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property, in respect of which the suit seems to have been dismissed upon a different finding which is clearly a finding against the plaintiffs on the question of title. It looks like a finding of fact; but it is not necessary for us to go further into the matter, because in our opinion the case will have to go back to the lower court for decision on the merits. The suit has been dismissed in that court upon the finding that the plaintiffs, by reason of the nature of the relief sought in their plaint must either get a decree for partition by metes and bounds or no decree at all. We reverse that finding, holding that the plaintiffs, if their title is established, should receive a decree for joint possession over such fractional share in the property in suit as the court finds to be their rightful due. The case must now go back to the lower appellate court in order that the defendants respondents may have an opportunity, if they wish to do so, of supporting the decree of the court of first instance on any of the points which have been decided in favour of the plaintiffs. In fact the lower appellate court will have to try the suit on the merits unless the defendants now withdraw any of the pleas upon which issues were framed in the court of first instance. Our order, therefore, on Second Appeal No. 711 of 1918 is that we set aside the decree of the lower appellate court and remand the case to that court, with orders to readmit the same on to its file of pending appeals and to dispose of it on the merits. We think that the plaintiffs are clearly entitled to their costs of this appeal, and we order accordingly.

Appeal decreed and cause remanded.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Gokul Prasad.

GYAN SINGH AND OTHERS (PLAINTIFFS) v. ATA HUSAIN AND OTHERS (DEFENDANTS)*

1920. *December*, 8.

Act No. IX of 1908 *(Indian Limitation Act), schedule I, article* 181—*Civil Procedure Code* (1908), *order XLI, rule* 33—*Mortgage—Preliminary decree for sale specifying separate liability of each property for a separate sum—Appeal by some only of the defendants—Decree reversed as against appellants—Application for final decree against the other defendants—Limitation.*

A preliminary decree in a suit on a mortgage declared the liability of each of the properties against which the mortgage was sought to be enforced and

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*First Appeal No. 174 of 1918 from a decree of Kshirod Gopal Banerji, Subordinate Judge of Cawnpore, dated the 5th of January, 1918.

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also that each of these would be liable for a proportionate part of the amount found to be due on the mortgage. Those amounts were specified in the decree and the property which was to be liable for those amounts was also specified.

Against this decree some only of the defendants appealed and as against them only the decree was set aside. More than five years after the decree of the first court, though within three years of the appellate decision, the decree-holders applied for a final decree against those of the defendants who had not appealed.

Held that the application was time-barred under article 181 of the first schedule to the Indian Limitation Act, 1908.

Held, also, that when a decree for sale provided that the decree-holders would not be entitled to sell unless they paid off a certain prior mortgage, but no time was fixed for payment, that the payment was to be made within a reasonable time, that is to say, not exceeding six months.

THE facts of this case are fully stated in the judgment of the Court.

Babu *Satya Chandar Mukerji* and Babu *Piari Lal Banerji* for the appellants.

Dr. *S. M. Sulaiman* and Dr. *Surendra Nath Sen* for the respondents.

BANERJI and GOKUL PRASAD, JJ. :—This appeal arises out of an application for a final decree in a mortgage suit. The application which is now the subject matter of controversy was presented on the 12th of June, 1917. The question is whether this application was time-barred. The preliminary decree in the suit was made on the 30th of April, 1912. The suit was brought to enforce a mortgage against some of the properties comprised in the mortgage, on the ground that the other properties had been purchased by the mortgagees themselves. The court in making its decree declared the liability of each of the properties against which the mortgage was sought to be enforced and it also declared in its decree that each of those properties would be liable for a proportionate part of the amount found to be due upon the mortgage. Those amounts were specified in the decree and the property which was to be liable for those amounts was also specified. Six months were granted to the mortgagors for payment of those amounts. There was a further provision in the decree that the decree-holders would not be entitled to bring the property to sale unless they paid the amount of a prior mortgage. The decree, however, did not fix any time within which the amount last mentioned was to be

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paid. It may be noted that the suit was brought upon a copy of the original mortgage, which was alleged to have been lost. Three of the defendants appealed against this decree and their contention was that the loss of the original had not been accounted for and that the debt had been discharged. This appeal was preferred only in respect of the amount which the three appellants had been ordered to pay on account of the ownership of the property which was held to be liable for that amount. The appellate court, which was the High Court, held that the loss of the original had not been accounted for and that the suit was therefore not maintainable, and on this ground dismissed the suit as against the appellants. As against the other defendants to the suit, who were no parties to the appeal to the High Court and who themselves had preferred no appeal, the High Court made no order. The decree of the High Court was passed on the 6th of July, 1914. An application for a final decree was made on the 7th of April, 1915, by all the decree-holders except the Court of Wards. The Court of Wards, however, was named as an opposite party to the application. That application was dismissed for default and subsequent applications made with the object of having the application of the 7th of April, 1915, restored and revived were also dismissed. After these proceedings had taken place the present application of the 12th of June, 1917, was presented by all the decree-holders. The court below has dismissed the application and we have to consider whether the decision of that court is right. It is not disputed that the limitation applicable to an application of this kind is that provided by article 181 of the first schedule to the Limitation Act, and the period of limitation is three years from the date on which the right to apply accrued. We have, therefore, to determine when the right of the present decree-holders to make an application for a final decree in the cause arose. It may be taken as settled law that the right to apply for a final decree accrued to the decree-holders when the preliminary decree became conclusive between the parties. We have, therefore, to consider in this case when the decree of the court of first instance became conclusive as between the decree-holders and the judgment-debtors against whom the present application

