APPELLATE CIVIL.

Before Mukerji and Mitter JJ.

KRISHNABANDHU GHATAK

v.

PANCHKARI SAHA.*

1930

Aug. 7, 12.

Limitation—Right to apply for decree for balance—Time of accruing—Sale—Confirmation—Code of Civil Procedure (Act V of 1908), O. XXI, r. 92; O. XXXIV, rr. 5, 6—Indian Limitation Act (IX of 1908), Sch. I, Art. 181.

The right to apply for a decree against the defendant for the balance, under Order XXXIV, rule 6, of the Code of Civil Procedure, does not accrue until the court has put a seal of finality to the proceedings by confirming the sale under Order XXI, rule 92.

Such an application is governed by Article 181 of Schedule I of the Limitation Act.

Pell v. *Gregory* (1) referred to.

Once this right has accrued time begins to run and the uncertainty caused by an appeal or other proceedings taken need not by itself be held sufficient to suspend the operation of the Statute or to entitle the plaintiff to get a deduction.

Hari Mohan Dalal v. Parmeshwar Shau (2) explained.

FIRST APPEAL by the defendants.

The facts of the case, out of which this appeal arose, appear in the judgment under report herein.

Annadacharan Karkun for the appellants.

Gopalchandra Das, *Bhubanmohan Saha* and *Bishwanath Ray* for the respondents.

Cur. adv. vult.

MUKERJI J. The defendants, who unsuccessfully resisted an application for a decree for the balance under Order XXXIV, rule 6, Civil Procedure Code, have preferred this appeal. They took four objections, which were all overruled, and two of them have been pressed before us as of any substance.

*Appeal from Original Decree, No. 61 of 1928, against the decree of Shibchandra Sil, Subordinate Judge of Mymensingh, dated July 28, 1927.

(1) (1925) I. L. R. 52 Calc. 828. (2) (1928) I. L. R. 56 Calc. 61.

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The final decree for sale was passed on the 18th June, 1921. The sale was held on the 28th October, 1922, and was confirmed on the 26th June, 1925. The application for a decree for the balance was made on the 27th May, 1926. It is conceded, and indeed cannot be disputed, that the application is governed by Article 181 of Schedule I of the Limitation Act [*Pell* v. *Gregory* (1)]. This is the Article, which the Subordinate Judge has applied. He has, however, observed,—"I think that the time, from "which limitation would run, is the date of "confirmation of the sale, inasmuch as, unless and "until the sales were confirmed by the court after "disposing of all objections against it, the deficiency "in the amount could not be ascertained for the "purpose of Order XXXIV, rule 6; and until this "could be ascertained, the plaintiffs' right to apply "could not accrue." It is said on behalf of the appellants that the right to apply arose on the sale having taken place, that with some foresight deficiency could be ascertained, and that, if the decree-holders are permitted to wait till the objections are decided, they might as well urge with propriety that they are entitled to wait until an Appeal or even a Second Appeal is disposed of, which would prevent their right to apply from accruing for an indefinite time. Such a view, it is said, would militate against the view of Article 181 taken in the case of *Hari Mohan Dalal* v. *Parmeshwar Shau* (2). The question, that arises upon a plain reading of the Article, is when did the right to apply accrue for an application for the balance; or, in other words, what was the earliest point of time, at which it could be said that it had arisen. That point of time can in no event be earlier than when, in the words of Order XXXIV, rule 6, "the net proceeds of any sale held under the last "preceding rule are found insufficient to pay the "amount due to the plaintiff." Now, on a sale taking place and the bid being accepted by the court, the person declared to be the purchaser has to deposit

(1) (1925) I. L. R. 52 Calc. 828. (2) (1928) I. L. R. 56 Calc. 61.

forthwith twenty-five *per cent.* of the purchase money, and on failure thereof the property has to be resold (Order XXI, rule 84). The full amount of purchase money has to be paid by the fifteenth day from the sale (Order XXI, rule 85), and in default thereof a resale takes place (Order XXI, rule 86). The sale may be set aside on deposit, within thirty days of sale, of five *per cent.* of the purchase money for payment to the purchaser and of the dues of the decree-holder for payment to him (Order XXI, rule 89). This provision has been held as applying to a sale in execution of a mortgage decree and has now been expressly included by the legislature in the amendment of Order XXXIV, rule 5, introduced in 1929. It may also be set aside on an application, made within thirty days of it, on the ground of irregularity or fraud. So many contingencies intervening, it is impossible to hold that the plaintiff is in a position to ascertain what the net proceeds of the sale amount to or to find out whether and, if so, to what extent, they are insufficient to pay the amount due to him. It is, therefore, only reasonable to hold that the right to apply does not accrue until the court has put a seal of finality to the proceedings by confirming it under Order XXI, rule 92. Once the right accrues, time begins to run and the uncertainty, caused by an appeal or other proceedings taken, need not by itself be held sufficient to suspend the operation of the Statute or to entitle the plaintiff to get a deduction. We are of opinion that the view taken by the Subordinate Judge is entirely correct. Nothing, that has been said in *Hari Mohan Dalal* v. *Parmeshwar Shau* (1), in our opinion, militates against this view.

The next point urged is that the right to a decree for the balance is barred, because the suit itself was instituted beyond time. This contention has no substance, because there were at least two payments made within three years of the suit. They were, it is true, made by the defendant No. 2 alone; but the

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evidence satisfies us, as it did the learned Subordinate Judge, that they were made with the hand of the defendant No. 2, from the joint family funds and presumably under the directions of the defendant No. 1, who was the *kartâ* of the family consisting of all the defendants.

The appeal is dismissed with costs; hearing fee three gold mohurs.

MITTER J. I agree.

Appeal dismissed.

G. S.