

## APPEAL FROM ORIGINAL CIVIL.

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*Before Rankin C. J. and Costello J.*

PRADYUMNAKUMAR MALLIK

v.

GOPENDRA MALLIK.\*

1932

April 20, 21, 26.

*Limitation—Mortgage suit—Application for personal decree against mortgagor—Costs—Taxation—Code of Civil Procedure (Act V of 1908), O. XXI, r. 92; O. XXXIV, rr. 2, 4, 5, 6; Sch. I, App. D, form Nos. 4, 8—Indian Limitation Act (IX of 1908), Sch. I, Art. 181.*

Limitation for the decree-holder's application for a personal decree for the balance of his dues against the mortgagor begins to run from the date of the order confirming the sale of the mortgaged property irrespective of the fact of non-completion of the taxation of the decree-holder's costs.

The costs in a mortgage suit are in no way different to costs awarded in any other suit and are to be regarded as a liquidated amount capable of ascertainment.

Order XXXIV, rule 6, of the Code of Civil Procedure is not limited by the form No. 8 in the appendix D to the Code, which form is provided merely for use and adaptation according to the circumstances of the case.

APPEAL from the judgment of Lord-Williams J.

The material facts appear from the judgment.

*Pugh* and *S. B. Sinha* for the appellant.

*Sir N. N. Sircar*, Advocate-General, and *S. C. Mitter* for the respondent.

*Cur. adv. vult.*

RANKIN C. J. This suit was brought, on the 26th July, 1921, by two persons of the name of Ray—mortgagees under an English mortgage, dated the 13th February, 1920, against two sets of defendants—against a first set as mortgagors and against a second set as puisne mortgagees. The suit was an ordinary suit for the enforcement of the mortgage. On the 18th of August, 1921, a receiver of the mortgaged property was appointed; on the 12th of April, 1922,

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a preliminary mortgage decree for sale was passed in the usual form. It was a decree under rule 4 of Order XXXIV of the Civil Procedure Code.

The usual form of mortgage decree on the Original Side of this Court is not literally and exactly in conformity with form No. 4 of appendix D to the first schedule of the Code, which has reference to clause (b) of rule 2 of Order XXXIV. It is usually necessary to direct the taking of accounts as contemplated by clause (a) of that rule. In the present case, apart from directions given for the benefit of the puisne mortgagees, the preliminary decree directed accounts to be taken of what would be due to the plaintiffs for principal and interest on a certain future date, and it further directed that the plaintiffs' costs of the suit should be taxed as between attorney and client. It then provided that, upon the defendants or any one of them, within a certain time, paying what should be reported to be due for principal and interest together with the plaintiffs' taxed costs with interest thereon at 6 per cent. per annum from the date of taxation until realisation, the defendants should get back the property. But that if such payments were not made by the time appointed, certain further interest and costs should be added as part of the amount payable to the plaintiffs under the decree; that the property be sold and the money to arise by the sale be paid into Court and applied first in payment of the amount payable to the plaintiffs under the decree, and so forth in accordance with rule 4 of Order XXXIV. In accordance with the rules of the High Court, a clause was inserted to the effect that, if the money to arise by the sale should not be sufficient, the plaintiffs should be at liberty to apply for a personal decree for the amount of the balance.

In courts other than the High Court, the costs of the suit are not referred to a Taxing Officer for taxation, but are summarily assessed and are inserted in the decree itself in the manner disclosed by form No. 1 of appendix D.

The Registrar took the accounts under this decree and, on the 21st of August, 1922, made his report stating what would be due for principal and interest on the security on the 12th of March, 1923. The plaintiffs' solicitors, however, had not carried in their bill of costs for taxation at this stage. On the 16th of April, 1923, the final decree for sale was passed, which simply recited the preliminary decree and the fact that payment thereunder had not been made. It ordered the premises to be sold and gave leave to the plaintiffs to bid, with the usual consequential directions. It may be noticed that the decree provided for the plaintiffs' costs of the suit subsequent to the preliminary decree and for taxation thereof. The present appellant thereafter took an assignment of the rights of the plaintiffs and obtained an order on the 25th of August, 1924, substituting him in their stead as the plaintiff.

