APPELLATE CIVIL.

1914

May 27.

Before Holmwood and Chapman JJ.

BISWAMBHAR SHAHA

v

RAM SUNDAR KAIBARTA*

Limitation—Mortgage suit—Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 3 and 6—Limitation Act (IX of 1908) Sch. I, Art. 181—Transfer of Property Act (IV of 1882) s. 90—Personal covenant.

The plaintiff in a mortgage suit, who has his personal remedy at the date of the institution of the suit, would not lose his personal right by reason of his not having made the application for personal decree under O XXXIV, r. 6 within three years of the date of the confirmation of the mortgage-sale, since applications under O. XXXIV, r. 6, are not governed by Art. 181 of the Limitation Act any more than an application for order absolute under O. XXXIV, r. 3.

Rahmat Karim v. *Abdul Karim* (1) and *Madhabmoni Dasi* v. *Pamela Lambert* (2) referred to.

SECOND APPEAL by Biswambar Shaha and others, the defendants.

This appeal arose out of a decision of the Subordinate Judge of Comilla reversing the order of the Munsif of Comilla. The facts are shortly these. The decree-holder filed a petition under section 90 of the Transfer of Property Act for permission to proceed against the properties of the mortgagor other

* Appeal from appellate Decree, No. 1016 of 1912, against the decree of Satkowri Haldar, Subordinate Judge of Comilla, dated Nov. 13, 1911, reversing the decree of Phanindra Mohan Chatterjee, Munsif of Comilla, dated May 20, 1911.

(1) (1907) I. L. R. 34 Calc. 672. (2) (1910) 12 C. L. J. 328.

than the mortgaged properties for realisation of balance of the mortgage decree. The original mortgagor died before the institution of the suit. His heirs opposed the petition by submitting that the petition, having been presented more than three years after the last execution, was barred by limitation. The learned Munsif, holding that Article 181 of the Limitation Act applied, rejected the petition.

Against this order the decree-holder appealed to the Subordinate Judge of Comilla who set aside the order of the lower Court and remanded the suit to the Munsif for determination of the balance legally recoverable from the defendants otherwise than from the property sold.

Against this order of the Subordinate Judge the defendants appealed to this Court.

Babu Sasadhar Roy, for the respondent, submitted that this appeal should not be heard since the order of remand, against which this appeal was preferred, was carried out by the first Court without the judgment-debtors making any attempt to stay proceedings or to expedite the hearing of the appeal in this Court. There has been great laches.

Babu D. L. Kastgir, for the appellant, submitted that the application of the decree-holder was barred by limitation. The fact that the remand order was carried out does not matter in the least. The new Art. 181 of the Limitation Act applies to a case such as this. The Legislature intended to remedy the earlier law.

The present application was under the Civil Procedure Code, Order XXXIV, rule 6, and the right to apply accrued from the date when the proceeds of the sale of the mortgaged property were found insufficient. The decisions in *Purna Chandra Mandal*

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v. *Radha Nath Dass* (1) and *Rahmat Karim* v. *Abdul Karim* (2) were no more good law since they were decisions under the law of Limitation before the amendment of 1908.

Babu Sasadhar Roy, in reply. The present law of Limitation does not profess to provide for all applications. Reads the Preamble where the words used are "law relating to the limitation of the suits, appeals and *certain* applications." Under O. XXXIV rule 6 no application is contemplated. It merely declares the power of the Court to pass a supplementary decree for money against the mortgagor personally. No application is necessary in such a case. The mortgagee simply reminds the Court to do what it could do of its own motion. The decisions referred to by my learned friend were still good law and have been followed in *Madhabmoni Dasi* v. *Pamela Lambert*(3). True, that case dealt with an order absolute but in principle there is no real distinction. I further rely on *Tiluck Sing* v. *Parsotein Proshad*(4) which has never been dissented from.

Babu D. L. Kastgir, in reply. The case of *Madhabmoni Dasi* v. *Pamela Lambert* (3) decided that certain applications, though made after the amendment of the Code, were merely a continuation of applications made before the amendment. Moreover, that case has nothing to do with an application for a supplementary decree and is therefore distinguishable.

HOLMWOOD AND CHAPMAN JJ. This is a second appeal arising out of a decision given by the Subordinate Judge of Comilla on the 13th November

(1) (1906) I. L. R. 33 Calc. 867.
(2) (1907) I. L. R. 34 Calc. 672.
(3) (1910) 12 C. L. J. 328.
(4) (1895) I. L. R. 22 Calc. 924.

1911, holding that a certain application under section 90 of the Transfer of Property Act was not barred by limitation and that the suit must be remanded to the Munsif for determination of what balance is legally recoverable from the defendant otherwise than from the property sold. An appeal was preferred to this Court on the 15th July 1912, and the first ground was with regard to the question of limitation, the second ground was with regard to the order of remand, the third was the general ground that the learned Subordinate Judge has misconstrued the law. That can only refer to the law of limitation which was the only question raised.

