

APPELLATE CIVIL.

1909

November 30.*Before Mr. Justice Sir George Knox and Mr. Justice Piggott.*MUHAMMAD RAZI (DECREE-HOLDER) v. KARBALAI BIBI AND OTHERS
(JUDGMENT-DEBTORS).**Civil Procedure Code (1882), section 230—Execution of decree—Limitation—
Abatement of appeal—Terminus a quo.*

Held that an order declaring an appeal to have abated is in effect an affirmation of the decree of the Court below, and limitation only begins to run against the decree-holder from the date of such order and not from the date of the decree under appeal. *Mahomed Mehdi Bella v. Mohini Kanta* (1) followed. *Kewal v. Tikha* (2), *Rup Singh v. Mukhraj Singh* (3), and *Akshoy Kumar Mondi v. Chunder Mohun Chathati* (4) referred to. *Fazal Husain v. Raj Bahadur* (5) doubted.

THE facts of this case were as follows. On the 23rd of May, 1893, a decree was passed against one Muhammad Malih. On the 15th of February, 1894, this decree was affirmed by the District Judge on appeal. The judgment-debtor appealed to the High Court, but died whilst his appeal was pending. An application was presented by one Mubarak Husain, who claimed to be the legal representative of the appellant, but on the 29th of March, 1897, the High Court held that there were other heirs of Muhammad Malih, namely, his daughters, who should have been brought upon the record. The High Court accordingly declared the appeal to have abated and gave costs to the respondent decree-holder. On the 14th of August, 1907, the decree-holder applied for execution but was met with the defence that execution of the decree was barred by the rule of limitation laid down in section 230 of the Code of Civil Procedure, 1882. The court of first instance (officiating Subordinate Judge of Jaunpur) sustained the objection and dismissed the decree-holder's application, and this decision was upheld on appeal by the District Judge. The decree-holder appealed to the High Court.

Maulvi Ghulam Mujtaba, for the appellant.

Mr. B. E. O'Connor, for the respondents.

* Second Appeal No. 295 of 1909 from a decree of Muhammad Rafik, District Judge of Jaunpur, dated the 9th of December 1908, confirming a decree of Keshab Deo, Subordinate Judge of Jaunpur, dated the 7th of March 1908.

(1) (1907) I. L. R., 34, Calc., 874.

(3) (1865) I. L. R., 7 All., 887.

(2) (1905) 3 A. L. J., 8.

(4) (1888) I. L. R., 16 Calc., 250.

(5) (1897) I. L. R., 20 All., 124.

KNOX and PIGGOTT, JJ.—This is a decree-holder's appeal. The essential facts are the following:—On May 23rd, 1893, the decree of the first court was passed against one Muhammad Malih. On February the 15th, 1894, this decree was confirmed by the District Judge on appeal. A second appeal was pending when Muhammad Malih the appellant died. An application was presented by one Mubarak Husain who claimed to be his legal representative, but on the 29th of March, 1897, the High Court held that there were other heirs of Muhammad Malih, namely, his daughters, who should have been brought on the record. The order thereupon passed was as follows:—"Ordered and decreed that this appeal do abate and the appellant pay Rs. 83, costs incurred in this Court, and the costs in the lower court be paid as awarded by the lower court." The application for execution out of which this appeal arises was presented on the 14th of August, 1907, and the point for determination is whether the said application is barred by limitation under the provisions of the latter part of section 230 of the Code of Civil Procedure, Act XIV of 1882. The provisions of the said section, on the face of them, appear to be intended to allow a period of 1½ years' limitation, in the case of an appeal, from the date of the decree of the appellate court. The courts below have held that this case is governed by the ruling of this Court in *Fazl Husain v. Raj Bahadur* (1). This was in any case a ruling under article 179 of the second schedule to the Indian Limitation Act (XV of 1877). It seems to have been doubted by a Judge of this Court in *Kewal v. Tirhka* (2), and is difficult to reconcile with the principle which appears to underlie such rulings as *Rup Singh v. Mukhraj Singh* (3) and *Akshoy Kumar Nundi v. Chunder Mohun Chathati* (4). In any case there seems to us clearer authority on the opposite side in a ruling of the Calcutta High Court which bears directly upon the section now under consideration. We refer to *Mahomed Mehdi Bella v. Mohini Kanta Saha Chowdhry* (5). It could not fairly be contended that the decree of the High Court of March 29th, 1897, was incapable of execution, at least in respect

1909

MUHAMMAD
RAZI
v.
KARBALAI
BEH.

