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## APPELLATE CIVIL.

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Before Mr. Justice Bayley, Chief Justice (Acting), and Mr. Justice Candy.

AMINABI AND ANOTHER (Original Plaintiffs), Appellants v.  
SIDU AND ANOTHER (Original Defendants), Respondents.\*

[15th August, 1892.]

*Decree—Execution—Execution pending appeal—Landlord and tenant—Enhancement of rent—Decree for enhanced rent, and in default possession to be given—Appeal by defendants—Execution of decree by plaintiff—Possession taken pending appeal—Decree confirmed on appeal—Time for complying with decree not enlarged by filing appeal—Application by defendants to be restored to possession on payment of amount ordered by appellate decree—Practice—Procedure.*

On the 13th February, 1889, the plaintiffs obtained in the District Court of Satara a decree, on appeal, against the defendants, who were their tenants, ordering [548] them to pay Rs. 34 as the rent of certain land for the year 1882-83, and Rs. 50 a year as rent from the 5th April 1883, on which date the plaintiffs had given them notice of enhancement. In default of payment by the defendants the plaintiffs were to take possession of the land. The plaintiffs were to give the defendants credit for any sums which they had paid as rent since the year 1882-83.

Both parties appealed to the High Court from this decree. While these appeals were still pending, the plaintiffs on the 13th February 1890 applied for execution of the decree. They prayed for immediate possession and for Rs. 334 alleged to be the rent due under the decree, viz. Rs. 34 for 1882-83 and Rs. 50 for each of the six years from 1883-84 to 1888-89 inclusive. The application was granted by the Subordinate Judge, and the plaintiffs obtained possession on the 19th February 1890.

On the 20th March 1890 the defendants applied to be restored to possession stating that they had appealed to the High Court against the decree of the District Court, which had fixed their rent at the enhanced rate of Rs. 50, and that their appeal was still pending; that the sum of Rs. 334 was not due to the plaintiffs, inasmuch as they (the defendants) had continued to pay the rent at the old rate (viz. Rs. 34) to the village officers together with the local fund cess Rs. 2-2, being a total of Rs. 36-2 for each of the six years. They contended that the plaintiffs were thus entitled only to Rs. 83-4, and not Rs. 334, and they claimed to get back the land on the ground that the plaintiffs had obtained possession on an illegal application.

While this application of the 20th March 1890 was still pending, the appeals against the District Court's decree of the 13th February 1889 came on for hearing before the High Court, which confirmed that decree on the 17th July 1890. Thereupon the defendants on the 1st August 1890 brought into Court Rs. 98 (being the difference between the old rent which they had paid and the enhanced rent payable under the confirmed decree), and applied to be restored to possession. On the 6th February 1891 the defendants' application of the 20th March 1890 came on for hearing, and was rejected by the Subordinate Judge on the ground that the defendants had not obeyed the District Court's decree. The defendants thereupon appealed to the District Court, which reversed that decision and ordered that possession should be given to the defendants on the ground that the time for payment of the amount due under the decree should be reckoned from the date of the confirmation of the decree by the High Court, viz. 17th July 1890, and that by their payments made to the village officers and their payment into Court on the 1st August 1890, the defendants had obeyed the decree and were entitled to be put back into possession. The plaintiffs appealed to the High Court.

*Held* (reversing the order of the District Court and restoring that of the Subordinate Judge) that the defendants could not recover possession. The fact that they had appealed to the High Court could not prevent the decree of the District Court from being executed, or enlarge the time for payment of the rent as decreed by that Court. No stay of execution was asked for, and all that the Subordinate Judge had to see in February 1890 was whether payment of rent had been made

\* Second Appeal, No. 214 of 1892.

in accordance with the terms of the decree of the District Court made on the 13th February 1889. The defendants had not paid that rent when the [549] plaintiffs executed the decree on the 19th February, 1890. The decree was legally executed before the High Court's decree was passed on the 17th July, 1890, and that execution could not be afterwards cancelled, because, of the High Court's decree. When the decree of the District Court was passed, the defendant should at once have paid to the village officers the balance of the rent due according to that decree, or, on the second appeal to the High Court being made, they should have applied for stay of execution. They followed neither course, and the decree was legally executed. The claim in the plaintiffs' application for execution may have been excessive but the defendants had never attempted to pay anything beyond the old rent.

