

APPELLATE CIVIL.

Before *Walmsley and B. B. Ghose JJ.*

HAYATUNNESSA CHOWDHURANI

v.

ACHIA KHATUN.*

1923

March 26.

Limitation—Mortgage—Execution of decree—List of properties to be proceeded against, if it can be supplemented subsequently.

In an application for execution of mortgage-decree passed under the Code of Civil Procedure, 1882 :—

(i) In computing the period of limitation, time begins to run from the date of the final decree.

(ii) It is not obligatory on the decree-holder to obtain a fresh decree in proper form to enable him to proceed to realise the debt by proceeding against properties other than the mortgaged properties because the final decree did not embody the reliefs granted in the form prescribed by the Code of 1908.

A decree-holder should not be allowed, by subsequent application made after the expiry of the period of limitation for execution of the decree, to add other properties to the list given in his original application, presented within the period of limitation.

Asgar Ali v. Troilokya Nath Ghose (1) followed.

Gaanendra Kumar Roy Choudhury v. Rishendra Kumar Roy (2) distinguished.

APPEALS by Hayatunnessa Chowdhurani, the decree-holder.

One Hayatunnessa Chowdhurani obtained an *ex parte* mortgage decree against the respondents on the 22nd November, 1907. The decree was signed on the 27th November following. The material portion of the decree ran as follows :—“The defendants other than defendants Nos. 13, 14 and 15 do pay to

(1) (1890) I. L. R. 17 Cal. 631. (2) (1918) 22 C. W. N. 540.

* Appeals from Orders, Nos. 399 of 1920 and 336 of 1921, against the orders of S. C. Ghose, District Judge of Noakhali, dated Aug. 24, 1920 and May 11, 1921, respectively.

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“the plaintiff the sum of Rs. 3,172-1 *a.* in claim and
 “the sum of Rs. 375-13 *as.* on account of costs of
 “this suit within six months from this day; that in
 “default the plaintiff will be competent to realise his
 “claim by auction sale of the properties mentioned
 “in the plaint excepting the properties Nos. 1 and 2.
 “If the amount claimed be not realised by sale of the
 “mortgaged properties, then the plaintiff shall be
 “competent to execute his decree against the other
 “properties of the defendants other than the defend-
 “ants Nos. 13, 14 and 15; and that if the whole
 “amount of claim be not realised thereby, the plaintiff
 “will then be competent to execute his decree
 “against the person of the defendant No. 1; that the
 “plaintiff do pay to the defendants Nos. 13, 14 and
 “15 the sum of Rs. 236-11-3 on account of their costs.”

On the 6th June, 1908, an application was made for making the decree absolute and on the 4th July following an *ex parte* order was passed by simply adding the words “Decree is made absolute.” After making several applications for execution, the decree-holder made this present application for execution on the 29th June, 1920. Judgment-debtor No. 5, Achia Khatun, preferred an objection under section 47 of the Code of Civil Procedure, 1908. She contended, *inter alia*, that there was no decree under Order XXXIV, rule 6 of the said Code or section 90 of the old Transfer of Property Act and hence there was no decree capable of execution and that the decree was barred by limitation.

The District Judge allowed the objections and dismissed the application on the 11th May, 1921, holding that it was barred by the rule of 12 years’ limitation, time running from the date of the preliminary decree excluding the period of grace of six months, the decree-holder having failed to show that he had

obtained the order absolute under section 89 of the Transfer of Property Act or a decree under the old section 90 of that Act or under Order XXXIV, rule 6 of the Code of Civil Procedure, 1908, within 12 years. A further objection taken at the hearing that the decree had never been made absolute was not allowed to be raised, the decree-holder not being ready to meet the objection as to this question of fact. It did not appear from the record when the decree had been made absolute. The other objections were found in favour of the decree-holder. Appeal No. 336 of 1921 was against this order.

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While this execution case was pending, the decree-holder applied on the 21st August, 1920, for amendment of the execution petition by adding other properties which was also disallowed on the 24th August, 1920. as inequitable, the judgment-debtors never protesting in the earlier executions. Out of this arose appeal No. 399 of 1920.

Both the appeals were heard together.

Babu Dharendra Lal Kastgir (with him *Babu Nagendra Nath Bose*), for the appellant. A preliminary decree or a decree *nisi* is a conditional decree which must be made absolute before execution can issue for sale of the property. Unless a decree is made absolute, there is in fact no decree capable of execution: *Ajudhia Pershad v. Baldeo Singh* (1). In this case an order for decree absolute was made on the 4th July, 1908. It is true that no final decree was drawn up separately. On the back of the preliminary decree it was written that the decree was made absolute. A separate decree should have been drawn up, but formerly, separate decree absolute was generally not drawn up and execution used to be issued after

(1) (1894) I. L. R. 21 Calc. 818.

