

1902

SHAM DAS
v.
BATUL
BIBI.

88 of Act No. IV of 1882, and upon sale under the decree purchased the land himself, and obtained possession of it. This was clearly obnoxious to the provisions of section 9 of Act No. XII of 1881, and not binding on the landlord.

For the foregoing reasons we allow the appeal, set aside the decree of the lower appellate Court, and restore the decree of the Subordinate Judge dismissing the plaintiff's claim with costs. The appellants will have their costs in all Courts.

Appeal decreed.

1902
July 5.

Before Mr. Justice Banerji and Mr. Justice Aikman.

ALI AHMAD (JUDGMENT-DEBTOR) v. NAZIRAN BIBI (DECREE-HOLDER)*
*Act No. IV of 1882 (Transfer of Property Act), sections 86 and 87—
Application for order absolute under section 87—Execution of decree
—Limitation—Act No. XV of 1877 (Indian Limitation Act), schedule
ii, articles 178 and 179.*

An application for an order absolute under section 87 of the Transfer of Property Act, 1882, is an application in execution of the decree under section 86 of the Act, and is governed as to limitation by article 178 of the second schedule to the Indian Limitation Act, 1877, the time from which limitation begins to run being the date fixed by the decree under section 86 for payment of the mortgage money.

*Kedar Nath v. Lalji Sahai (1), Oudh Behari Lal v. Nageshar Lal (2),
Chunni Lal v. Harnam Das (3), Parmeshri Lal v. Mohan Lal (4), Bag-
wan Ramji Marwadi v. Ganu (5), Muhammad Suleman Khan v. Muhammad
Yar Khan (6), Chhedi v. Lulu (7), Ram Sarup v. Ghaurani (8) and Ranbir
Singh v. Drigpal Singh (9) referred to.*

THE facts of this case are as follows :—

On the 27th of November, 1897, Naziran Bibi and Bismillah Bibi obtained a decree for foreclosure against Ali Ahmad conditioned on their paying off certain incumbrances. The time limited for redemption under this decree expired on the 27th May, 1898. On the 23rd of May 1901 Naziran Bibi applied to the Court for an order absolute for foreclosure in respect of her interest in the decree, alleging that the other decree-holder had

*First Appeal No. 130 of 1901 from an order of Munshi Mata Prasad, Officiating District Judge of Ghazipur, dated the 16th of September, 1901.

(1) (1889) I. L. R., 12 All., 61. (5) (1899) I. L. R., 23 Bom., 644.
(2) (1890) I. L. R., 13 All., 278. (6) (1894) I. L. R., 17 All., 39.
(3) (1898) I. L. R., 20 All., 302. (7) Weekly Notes, 1902, p. 60.
(4) (1898) I. L. R., 20 All., 357. (8) (1899) I. L. R., 21 All., 453.
(9) (1898) I. L. R., 16 All., 23.

refused to take any steps towards the execution of the decree, and that she (Naziran Bibi) alone had paid off the incumbrances mentioned in the decree. This application was resisted on two grounds—first, that it was barred by limitation, and secondly, that Naziran Bibi alone was not competent to apply. The Court of first instance (Subordinate Judge of Ghazipur) overruled the plea of limitation, and, at the suggestion of the applicant's pleader made an order absolute for foreclosure in respect of Naziran Bibi's share alone. The judgment-debtor appealed, and the lower appellate Court (Officiating District Judge of Ghazipur), while agreeing with the Court of first instance on the question of limitation, set aside the order on other grounds and remanded the case under section 562 of the Code of Civil Procedure. From this order the judgment-debtor appealed to the High Court, again raising the plea that the application made by Naziran Bibi was time-barred.

Mr. *J. Simeon*, for the appellant.

Mr. *Muhammad Raoof* and *Munshi Haribans Sahai*, for the respondent.

BANERJI, J. (AIKMAN, J., concurring).—The respondent, Musammât Naziran Bibi, and one Bismillah Bibi, obtained a decree for foreclosure against the appellant under section 86 of the Transfer of Property Act, 1882, on the 27th of November, 1897. For the payment of the mortgage money the decree allowed a period of six months, which expired on the 27th of May, 1898. On the 23rd of May, 1901, Musammât Naziran Bibi applied under section 87 of the Act for an order absolute for foreclosure. That application was resisted on two grounds—first, that it was barred by limitation; and secondly, that Naziran Bibi alone was not competent to make it. The plea of limitation has been overruled by both the Courts below. With reference to the other plea, the lower appellate Court has reversed the order of the Court of first instance, and remanded the case to that Court under section 562 of the Code of Civil Procedure. From this order of remand the present appeal has been brought.

