

The point is covered by authority binding upon us. There are other decisions to be found in I. L. R., 1 Mad., 343; 21 Mad., 278; 27 Mad., 192 and 28 Mad., 197, which go to support the respondent's case.

The appellant has therefore lost her right in respect to both sets of property, assuming, but not deciding, that she was initially entitled as regards the endowment made by Musammat Sundar.

The appeal must therefore fail and is dismissed with costs.

*Appeal dismissed.*

## FULL BENCH.

*Before Justice Sir Pramada Charan Bakherji, Mr. Justice Tudball and  
Mr. Justice Piggott.*

GAJADHAR SINGH (DECREE-HOLDER) v. KISHAN JIWAN LAL AND  
OTHERS (JUDGMENT-DEBTORS).\*

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

*Held* that in a suit for sale on a mortgage, if an appeal has been preferred from the preliminary decree, the decree which is to be made absolute is the decree of the final court of appeal. In such a case, therefore, limitation for an application for a decree absolute runs, not from the expiry of the term fixed for payment by the original decree, but from the date of the decree of the final court of appeal. *Shohrat Singh v. Bridgman* (1), *Muhammad Sulaiman Khan v. Muhammad Yar Khan* (2) and *Abdul Majid v. Jawahir Lal* (3) referred to. *Madho Ram v. Nihal Singh* (4) overruled *quoad hoc*.

THE facts of this case were as follows:—

On the 16th of May, 1911, the plaintiff obtained a preliminary decree under order XXXIV, rule 4, of the Code of Civil Procedure. Six months' time was allowed to the judgement-debtor to pay up the decretal amount. The decree was afterwards affirmed by the High Court on the 23rd of February, 1915. On the 28th of June, 1915, the plaintiff put in an application for the preparation of a final decree. The judgement-debtor, on the 7th of December, 1915, objected on the ground that under section 47 of the Code of

\* Second Appeal No. 603 of 1916, from a decree of D. R. Lyle, District Judge of Agra, dated the 22nd of January, 1916, confirming a decree of B. C. Forbes, Subordinate Judge of Muttra, dated the 11th of December, 1915.

(1) (1882) I. L. R., 4 All., 376. (3) (1914) I. L. R., 36 All., 250.  
(2) (1888) I. L. R., 11 All., 267. (4) (1915) I. L. R., 38 All., 21.

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Civil Procedure, the application of the plaintiff was time-barred. The Subordinate Judge allowed the objection. On appeal the District Judge agreed with the Subordinate Judge and held that the amendment of the decree by the High Court would not give a fresh start to limitation, the more so as the order of amendment was passed when the period of limitation had expired already. The plaintiff appealed.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him The Hon'ble *Munshi Narayan Prasad Ashthana*):—

The only decree which could be made final under order XXXIV, rule 5, of the Code of Civil Procedure, was the decree of the last court of appeal. The decree of the lower courts had become merged in the appellate decree. He referred to *Shohrat Singh v. Bridgman* (1), *Muhammad Sulaiman Khan v. Muhammad Yar Khan* (2) and *Abdul Majid v. Jawahir Lal* (3). The right to apply for a final decree accrues only when the preliminary decree has become conclusive between the parties. The contrary view would lead to anomalous procedure, for if the original decree were modified or reversed in appeal, another final decree would have to be prepared. Article 181 of the Indian Limitation Act, applies, and, the application, being filed within three years of the date of the decree of the High Court, is within time.

Pandit *Shiam Krishna Dar*, for the respondent, contended that the right to apply accrued within the meaning of article 181 of the Limitation Act on the date when time for payment fixed by the decree expired. He referred to *Madho Ram v. Nihal Singh* (4). There would be no inconvenience if the final decree once prepared was subsequently amended according to the result of the appeal. It could not be argued that the right to apply accrued on the date of the decree, whether of the original court or court of appeal. The appellate court did not provide any time for payment. Hence the time for payment fixed by the decree of the court of first instance should be taken for purposes of limitation.

The Hon'ble Dr. *Tej Bahadur Sapru* was not heard in reply.

(1) (1882) I. L. R., 4 All., 376.

(3) (1914) I. L. R., 36 All., 850.

(2) (1888) I. L. R., 11 All., 267.

