

## APPELLATE CIVIL.

1915  
July, 27.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Muhammad Rafiq.

MADHO RAM AND OTHERS (DECREE-HOLDERS) v. NIHAL SINGH AND  
OTHERS (JUDGEMENT-DEBTORS)\*

*Civil Procedure Code (1908), order XXXIV, rule 5—Application for decree absolute for sale on a mortgage—Limitation—Terminus a quo—Act No. IX of 1908 (Indian Limitation Act), schedule I, article 181.*

An application under order XXXIV, rule 5 (2) of the Code of Civil Procedure (1908), is an application in the suit and not an application in execution, and is governed as regards limitation by article 181 of the first schedule to the Indian Limitation Act, 1908. *Datto Aimaram Hasabnis v. Shankar Daitabraya* (1), *Anlook Chand Parraek v. Saral Chunder Mukerjee* (2), *Ali Ahmad v. Naziran Bibi* (3) and *Udit Narain v. Jagan Nath* (4) referred to.

The right to make such an application accrues on the date when the time limited by the preliminary decree expires, unless such time has been extended by a court of appeal. The principle of the decision in *Gaya Din v. Jhumman Lal* (5) applied.

THIS appeal arose out of an application by the decree-holders for a decree absolute for sale on a mortgage. The preliminary decree for sale upon a mortgage had been passed on the 27th of February, 1909. It allowed a period of six months for payment of the decretal amount. The judgement-debtors appealed from the decree, and the appeal was dismissed and the decree confirmed on the 25th of January, 1911. A second appeal to the High Court was also dismissed on the 25th of January, 1912. No extension of the time fixed by the decree of the court of first instance for payment of the amount of the decree was obtained from either the first appellate court or from the High Court. The decree-holders applied, on the 25th of April, 1913, under order XXXIV, rule 5, of the Code of Civil Procedure for a final decree for sale. The application was disallowed as being barred by limitation. On appeal, the lower appellate court confirmed this decision. The decree-holders appealed to the High Court.

\* Second Appeal No. 1828 of 1914, from a decree of A. G. P. Pullan, District Judge of Saharanpur, dated the 26th of August, 1914, confirming a decree of Abdul Hasan, Subordinate Judge of Saharanpur, dated the 24th of July, 1913.

(1) (1913) I. L. R., 38 Bom., 32.

(3) (1902) F. L. R., 24 All., 542.

(2) (1911) I. L. R., 38 Cal., 913.

(4) (1904) 1 A. L. J., 15.

(5) (1915) I. L. R., 37 All., 400.

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Babu Durga Charan Banerji (with him Dr. Surendra Nath Sen), for the appellants :—

Since the coming into operation of the present Code of Civil Procedure an application for a decree absolute for sale is to be deemed an application in the suit itself and not an application in execution of a decree. Article 182 of the Limitation Act, therefore, does not govern such an application. There being no other article applicable, article 181 applies, which provides a period of three years from the time when the right to apply accrues. The question is when the right to apply accrues. The right, no doubt, accrued for the first time when the period fixed for payment by the decree of the first court expired; but it is submitted, the right accrued afresh when the decree was confirmed by the first appellate court and again when it was confirmed on second appeal by the High Court. The right to apply did not accrue only once and once for all, but it accrued on each of the three dates. The words in the third column of Article 181 are not "when the right to apply first accrues." Obviously, the right to apply for a decree absolute accrues more than once. Where the original decree is reversed on appeal but restored on further appeal the right clearly accrues for the second time from the final appellate decree. The principle is the same whether the first appellate court decrees or dismisses the appeal to it. Again where the appellate court extends the time for payment, the right which accrued for the first time on the expiry of the period fixed by the first court decree accrues again from the subsequent date fixed by the appellate decree. Then again, the judgement-debtors having appealed from the decree, the whole matter became *sub judice*. The final decree would be that of the court of final appeal, although the appellate decree merely confirmed that of the first court; *Abdul Mujid v. Jawahir Lal* (1). The first court decree becomes merged in that of the appellate court, and it is the latter decree which would be followed by the decree absolute. There could be no decree absolute until the preliminary decree had become final, and as long as the matter was *sub judice* the preliminary decree could not become final. There

(1) (1910) I. L. R. 33 All., 154, (158,159).

was an accrual of the right to apply for a decree absolute when the appellate decree was passed, and the application having been made within three years of the appellate decree, it was not barred by limitation.

Mr. *Nihal Chand* (with whom Mr. *W. Wallach*), for the respondents :—

It is not disputed that article 181 of the Limitation Act is the article applicable to the case. As to the question of the time when the right to apply accrued, the test is, when could the decree-holders have presented an application for a decree absolute. Undoubtedly they could have done so when the period fixed by the decree of the first court expired. The right to apply accrued on the expiry of that period; *Ali Ahmad v. Naziran Bibi* (1), *Udit Narain v. Jagan Nath* (2). The right having once accrued, the mere fact that the judgement-debtors had preferred an appeal did not put a stop to that right or keep it in abeyance. There was nothing to prevent the decree-holders from proceeding with an application for a decree absolute. The Legislature nowhere lays down that the holder of a preliminary decree for sale must wait for the termination of all proceedings in appeal before applying for a final decree; *Muhammad Sadiq v. Ghous Muhammad* (3). There was no impediment in the present case preventing the decree-holders from proceeding with their application as there was in the case of *Ruddar Singh v. Dhanpal Singh* (4). There the decree-holders were estopped by an injunction, and it was held that time began to run against the decree-holders as soon as the bar of injunction was removed; fresh time was not allowed from the date of the confirmation by the High Court of the decree of the lower appellate court. The right is not a recurrent right. The appellants are trying to read into article 181 of the Limitation Act the provisions of article 182 regarding appellate decrees. Even if the right in question be deemed capable of accruing more than once the meaning to be put upon the provisions of article 181 is that time begins to run from the date when the right first accrues. The case of instalment bonds is analogous and I rely on the principle of the

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(1) (1902) I. L. R., 24 All., 542. (3) (1913) 11 A. L. J., 975.