As regards the remand, we find that the defendants-appellants have been guilty of the greatest laches. The appeal which they filed on the 4th May 1912 was without the certified copy of the Munsif's judgment and could not be admitted till the 15th July. The *talabana* was not filed till the 10th January 1913, and meanwhile the learned Munsif had heard the remand and decided it in November 1912. We have seldom met with a case where the appellant deserved less consideration from the Court. But as regards the question of limitation, it is of course quite open to him still to argue that.

This is the only point which we can consider. It raises a somewhat new point. The mortgage decree was passed on the 1st April 1905, the mortgage was dated the 2nd March 1901, the due date was 12th February 1902, and the plaint in the mortgage suit was filed on the 11th February 1905. On the authority of the ruling in *Rahmat Karim* v. *Abdul Karim*(1), the plaintiff had his personal remedy at the date of the institution of the suit. The question which has been raised in this case is whether he loses that personal

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right by reason of his not having made the application for personal decree under Order XXXIV, rule 6 within three years of the date of the confirmation of the mortgage sale which took place on the 12th September 1907. The application which he did make was on the 31st January 1911. On that date the new Code of Civil Procedure was in force, and it is argued that Article 181 must necessarily apply to an application of this nature. It was held that the section which corresponded to section 181 in the later Limitation Act, namely Article 178 did not apply to an application by a mortgagee for a supplemental decree under section 90 of the Transfer of Property Act, and since the new Civil Procedure Code has come into force there has been the ruling in the case of *Madhabmoni Dasi* v. *Pamela Lambert*(1), where Mr. Justice Mookerjee in delivering the judgment of the Court follows the decision, to which one of us was a party, in *Rahmat Karim* v. *Abdul Karim* (2), and applies it to Order XXXIV, rule 3, which is the case of order absolute in a mortgage suit.

It is urged that what applies to Order XXXIV rule 3 does not apply to Order XXXIV, rule 6. But we are unable to accede to this contention. Not only are both the cases in our opinion strictly parallel but the rule of law and justice which was the *ratio decidendi* of the case in *Rahmat Karim* v. *Abdul Karim* (2) applies as has been shown by Mr. Justice Mookerjee to both the cases equally. The passage to which we were referred in his judgment may be quoted. "It may be conceded that Article 178 of the Limitation Act of 1877 did not apply to applications beyond the scope of the Civil Procedure Code; but it does not follow that that article or the corresponding article

(1) (1910) 12 C. L. J. 328. (2) (1907) I. L. R. 34 Calc. 672.

of the Limitation Act of 1908 applies to all applications made in the course of the suit. It may be pointed out in the first place that the preamble to the Limitation Act of 1908 states expressly that the object of the Legislature was to consolidate the law of limitation relating to only certain applications to Court; in other words, the Limitation Act does not profess to provide for all kinds of applications to Courts whatsoever. The Act certainly does not apply to applications to the Court to do what the Court has no discretion to refuse"; (and this is one of those matters in which the Court has no discretion to use if it is legally recoverable). The words "legally recoverable" cannot possibly apply to any question of limitation; "nor can the provisions of the Act be held to apply to an application to the Court to terminate a pending proceeding the final order in which has been postponed for the benefit of the defendant or for the convenience of the Court. In cases of this class it has been suggested that the right to make an application may indeed be deemed to accrue from moment to moment. If this view is adopted any exception on the ground of limitation cannot obviously be supported"; and in this connection the learned Judge cites the case in *Rahmat Karim* v. *Abdul Karim* (1), to which we have already referred, and applies it in support of the principle which he here lays down. It is therefore clear that applications under Order XXXIV, rule 6, are not governed by Article 181 of the Limitation Act of 1908 any more than applications for order absolute under Order XXXIV, rule 3.

We are, therefore, of opinion that the learned Judge was right in holding that the suit was not barred by limitation and he was right in making the remand, and we dismiss the appeal and direct that all

(1) (1907) I. L. R. 34 Calc. 672

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costs including the costs in remand be paid by the appellant to the respondent.

We mark our sense of the defendants' dilatory conduct by doubling the ordinary hearing fee and making it two gold mohurs.

S. K. B. *Appeal dismissed.*

APPELLATE CRIMINAL.

Before Holmwood and Chapman JJ.

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June 4.

DEPUTY LEGAL REMEMBRANCER

v.

SITAL CHANDRA PAL.*

Provident Insurance—Company with share capital carrying on business of a provident insurance society—Liability to registration as such before receiving premiums—Provident Insurance Societies Act (V of 1912) ss. 2 (8), 6, 7, 21.

A company having a share capital divided into shares must, if it intends to carry on the business of a provident insurance society, be registered under the Provident Insurance Societies Act (V of 1912) before it receives any premium or contribution.

Oriental Government Security Life Assurance Co. v. *Oriental Assurance Co.* (1) explained.

IN January 1913, a company entitled the "*New King Insurance Co., Ltd.*", with a share capital divided into shares, was started in Calcutta for the purpose of carrying on the business of a provident insurance society, and began to receive premiums without registration under the provisions of the Provident Insurance Societies Act (V of 1912). Two of the directors,

* Government Appeal No. 2 of 1914, against the order of D. Swinhoe, Chief Presidency Magistrate of Calcutta, dated Sept. 20, 1913.

(1) (1913) I. L. R. 40 Calc. 570, 578.