(1) (1897) I. L. R., 20 All., 124.

(3) (1885) I. L. R., 7 All., 887.

(2) (1905) 3 A. L. J. R., 8.

(4) (1888) I. L. R., 16 Calc., 250.

(5) (1907) I. L. R., 34 Calc., 874.

1909

MUHAMMAD
RAZI
v.
KARBALAI
BIBI.

of the costs awarded against the appellant, and the incongruity of breaking up a single decree into a portion still capable of execution and a portion barred by limitation appears considerable. It seems to us that under the terms of section 230 of Act XIV of 1882, as well as on the balance of authority, the decree-holder in this case is entitled to the benefit of 12 years' period of limitation calculated from the 29th of March, 1897, when the final decree of the High Court was passed, which had the effect of affirming the decrees of the courts below. We therefore accept this appeal, set aside the decrees of the courts below and direct the court of first instance to proceed with the execution of the decree. The appellant will get his costs.

Appeal allowed.

1909.
December 2.

APPELLATE CIVIL.

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

MATI-ULLAH KHAN (DEFENDANT) v. BANWARI LAL (PLAINTIFF) AND RAI DARIO SINGH AND OTHERS (DEFENDANTS).*

Act No. IV of 1882 (Transfer of Property Act), section 74—Mortgage—Prior and subsequent mortgages—Right of purchaser of mortgaged property in execution of decree of subsequent mortgagee who has paid off a first mortgage as against a second mortgagee suing for sale.

A mortgaged certain property first to B and afterwards to C and finally sold it to D. D mortgaged the property to E, who paid off B's mortgages and brought the property to sale in satisfaction of his own mortgage, and it was purchased by M. Held on suit for sale on his mortgages by C, the second mortgagee, that M was entitled to hold up as a shield against C the mortgages in favour of B, which had been satisfied by E. *Kallu v. Sant Lal* (1), *Baldeo Prasad v. Uman Shankar* (2) and *Mamraj v. Ramji Lal* (3) referred to. *Bairnath v. Murlidhar* (4) distinguished.

THE facts of the case were as follows :—

Dario Singh owned certain property, part of which he mortgaged to Bhola Nath by three bonds in 1894 and 1895. He subsequently executed two mortgage bonds dated respectively July 11th, 1897, and August 4th, 1898, in favour of Banwari Lal (plaintiff). On the 23rd of April 1900 Dario Singh sold a

* First Appeal No. 24 of 1903 from a decree of C. D. Steel, District Judge of Shahjahanpur, dated the 8th of October 1907.

(1) Weekly Notes, 1893, p. 123.

(2) (1907) I. L. R., 32 All., 1.

(3) (1903) 7 A. L. J., 15.

(4) Weekly Notes, 1907, p. 85.

portion of his property to Prag Narain for Rs. 4,000 and left with him out of this amount Rs. 2,600 for payment to Bhola Nath, being the amount due to him under his three bonds. On the 16th of September, 1901, Prag Narain mortgaged this property to Hardwari Lal for Rs. 3,300, out of which Rs. 2,200 were left with the mortgagee for payment to Bhola Nath aforesaid. This amount was paid by Hardwari Lal to Bhola Nath, and the latter's mortgages were thus discharged. Hardwari Lal then brought a suit against his mortgagors and obtained a decree on the 9th of September, 1902, in execution of which the mortgaged property was sold and purchased by Mati-ullah Khan on the 31st of March, 1904. Banwari Lal sued to enforce the security in his favour, and pleaded, among others, the said auction purchaser. The latter set up the mortgages in favour of Bhola Nath as a shield against the claim. This defence was overruled by the court of first instance relying on the ruling in *Bajinath v. Murlidhar* (1) and a decree passed in favour of the plaintiff. The defendant Mati-ullah appealed.

Mr. A. E. Ryves (with him Maulvi Ghulam Mujtaba) for the appellant, submitted that the doctrine of *Toulmin v. Steere* (2) was not applicable in India, and relied upon the following authorities:—*Gokal Das v. Puran Mal* (3), *Tulsa v. Khub Chand* (4), *Vanmikalinga v. Chidambara* (5), *Mamraj v. Ramji Lal* (6), and *Baldeo v. Uman Shankar* (7).

