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No. 2 by defendant No. 1. The trial Court found that there was no money consideration for the sale, and that as the plaintiff No. 2 had been the mistress of defendant No. 1, the real consideration for the transaction was past co-habitation. That was not the case made out in the plaint, and if, as we are told, the point has never been decided in this Court, we are decidedly of opinion now that past co-habitation will not be good consideration for the transfer of property. The facts of this case go even further, because it was not merely the case of plaintiff No. 2 being the mistress of defendant No. 1, but of the connection between the two being adulterous as plaintiff No. 2 had a husband living. Therefore it comes to this that the transaction was really a gift, and as the property was joint family property between the defendants, and there had been no partition, the fact that the first defendant purported to sell half the house would not thereby effect a partition. Therefore whichever way we look at it, the plaintiff must fail and the appeal is dismissed with costs.

*Appeal dismissed.*

J. G. R.

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## APPELLATE CIVIL.

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*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.*

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November 28.

SUPDU DHODU GUJAR (ORIGINAL PETITIONER), APPELLANT. v. MA-DHAVRAO JIVRAM GUJAR (ORIGINAL OPPONENT), RESPONDENT.<sup>a</sup>

*Consent-decree—Default—Variation—Court's power to vary the terms of consent-decree.*

The plaintiff sued for a declaration that an ostensible sale deed was merely a mortgage deed and that he was entitled to redeem the property. The parties arrived at a compromise and a consent-decree was passed in terms that the plaintiff do pay defendant within one month from the 4th September 1917, a sum of Rs. 1,100 and the Survey No. 529 at Jamner should be given in

<sup>a</sup> Second Appeal No. 870 of 1918.

plaintiff's possession as owner by defendant in February 1918 after removing that year's crop; if the above sum was not paid by plaintiff to defendant within one month, defendant should retain possession of the Survey number as owner. The plaintiff made default and the defendant claimed that he was entitled to retain the property under the terms of the consent-decree. The plaintiff, thereupon, paid the sum into Court on the 26th November 1917 and presented an application for extension of time mentioned in the consent-decree. The lower appellate Court dismissed the application on the ground that it had no power to vary the terms of the consent-decree. On appeal to the High Court,

*Held*, that it would be open to the Court to relieve against a default of the plaintiff on proper terms, inasmuch as the plaintiff paid the money still three months before he would get possession under the consent decree.

*Per Macleod, C. J.*:—"In each case the terms of the consent-decree must be considered. The Court cannot lay down a general principle that in no case can the terms of the consent-decree be varied."

SECOND appeal against the decision of M. I. Kadri, Assistant Judge of Khandesh, reversing the decree passed by S. A. Gupte, Second Class Subordinate Judge at Jalgaon.

In 1916, the plaintiff sued for a declaration that a sale deed of his property Survey No. 529 at Jamner, obtained by the defendant was in the nature of a mortgage. The parties arrived at an amicable settlement and in accordance with a compromise application filed by them a consent decree was passed on the 4th September 1917. The terms of the consent-decree were:

"The plaintiff should pay defendant within one month from to-day Rs. 1,100 cash, and the suit Survey No. 529 at Jamner should be given in plaintiff's possession as owner by defendant in coming Magh (February 1918) after removing this year's crop; the assessment for 1918 should be paid by defendant; each party to bear his own costs. If the above sum is not paid by plaintiff to defendant within one month defendant should retain possession of the suit number as owner.

It is also settled between the plaintiff and defendant that plaintiff should pay defendant Rs. 400 in cash within one month from to-day and defendant should hand over possession of Survey No. 526 to plaintiff as owner in next Magh."

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The plaintiff failed to pay the sum within one month but he deposited the amount of Rs. 1,500 in Court on the 26th November 1917. The defendant refused to accept the amount and claimed to retain the property under the terms of the consent-decree.

The plaintiff, thereupon, made an application to the Court praying that the time stated in the consent decree for the payment should be extended and the defendant should be made to accept the amount deposited in Court.

The Subordinate Judge held that time was not of the essence of the contract in the case, and directed the defendant to accept the amount deposited in Court and restore possession to the plaintiff.

On appeal, the Assistant Judge reversed the decree and dismissed the plaintiff's application. He held that the parties had entered into a solemn agreement upon which they based their rights and liabilities and that agreement being embodied in a consent decree, the Court had no power to extend the time: *Lachiram v. Jana Yesu*<sup>(1)</sup>.

The plaintiff-petitioner appealed to the High Court.

*P. B. Shingne*, for the appellant :—The lower Court has misconstrued the consent decree in question. The terms of that decree show that time was not of the essence of the contract inasmuch as the defendant was to give possession of the suit number long after the plaintiff had paid him Rs. 1,100 within the stipulated period; besides the plaintiff had paid the amount before the date fixed for giving back the possession of the land to him and so it is a valid payment under the compromise. The case reported in *Lachiram v. Janu Yesu*<sup>(1)</sup> relied upon by the lower appellate Court does not apply; the Court is not precluded from granting equitable relief to

<sup>(1)</sup> (1914) 16 Bom. L. R. 668.

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the parties in appropriate cases governed by consent decrees. I rely upon the Full Bench case of *Krishnabai v. Hari Govind*<sup>(1)</sup> and *Sitaram Narayan Oka v. Mahadaji Ballal Oka*<sup>(2)</sup>.