The plea of limitation has been repeated before us, and it is urged that under art. 179 of the second schedule of the Indian

1902

ALI AHMAD
v.
NAZIRAN
BIBI.

1902

ALI AHMAD

v.
NAZIRAN
BIBI.

Limitation Act, limitation should be computed from the date of the decree under section 86, and not from the date on which, according to that decree, the mortgage money was payable.

According to the rulings of this Court an application for an order under section 87 of the Transfer of Property Act is an application in execution. In *Kedar Nath v. Lalji Sahai* (1), it was held by a Full Bench that the order mentioned in that section is an order in execution of the substantive foreclosure decree. It necessarily follows that an application for such an order is an application in execution. This view was upheld in the later Full Bench case of *Oudh Behari Lal v. Nageshar Lal* (2). In that case it was held that an application for an order absolute for sale under section 89 is a proceeding in execution, and subject to the rules of procedure governing such matters. The ruling in *Kedar Nath v. Lalji Sahai* was approved of, and although, as stated above, the case was one to which section 89 applied, reference was made to section 87, and the same rule was held to apply to applications under both the sections. Following the principle of these rulings and of the decision in *Chunni Lal v. Harnam Das* (3), it was held in *Parmeshri Lal v. Mohan Lal* (4), that an application for an order under section 87 of Act No. IV of 1882, is an application in execution to which the provisions of the Limitation Act apply. With this view we entirely concur.

The next question which we have to consider is, what is the period of limitation governing an application under section 87, and what is the date from which limitation should be computed? It is contended on behalf of the appellant that the limitation applicable is that prescribed by art. 179 of the second schedule, and that it should be computed under the first paragraph of the 3rd column of that article, from the date of the decree under section 86. In support of this contention the rulings in *Chunni Lal v. Harnam Das* (3) and *Parmeshri Lal v. Mohan Lal* (4), and the dictum of Parsons, A. C. J. and Ranade, J., in *Bhagwan Ramji Marwadi v. Ganu* (5) have been referred to. It is conceded that the only paragraph

(1) (1889) I. L. R., 12 All., 61. (3) (1898) I. L. R., 20 All., 802.
 (2) (1890) I. L. R., 13 All., 278. (4) (1898) I. L. R., 20 All., 357.
 (5) (1899) I. L. R., 23 Bom., 644.

of art. 179, which is, if at all, applicable to the present case, is the first, the other paragraphs having no application. Now, there can be no doubt that the decree or order referred to in that paragraph must be a decree or order which, on the date of it, is capable of execution, and that the *terminus a quo* under that paragraph cannot be a date on which the decree or order is not executable. This was held in *Muhammad Suleman Khan v. Muhammad Yar Khan* (1) and in the recent case of *Chhedi v. Labu* (2). A decree for foreclosure under section 86 of the Transfer of Property Act, which, in compliance with the provisions of that section, fixes a date for payment of the mortgage money, cannot be enforced before the expiry of that date. This is clear from the terms of section 87. Under that section the plaintiff may apply for an order absolute for foreclosure if payment is not made as directed by the decree under section 86. An application under section 87 cannot, therefore, be made on the date of the decree under section 86, and from the very nature of things limitation cannot run against the applicant from that date. Consequently the first paragraph in the third column of art. 179 cannot apply to an application under section 87. It is true that in the cases mentioned above art. 179 was referred to, but the real question was that of the applicability of the second schedule of the Limitation Act. In the two cases decided by this Court, the date fixed in the decree for the payment of the mortgage money had long expired before the date of the application under consideration. It was not, therefore, necessary to decide in those cases what was the *terminus a quo* for purposes of limitation. One of us was a party to the ruling in *Chunni Lal v. Harnam Das* (3), and is in a position to state that no question arose in that case as to the date from which limitation should be computed. In *Parneshri Lal v. Mohan Lal* (4), the learned Judge, Burkitt, J., after holding that an application under section 87 of the Transfer of Property Act was an application in execution to which the provisions of art. 179 of sch. ii of the Limitation Act applied, observed as follows:—"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.