The mortgaged property was thereafter sold by the Registrar in different lots, the last lot being sold to the present appellant on the 27th of February, 1926. This sale was confirmed by an order of the Court made on the 29th of March, 1926.

On the 4th of December, 1931, the appellant, by notice of motion, instituted the proceeding out of which this appeal arises. In this proceeding, he asked for a personal decree to be passed against the mortgagor-defendants for the sum of Rs. 2,67,513, as being the balance due to him after realisation of the mortgaged property. The learned Judge has dismissed this application on the ground that it is barred under Article 181 of the Schedule to the Limitation Act of 1908, which requires the application to be made within three years from the time when the right to apply accrues.

That Article 181 is applicable was decided by this Court in *Pell v. Gregory* (1) and that the date from which time begins to run is the date of the order made under Order XXI, rule 92, was decided in

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(1) (1925) I. L.R. 52 Calc. 828.

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*Krishnabandhu Ghatak v. Panchkari Saha* (1). *Primâ facie*, therefore, the appellant's right to apply for a personal decree was barred on the 29th of March, 1929. Before the learned Judge and before us the appellant has sought to avoid this conclusion by reason of the fact that he did not carry in his bill of costs for taxation till 1930 and 1931. The two allocaturs he holds are dated the 9th of May, 1930, and the 8th of August, 1931. This is the single point submitted for our consideration and it is the only point dealt with in the judgment of the learned Judge. Other points are taken in the memorandum of appeal, but we have not been asked to consider them.

On behalf of the appellant, Mr. Pugh does not contend that there is any need in the High Court to have the costs of suit taxed before applying for a personal decree, which in this Court, in a case like the present, usually recites the amount of the net proceeds of sale, the amount of the plaintiff's claim for principal and interest and the difference between these two sums, and then directs the defendant to pay to the plaintiff this difference with decretal interest at 6 per cent. per annum and also his costs of the suit. He contends, however, that he is not obliged to ask for a decree in this form, and that if we look at form No. 11 of appendix D as it stood in 1929, or form No. 8 of the appendix as it now stands, we will find that the amount due to the plaintiff in respect of costs is contemplated as having been ascertained. He says, accordingly, that he is entitled to ask for a decree for a definite sum of money which would include everything including all costs, except the costs of this application for a personal decree.

I agree with the learned Judge in thinking that this contention is unsound. The object of the personal decree is to give to the plaintiff a remedy not so far given to him by the preliminary or the final decree for sale; and to give him this remedy only after compelling him to give credit to the

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defendant for the sale proceeds. The fact that the forms contemplate that the costs have either been assessed at a specific sum by the earlier decrees or can there and then be assessed is explained by the circumstance that courts in India have ordinarily no taxing master and no procedure for the carrying in of bills of costs for taxation. The High Court, on its Original Side, like the courts in England, assesses costs on different principles and by a more elaborate machinery. Where it is clear that, apart from the costs, a heavy balance is due to the plaintiff upon his mortgage, the personal decree, which, for the first time makes the mortgagor liable for the payment of costs, is in no way different from any other decree which awards the costs of a suit. These costs are not like an award of damages, but are to be regarded as a liquidated amount capable of ascertainment. Rule 6 of Order XXXIV speaks of "the amount due to the plaintiff", "the net proceeds of the sale" and "the balance". The rule makes no specific reference to the form and is not limited by the form which is provided merely for use and adaptation according to the circumstances of the case. Article 181 of the Limitation Act is a residuary Article adapted to many different classes of application. The words in the third column are only the expression of a broad common law principle. They have to be interpreted and applied according to the substance of each case.

In the present case, as it is not disputed that the plaintiff in the ordinary way could have obtained a personal decree in the ordinary form for the balance, including what was due to him for costs, I agree with the learned Judge in thinking that the argument for the appellant cannot be accepted and this appeal must therefore be dismissed with costs.

COSTELLO J. I agree.

*Appeal dismissed.*

Attorney for appellant: *M. N. Sen.*

Attorney for respondent: *P. C. Ghose.*

A. K. D.