(2) (1904) 1 A. L. J., 15. (4) (1903) I. L. R., 26 All., 156.

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decision in *Gaya Din v. Jhumman Lal* (1). The decree-holders' right to apply for a decree absolute having accrued on the expiration of the six months fixed by the preliminary decree, and that decree having never been reversed or modified in any way by either of the appellate courts, and there never having been any impediment against the decree-holders' prosecuting their application if they chose to do so, the time ran against them continuously for more than three years and their right is extinguished. The ruling in I. L. R., 33 All., 154, cited by the appellants has no application, as it relates to a case of execution of decree.

Babu *Durga Charan Banerji*, in reply:—

With the exception of the case in 1 A. L. J., 15, the cases cited by the respondents are not in point. None of them dealt with the question in issue in the present case, namely, where the appellate decree confirms the first court decree and does not extend the time fixed for payment whether the decree-holder can apply within three years of the appellate decree. In the case in 1 A. L. J., 15, there was no appeal as regards the 2/3 share in respect of which the order absolute was sought to be obtained. The appellants' contention rests on one or other of two views; either the decree of the appellate court revives the right to apply for a decree absolute or the decree of the first court is merged in the appellate decree and the right accrues after six months from the appellate decree.

BANERJI and MUHAMMAD RAFIQ, JJ. :—This appeal arises out of an application made under order XXXIV, rule 5, of the Code of Civil Procedure for a final decree in a suit for sale upon a mortgage. The preliminary decree under order XXXIV, rule 4, was made on the 27th of February, 1909. That decree allowed a period of six months to the judgement-debtor to pay the amount of the decree, and that period expired on the 26th of August, 1909. Meanwhile the judgement-debtor appealed, with the result that the decree of the court of first instance was affirmed by the lower appellate court on the 25th of January, 1911, and on second appeal by the High Court on the 25th of January, 1912. Neither the first appellate court nor this Court extended the time for

(1) (1916) I. L. R., 37 All., 400.

payment of the mortgage money. The present application was made on the 25th of April, 1913. It was contended on behalf of the judgement-debtors, that is, the mortgagors, that the application was beyond time. This contention was allowed by the court of first instance and the decision of that court was affirmed by the lower appellate court. The decree-holders have preferred this appeal, and it is urged on their behalf that limitation should be computed either from the date on which the decree of the court of first instance was affirmed by the lower appellate court or when the decree of this Court was made. In order to consider whether the application is barred by limitation or not, it is first of all necessary to determine what article of the first schedule of the Limitation Act is applicable to the present case. It is clear that article 182 does not apply, and, there being no other article which is applicable, the only article which can be applied is article 181. Rule 5 of order XXXIV provides that where payment is not made within the time fixed, the court shall on application made in that behalf by the plaintiff pass the final decree for the sale of the mortgaged property or a sufficient part thereof. Therefore it is necessary that an application should be made by the plaintiff in order to obtain a final decree under that order. The application is thus an application in the suit and since the passing of the present Code of Civil Procedure it can no longer be said to be an application in execution or for the execution of a decree. It is therefore manifest that article 182 cannot apply, and, as stated above, since there is no other article which is applicable, the only article which would govern an application of this kind, would be article 181. This has been held by the Bombay High Court in *Datto Atmaram Hasabnis v. Shankar Dattatraya* (1), following the decision of JENKINS, C.J., in *Amlook Chand Parrack v. Sarat Chunder Mukerjee* (2). Under the old Limitation Act also it was held by this Court in *Ali Ahmad v. Naziran Bibi* (3) and *Udit Narain v. Jagan Nath* (4) that an application for an order absolute for sale under the Transfer of Property Act was governed by article 178 of the Limitation Act of 1877, which corresponds to article 181 of the present Act.

(1) (1913) I. L. R., 38 Bom., 32. (3) (1902) I. L. R., 24 All., 542.

(2) (1911) I. L. R., 38 Cal., 913. (4) 11 (4) I. A. J., 15

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The next question to be considered is when did the right to apply accrue, as provided in the 3rd column of that article. There can be no doubt that after the expiry of the six months, allowed by the decree of the court of first instance, the decree-holders plaintiffs became entitled to apply for a final decree. The mere fact that an appeal was preferred from the preliminary decree did not take away that right or postpone it. This is conceded by the learned vakil for the appellants, but he urges that he also acquired the right to apply when the decrees of the appellate courts, namely, that of the first court of appeal and of the High Court, were passed. It seems to us that limitation should be computed from the time when the right to apply first accrued. That right accrued, as we have said above, when the six months granted by the court of first instance to the judgement-debtors expired. The passing of the subsequent decrees by the appellate courts only affirmed that right and did not give rise to a fresh right, unless the decree of the court of first instance was in any respect varied by the appellate courts. We think that the analogy of the decision of the majority of the Full Bench in *Gaya Din v. Jhumman Lal* (1) applies. That was a case in which the question was whether the money sought to be recovered became due under article 132 of the first schedule when default was first made in the payment of instalments. It was held that the money became due when the first default was made. On the same principle limitation must be computed in a case like the present, from the time when the plaintiff's right to make an application for a final decree first accrued. Admittedly the right first accrued in this case on the 26th of August, 1909, and, more than three years having expired from that date when the present application was made, it is beyond time. We accordingly dismiss the appeal with costs.

*Appeal dismissed.*

(1) (1915) I. L. R., 37 All., 400.