Dr. Satish Chandra Banerji (for Pandit Moti Lal Nehru), for the respondent plaintiff, cited *Bajinath v. Murlidhar* and (1) *Tufail Fatima v. Bitola* (8) and contended that the test to be applied was whether the money which went to discharge a prior incumbrance was the mortgagor's money or the subsequent incumbrancer's. The mortgagor could not set up as a shield the mortgage he had himself discharged, and it made no difference that instead of making the payment personally he directed another person, who held money to his credit, to apply that money to the payment of a prior incumbrance. The decision in *Baj Nath's* case was affirmed in Letters Patent Appeal.*

(1) Weekly Notes, 1907, p. 85.

(2) (1897) 3 Mar. 210.

(3) (1884) I. L. R., 10 Cal., 1035, 1046.

(4) (1891) I. L. R., 18 All., 561.

(5) (1905) I. L. R., 29 Mad., 37.

(6) (1909) 7 A. L. J., 15.

(7) (1907) I. L. R., 32 All., 1.

(8) (1904) I. L. R., 27 All., 400.

* Per STANLEY, C. J., and BANERJI, J., L. P. A. No. 29 of 1907 decided on January 4th, 1908.

1909

 MATI-ULLAH
 KHAN
 v.
 BANWARI
 LAL.

1909

MATI-ULLAH
KHAN
v.
BANWARI
LAL.

Munshi Govind Prasad for defendant respondent, claimed to be exempted with costs.

Mr. A. E. Ryves, in reply, cited *Kalbu v. Sant Lal* (1).

STANLEY, C. J., and BANERJI, J.—This appeal arises out of a suit for sale upon two mortgages made respectively on the 11th of July, 1897, and the 4th of August, 1898, by one Dariao Singh in favour of the plaintiff, Banwari Lal. Dariao owned a 6½ biswa share in the village Serai Khas. On the 18th of August, 1894, he mortgaged a 4 biswa share to one Bhola Nath. On the 11th of December, 1894, he mortgaged 5 biswas to Bhola Nath, and on the 14th September, 1895, he mortgaged 1 biswa more to the same mortgagee. After these mortgages he made the two mortgages in favour of Banwari Lal to which we have referred above. On the 23rd of April 1900, Dariao sold to Prag Narain his interest in the mortgaged property, and he left Rs. 2,600 with the purchaser for discharge of the mortgages held by Bhola Nath. Prag Narain did not pay off those mortgages, but on the 16th of September, 1901, he made a mortgage of the property to one Hardwari Lal for Rs. 3,300, and out of this sum Hardwari Lal withheld Rs. 2,200 for payment to Bhola Nath. With this money he discharged the mortgages held by Bhola Nath. Hardwari Lal brought a suit for sale upon his mortgage and obtained a decree against Prag Narain. In execution of that decree the mortgaged property was sold by auction and the appellant Mati-ullah Khan became the purchaser. In the suit out of which this appeal arises Banwari Lal prayed for the sale of the property purchased by Mati-ullah Khan. Mati-ullah's defence was that he was entitled to hold up the mortgages of Bhola Nath as a shield against the claim of Banwari Lal. The court below, relying upon the ruling of this Court in *Baij Nath v. Murti Dhar* (2), has held that Mati-ullah Khan has no right by virtue of his purchase to claim priority over the plaintiff.

The correctness of this decision is impugned in this appeal, and it is urged that Mati-ullah as standing in the shoes of Hardwari Lal is entitled to claim the benefit of the prior mortgages held by Bhola Nath which were discharged by Hardwari Lal. This contention is in our judgment well founded.

(1) Weekly Notes, 1896, p. 129.

(2) Weekly Notes, 1907, p. 85.

