

APPEAL FROM ORIGINAL CIVIL.

Before Mookerjee and Fletcher JJ.

APURBA KRISHNA SETT

v.

RASH BEHARY DUTT.*

Limitation—Mortgage—Order absolute for sale—Application to enforce the order more than 12 years after the date of the order—Limitation Act (IX of 1908) Sch. I, Art. 183.

A suit was brought in 1904 for the enforcement of a mortgage security. The usual preliminary decree under section 88 of the Transfer of Property Act, 1882, was made on the 30th June 1904 and on the 22nd March 1907 the decree-holder applied for and obtained an order absolute for sale under the provisions of section 89 of the same Act. The order was drawn up and signed on the 25th May 1907, but was not otherwise completed and no steps whatever had been taken under it. The present application was made on the 19th May 1919 by the representative of the decree-holder (who had died in the meantime) asking that the representatives of the parties deceased be substituted on the record and that thereupon the order absolute for sale may be completed and the sale proceeded with :—

Held, that a present right to enforce the judgment or order having accrued to the decree-holder on the 22nd March 1907 when the order absolute for sale was pronounced, the present application to enforce the said order is barred by Article 183, Sch. I of the Limitation Act, 1908.

APPEAL by Apurba Krishna Sett from the judgment of Rankin J.

This appeal arose out of an application made in Chambers before Rankin J. in Suit No. 71 of 1904 on the part of the appellant Apurba Krishna Sett for an order that the representatives of parties deceased be substituted on the record and that thereupon the order absolute for sale made in the said suit and

* Appeal from Original Civil, No. 73 of 1919, in Suit No. 71 of 1904.

bearing date the 22nd March 1907 be completed and the sale proceeded with, and that for the purposes aforesaid, all necessary directions be given and that the costs of and incidental to the application be costs in the said sale.

The facts of the case for the purposes of this report sufficiently appear from the judgment.

Rankin J. dismissed the application with costs holding that the application was barred by Art. 183, Sch. I of the Limitation Act, 1908.

His Lordship's judgment was as follows :—

RANKIN J. This is a suit brought in 1904 for the enforcement of a mortgage created by deposit of title deeds. The suit being prior to the Code of 1908, the decree which was given on the 30th June 1904 was a decree for sale under section 88 of the Transfer of Property Act, 1882. The Registrar having made his report on the accounts on the 26th January 1905, and the mortgagor having made default in payment of the amount so found to be due, plaintiff applied for, and on the 22nd March 1907 obtained an order absolute for sale of the mortgaged property under section 89 of the same Act. The order was drawn up and signed on the 25th May 1907, but has not been otherwise completed and until the present application was made on the 19th May 1919 no steps whatever have been taken under it. Meanwhile, the mortgagor defendant died on the 8th September 1910, and the plaintiff on the 26th December 1917. The present applicant is the plaintiff's executor who has obtained probate on the 2nd June 1919 since the making of the application. He asks that the representatives of the parties deceased be substituted on the record, and that thereupon "the order for sale made herein and bearing date the 22nd March 1907 may be completed, and that the sale be proceeded with." To this it is objected that the period of 12 years under Article 183 of the Limitation Act of 1908 has expired; that the order cannot now be enforced; that the order as to substitution would either be useless or else harmful under the proviso to Article 183 and that the application should be dismissed: *Mungul Pershad v. Grija Kant Lahiri* (1).

It is argued for the petitioner, in reply, that the order absolute was itself an order in execution of the decree of 30th June 1904, that the application upon which it was made is not yet terminated or exhausted,

1920
 APURBA
 KRISHNA
 SETT
 v.
 RASH
 BEHARY
 DUTT.

1920

APURBA
KRISHNA
SETT
v.
RASH
BEHARY
DUTT.

