

instance restored. The respondents will pay the costs in this and in the lower appellate court.

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Appeal allowed.

HABIB-ULLAH
v.
MANRUP.

1917

December, 3.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

AHMAD KHAN AND OTHERS (OBJECTORS) v. MUSAMMAT GAURA

(APPLICANT).*

Act No. IX of 1908 (Indian Limitation Act), schedule I, article 181—Mortgage—Suit for sale—Application for final decree—Limitation.

An application for a final decree in a suit for sale on a mortgage being an application in the suit and not an application in execution, the fact that one such application has been made within the prescribed period of limitation does not operate to extend the period of limitation in favour of a second application, the first having been dismissed for default.

THE facts of this case were as follows:—

The respondent obtained a preliminary decree for sale on the 27th of August, 1908. She applied for a final decree on the 26th of August, 1911, but the application was dismissed for default of both parties on the 9th of April, 1912. The respondent again applied for a final decree on the 10th of September, 1912. This application was resisted on the grounds that after the dismissal of the previous application the present application was not maintainable and that it was barred by time. The first court held that the proper remedy of the respondent was to apply for the revival of the previous application and that the subsequent application was not maintainable. The lower appellate court reversed the decision of the first court and remanded the case for proceeding with the application. The judgement-debtors appealed to the High Court.

Maulvi *Iqbal Ahmad*, for the appellants:—

When the first application was dismissed for default, the proper remedy of the decree-holder was either to appeal against the order of dismissal or to apply under order IX, rule 9, of the Code of Civil Procedure for an order setting aside the dismissal. The present application is neither in form nor in substance an application under order IX, rule 9, and was presented long after the period prescribed for such an application by article 163 of the

*First Appeal No. 72 of 1917, from an order of Sulekhan Dayal, Second Additional Subordinate Judge of Jaunpur, dated the 20th of March, 1917

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Limitation Act had expired. The present application, therefore, cannot be treated as an application for the revival of the former application. Even assuming that the application is maintainable, it is barred by time. The present Code of Civil Procedure makes it clear that an application for a final decree is not an application in execution of a decree but an application in the suit itself. Therefore article 182 of the Limitation Act is not applicable to the case, and the previous application made by the respondent cannot give a fresh start to the period of limitation. The present application is governed by article 181. As it was made more than three years after the expiry of the time for payment fixed by the preliminary decree it is barred by time.

Dr. S. M. Sulaiman, for the respondent :—

No appeal lies from the order of remand passed by the lower appellate court in this case. Every order of remand sending a case back for trial on the merits is not necessarily appealable; *Wahid-un-nissa v. Kundan Lal* (1). In the present case the order of remand having been made in an appeal from an order and not from a decree, no further appeal lies to the High Court. The present application is maintainable. The order of dismissal of the previous application was made because of the non-appearance of both parties; it was an order under rule 3 and not rule 8 of order IX, Civil Procedure Code. In such a case a fresh application is maintainable. The question of limitation has not yet been decided by the courts below; it will be one of the questions for determination by the lower court when the case goes back in accordance with the order of remand. The period of three years should be calculated from the date of the dismissal of the previous application, and not from the date of the expiry of the time fixed for payment.

Maulvi Iqbal Ahmad, was not heard in reply.

RICHARDS, C. J., and BANERJI, J.:—This appeal arises out of an application for a final decree in a mortgage suit. The preliminary decree was passed on the 27th of August, 1908, and six months were allowed to the defendant to pay the mortgage-money. It is stated in the petition filed by the decree-holder that no payment was made. He made an application on the 26th

of August, 1911, for a final decree under order XXXIV, rule 5. That application was dismissed for default on the 9th of April, 1912. On the 10th of September, 1912, the present application was made for a final decree. It was opposed on two grounds, first, that the order dismissing the previous application was a bar to the present application and, secondly, that the application was time-barred. The court of first instance allowed the first objection and did not decide the second. It dismissed the application now made. Upon appeal the lower appellate court disagreed with the court of first instance and remanded the case for proceeding with the application.

So far as the first point is concerned the defendant's objection was without force, because, the first application having been dismissed for default of appearance of both parties, a fresh application could be made, but this second application ought to have been made within the period prescribed by the law of limitation. It is clear that the application was beyond time. The period of limitation which governs a case of this kind is three years, under article 181 of the first schedule to the Limitation Act, from the date on which the right to apply accrued, that is, from the expiration of the time allowed by the decree for payment of the mortgage money. In the present case the six months expired on the 27th of February, 1909, and as the present application was made on the 10th of September, 1912, it was clearly beyond time. The court below seems to have overlooked the fact that in the present Code of Civil Procedure a "final decree" in a mortgage suit is a decree in the suit itself and an application for a final decree cannot be deemed to be an application in execution. The second application cannot be regarded as a revival of an application which was disposed of. In this view the present application was clearly beyond time and ought to have been dismissed.

We accordingly allow the appeal, set aside the order of the court below and restore the order of the court of first instance with costs in all courts.

Appeal allowed.

1917

ARMAD KHAN
v.
MUSAMMAT
GAURA.