[Expl., 16 Bom. L.R. 778 ; R., 16 A. 65 (69) ; 17 C.L.J. 120=17 C.W.N. 457 (459)=18 Ind. Cas. 747 ; L.B.R. (1893-1900) 174 ; L.B.R. (1893-1900) 420.]

SECOND appeal from the order of J. W. Walker, District Judge of Satara, passed in execution of a decree.

The defendants were tenants of the plaintiffs at an annual rent of Rs. 34. On the 5th April, 1883, the plaintiffs gave the defendants notice of enhancement of rent to Rs. 50. They afterwards sued the defendants claiming rent at the old rate up to the date of the notice of enhancement and at the higher rate for the period subsequent to the notice.

The suit came on appeal to the District Court, which, on the 13th February, 1889, passed a decree for the plaintiffs, ordering the defendants to pay Rs. 34 as rent for the year 1882-83 and Rs. 50 per year as rent from the date of the plaintiffs' notice of 5th April, 1883. In default of payment by the defendants, the plaintiffs were to take possession of the land. The plaintiffs were to give the defendants credit for any sum which they had paid as rent since the year 1882-83.

Both parties appealed from this decree to the High Court. On the 13th February, 1890, while these appeals were pending, the plaintiffs applied for execution of the decree. They prayed for immediate possession of the land and for Rs. 334 alleged to be the amount of rent due under the decree, viz., Rs. 34 for 1882-83 and Rs. 50 for each of the six years from 1883-84 to 1888-89 inclusive. The application was granted by the Subordinate Judge, and possession of the land was given to the plaintiff on the 19th February, 1890.

On the 20th March, 1890, the defendants applied to be restored to possession. They stated that they had appealed to the High Court against the decree of the District Court, which fixed their rent at the enhanced rate of Rs. 50, and that their appeal was [550] still pending. They alleged that the sum of Rs. 334 was not due to the plaintiffs, as they (the defendants) had continued to pay the rent at the old rate, viz., Rs. 34, to the village officers together with the local fund cess Rs. 2-2, being a total of Rs. 36-2 for each of the six years. They had therefore paid a sum of Rs. 250-12 including Rs. 34 for the year 1882-83 and the plaintiffs were thus only entitled to Rs. 83-4 and not Rs. 334. They claimed to get back the land on the ground that the plaintiffs had obtained possession thereof with the crops standing thereon on an illegal application.

While this application of the 20th March 1890 was pending the appeals against the decree of the 13th February 1889 came on before the High Court, which, on the 17th July 1890, confirmed the decree of the District Court. Thereupon the defendants on the 1st August 1890 brought into Court Rs. 98 (being the difference between the old rent which they had paid, and the enhanced rent payable under the decree confirmed by the High Court), and applied to be restored to possession.

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On the 6th February 1891 the defendants' application of the 20th March 1890 came on for hearing, and was rejected by the Subordinate Judge on the ground that the defendants had not obeyed the District Court's decree. The defendants appealed to the District Court, which reversed the decision of the lower Court and ordered that possession should be given to the defendants, on the ground that the time for payment of the amount due under the decree should be reckoned from the date of the confirmation of the decree by the High Court, *viz.*, 17th July 1890, and that by their payments made to the village officers, and the sum paid into Court on 1st August 1890, the defendants had obeyed the decree and were entitled to be put back into possession.

From this order the plaintiffs filed a second appeal to the High Court.