(1) (1894) I. L. R., 17 All., 39.

(2) Weekly Notes, 1902, p. 60.

(3) (1898) I. L. R., 20 All., 302.

(4) (1898) I. L. R., 20 All., 357.

1902

ALI AHMAD
v.
NAZIRAN
BIBI.

1902

ALI AHMAD
v.
NAZIRAN
BIBI.

The application was therefore time-barred when made." The learned vakil for the appellant relies upon these observations as supporting his contention that limitation should be computed from the date of the decree. We have, however, the authority of our brother Burkitt for stating that he did not decide, and did not intend to decide, that the starting-point for computing limitation is the date of the decree under section 86, as the question did not arise for consideration. In the Bombay case to which we have referred the point was not decided. For the reasons we have stated above, we are unable to hold that limitation runs, in a case like this, from the date of the decree.

As art. 179 of the second schedule of the Limitation Act does not govern the application of the respondent, we have to determine what other article is applicable. In our opinion the application in question is governed by art. 178, that being the article which prescribes the limitation for an application for which provision is not made in any other article in the schedule. The application being one in execution, it cannot be said to be an application to which the Code of Civil Procedure has no reference. It is no doubt an application under the specific provisions of section 87 of the Transfer of Property Act; but it is to the Code of Civil Procedure to which we must look for the procedure by which it is governed. The learned vakil for the appellant referred us to the case of *Ranbir Singh v. Drigpal Singh* (1), in which art. 178 was held to be inapplicable to an application under the Transfer of Property Act. That was a case decided by a single Judge. In the later case of *Ram Sarup v. Ghaurani* (2), a Division Bench of two Judges, one of whom, it may be observed, was the learned Judge who had decided the case in 16 Allahabad, held art. 178 to be applicable to an application for a decree under section 90 of the Transfer of Property Act. We see no reason for holding the article to be inapplicable to an application like the one before us. And as the said application was made within three years from the date on which the right to apply accrued, that is, from the date fixed in the decree under section 86 for payment of the mortgage money, the application was not time-barred.

(1) (1893) I. L. R., 16 All., 23. (2) (1899) I. L. R., 21 All., 453.

In our opinion the third ground of appeal has no force, and the order of remand appealed against was a proper order. We dismiss the appeal with costs.

Appeal dismissed.

1902

ALI AHMAD
v.
NAZIRAN
BIBI.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.

GHANSHAM SINGH (PLAINTIFF) v. BADIYA LAL AND ANOTHER

(DEFENDANTS).*

1902

July 7.

Hindu Law—Hindu widow—Alienation for legal necessity—Duty of person advancing money to Hindu widow—Burden of proof.

If a mortgagee advances money to a Hindu widow holding a widow's estate in the property mortgaged after making proper inquiry for the purpose of ascertaining that the money is required for legal necessity, it is not incumbent on him to see that the money he advances is applied to meet such legal necessity, nor is he bound to ascertain that every pie of the money so advanced is actually required for a legal necessity. *Amar Nath Sah v. Achar Kunwar* (1) referred to.

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

Pandit *Moti Lal Nehru* and *Munshi Gokul Prasad* (for whom *Babu Sital Prasad Ghosh*), for the appellant.

Pandit *Sundar Lal*, for the respondent.

STANLEY, C.J. and BANERJI, J.—This suit was brought by the plaintiff to have it declared that two mortgages, one made by the widow of Charan Singh and the other by his mother, were made without legal necessity and were void, and for possession and mesne profits. Charan Singh was the owner of the property in suit. After his death his mother *Jai Kunwar* was recorded as owner. On the 8th of January, 1877, the mother and the widow together hypothecated a share in the village *Nawanagir* to *Madan Gopal* to secure a sum of Rs. 300. *Madan Gopal* sued upon his mortgage and obtained a decree, and at the auction sale *Ishri Prasad*, father of the defendants, purchased the property on the 23rd of August, 1892. Again, on the 7th of February, 1881, the same parties mortgaged a share in another village called *Kajrauth* to one *Murli Dhar*. On his death the name of

* Second Appeal No. 989 of 1900 from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 13th of August, 1900, reversing a decree of *Maulvi Ahmad Ali Khan*, Subordinate Judge of Aligarh, dated the 29th September, 1899.