

1903.

NINGAWA
v.
RAMAPPA.

We amend the decree of the Subordinate Judge by adding the words "except Revision Survey Nos. 44 and 149 both situate at Kadadi" after the words "the entire properties specified in the plaint" and before the words "to the plaintiff No. 2." The decree stands confirmed in other respects. Appellants to pay to the respondents the costs of this appeal.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1903.

August 18.

ISHWAR LINGO DESAI (ORIGINAL PLAINTIFF), APPELLANT, v. GOPAL JIVAJI DESAI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Transfer of Property Act (IV of 1882), section 93—Redemption-decree—Failure to pay money on date fixed—Court's power to enlarge time for payment.

The failure to pay money on or before the date mentioned in the redemption-decree does not absolutely bar the mortgagor's right to obtain possession of the mortgaged property; since, the Court may, under section 93 of the Transfer of Property Act (IV of 1882) upon good cause shown, enlarge the time for payment upon such terms as it thinks fit.

The plaintiff within three years of the date of the decree produced in Court the decretal amount and prayed for possession of the mortgaged property.

Held, such an application could be treated as one for enlargement of time under section 93 of the Transfer of Property Act.

SECOND appeal from the decision of R. Knight, District Judge of Dhárwár, reversing the order passed by V. D. Joglekar, Subordinate Judge, at Hubli.

The plaintiff obtained a decree on the 30th November, 1898, to redeem a mortgage on payment of certain amount on or before the 23rd March, 1899, and obtain possession of the mortgaged property from the defendant, the mortgagee. The plaintiff failed to redeem the mortgage on or before the date fixed. The mortgagee also did not obtain an order from the Court declaring that the right of the mortgagor to redeem the mortgage was extinguished and the decree contained no provision to that effect.

* Second Appeal No. 241 of 1902.

At a later date, but within three years from the date of the decree, the plaintiff produced in Court the amount mentioned in the decree, and prayed for possession of the mortgaged property. It was contended by the defendant that the plaintiff had no right to redeem after the date fixed by the Court in the decree.

The Subordinate Judge decided "that the plaintiff has a right to obtain possession of the land and the amount paid in Court should be paid to the mortgagee as ordered by the decree."

This order was, on appeal, reversed by the District Judge on the following considerations:—

"The order of the lower Court is inconsistent with the terms of the decree, which binds plaintiff to perform a certain act by a certain date if he wishes to benefit by it. The effect of the order is to render the entry of the date in the decree wholly superfluous and meaningless. If plaintiff wished for an extension of the time for payment he should have applied under section 68 of the Transfer of Property Act. The rulings in *Maruti v. Krishna* (1 Bom. L. R. 31) and *Narayan v. Anandram* (I. L. R. 16 Bom. 480) have no application to the present case, inasmuch as they refer to decrees which did not fix any specific date for payment. On the other hand, *Marlidhar v. Parasharam* (2 Bom. L. R. 633) is conclusive in such a case as the present, *vide* remark on page 625."

The plaintiff appealed to the High Court.

G. S. Mutgaonkar, for the appellant (plaintiff):—Our contention is that we should be allowed to redeem the mortgaged property on the grounds that we produced the decretal amount in Court within three years from the date of the decree; and that the defendant-mortgagee did not obtain an order absolute on the plaintiff's failure to pay within the appointed time. The lower Appellate Court refused to allow us to do so on the ground that we failed to pay within the appointed time in the decree: and that if we so required we should have applied for an extension of time. The first ground is answered by reference to the last paragraph of section 93 of the Transfer of Property Act (IV of 1882): see also *Nandram v. Babaji* ⁽¹⁾, *Kanara Kurup v. Govinda Kurup* ⁽²⁾, and *Taniram v. Gajanan*.⁽³⁾ The lower Appellate Court should have treated our present application as one for extending the time appointed in the decree.

(1) (1897) 22 Bom. 771.

(2) (1892) 16 Mad. 214.

(3) (1899) 24 Bom. 300.

1903.

ISHWAR
LINGO
C.
GOPAL
JIVANJI.

