

PRIVY COUNCIL.

MUNNA LAL PARRACK

v.

SARAT CHUNDER MUKERJI.

P. C.^o
1914

Nov. 5.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Limitation—Preliminary Mortgage-decree—Limitation Act (IX of 1908) Sch. I, Arts. 180, 183—Application for sale of mortgaged property under decree—Transfer of Property Act (IV of 1882) ss. 85 to 89—Civil Procedure Code (Act V of 1909), O. XXXIV, rr. 4, 5.

In this case their Lordships of the Judicial Committee affirmed the decision of the High Court in *Amluck Chand Parrack v. Sarat Chunder Mukerjee* (1) that an application for an order absolute for sale under a mortgage decree is an application "to enforce a judgment or decree" within the meaning of Art. 183 of Sch. I of the Limitation Act (IX of 1908), and is therefore barred if not made within the period prescribed by that Article.

APPEAL No. 18 of 1914 from an order (20th July 1911) of an Appellate Bench of the High Court at Calcutta which affirmed an order (13th May 1910) of a Judge sitting in the exercise of the original civil jurisdiction of the same Court.

The representatives of the plaintiff were the appellants to His Majesty in Council.

The only question for determination on the present appeal was whether an application made on 3rd July 1909 to execute or enforce a decree made by the High Court on 16th December 1886 was or was not barred by the Limitation Act. Both Courts in India held that it was barred.

^o *Present*: LORD SHAW, LORD PARKER, LORD SUMNER, SIR JOHN EDGE, AND MR. AMEER ALI.

The necessary facts were shortly as follows. On 25th January 1886 the first respondent, Sarat Chunder Mukerji, executed a mortgage in favour of one Amlook Chand Parrack (the predecessor in title of the appellants) of one-third share in certain properties which he was then claiming in litigation pending in the High Court to secure a sum of Rs. 25,500 and interest. The sum so secured was made repayable under the mortgage on 1st July 1886.

As the money was not paid on the due date, the mortgagee instituted a suit in his mortgage in the Calcutta High Court, and on 16th December 1886 a consent decree was made in the suit for Rs. 25,382-8 annas to be paid on 15th June 1887, and it was provided that in default of payment the mortgaged properties should be sold, and that the mortgagor should be liable for any deficiency there might be on the sale.

In the course of the litigation (which was protracted), as to the first respondent's share in the mortgaged properties, he sold a one-fourth share in one of the properties to one Narendra Krishna Bose, who subsequently transferred his interest to Upendra Lal Bose, the second respondent. The result of the litigation was a decree made on 3rd November 1903, by which the first respondent was declared entitled to an undivided one-fourth share in some of the mortgaged properties, and a partition was directed to be made, the proceedings in which only came to an end early in 1909; and shortly before the Partition Commissioner made his report, the mortgagee made in his mortgage suit the application which gave rise to the present appeal, namely, that the second respondent should be made a party-defendant to the suit, and that he (the mortgagee) might be at liberty to sell the shares of the mortgagor and the second respondent in the mortgaged properties.

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The application was heard by FLETCHER J. sitting in the exercise of the Original Civil Jurisdiction of the Court, and he held that it was an application to enforce a decree within the meaning of article 180 of Schedule II of the Limitation Act (XV of 1877), and that not having been made within the period prescribed by that article the application was barred.

An appeal by the mortgagee was heard by a Divisional Bench (SIR LAWRENCE JENKINS C.J., and WOODROFFE J.) of the High Court and was dismissed.

The mortgage decree of 16th December 1886 and the judgment of the Appellate Court will be found set out in the report of *Amlook Chand Parrack v. Sarat Chunder Mukerjee* in I. L. R. 38 Calc. 913.

On this appeal,

Jenkins, K.C., and *Sir W. Garth*, for the appellants, contended that the application was not one to enforce a decree within the meaning of either article 180 or 183 of Schedule I of the Limitation Act (IX of 1908); for the decree of 16th December 1886 was a preliminary mortgage decree which could not be enforced or executed itself, but required a supplemental decree or order absolute for the purpose of being 'executed'. The application, therefore, it was submitted, was not barred. Reference was made to the Transfer of Property Act (IV of 1882) sections 85 to 89, which were now to be found in the Civil Procedure Code (Act V of 1908), Order XXXIV, rule 5. This was an application for which no period of limitation was provided in the Limitation Act. The question was whether an application for a preliminary decree was sufficient for execution of the mortgage decree, or rather whether an application for a final decree would be sufficient for execution of the preliminary decree? It was submitted it would not.

[*De Gruyther, K.C.*, referred to the cases of *Abdul Majid v. Jawahir Lal* (1) and *Batuk Nath v. Munnai Dei* (2) in which it was held by this Board that such an application as the present one was barred if not made within the period prescribed by the Limitation Act.] The articles referred to in the cases cited were those applying to the inferior Courts and not to the High Court as established by Charter; and reference was made to *Mudhabmani Dasi v. Lambert* (3) as being in favour of the appellant,

De Gruyther, K.C. and *A. R. Macklin*, for the respondents, were not called upon.

The judgment of their Lordships was delivered by

LORD SHAW. Their Lordships see no reason for interfering with the decisions of the Courts below, and they will humbly advise His Majesty to dismiss the appeal with costs.

Appeal dismissed.

Solicitor for the appellants: *G. C. Farr.*

Solicitors for the respondents: *J. E. Fox & Co.*

J. V. W.

(1) (1914) I. L. R. 36 All. 350. (3) (1910) I. L. R. 37 Calc 796 ;

(2) (1914) I. L. R. 36 All. 284 ; 15 C. W. N. 337.

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