

1924.

Present: Ennis and Porter JJ.

KALID *v.* PACKEER.

292—D. C. Colombo, 383.

Judgment directing that if defendant did not pay money within one month plaintiff should have possession of land—Appeal by defendant—Appeal dismissed—Money deposited within one month of receipt of record in District Court after appeal.

By judgment dated May, 1922, defendant was given one month within which to pay a certain sum; failing that plaintiff was to obtain possession of a land. The defendant appealed, and his appeal was dismissed on February 16, 1923. The judgment in appeal made no mention of time.

The record was received back in the District Court on February 28. On March 23 the defendant deposited in the Kachcheri the amount mentioned in the decree, and on March 28 the Kachcheri receipt was produced before Court.

Held, that in the circumstances the payment was in time, and that plaintiff was not entitled to a writ of possession as if defendant had made default of payment.

" It has hitherto been the rule of the Supreme Court to specify in its decree that the time shall run from the date after the appeal and after the receipt of the record by the District Court. It unfortunately was not done in this case. But it has been such an invariable practice that it would seem desirable that it should become a practice under section 4 of the Civil Procedure Code."

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THE facts are set out in the judgment.

Hayley (with him *Cooray*), for the appellant.

H. H. Bartholomeusz (with him *R. L. Bartholomeusz*), for the respondent.

February 18, 1924. ENNIS J.—

This is an appeal from an order refusing to recall a writ of possession. It appears that on May 9, 1922, by a judgment of the District Court, the defendant-appellant was given one month within which to pay a certain sum; failing that, the plaintiff was to obtain possession of the land. The defendant appealed, and his appeal was dismissed on February 16, 1923. The judgment in appeal made no mention of time. On March 19 the plaintiff applied for execution of his decree, and on March 20 and 23 writs of possession issued. On March 23 the defendant deposited in the Kachcheri the amount mentioned in the decree, and on March 28 the Kachcheri receipt was produced before the District Judge. The question then arose as to whether this payment was in time. The learned Judge decided to follow certain Indian cases, and he held that the month would run from the date of the decree in appeal, and inasmuch as the plaintiff had not been paid within that date, he refused to recall the writs issued at the instance of the plaintiff. The appeal is from this order. It seems that there is no definite procedure for a case such as this. Section 777 of the Code says that "When a party entitled to any benefit under a decree passed in an appeal desires to obtain execution of the same, he should apply to the Court which passed the decree against which the appeal was preferred; and such Court shall proceed to execute the decree passed in appeal." The only other provision of the Code which has any bearing on this question is section 4, which says that "In every case in which no provision is made by this Ordinance, the procedure and practice hitherto in force shall be followed, and if any matter or procedure or practice for which no such provision is made by this Ordinance or by any law for the time being in force shall after this Ordinance comes into operation arise before any Court, such Court shall thereupon make application to the Supreme Court for, and the Supreme Court shall and is hereby required to give, such special orders and directions thereupon as the justice of the case shall require." The Indian cases which the learned Judge followed

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do not appear to be in point. They merely say that the judgment in appeal is deemed the judgment of the lower Court. In these cases the payment was made within the time counted from the decree in appeal, and no case was cited where a tender of payment was made after that time. These cases, therefore, do not directly apply to the present case. It has hitherto been the rule of the Supreme Court to specify in its decree that the time shall run from the date after the appeal and after the receipt of the record by the District Court. It unfortunately was not done in this case. But it has been such an invariable practice that it would seem desirable that it should become a practice under section 4 of the Civil Procedure Code. In the present case, the record was received back by the District Court on February 27 or 28 (the date is blurred in the record). In these circumstances it would seem that the defendant tendered payment within the month from the date when the record was received back by the District Court. In the circumstances I would hold that the payment was in time, and accordingly allow the appeal, but make no order as to costs in both Courts.

PORTER J.— I agree.

Appeal allowed.