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the order for decree final was passed; *Ashfaq Husain v. Gauri Sahai* (1). The period of limitation is 12 years from the date of the decree absolute: *Harish Chandra Shaha v. Chandra Mohan Dass* (2), *Mahabir Prasad v. Sital Singh* (3).

Amendment of execution petition by adding other properties cannot be disallowed: *Gnanendra Kumar Roy Choudhry v. Rishendra Kumar Roy* (4), *Mohini Mohan Sirkar v. Navadwip Chandra Biswas* (5).

Babu Jatis Chandra Guha, for the respondents. The order dated 4th July, 1908, making the decree absolute was not an order as contemplated by section 89 of the Transfer of Property Act. Hence it was unenforceable and, under section 48 of the Code of Civil Procedure, time would run from the date of the decree, *i.e.*, the 22nd November, 1907. See *Lakhi Narain Jagdeb v. Chowdhury Kirtibas Das* (6), *Abdu Majid v. Jawahir Lal* (7), *Maharaja of Darbhanga v. Homeshuar Singh* (8), *Sachindra Nath Roy v. Maharaj Bahadur Singh* (9).

Babu Dharendra Lal Kastgir, in reply. The case cited last by my friend is inapplicable.

WALMSLEY J. These two appeals are preferred by the decree-holder. The facts necessary for understanding the case are as follows: a preliminary decree upon a mortgage was passed on the 22nd November, 1907, allowing six months' grace to the mortgagor. On the application of the decree-holder, a final decree was made on the 4th of July, 1908; but the reliefs granted were not embodied in a formal decree in the form now prescribed by the new Civil Procedure Code. The

(1) (1911) I. L. R. 33 All. 264.

(2) (1900) I. L. R. 28 Calc. 113.

(3) (1897) I. L. R. 19 All. 520.

(4) (1918) 22 C. W. N. 540.

(5) (1918) 47 Ind. Cas. 911.

(6) (1913) 18 C. L. J. 133.

(7) (1914) I. L. R. 36 All. 350.

(8) (1920) L. R. 48 I. A. 17;

25 C. W. N. 337.

(9) (1921) I. L. R. 49 Calc. 203.

Judge's order simply stated that the decree was made absolute as applied for. After various applications for execution, the application from which these appeals arise was presented on the 29th of June, 1920. The learned Judge by his order of the 11th May, 1921, held that the application was barred by limitation. He over-ruled several objections preferred by the judgment-debtor; but, when he came to the last point which was to the effect that the application was presented more than 12 years after the date of the decree, he allowed that, and on that ground, dismissed the application for execution. The learned pleader who appears for the respondent, the judgment-debtor, has tried to uphold this order, first, on the ground that time must run from the date of the preliminary decree and, secondly, on the ground that the decree-holder ought to have obtained a fresh decree before he could proceed to realize the debt by proceeding against properties other than the mortgaged properties. It appears to me that there is no substance in either of these arguments. The preliminary decree was incapable of execution and before the Procedure Code of 1908 came into force, it was often the case that decrees absolute were drawn up in an informal manner. Inasmuch, therefore, as the preliminary decree could not be executed, time must begin to run from the date of the final decree, however informally it was expressed. As to the second contention, there is no warrant for the view that a fresh decree was necessary before the decree-holder was entitled to enforce his decree against properties other than those mentioned in the decree. In my opinion, therefore, the appeal against the order of the 11th May, 1921, that is, Appeal No. 336 of 1921, should be allowed.

Then we come to the earlier appeal No. 399 of 1920. That is an appeal against the order of the 24th August,

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1920. The decree-holder made his application, as already mentioned, on the 29th of June, 1920 in which he mentioned certain properties against which he wanted to proceed. On the 21st August, he put in a petition asking for permission to be allowed to add several other properties to the list given in his original application. The learned Judge held that he was not entitled to do so. On behalf of the appellant, our attention has been drawn to the case of *Gnanendra Kumar Roy Choudhry v. Rishendra Kumar Roy* (1). The circumstances of that case appear to me to be very different from those in the present case and I think we ought to follow the principles laid down in the Full Bench decision of *Asgar Ali v. Troilokya Nath Ghose* (2). Consequently, in my opinion, appeal No. 399 of 1920 against the order of the 24th August, 1920, should be dismissed.

The result of both orders will be that the decree-holder will be entitled to proceed with his application for execution against the properties mentioned in the application as it was at the time of presentation on the 29th of June, 1920. As success is equally divided between the parties, there will be no order as to costs.

(1) (1918) 22 C. W. N. 540.

(2) (1890) I. L. R. 17 Cal. 631.

GHOSE J. I agree.

S. M.