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Transfer of Property Act, its object being to have an order made debarring the judgment-debtor from all right to redeem the mortgaged property. I am unable sufficiently to distinguish proceedings under section 89 from those under section 87 of the Transfer of Property Act, so as to be able to say that the former are, and the latter are not, proceedings in execution. I must hold, following the ruling of this Court quoted above, that the present application is an application in execution to which the provisions of art. 179 of sch. II of the Limitation Act apply. It is admitted that a period of more than three years has elapsed between the date of the decree and the date of the application. The application was therefore time-barred when made. I allow this appeal, and, setting aside the decree of the Court below, restore the decree of the Court of first instance and dismiss the decree-holder's appeal to the lower appellate Court with costs.

*Appeal decreed.*

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April 5.

*Before Mr. Justice Know.*

ANWAR-UL HAQ (PLAINTIFF) v. JWALA PRASAD (DEFENDANT)\*

*Pre-emption—Mortgage—Limitation—Date of accrual of cause of action—Act No. IV of 1882 (Transfer of Property Act) sections 86 and 87.*

*Held* that where a right of pre-emption arises on the foreclosure of a mortgage under the Transfer of Property Act, 1882, the right to sue for pre-emption accrues, not from the date fixed in the decree under section 86 as the date upon which the payment is to be made by the mortgagor, but from the date on which the mortgagee obtains an order absolute under section 87 of the said Act. *Raghubir Singh v. Nandu Singh* (1); *Ali Abbas v. Kalka Prasad* (2); and *Poresh Nath Mojumdar v. Ramjodu Mojumdar* (3), referred to.

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

Munshi *Ram Prasad*, for the respondent.

\* Second Appeal No. 1014 of 1896 from a decree of F. W. Fox, Esq., District Judge of Jhansi, dated the 1st October 1896, reversing a decree of Maulvi Muhammad Tajammal Husain, Munsif of Orai, dated the 9th June 1896.

(1) Weekly Notes, 1891, p. 134.

(2) I. L. R., 14 All., 405.

(3) I. L. R., 16 Calc., 246.

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KNOX J.—The question which arises for determination in this second appeal is whether a right of pre-emption accrues from the date upon which a mortgagor is, under a decree given under section 86 of the Transfer of Property Act of 1882, declared absolutely debarred of all rights to redeem the property, or from the date on which the mortgagee obtains an order absolute in terms of section 87 of the same Act. In order that the question may be more clearly apprehended, it will be well to set out the facts out of which this question arises. Har Prasad was the owner of the property, the subject matter of this appeal. He transferred his interests under a deed of conditional sale to the father of one Mata Din. On the 11th of April 1893 Mata Din sued for foreclosure, and obtained a decree ordering Har Prasad to pay to the plaintiff or into Court the sum due on or before the 11th of October 1893, and declaring further that if the payment was not made on or before that date, Har Prasad would be absolutely debarred from all rights to redeem the property. The amount was not paid by the time fixed, and has not up to the present been paid. On 15th of March, 1894, Mata Din sold his right under his decree of the 11th of April 1893 to Jwala Prasad, the present respondent, and on the 13th of April 1894 Jwala Prasad got his name entered in the village papers as mortgagee. On the 9th of March, 1895, Anwar-ul Haq, the present appellant, purchased a share in the village in which the property in appeal is situated. Upon the 6th of April 1895 Jwala Prasad applied to the Court for, and obtained, an order absolute in the terms of section 87 of the Transfer of Property Act, and on the 2nd of April 1896 Anwar-ul Haq instituted the present suit. The defence made to the suit was *inter alia* that Anwar-ul Haq was not a sharer in the village on the 11th October 1893, when the date fixed by the Court for payment of the mortgage money by Har Prasad expired; that therefore he had no right of pre-emption; that on the said date the respondent's title of conditional vendee had become that of an absolute vendee and the sale had become

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an absolute sale. The learned Judge accepted this contention: he held that the mortgagee having been all along in possession of the mortgaged property, "his title became complete when the mortgagor failed to pay before the 11th of October 1893. If the mortgagee chose to take further steps under section 87 such steps were merely proceedings in execution with the object of clearing his title. The title itself was acquired on the 11th of October 1893." Upon this view he held that the title to pre-empt arose on the 11th of October 1893, when the appellant was not a co-sharer. The appellant adheres to the case stated in the plaint, namely, that no right of pre-emption accrued to him till the 6th of April 1895, when, as he maintains, the sale in favour of the respondent became complete in law. In support of this contention he relied on the precedent *Raghubir Singh v. Nandu Singh* (1). Against that the learned advocate for the respondent referred me to a Full Bench ruling of this Court, *Ali A'bas v. Kalka Prasad* (2), and to certain other precedents of this Court, in which it has been laid down that applications for an order absolute under section 87 of the Transfer of Property Act are steps in execution. Neither of the cases above cited are any safe guide in the case before me. They were both decisions governed by Regulation No. XVII of 1806, and the law applicable was that which prevailed before Act No. IV of 1882 came into force. It has been held by this Court in *Ali Abbas v. Kalka Prasad* that on the expiration of the year of grace provided by sections 7 and 8 of Regulation No. XVII of 1806, if anything remained to be paid under the mortgage and the proceedings under the Regulation had been regular, the title of the conditional vendee became that of an absolute vendee and the sale became an absolute sale on the day when the year of grace expired. An important change was, however, introduced by section 87 of Act No. IV of 1882, and it is by this section that the present appeal is governed. This section provides that if payment be not made by the mortgagor on the day fixed by the Court the plaintiff may apply

(1) Weekly Notes, 1891, p. 134.

(2) I. L. R., 14 All. 65.

to the Court for an order that the defendant be debarred absolutely of all right to redeem the mortgaged property; when he has so applied the Court shall then pass such order, and on the order being passed the debt secured by the mortgage shall be deemed to be discharged. These words are without meaning, it seems to me, and the procedure provided in section 87 is a purely superfluous procedure in the case of a mortgagee in possession, if his title has become complete and the sale an absolute sale as soon as the date fixed by the Court for payment of the mortgage money has expired. Under section 87 a Court can upon good cause shown from time to time postpone the day appointed for payment. In other words, it can postpone the date on which the title of the mortgagee would become complete. This power was not given in Regulation No. XVIII of 1806, nor was there any provision made for an application for an order absolute like that provided for in section 87 of Act No. IV of 1882. The Calcutta High Court has held in the case of *Poresb Nath Mojumdar v. Ramjodu Mojumdar* (1) that a mortgagor can redeem at any time till the order absolute is made under section 87 of the Transfer of Property Act of 1882. I need not, and do not, determine that point here; but I am satisfied that the procedure enjoined by section 87 is not superfluous or procedure merely to clear title, and that until such an order absolute has been made a right to pre-empt does not accrue. The right to pre-empt accrues, not from the date fixed in the decree under section 86 as the date on which the payment is to be made by the mortgagor, but from the date on which the mortgagee obtains an order absolute under section 87 of the Transfer of Property Act of 1882.

I accordingly decree the appeal, set aside the judgment and decree of the lower appellate Court, and restore that of the Court of first instance. Three months from the date of this decree is allowed for the payment of the pre-emption money.

*Appeal decreed.*

(1) I. L. R., 16 Calc., 246.