After the sale to Prag Narain the mortgagor ceased to have any interest in the mortgaged property and those interests vested in Prag Narain under his purchase. Hardwari Lal, as mortgagee from Prag Narain, was thus a subsequent mortgagee of the property. As such subsequent mortgagee he redeemed the prior mortgages held by Bhola Nath, and therefore under the provisions of section 74 of the Transfer of Property Act, he was entitled to take the benefit of the securities held by Bhola Nath. Further, as upon his discharge of the prior mortgages held by Bhola Nath the mortgage deeds were handed over to him, this is evidence of his intention to keep the mortgages alive. He was therefore entitled to hold them up as a shield against the claim of the subsequent mortgagee. This was so held in *Kallu v. Sant Lal* (1), and is in agreement with the unreported decision in *Baldeo Prasad v. Uman Shankar* (2), Second Appeal No. 1069 of 1905, decided on the 6th April, 1907, and also with the decision in *Mamraj v. Ramji Lal* (3), Second Appeal No. 757 of 1908, decided on the 25th of May, 1909, which has not yet been reported. The case on which the court below has relied is distinguishable from this case. The circumstances of that case were peculiar, and having regard to those circumstances the puisne mortgagee was held to be entitled to enforce his mortgage against the subsequent purchaser, who had discharged prior incumbrances.

For the above reasons we are of opinion that the plaintiff Banwari Lal is not entitled to bring the mortgaged property to sale without discharging the prior mortgages which have been paid off by Hardwari Lal. The court below has not determined what amount, if any, is due on those prior mortgages. We cannot therefore decide this appeal without obtaining findings on the following issues, which we refer to the court below under the provisions of order 41, rule 25, of the Code of Civil Procedure :—

- (1) What amount, if any, is due on each of the mortgages held by Bhola Nath, dated respectively the 18th of August, 1894; the 11th of December, 1894, and the 14th of September, 1895?
- (2) Is the claim under any and which of these mortgages barred by limitation?

(1) Weekly Notes, 1896, p. 129. (2) Since reported, I. L. R. 32 All., 1.
 (3) Since reported, 7 A. L. J., 15.

1909

 DU JAH
 HAN
 C.
 BANWARI
 LAL.

1909

MARI-ULLAH
KHAN
v.
BANWARI
LAL.

1909
December 8.

The Court will take such additional evidence as may be necessary. On receipt of its findings ten days will be allowed for filing objections.

Issues remitted.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.
HAR DAYAL AND OTHERS (DEFENDANTS) v. PIRTHI SINGH (PLAINTIFF).
Act No. IV of 1882 (Transfer of Property Act), section 83—Deposit paid to mortgagee—Balance of mortgage debt promised—Mortgage not discharged.

The consequences resulting from a payment into Court under section 83 of the Transfer of Property Act, 1882, only occur when the amount paid in is found to be or is accepted by the mortgagee as being equivalent to the full amount due under the mortgage in suit.

THE respondent brought a suit upon a mortgage dated the 17th of December, 1886, executed by the first set of the appellants. The bond was for Rs. 1,300 and provided payment with compound interest at Re. 1-4-0 per cent. per mensem. He impleaded as defendants the mortgagors and certain purchasers of half the mortgaged property from the mortgagors under a sale deed dated the 20th of April, 1894. In July, 1895, they deposited Rs. 2,725 in court under section 83 of the Transfer of Property Act, 1882, for payment to the mortgagee, respondent. In reply to this application, the respondent stated that Rs. 4,591-0-3 were due to him up to date and said :—

“ He has deposited Rs. 2,725 for the opposite party and has shown his readiness to pay the remaining amount that may be found due according to account. It is therefore prayed that the said amount may be paid to the opposite party and the applicant be directed to pay the remaining dues to the opposite party under the said bond. The opposite side has no objection to take the whole account of the said bond, viz., Rs. 4,591-0-3, and return the said bond. The sum of Rs. 2,725 which the applicant has deposited for the opposite party may be paid to the opposite party. The opposite party will enter the payment of this sum on the reverse of the said bond. If the remaining amount is not paid to the opposite party he will seek his remedy in due course from the court.”

Thereupon the pleader for the applicant stated :—

“ The money due to the opposite party is not so much as he states. The applicant has deposited Rs. 2,725. That sum may be paid to the opposite party. As for the rest, the opposite party can seek his remedy in court. The vendor had left only that sum with my client for payment to the opposite party.”

The following order was then made by the court :—

“ That the amount deposited in the court be made over to the mortgagee and the mortgage deed be returned after noting the payment of the amount with

* First Appeal No. 89 of 1906 from a decree of Muhammad Ahmad Ali Khan, Additional Judge of Meerut, dated the 21st of January, 1906.