought to be reckoned from the service, and not from the date of the perwana.

I should remark that the decisions even from 1846 are not uniform. The Circular Order says, that the year allowed for redemption must necessarily be calculated from the date of the notification, and therefore it directed that it should bear date on the day on which it was actually issued, and that the period of one year should be calculated from the date so inserted. The construction was, that the time should be reckoned from the date of the notification. Their order consequent upon that construction of the law was, that the date of the notification was the day on which it was issued.

The decision of 1846 was that the date from which the period was to be counted was the date of the notice. The decision of 1858 was that it was to count from the date of the issue of the notice, and that decision was considered by the Division Bench of this Court, in the case of *Sarup Chandra Nag* v. *Banamali Pandit* (1), to mean, not the date of the document itself, *viz.*, the date of its being signed, but the date of its issue by the Court. They say: "This ruling, it must be said, finds but little countenance in anything which appears in Regulation XVII., and is not perhaps always capable of being applied. We understand it in effect to lay down that no time should be counted against the mortgagor during which the perwana, although it may be complete in all respects, is lying idle in the Sherista of the Court; and that whatever may be the actual date when the Court put its hand to the document, still it is not to be treated as a notification within section 8, until it has become an active order of Court. We are willing to concur in this view, considering as we do, that the notification intended by the legislature is not made until even a later period." Turning to the facts of the case, the Court was of opinion that the perwana was not

(1) 9 W. R., 116.

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issued as long as the Nazir kept it in his desk, and that it was in fact first issued when, on the 23rd of August 1864, it was handed to the peon for delivery. Why it was not an active order while lying in the desk of the Nazir, but would be an active order whilst kept by the peon in his pocket, I am at a loss to understand. I cannot feel myself bound by the decision of 1858, if it is capable of such a meaning. How the mortgagor, who is to steer his course according to the notification, is to ascertain how long the order may have been kept in the desk of the Nazir, or how long in the pocket of the peon, there is nothing to show. Whatever is to be the construction of the Regulation in question, I think it should be clearly defined, and it should be laid down in such a manner, that the borrower may know within what period it is notified to him, that he must redeem the mortgage in order to prevent a final foreclosure.

Seeing that the decisions are conflicting, and that there is no uniform course of decisions by which we can be guided, I think we ought to decide this case according to what we believe to have been the actual intention of the legislature, and that is, that the year is to be counted from the date on which the borrower has notice of the application to foreclose, and has it notified to him by the service of the perwana that he is to come in and redeem, if he wish it.

The opinion of the learned Judges upon the question proposed to them was delivered as follows by

PEACOCK, C. J.—The Court is of opinion that the year mentioned in the Regulation ought to be reckoned from the date of the service of the notice. I can add nothing to what I said when the case was referred by the Division Bench. It is unnecessary to determine what would be the case, if the mortgagor should keep out of the way to avoid service.