*Manekshah J. Taleyarkhan*, for the appellants (plaintiffs):—The defendants did not comply with the decree of the District Court within a year, and pay the rent as ordered, and accordingly the plaintiffs took out execution and obtained possession. The fact [551] that the defendants had appealed, did not enlarge the time allowed them for obeying the decree and paying the money. This is not a redemption decree—*Mahant Ishwargar v. Chudasama Manabhai* (1). When the defendants preferred their second appeal, they ought to have applied for stay of execution of the lower Court's decree, but instead of doing that they, in defiance of the decree, deliberately waited till the disposal of their second appeal and then proposed to pay the amount due. The decree has been legally executed, and the defendants cannot cancel the execution, because of the subsequent decision in appeal.

*Mahadeo Chimnaji Apte*, for the respondents (defendants):—The only question here is whether the time allowed to the defendants for paying the enhanced rent should not be computed from the date of the High Court's decree. The cases show that where there is an appeal against a decree, the decree is suspended—*Daulat v. Bhukandas* (2); *Noor Ali v. Koni Meah* (3); *Sakharam Mahadev v. Hari Krishna* (4). The decree of the High Court being the final decree, it is that decree, which ought to be executed, and not the decree of the District Court—*Shohrat Singh v. Bridgman* (5); *Muhammad Sulaiman Khan v. Muhammad Yar Khan* (6). Prior to the High Court's decree the plaintiffs had no doubt, applied for execution of the District Court's decree, but that application and the order thereon were *ex parte*, and subsequently the defendants made an application under s. 583 of the Civil Procedure Code (XIV of 1882). When a decree is executed pending appeal, the execution must be considered to be subject to the final order in the appeal. In this case the plaintiffs appealed as well as the defendants against the District Court's decree, but, although they appealed against it and while their appeal was pending, they applied for and obtained execution.

After the passing of the High Court's decree the defendants paid the amount of the enhanced rent into Court; the plaintiffs have taken it, and also recovered possession, which they ought not to have done.

#### JUDGMENT.

[552] CANDY, J.—The plaintiffs in this case on 13th February 1889 obtained a decree of the District Judge that "defendants do pay to plaintiffs Rs. 34 as rent for 1882-83 and Rs. 50 as annual rent from the date of

(1) 13 B. 106.  
(4) 6 B. 113.

(2) 11 B. 172.  
(5) 4 A. 376.

(3) 13 C. 13.  
(6) 11 A. 267.

plaintiffs' notice of 5th April 1883; in default of payment the plaintiffs are to take possession of the land from defendants; any sums which defendants have paid since the year 1882-83 as rent for the land are to be credited to them, and only the balance to be recovered by the plaintiffs."

On 13th February 1890 plaintiffs applied to the Subordinate Court to execute this decree by praying for immediate possession of the land and for the rent due, which was given as Rs. 334. This sum was apparently arrived at by adding the rent for 1882, 83 (Rs. 34) to the rent at Rs. 50 for six years, *viz.*, 1883-84 to 1888-89 inclusive. The defendants had all along continued to pay the old rent only (Rs. 34) through the village officers s. 85. Land Revenue Code, Bom. Act V of 1879).

The Subordinate Judge at once ordered immediate possession to be given to the plaintiffs, which was done on 19th February 1890.

On 20th March 1890 defendants made an application to the Subordinate Judge objecting to being ousted from possession, alleging that plaintiffs should have demanded Rs. 83-4 only; that they (defendants) had preferred a second appeal to the High Court against the decree of the District Court fixing the rent at Rs. 50; that credit should be given for the sums paid to the village officers, *i.e.*, Rs. 34 rent, and Rs. 2-2 local fund cess, total Rs. 36-2 each year; and demanding restoration of the land on the ground that plaintiffs had obtained possession with the crops on the strength of an illegal application. This application of the defendants was not finally disposed of by the Subordinate Judge till 6th February 1891.

In the meanwhile both parties had filed second appeals in the High Court against the District Court's decree, which, however, was confirmed on 17th July 1890, no written judgment being delivered.