(4) (1915) I. L. R., 38 All., 21

BANERJI, J.—The question in this case is whether the application of the plaintiff decree holder for a final decree for sale under order XXXIV, rule 5, of the Code of Civil Procedure is or is not barred by limitation. The preliminary decree for sale was passed by the court of first instance on the 16th of May, 1911. The mortgagors were allowed six months from that date to pay the mortgage amount, so that the date fixed for payment was the 15th of November, 1911. The plaintiff, whose claim had only been partially decreed by the court of first instance, preferred an appeal to the lower appellate court, but that appeal was dismissed on the 3rd of November, 1911. He appealed to the High Court, and this Court affirmed the decree of the lower court on the 3rd of July, 1912. The present application was filed on the 22nd of June, 1915. Among the pleas raised on behalf of the defendants was the plea of limitation, and it was contended that the application had been filed beyond time. If limitation is to be computed from the date of the High Court's decree of the 3rd of July, 1912, the application is certainly within time. If, however, limitation is to be reckoned from the 16th of November, 1911, when the date fixed for payment by the court of first instance expired, the application would be beyond time. It is not disputed by either party that the article in schedule I of the Limitation Act applicable to the present application is article 181. The present application being an application in the suit for a final decree, it is not an application for execution, and therefore the article applicable to an application for execution of decree does not govern it. We have, therefore, to consider whether the right of the plaintiff to apply for a final decree accrued when the decree of the High Court was passed or on the expiry of the six months allowed for payment by the court of first instance. Order XXXIV, rule 5, provides that where payment is not made as directed by the preliminary decree for sale, "the court shall, on application made in that behalf by the plaintiff, pass a decree that the mortgaged property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in rule 4." It seems to me that this rule contemplates the passing of only one final decree in a suit for sale upon a mortgage. The essential condition to the making of a final decree is the existence

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of a preliminary decree which has become conclusive between the parties. When an appeal has been preferred, it is the decree of the appellate court which is the final decree in the cause. This is beyond controversy having regard to the decisions of the Full Bench of this Court in *Shohrat Singh v Bridgman* (1) and *Muhammad Sulaiman Khan v. Muhammad Yar Khan* (2). The view taken in those cases was affirmed by their Lordships of the Privy Council in *Abdul Majid v. Jawahir Lal* (3). As has been already stated, if an appeal is preferred and the case is decided by the appellate court, the decree of the appellate court takes the place of the decrees of the subordinate courts where it affirms the decrees of those courts and the decrees of the subordinate courts are merged in the decree of the final court of appeal. Therefore, where a preliminary decree for sale is appealed to the High Court it is the decree of the High Court which must be deemed to be the preliminary decree that may be made final under order XXXIV, rule 5. In the present case the decree of the High Court, no doubt, affirmed the decree of the lower courts: but whether the decree of this Court is a decree of affirmance or modification of the decrees of the courts below, it is the final decree in the cause. It is this decree which in a suit for sale the plaintiff can seek to be made absolute and final. In the present case the plaintiff's application was to the effect that the decree of this Court should be made final. He applied for interest for the period subsequent to the decree of the first court and subsequent costs which could be added to the amount of the mortgage under rule 10. These he could not have claimed before the decree of the High Court was passed. In the case of *Madho Ram v. Nihal Singh* (4), to which I was a party, it was no doubt held that the right of the decree-holder to apply for a final decree accrued upon the expiry of the term fixed for payment. I must confess that the considerations to which I have referred were overlooked in that case. Upon further consideration, I think the view taken in that case was not correct. It is impossible to hold that there can be more final decrees than one in a suit for sale upon a mortgage. Unless it be held that the right to apply for a

(1) (1882) I. L. R., 4 All., 376.

(3) (1914) I. L. R., 36 All., 350.

(2) (1888) I. L. R., 11 All., 267

(4) (1915) I. L. R., 38 All., 21.

final decree accrues when the decree of the appellate court is passed in a case in which an appeal has been preferred to the final court of appeal, it may be open to a party to apply for several final decrees in the same cause. That surely was not contemplated by the Legislature. In this view the appeal must prevail. I would allow it, set aside the orders of the courts below and remand the case to the court of first instance for disposal of the application of the plaintiff according to law.

TUDBALL, J.—I fully agree and there is very little that I can with advantage add to the judgement which has just been delivered. When the Munsif passed the decree, it was open to the plaintiff, or the defendant, to accept that decree or to appeal. If an appeal is preferred, the final decree is the decree of the appellate court of final jurisdiction. When that decree is passed, it is that decree, and only that, which can be made final in the cause between the parties.

PIGGOTT, J.—I concur.

BY THE COURT :—The order of the Court is that the appeal is allowed; the orders and decrees of the courts below are set aside, and the case is remanded to the court of first instance with directions to re-admit it under its original number in the register and to dispose of it according to law. Costs here and hitherto will be costs in the cause.

*Appeal allowed and cause remanded.*

## APPELLATE CIVIL.

*Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.*

RATAN DEI (PLAINTIFF) v. DURGA SHANKAR BAJPAI AND OTHERS  
(DEFENDANTS).\*

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*Act No. XII of 1881 (N. W. P. Rent Act)—Sale of zamindari—Agreement to relinquish proprietary rights in sir lands—Void contract*

In 1899 one R. D., the widow of a Hindu who had died heavily in debt, sold most of her husband's property to his principal creditor D. S. By the terms of the sale-deed the vendor agreed to file a relinquishment of her

\* Second Appeal No. 889 of 1915, from a decree of B. J. Dalal, District Judge of Benares, dated the 26th of April, 1915, modifying a decree of Udit Narain Singh, Subordinate Judge of Benares, dated the 18th of December, 1914.