1903.

ISHWAR
LINGO
v.
GOPAL
JIVAJI.[CHANDAVARKAR, J., referred to *Rango v. Bhomshetti*.⁽¹⁾]

The case of *Murlidhar v. Parsharam*⁽²⁾ is not against our contention: though it is difficult to understand the remark of Fulton, J., in that case, where his Lordship says: "Had he been out of possession he would doubtless have lost his right to recover possession when the time expired." There is no warrant for the remark in sections 92 and 93 of the Transfer of Property Act (IV of 1882)—*vide* also *Narayan v. Anandram*⁽³⁾, *Maruti v. Krishna*.⁽⁴⁾

S. V. Bhandarkar, for the respondent (defendant):—The law is clearly laid down in *Mahant Ishwargar v. Chudasama Manabhai*.⁽⁵⁾

The mortgagor should have redeemed within the time appointed. The decree did not contain a default clause and therefore it was not necessary to obtain an order absolute.

G. S. Mulyaonkar, in reply:—The decision in *Mahant Ishwargar v. Chudasama Manabhai*⁽⁵⁾ represents the law as it stood before the introduction of the Transfer of Property Act (IV of 1882) in Bombay.

CHANDAVARKAR, J.:—In this case we have already held on the record before us that respondent 1 having died, the cause of action survives to the other respondents who are alive.

The appeal has accordingly been heard on the merits.

We do not agree with the District Judge's view that because the plaintiff failed to pay the amount of the decree to the defendants within the period fixed therein, he has lost his right to obtain possession on the payment of the redemption-money after that period. The District Judge has overlooked the proviso to section 93 of the Transfer of Property Act, which says: "The Court may upon good cause being shown and upon such terms, if any, as it thinks fit from time to time postpone the day fixed under section 92 for payment to the defendant."

The Subordinate Judge allowed the *darkhast* to proceed. The question which ought to have been considered in this *darkhast* is whether good cause was shown by the plaintiff for

(1) (1901) 26 Bom. 121.

(3) (1891) 16 Bom. 480.

(2) (1900) 25 Bom. 101.

(4) (1899) 23 Bom. 592; (1899) 1 Bom. L. R. 31.

(5) (1888) 13 Bom. 100.

enlarging the time fixed in the decree, and whether, if time ought to be enlarged, the plaintiff ought to be put on any terms. The plaintiff, it is true, did not make any application expressly for an enlargement of the time; but following *Rango v. Bhomshetti* (1) we think his present application may well be treated as one made for such enlargement to be followed by an order for the execution of the decree. The *darkhast* ought to be dealt with from that point of view, and the Appellate Judge should consider, after taking or directing to be taken by the Subordinate Judge, such evidence as the parties may adduce, firstly whether there is good cause shown for enlarging the time fixed by the decree, and then, if he is of opinion that it should be enlarged, whether the plaintiff ought to be put on any terms.

We reverse the decree of the lower Appellate Court and remand the *darkhast* for disposal with reference to the remarks made above.

Costs to follow result.

Decree reversed. Darkhast remanded.

(1) (1901) 26 Bom. 121.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL PLAINTIFF), APPELLANT, v. BALVANT GANESH OZE (ORIGINAL DEFENDANT), RESPONDENT.*

1903.
August 19.

Bombay Irrigation Act (Bom. Act VII of 1879), sections 3, sub-section (2), 5, 8, 23, 27, 28 (1)—Nālā—Water-course—Canal—Irrigation Department—Right to control water or to obstruct the use thereof—Riparian Proprietor—Enjoyment and benefit of water—Strict construction of statutes encroaching on the rights of subjects.

The defendant was in possession of a plot of land, Sarvey No. 13, and a *nālā*, that is, a water-course, ran past that plot of land. The *nālā* was crossed at a

* Appeal No. 86 of 1902.

(1) Sections 3, sub-section (2), 5, 8, 23, 27, 28 of the Bombay Irrigation Act (Bom. Act VII of 1879):

3. In this Act, unless there will be something repugnant in the subject