1915, was not made under order XX, rule 11. As to the argument put forward grounded on the provisions of section 15 of the Limitation Act, this section runs as follows:—"In computing the period of limitation prescribed for any suit or application for the execution of a decree the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded." In the first place, the order of the 23rd of September, was not strictly an order staying the execution of the decree. Further more, the Limitation Act itself prescribes periods of limitation for bringing suits and periods of limitation for the execution of decrees, and it seems pretty clear that the word "prescribed" in this section refers to periods prescribed by the Limitation Act. Section 48 of the Code of Civil Procedure does not in a strict sense provide a "period" of limitation. It is an enactment which forbids an order for execution upon a decree which is more than twelve years old. We must 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..

1918

JUBAWAN PASI v. MAHABIR DHAR DUBE.

Appeal allowed.

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

1918 *January*, 5.

NIZAM-UD-DIN SHAH (DEFENDANT) *v.* BOHRA BHIM SEN (PLAINTIFF)*

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

An application for a final decree under order XXXIV, rule 5, of the Code of Civil Procedure is an application in the suit, and not an application in execution: the limitation applicable is that prescribed by article 181 of schedule I to the Indian Limitation Act, 1908, and time begins to run, if there has been an appeal in the suit, from the date of the decree of the final court of appeal. *Gajadhar Singh* v. *Kishan Jiwan Lal* (1) referred to.

THE facts of this case, so far as they are necessary for the purposes of this report, were as follows:—

A suit for sale on a mortgage was instituted in 1911, and the High Court in appeal made a decree on the 17th of June, 1912.

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*First Appeal No. 321 of 1916, from a decree of Khwaja Abdul Ali, Subordinate Judge of Agra, dated the 21st of July, 1916.

(1) (1917) I. L. R., 39 All., 641.

1918

NIZAM-UD-DIN SHAH v. BOHRA BHIM SEN.

On the 16th of March, 1916, the decree-holder made an application for a decree absolute under order XXXIV, rule 5, of the Code of Civil Procedure against the heir of the original judgment-debtor. He objected that the property was *waqf* and the application was time-barred. The court below disallowed the objections. The objector thereupon appealed to the High Court.

Mr. *B. E. O'Conor* (Mr. *S. A. Raoof* with him), for the appellant.

Pandit *M. L. Sandal*, for the respondents.

RICHARDS, C. J., and BANERJI J.:—The facts connected with this appeal are as follows:—A suit was instituted in the year 1911, on foot of a mortgage. Two persons were made defendants to this suit, namely one Musammat Kadri Begam and Nizam-ud-din Shah. The usual preliminary decree was granted by the court of first instance. Two appeals were filed in the High Court, which dismissed the suit against Nizam-ud-din Shah, but gave a decree against Musammat Kadri Begam. The High Court's decree was dated the 17th of June, 1912. The Court does not appear to have been asked to extend the time and did not do so. The present application was one made on the 16th of March, 1916. The application stated that Musammat Kadri Begam, the sole defendant, had died and that Nizam-ud-din Shah was her heir. The application was one for the preparation of a final decree under order XXXIV, rule 5. Several objections were taken by Nizam-ud-din Shah. He tried to set up that the property was *waqf*. He also objected that the application for the decree was beyond time and that Musammat Kadri Begam had died more than six months before the application was made. The court below held, and we think rightly held, that Nizam-ud-din Shah could not set up the plea that the property was *waqf*. He could only make such objections to the execution of the decree as Musammat Kadri Begam whose heir he was, could have made and she could not have raised the objection that the property was *waqf*. The learned Subordinate Judge overruled the other two objections based on limitation. This Court has held in a case like the present that the High Court's decree is the decree in respect of which an application for a final decree is to be made. It has also held that article 181, schedule I, of the Limitation Act

is the proper article and that time begins to run from the period for payment fixed by the High Court's decree, see *Gajadhar Singh* v. *Kishan Jiwan Lal* (1). Applying this authority to the present case time began to run from the 17th of June, 1912. The application was accordingly clearly beyond time. Section 6 of the Limitation Act will not help the plaintiff, because that section only applies to the time for the institution of suits or the time for an application for the execution of the decrees. An application for a final decree in a mortgage suit is not an application for execution of a decree It is clear, therefore, that the application was beyond time. It is admitted that Musammat Kadri Begam died more than six months before the application was made. Order XXII, rule 4, provides that where a sole defendant dies and the right to sue survives the court on an application made in that behalf shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit. Sub-section (3) further provides that where within the time limited by law no application is made under sub-rule (1) the suit shall abate as against the deceased defendant. In the case of *Muhammad Masihullah Khan* v. *Jarao Bai* (2) it was held that a suit for redemption is still a "pending" suit after a preliminary decree has been made. It would, therefore, appear in the present case that there ought to have been an application to bring the heir of Musammat Kadri Begam on to the record within six months from the date of her death. Otherwise the suit would have abated. It is not, however, necessary for the decision of the present case that we should decide this last mentioned point.

We allow the appeal, set aside the order of the court below and dismiss the application of the respondent. The appellant will have his costs in both courts.

Appeal allowed

(1) (1917) I. L. R., 39 All., 641. (2) (1915) I. L. R., 37 All., 226.