Defendants then on 1st August 1890 made an application to the Subordinate Judge, producing Rs. 98, which they apparently [553] calculated as the difference (Rs. 14) for seven years between the rent confirmed by the High Court (Rs. 50) and what they had hitherto paid (put by defendants as Rs. 36). This of course was an error in calculation, for defendants apparently included local fund cess, whereas it is evident that the District Judge intended the Rs. 50 to be in place of the Rs. 34, exclusive of any local fund cess.

Eventually, as noted above, on 6th February, 1891, the Subordinate Judge disposed of the defendants' application claiming to be restored to possession. He refused their prayer, holding that they had defaulted in complying with the terms of the decrees.

On appeal to the District Court the Judge reversed the order of the Subordinate Judge, holding on the authority of *Patloji v. Ganu* (1) that the time fixed for payment of the rent due must be reckoned from the date of the decree of the High Court; that defendants had since 1885-86 paid to the village officers Rs. 170 in addition to the Rs. 98 paid into Court; and that, therefore, defendants were entitled to be put back into possession.

We are unable to agree with the conclusions of the District Judge. There is apparently some mistake in regard to the case quoted by him. The ruling in *Patloji v. Ganu* is simply that the order of the High Court, allowing the withdrawal of a second appeal, is not a decree from which a fresh period can be computed for payment of redemption money. But there are expressions in the judgments of the learned Judges which tell strongly against the view taken by the District Judge. Thus Parsons, J.,

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said: "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.....The plaintiffs have only themselves to blame if they did not within the prescribed time pay the money they were ordered to pay. They waited the result of the defendant's appeal at their own risk." So here: both plaintiffs and defendants appealed to the High Court: but that fact could not prevent the decree of the District Court being executed, or enlarge the time for payment of the rent as decreed by the District Court. Even if the [554] Subordinate Judge had the power to enlarge the time for payment in the course of execution, the mere fact that an appeal had been lodged would afford no special ground for enlarging the time (*Mahant Ishwargar v. Chudasama Manabhai* (1)). No stay of execution was asked for: therefore all that the Subordinate Judge had to see in February 1890 was whether payment of rent had been made in accordance with the terms of the District Court's decree of the 13th February, 1889.

The Subordinate Judge was wrong in supposing that nothing had been paid since 1882-83: strictly speaking, the subsequent payments to the village officers were the only payments which the Courts could recognize. But assuming that the District Court's decree allowed, and could allow, payment either to the village officers or into Court, it is a fact that in February 1890 nothing had been paid beyond the old rent of Rs. 34, and not a pie in excess of that rent was tendered by defendants till August 1890. It is unnecessary therefore to enquire whether the District Judge in the present case was justified in assuming that, though the District Court's decree directed defendants to pay "Rs. 50 as annual rent from the date of plaintiffs' notice of 5th April 1883," yet defendants were justified in paying the old rent only (Rs. 34) for 1883-84 and 1884-85. In any case, defendants had not paid their due rent from 1885-86 to 1888-89 when the plaintiffs executed the decree. Nor did they tender it, or pay it to the village officers, when they objected (March 1890) to being ousted from possession.

Ought, then, the Subordinate Judge to have subsequently cancelled the execution of the decree, and restored the defendants to possession, because on 17th July 1890 the High Court confirmed the decree of the District Court, which directed defendants to pay the enhanced rent, and ordered that in default of payment the plaintiffs were to take possession of the land from defendants? We think not. It may be a hard case for defendants, but they have only themselves to blame. When the District Court's decree was passed, they should at once have paid to the village officers the balance of the rent due according to that decree, or they should, [555] on second appeal being made, have applied for stay of execution. They followed neither course, and the decree was, therefore, legally executed before the High Court's decision was passed. The claim in the plaintiffs' application for execution may have been excessive in regard to the amount of rent claimed; but the fact remains that defendants had never made any attempt to pay anything beyond the old rent. Under these circumstances, we must discharge the order of the District Judge and restore that of the Subordinate Judge. All costs on defendants.

*Order discharged.*