RANKIN J.

but is still a pending proceeding in execution, that the present application is not a fresh or substantive application; and that there is absolutely no limit of time for the continuance of these pending proceedings: *Jit Mal v. Jwala Prasad* (1), *Quamaruddin v. Jawahir Lal* (2), *Kedar Nath v. Harra Chand* (3), *Chaluvadi v. Poloori* (4), and *Madhabmani Das v. Lambert* (5).

It is settled by authority that the relation between decree *nisi* under section 88 and an order absolute under section 89 is such that an application for the latter is an application to enforce the former within the meaning of Article 183 [*Amlook Chand Parrack v. Sarat Chunder Mukerjee* (6)], and also an application for the execution of the former within Article 182 [*Batuk v. Muini* (7), *Abdul Majid v. Jawahir Lal* (8).] In view of the unique position of an order absolute, standing midway between the previous decree on one hand, and the ordinary forms of execution that are to follow on the other, I do not think it is inconsistent with this ruling to hold that the relation between these acts of the Court is also such that any applications or proceedings under Order XXI of the Code (by which alone this sale can be effected now) are applications or proceedings to enforce the order absolute, and that they will be in time in this case within 12 years from the date of that order. The reason is that when the Court gives a direction subject to a condition which is to happen or to fail in the future, and afterwards repeats the same direction absolutely, it does so for the very purpose of drawing a new and clear *datum* line to which alone in subsequent proceedings the parties are required, and the Court will consent, to look. I think, therefore, that if this application had been made within 12 years from the date of the order absolute, it would be in time but it is not made within 12 years from the date of the order absolute; and I have, therefore, to consider whether I assent to the proposition that when an application for order absolute has been heard and the order made, there is no period of limitation to any further proceedings.

Now, the principle that a pending application in execution knows no limitation but gives rise to rights which accrue from day to day until it is disposed of, is equally applicable in the Mofussil Courts as in the High Court, and when applicable it is equally fatal to a plea of limitation

- | | |
|--|--|
| (1) (1898) I. L. R. 21 All 155. | (5) (1910) I. L. R. 37 Calc. 796. |
| (2) (1905) I. L. R. 27 All. 334 ;
L. R. 32 I. A. 102. | (6) (1911) I. L. R. 38 Calc. 913 ;
L. R. 42 I. A. 88. |
| (3) (1882) I. L. R. 8 Calc. 420. | (7) (1914) I. L. R. 36 All. 284 ;
L. R. 41 I. A. 104. |
| (4) (1907) I. L. R. 31 Mad. 71. | (8) (1904) I. L. R. 36 All. 350. |

whether raised under Article 181, 182 or 183. But it seems to be well decided that an application made in the present circumstances for execution of an order under section 89, would have to be brought within the time limited by Article 182 if that order had been made by a Mofussil Court: *Troylokya Nath Bose v. Jyoti Pr. kash Nandi* (1) and *Ahsanullah v. Dakkhini Din* (2). It may be and I desire to encumber section 182 with no *ditum* of mine—that the *application* for order absolute is the date from which the time begins to run, and that this is because the execution proceedings have been viewed as being under the decree *nisi*, and the application for order absolute as being within clause 5, Article 182. But the argument to which the petitioner in the present case is compelled to resort, and the cases upon which he founds are quite irreconcilable with the existence of any limitation whatever. I think that the order absolute having been obtained, the mere fact that the path of execution had not been followed to its end, while it means that the suit was a pending suit, and any steps open to the decree-holder could still be taken in the suit, does not mean that the execution proceeding was pending, interrupted or undisposed of, so as to make a right accruing from day to day to have them continued as upon the basis of the same application. That being so, I think that there is a limit to an application for the ordinary forms of execution under the order absolute, and that that limit is in the present case 12 years from the date of a present right to enforce the order absolute under Article 183.