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has been made. It is contended that the preliminary decree could not have become final as between the parties to the present appeal until the decision of the High Court in the appeal which was preferred by the three judgment-debtors who obtained a decree in the High Court. This contention is based mainly upon the provisions of order XLI, rule 33, of the Code of Civil Procedure. It is urged that since some of the judgment-debtors preferred an appeal to the High Court the whole of the decree became *sub judice* and that it was competent to the High Court to dismiss the whole suit as against all the defendants, and until the final decision of the High Court it could not be said that the decree against those defendants who had not appealed had become final. We are unable to agree with this contention. Under order XLI, rule 4, the appellate court could upon the appeal of some of the parties reverse the decision of the lower court if the appeal had been preferred against the whole decree and if the court had proceeded upon a ground common to all the parties. In the present case the appeal, which was preferred by three of the defendants, was limited to that part of the decree which directed their property to bear a proportionate part of the decretal amount, and it was not an appeal against the whole decree. Therefore, although the court of first instance had proceeded upon a ground common to all the defendants, the appellate court could not have reversed the decree under order XLI, rule 4. Mr. *Piari Lal Banerji*, who has ably argued this case on behalf of the appellants, concedes that rule 4 of order XLI would not apply, but he rests his contention upon the provisions of rule 33 of that order. We think that he cannot avail himself of the provisions of that rule, and that the appellate court in the appeal preferred by some of the defendants in respect of only a part of the decree could not by virtue of the provisions of rule 33, have dismissed the suit against those defendants who had in fact submitted to it. The principle of the Full Bench ruling in *Rangam Lal* v. *Jhandu* (1) applies to this case. There being a distinct provision as to the power of an appellate court to interfere with the decision of the court of first instance upon an appeal preferred by some

(1) (1911) I.L.R., 34 All., 32.

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of the defendants in certain cases, the provisions of rule 33 could not apply to cases for which clear provision is made in the order or to cases which would not come within the purview of the specific rule. We are, therefore, of opinion that the decree of the court of first instance did not become *sub judice* when an appeal was preferred to this Court by some of the defendants only. The appellants were consequently not entitled to reckon limitation from the date of the decision of the High Court. The decree of the court of first instance was in fact a decree which was a combination of several decrees against separate sets of defendants for separate amounts. As regards those of the defendants who did not appeal that decree became conclusive upon the expiry of the period of limitation for an appeal from that decree. In the present case the decree allowed six months to the judgment-debtors to pay the amount decreed against each of them. That amount was payable on the 30th of October, 1912. The decree, therefore, against the defendants who did not appeal became a final and conclusive decree as between the decree-holders and them on that date, the period of limitation for an appeal having expired before that date. As the present application was presented more than three years after the day on which the preliminary decree became conclusive against the respondents, it is beyond time.

Another contention which was put forward on behalf of the appellants was that the decree, in directing the appellants to discharge the amount of a prior mortgage, did not prescribe a particular period within which the prior mortgage was to be discharged, and therefore, as the decree-holders could not bring the mortgaged property to sale without payment of the amount of the prior mortgage, their right to apply for a final decree for the sale of the mortgaged property only accrued when they paid or tendered the amount of the prior mortgage. If this contention be carried to its legitimate length the decree-holders might wait for any number of years before they paid the amount of the prior mortgage. But Mr. *Banerji* fairly concedes that although no date was fixed in the decree for payment of the amount of the prior mortgage it ought to have been paid or tendered within a reasonable time. It is clear that the decree,

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in so far as it directed payment of the amount of the prior mortgage, was a decree for the redemption of that mortgage. The period within which the amount of the mortgage could be paid for redemption, as prescribed in order XXXIV, rule 7, is a period within six months of the decree, so that the maximum period within which the amount of the prior mortgage could be paid for redemption of that mortgage was six months. If we adopt Mr. *Piari Lal Banerji's* contention that the period should be a reasonable period, we are unable to hold that that period should be anything more than the period mentioned in rule 7, order XXXIV, i. e., a period of six months. If limitation be computed from the expiry of that period the present application would be beyond time. For these reasons we hold that the court below was right in dismissing the application made by the decree-holders and this appeal must fail. We dismiss it with costs.

Appeal dismissed.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Ryves.

SHAM DAS (PLAINTIFF) v. BAHADUR SINGH AND ANOTHER (DEFENDANTS).*

1920 *December,* 9.

Jurisdiction—Civil and Revenue Courts—Act (Local) No. II of 1901 (Agra Tenancy Act), chapter X, and section 198(2)—Rent-free grantee—Suit against zamindar for declaration of status and recovery of rent wrongfully realized by zamindar from sub-tenant.

Plaintiff brought his suit in a Civil Court and asked for a declaration that he was the rent-free grantee of certain land, and that, having occupied the land for a certain period, he had thereby become the proprietor. Incidentally plaintiff also asked for the refund of a sum of money which the defendant's predecessor in title had received as rent from a third party.

Held that the suit as framed was within the cognizance of a Civil Court, *Gobind Rai* v. *Banwari Lal* (1) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Babu *Piari Lal Banerji,* for the appellant.

Munshi *Panna Lal,* for the respondents

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* Second Appeal No. 145 of 1918 from a decree of B. J. Dalal, District Judge of Aligarh, dated the 19th of November, 1917, reversing a decree of Hanuman Prasad Varma, Munsif of Haveli, dated the 16th of May, 1917.

(1) (1920) I. L. R., 42 All., 412.