*B. G. Rao*, for the respondent:—In this case the Court has to construe the terms of a consent decree. Under the terms of the consent decree in question, it was provided that if the plaintiff did not pay Rs. 1,100 within one month from the date of the decree, defendant was to retain possession of the plaint property as owner; in other words the parties contemplated that time was of the essence of the contract. When once a consent decree is passed the relations of the parties and their rights and liabilities are solely governed by that decree, and the Court has no power to afford equitable relief to the parties by varying the terms of the decree: *Lachiram v. Janu Yesu*<sup>(1)</sup>. In the Full Bench case of *Krishnabai v. Hari Govind*<sup>(2)</sup> the Court gave equitable relief against forfeiture on the ground that the relations between the parties as created by the decree were those of landlord and tenant. In the present case no such relationship exists. Therefore the Full Bench case of *Krishnabai v. Hari Govind*<sup>(2)</sup> does not apply as pointed out in *Lachiram v. Janu Yesu*<sup>(1)</sup>. Plaintiff having made a default in payment, the defendant is entitled to retain possession of the suit number as provided in the decree.

*MACLEOD, C. J.*:—In this case the plaintiff sued for a declaration that what appeared to be a sale deed of the plaint property was merely a mortgage deed, and that he was entitled to redeem the property. The parties arrived at an amicable settlement and in accordance with a compromise application filed by them a consent decree was recorded. The terms are set out at page 1 of the print. It will be seen that with regard to one

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<sup>(1)</sup> (1914) 16 Bom. L. R. 668.

<sup>(2)</sup> (1906) 31 Bom. 15.

<sup>(3)</sup> S. A. 903 of 1916 (unreported), 6-9-1916.

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Survey number the plaintiff had to pay Rs. 1,100 to the defendant within one month from the date of the consent decree. If the above amount was not paid, the defendant was entitled to retain possession of the suit number as owner. In any event he was entitled to remain in possession until the February following for the purpose of removing the crop he had sown. The plaintiff made default and the defendant claimed that he was entitled to retain the property under the terms of the decree. The plaintiff paid in Rs. 1,500 for both the properties on the 26th November 1917, and then presented an application for a declaration that time stated in the compromise application was not of the essence of the contract. The trial Court allowed the application. An appeal against that order was successful, the learned Assistant Judge holding that the parties had come to a solemn agreement upon which they based their rights and liabilities. It was held in *Lachiram v. Janu Yesu*<sup>(1)</sup> where there had been a consent decree which provided for the payment of a certain sum found due by fixed instalments, and it was provided that on failure to pay two instalments the plaintiff was entitled to recover possession of certain lands, the plaintiff was entitled to take possession of the property after there had been a default and the Court had no power to vary the consent decree. The Full Bench case of *Krishnabai v. Hari Govind*<sup>(2)</sup> was referred to in the judgment, and it was held that that case was inapplicable where the relation of landlord and tenant was not created by the decree. In *Krishnabai v. Hari Govind*<sup>(2)</sup> there was a consent decree which established the relation between the parties of landlord and tenant. The plaintiff then filed a suit claiming that by his action the defendant had forfeited his rights created by that consent decree; and the Full Bench considered that the consent decree

(1) (1914) 16 Bom. L. R. 668.

(2) (1906) 31 Bom. 15.

constituted an agreement between the parties, and was to be dealt with as if there had been an original agreement between the parties out of Court, and, as under such an agreement made out of Court the Court would relieve against forfeiture, so the Court would relieve against forfeiture under the contract created by the consent decree. Therefore in each case the terms of the consent decree must be considered. The Court cannot lay down a general principle that in no case can the terms of a consent decree be varied. Now the consent decree in this case amounted to a decree for redemption. The plaintiff mortgagor had to pay into Court a certain sum within a month, and if he did not do so, certain consequences arose. In every decree for redemption where a period for payment is described, it will follow that if default is made the mortgagee has certain rights. He can apply for foreclosure or for sale. But until he has foreclosed or sold the property, a Court of Equity will always be disposed to grant relief to the defaulting mortgagor. In this case, although the plaintiff might have paid the amount decreed within the month allowed, he would not have got possession until the February following, and that evidently was considered by the Court and by the parties when they arranged the compromise the important date. It is true that under the consent decree the defendant for a certain period would have the advantage of his money and also would have the advantage of possession. But we think it would be open to the Court to relieve against a default of the plaintiff on proper terms. As a matter of fact the plaintiff paid in the money by the 26th November, still three months before he would get possession under the consent decree. We think, therefore, that he is entitled to recover possession of the property on paying interest from a month from the date of the decree until the 26th of November 1917 at 6 per cent. The appeal,

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therefore, will be allowed with costs in this and the lower appellate Court.

HEATON, J. :—When once it is conceded that we have here, though it takes the form of a decree, what is substantially a contract, then I think the principle, on which the decision in *Krishnabai v. Hari Govind*<sup>(1)</sup> was founded, applies. Then whether we apply the rule as to time being of the essence of the contract, or the general principle that where you have relations of mortgagor and mortgagee, although the time may be fixed for the payment of the mortgage debt by the contract, the mortgagor would still be entitled to pay the mortgage debt until the relation of mortgagor and mortgagee had ceased to exist, the result is the same. The contract we are concerned with, is of course peculiar. It is in some ways like an agreement to purchase property on the part of one person and an agreement to sell on the part of another. It is in some ways like a mortgage where the provision is that the mortgage debt shall be paid on a particular date, and that on a later date the mortgaged property should be restored to the mortgagor. But although it is peculiar in its terms, it seems to me the contract is one to which the principles governing contracts for the sale and purchase of immoveable property, or contracts of mortgage, might well be applied, and ought to be applied. If they are applied, then it follows, as it seems to me with no room for hesitation whatever, that although a date was fixed for the payment, the payment that was made in this case will be allowed to operate as a proper payment under the decree, though it was made some two months later than the time fixed. I agree, therefore, that the appeal should be allowed with costs in this Court and the lower appellate Court.

*Decree reversed.*

J. G. R.

<sup>(1)</sup> (1906) 31 Bom 15.