The only remaining question is whether the present right to enforce the order absolute arose when the order was pronounced. I think it did. The signing of the order has got nothing to do with the *right* in this case, any more than in the case of an ordinary judgment for the payment of money. Before a judgment will be enforced an applicant has no doubt to prove his right to do so, and to prove that there is a judgment, but his right exists before he proves it. This 12 years' period of limitation is guarded by the words in the third column of the article, because judgments are often given to take effect in part or whole upon the happening of a future event; not because it takes a little time to perfect an order, and not because it is desired to encourage sloth or negligence. Special and different provision has been made as regards short periods within which appeals have to be brought. In the present case, it is not even true that a copy of the order is required before an application can be made for execution: *Raj Gir v. Iswardhari* (3).

In these circumstances, I dismiss the present application with costs. Certified for counsel.

(1) (1903) I. L. R. 30 Calc. 761. (2) (1905) I. L. R. 27 All. 575, 576.

(3) (1910) 11 C. L. J. 243.

1920

APURBA
KRISHNA
SETT

v.
RASH
BEHARY
DUTT.

RANKIN J.

1920

APURBA
KRISHNA
SETT
v.
RASHI
BEHARY
DUTT.

The petitioner then appealed.

Mr. H. D. Bose, for the appellant. The time ran from the 25th May, 1907, when the order was signed and not from the 22nd March, 1907, when it was pronounced. The appellant could not enforce the order on the day it was made.

Counsel did not press any other point in the case.

The respondents were not called upon to reply.

MOOKERJEE J. This appeal raises the question, whether an application by the appellant to enforce a judgment of this Court, made in the exercise of its Ordinary Original Civil Jurisdiction, is or is not barred by limitation. The suit was instituted for the enforcement of a mortgage security. On the 30th June 1904, the usual preliminary decree under section 88 of the Transfer of Property Act was made. On the 26th January 1905, the Registrar submitted a report on the accounts, and the 18th August 1905 was fixed for repayment. But the amount was not paid, and on the 22nd March 1907 an order absolute was made in accordance with the provisions of section 89. It was, however, not till the 19th May 1919 that the representative of the decree-holder (who had died in the meantime) applied to the Court to enforce his rights and realise his dues under the judgment. Mr. Justice Rankin has held that the application is barred by limitation.

Article 183 of the Schedule to the Indian Limitation Act provides that an application to enforce a judgment, decree or order of any Court established by Royal Charter, in the exercise of its Ordinary Original Civil Jurisdiction, must be made within 12 years from the date when a present right to enforce the judgment, decree or order accrues to some person capable of realising the right. There is a proviso to the Article

which lays down that the period of 12 years shall be computed from the date of payment, acknowledgment or revivor where there has been such payment, acknowledgment or revivor. It is not disputed that the facts of the present case do not bring it within the proviso. Consequently, the question is, has the application been made within 12 years from the date when a present right to enforce the judgment or decree or order accrued to some person capable of realising the right. Such right, in our opinion, accrued to the decree-holder when the order absolute for sale was made on the 22nd March 1907. It has been finally suggested on behalf of the appellant, that the right could not accrue till the order had been filed; but no attempt has been made to support this contention by reference to principle or authorities. The reason is obvious; if the contention of the appellant were to prevail, the result would follow that the period of limitation might be indefinitely extended by reason of the laches of the decree-holder, who might not, as has happened in the case before us, file the decree for years. We may add that no attempt has been made in this Court to reiterate the desperate argument, advanced before Mr. Justice Rankin and rightly overruled by him, that no rule of limitation applies to this matter. In our opinion, the application has been properly dismissed as barred by limitation and this appeal must be dismissed, with separate costs to the two sets of respondents.

FLETCHER J. I agree.

A. P. B.

Appeal dismissed.

Attorney for the appellant : *Jahar Lal Dutt.*

Attorneys for the respondents : *Jogendra Krishna Dutt and Sailendra Nath Ghosh.*

1920

APURBA
KRISHNA
SETT
v.
RASHI
BEHARY
DUTT.

MOOKERJEE
J.