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June 5

Before Mr. Justice Banerji and Mr. Justice Aikman.

MAHABIR PRASAD (DECREE-HOLDER) v. SITAL SINGH AND OTHERS  
(JUDGMENT-DEBTORS).\*

Act No. IV of 1882 (Transfer of Property Act) sections 88 and 89—Order absolute for sale—Execution of decree—Limitation—Act No. XV of 1877, (Indian Limitation Act) Sch. II, Art. 179.

The period of limitation for execution of a decree for sale under section 88 of the Transfer of Property Act begins to run from the date of the granting of an order absolute for sale under section 89 of the Act, without which order the decree cannot be executed, and not from the date of the decree itself. *Oudh Behari Lal v. Nageshar Lal* (1) and *Mulchand v. Mukta Pal Singh* (2) referred to.

THE facts of the case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal* and Pandit *Baldeo Ram Dave*, for the appellant.

Munshi *Gobind Prasad*, for the respondents.

BANERJI, J.—This appeal arises out of proceedings relating to the execution of a decree. The appellant, decree-holder, obtained on the 17th of December, 1886, from the Court of first instance a decree for sale on a mortgage, which was affirmed in appeal on the 10th of August, 1887. The decree was one under section 88 of Act No. IV of 1882. On the 15th of July 1890, the decree-holder applied for an order absolute for sale under section 89 of that Act, and on the 20th September, 1890, the order asked for was made. He then applied for sale in execution of his decree on the 12th September, 1893. The lower appellate Court has held that this application was beyond time, having been made after the expiry of three years from the date of the application for an order under section 89 and that execution is therefore barred. In my opinion the court below was wrong. A decree-holder who obtains a decree under section 88 of the Transfer of Property Act is not entitled to apply for the sale of the mortgaged property upon the passing of that decree. His right to obtain execution by sale of

\* Second Appeal No. 383 of 1895 from an order of V. A Smith, Esq., District Judge of Gorakhpur, dated the 5th June 1894, reversing an order of Kunwar Mohan Lal, Subordinate Judge of Gorakhpur, dated 3rd March 1894.

(1) I. L. R., 13 ALL, 278.

(2) Weekly Notes, 1896, page 100.

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the mortgaged property only accrues to him, and the decree made under section 88 becomes capable of execution, on his obtaining an order absolute for sale under section 89. Until that order has been passed, the mortgagor's right to redeem does not become extinct, and it is only when the right of redemption of the mortgagor is gone that the mortgagee can cause the mortgaged property to be sold by applying for execution of the decree passed under section 88. His right to execute that decree thus depends upon the passing of the order absolute for sale under section 89, and, as I have said, since he could not apply for sale until that order was made, his application for execution would be within time if presented within three years of the date of the order under section 89. In this case the application for execution was made before the expiry of three years from the date of the order under section 89. It may be that the application was an application to execute, not the order, but the decree itself; but the right to execute the decree did not accrue to the decree-holder, and the decree did not become capable of execution, until the order was obtained. In this view the application was not time-barred, and the Court below has erred in holding it to be so. It is true that in *Oudh Behari Lal v. Nageshar Lal* (1) it was held that an application for an order absolute for sale under section 89 of the Transfer of Property Act is a proceeding in execution and may be made to the Court executing the decree, but that is not the question before us. The question which arises in this appeal is whether a decree-holder could apply for the execution of a decree obtained by him under section 88 until he had obtained an order under section 89. As, in my opinion, he could not do so, his application, if made within three years from the date of the order under section 89, would be an application within time. I do not mean to imply that it is necessary for the decree-holder to make a separate application for an order under section 89, though that would be a preferable course to pursue. The prayer for an order under that section and for the sale of the property may be contained in the same application, as

(1) I. L. R., 18 All., 278.

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held in the case referred to above. I would allow the appeal, and, setting aside the decree of the lower appellate Court, restore that of the Court of first instance with costs here and in the lower appellate Court.

AIKMAN, J.—The question raised by this appeal was considered by me in *Mulchand v. Mukta Pal Singh* (2). For the reasons given in my judgment in that case I concur with my brother Banerji in thinking that this appeal should be allowed and in the order proposed by him.

*Appeal decreed.*

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June 7.

*Before Mr. Justice Banerji and Mr. Justice Aikman.*

WAZIR SINGH (DEPENDANT) v. THAKUR KISHORI RAWANJI THROUGH SHIB GOPAL AND ANOTHER (PLAINTIFFS).\*

*Act No. XII of 1881 (N.-W. P. Rent Act) section 185—Civil Procedure Code section 623—Review of judgment—Section 623 of the Code of Civil Procedure not applicable to cases under the Rent Act.*

Section 623 and the following sections of the Code of Civil Procedure which deal with reviews of judgments have no application to suits and proceedings under the N.-W. P. Rent Act, 1881.

Where section 185 of Act No. XII of 1881 applies, it is only in cases where there is no right of appeal that a review can be granted, and that only on the special ground provided for in the Act itself.

THE facts of this case sufficiently appear from the judgment of the Court.

*Babu Satya Chandar Mukerji*, for the appellant.

The respondents were not represented.

BANERJI and AIKMAN, JJ.—This was a suit for profits by a co-sharer against the lambardar under cl. (b) of section 93 of Act No. XII of 1881. The claim was to recover Rs. 104-12-6. On the 29th of May, 1893, the Court of first instance made a decree in favour of the plaintiffs for Rs. 15-12-5. The plaintiff did not appeal from that decree, although an appeal lay under section 189

\* Second Appeal No. 584 of 1895 from a decree of H. G. Pearse, Esq., C.S., District Judge of Agra, dated the 19th February 1895, confirming a decree of Maushi Narain Singh, Assistant Collector of Muttra, dated the 29th September 1893.