

1898

GIRDHAR
DAS
v.
HAR
SHANKAR
PRASAD.

temporarily withheld. We allow this appeal. We set aside the decree of the lower Court with costs, and we direct that Court to issue a certificate of non-satisfaction if the decree has not been satisfied. The appellants will have their costs in this Court.

Appeal decreed.

1898

April 22.

Before Mr. Justice Banerji and Mr. Justice Aikman.

HAMID-UD DIN (JUDGMENT-DEBTOR) v. KEDAR NATH (DECREE-HOLDER).^{*}
Act No. IV of 1882 (Transfer of Property Act) section 90—Application for a decree over against non-hypothecated property—Balance legally recoverable—Limitation.

On an application under section 90 of the Transfer of Property Act, 1882, the time to be looked at in considering whether the balance sought to be recovered is legally recoverable from the mortgagor is the date of the institution of the suit and not the date of the making of the application under section 90. *Bageshri Dial v. Muhammad Naqi* (1) referred to.

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

Mr. *Amir-ud-din* for the appellant.

Mr. *Abdul Majid* for the respondent.

BANERJI and AIKMAN JJ.—This appeal arises out of an application for a decree under section 90 of Act No. IV of 1882. The judgment-debtor is the appellant before us, and the grounds taken by him are two:—first, that the application was barred by limitation, and secondly, that the matter is *res judicata* in consequence of the decree passed in the original suit. The suit was one for sale upon a mortgage of the 16th of September 1889. The amount secured by the mortgage was payable on demand, and the mortgage-deed was a registered instrument. The suit for sale was brought on the 29th of January 1891. The plaintiff asked for a decree not only for sale of the mortgaged property, but also against the person and the other property of the mort-

^{*} Second Appeal No. 165 of 1896 from an order of Pandit Raj Nath Sahib, Subordinate Judge of Moradabad, dated the 16th December 1895, reversing a decree of Babu Bhawani Chandar Chakravarti, Munsif of Sambhal, dated the 7th September 1895.

1898

 HAMID-UD-
 DIN
 v.
 KEDAR
 NATH.

gagor. The Court of first instance refused to make a decree against the person of the mortgagor and against the other property, and limited its decree to one for sale of the mortgaged property. That decree was affirmed by the Court of first appeal, which held that the claim for a decree against the mortgagor's person and other property was premature. The mortgagee caused the mortgaged property to be sold in execution of the decree obtained by him. The proceeds of the sale having proved insufficient to pay the amount due to him, he made the present application on the 3rd of August 1895 for a decree under section 90 of Act No. IV of 1882. It is contended that since the Court in the original suit refused to make a decree against the person of the mortgagor and against non-hypothecated property, it is not open to the decree-holder now to ask for such a decree under section 90. We are unable to accede to this contention. We agree with the observations contained in the judgment of this Court in *Musahab Zaman Khan v. Inayat Ullah* (1). In that judgment it was observed:—"In our opinion section 13 of the Code of Civil Procedure would not apply to an application under section 90 for a decree, no matter whether the plaintiff had or had not claimed originally in his suit subsequent relief, or whether, if claimed, such subsequent relief, had been allowed or disallowed by the Court when making the decree under section 88, the time for adjudicating on the claim for subsequent relief not arriving until the decree under section 88 had been exhausted." As regards the second plea, namely, that of limitation, we have to consider whether, under section 90, the balance which must be legally recoverable should be a balance which might be legally recoverable on the date of the institution of the suit or on the date of the application for a decree under the section. We are clearly of opinion that the former is the date which must be looked to. If we were to hold otherwise, serious injustice might result. The debt might be a debt not barred by limitation and legally recoverable from the mortgagor personally on the date

(1) I. L. R., 14 All., 513.

1898

HAMID-UD-
DIN
v.
KEDAR
NATH.

of the institution of the suit, if the mortgagee chose to ask for a decree against his person only. If he sued for sale, the proceedings connected with the sale might be protracted, as they often are, for such a length of time that the mortgagee's personal remedy, if he were to claim such remedy after the sale, would be barred. This certainly could not have been contemplated by the Legislature. Our view is supported by the observations contained in the ruling already quoted, and also by the judgment of our brother Burkitt in *Bageshri Dial v. Muhammad Naqi* (1). For these reasons we are of opinion that if the balance would have been legally recoverable from the mortgagor otherwise than out of the mortgaged property at the date of the institution of the suit, the mortgagee would be entitled to a decree under section 90. We have next to consider whether on the 29th of January 1891, when the suit of the decree-holder was brought, the balance now sought to be realized was legally recoverable personally from the mortgagor. The lower appellate Court has found that payments were made of interest as such on the 22nd of June 1884 and the 26th of February 1886. As the period of limitation for a suit personally against the debtor was six years, by reason of the mortgage-deed being registered, these payments save the operation of limitation under section 20 of the Indian Limitation Act, as the first payment was made within six years of the date of the bond, that being the date on which limitation began to run, and the suit was brought within six years of the date of the second payment. Moreover, the lower appellate Court has found that letters acknowledging liability were written by the debtor on the 13th of September 1885 and the 17th of June 1888; from the dates of those letters also the suit was, with reference to section 19 of the Limitation Act, within time. For the above reasons we hold that the balance now claimed was legally recoverable, and the lower appellate Court has rightly overruled the objection of the judgment-debtor.

We dismiss this appeal with costs.

Appeal dismissed.

(1) I. L. R., 15 All., 331.