

have been prejudiced by the irregularity. I would now reverse the acquittal by the Sessions Judge, and would convict the accused under section 116, Indian Penal Code; and I would restore the sentence of eighteen months' rigorous imprisonment imposed by the Assistant Sessions Judge, and direct that the prisoner undergo the unexpired portion thereof.

1900.
 QUEEN-
 EMPRESS
 ANANT
 PURANIK.

APPELLATE CIVIL.

Before Mr. Justice Fulton and Mr. Justice Crowe.

MURLIDHAR (ORIGINAL DEFENDANT-APPLICANT), APPELLANT, v.
 PARSHARAM (ORIGINAL PLAINTIFF-OPPONENT), RESPONDENT.*

1900.
 June 28.

Mortgage—Redemption—Decree for redemption—Failure of mortgagor to pay the sum ordered by the decree—Rights of mortgagee on such failure—Transfer of Property Act (IV of 1882), Secs. 92 and 93.

In a suit by a mortgagor for redemption of a mortgage dated 17th March, 1891, a decree was passed in 1897 allowing him to redeem on payment of the mortgage-debt within a year from the date of the decree; but the decree did not contain any provision for foreclosure or sale in default of payment on the due date.

The plaintiff having made default, the defendant applied to the Court for an order absolute for foreclosure or sale, under section 93 of the Transfer of Property Act (IV of 1882). His application was rejected on the ground that as the decree did not contain any clause for foreclosure or sale, section 93 of the Act was not applicable.

Held, in second appeal, that the defendant (mortgagee) was entitled to the remedy given by section 93 although the decree was not drawn up as prescribed by section 92. The omission of the Court to draw up the proper decree under section 92 did not deprive the mortgagee of the relief provided by section 93.

SECOND appeal from the decision of Ráo Bahádur D. N. Ranadive, Additional First Class Subordinate Judge, A. P., at Násik.

On the 30th January, 1897, the plaintiff obtained a decree for the redemption of a mortgage dated the 17th March, 1891.

The decree provided as follows:—

“The Court decrees plaintiff's claim for redemption of the mortgaged house and possession of title-deeds as prayed for, on

* Second Appeal, No. 661 of 1899.

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payment of Rs. 1,096-10-0 within one year from this date, and interest on the principal sum of Rs. 900 at 6 per cent. per annum from the 1st December, 1894, till payment to the defendant."

The plaintiff (mortgagor) was in possession of the mortgaged property.

In 1898 the defendant (mortgagee) presented a *darkhást* praying that as the mortgagor had failed to pay the mortgage-money within the time fixed by the decree, the mortgagor's right to redeem should be foreclosed and the applicant be put in possession, or that the mortgage-money be realized by sale of the mortgaged property.

The Subordinate Judge rejected this application. He held that the application was made under section 93 of the Transfer of Property Act (IV of 1882), but that section only applied when the decree had been made under section 92. The decree in this case was not in the form prescribed by section 92. It omitted to provide for the case of default in payment. Section 93, therefore, did not apply, and the applicant (mortgagee) was not entitled to any remedy not given by the terms of the decree. The decree was defective and the defect could not be cured in execution. In his judgment he said:—

"I am of opinion that the prayers of the applicant cannot be allowed in execution of the decree which contains nothing to that effect. It is a patent rule of law that a decree can only be executed according to its terms, and that no direction which it does not contain can be enforced. Sections 92 and 93 (of the Transfer of Property Act) must be read together. The former lays down the form of the decree and is the principal of the two, the latter being only explanatory. Where, therefore, the decree is not drawn up strictly under section 92, section 93 cannot help or come in to supplement it. When judgment was pronounced, it was the duty of the mortgagee or his pleader to have asked the Court to draw up the decree in the language of section 92, in which case section 93 would have applied. But as this was not done, the decree remained defective, which defect cannot be cured by section 93 in execution."

This decision was upheld in appeal.

The defendant preferred a second appeal to the High Court.

D. A. Khare for appellant.

R. R. Desai for respondent.

1900.

MURLIDHAR
v.
PARSHARA

FULTON, J.:—We think the provisions of section 93 of the Transfer of Property Act are applicable to this suit notwithstanding that the mortgage was of a date before its introduction. Section 2 preserves the rights of the parties, but after the introduction of the Act the procedure for enforcing those rights is governed by its provisions. The case of *Nandram v. Babaji*⁽¹⁾ may be referred to as a precedent on this point. In these circumstances we think that the defendant can claim to enforce the provisions of section 93 although the first decree was not drawn up in the terms of section 92. It was a suit for redemption in which the plaintiff was allowed to redeem within a certain time, but nothing was said as to what was to happen if he did not pay the money within the time prescribed. Had he been out of possession, he would doubtless have lost his right to recover possession when the time expired. But as he was in possession, there was nothing in the wording of the decree to disturb him even though he failed to pay the redemption money.

The question then arises whether the mortgagee has no remedy in this suit. We think it is provided by section 93 and cannot agree with the lower Courts in holding that the omission of the Court to draw up a proper decree under section 92 deprives the mortgagee of the relief provided by section 93. What that relief may be—whether foreclosure or sale—depends on the nature of the mortgage.

We now reverse the orders of the Courts below and remand the application to the Court of first instance for disposal according to law. Costs throughout to be costs in the application.

Order reversed.

(1) (1897) 22 Bom., 771.