APPELLATE CIVIL.

Before Mr. Justice Mukerji and Mr. Justice Niamat-ullah.

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January, 29

KHAIR-UN-NISSA BIBI (PLAINTIFF) *v.* OUDH COMMERCIAL BANK, LTD., AND OTHERS (DEFENDANTS).*

Civil Procedure Code, order XXXIV, rule 5—Final decree for sale passed pending an appeal from a preliminary decree—Validity.

A final decree for sale on foot of a mortgage, passed during the pendency of an appeal from the preliminary decree which is eventually affirmed by the court of appeal, is valid and binding on the parties and is capable of execution; but since it can not include costs of the appellate court the mortgagee seeking to execute it cannot insist on including such costs, as he could do if he obtained a final decree on foot of the preliminary decree passed on appeal. *Lalman* v. *Shiam Singh* (1), distinguished. *Gajadhar Singh* v. *Kishan Jiwan Lal* (2), *Fitzholmes* v. *Bank of Upper India, Ltd.*, (3) and *Jowad Husain* v. *Gendan Singh* (4), referred to.

Maulvi *Iqbal Ahmad* and Maulvi *Mukhtar Ahmad*, for the appellant.

Dr. *Kailas Nath Katju* and Munshi *Shabd Saran*, for the respondents.

MUKERJI, J.:—The plaintiff is the appellant in this Court. She instituted the suit out of which this appeal has arisen under the following circumstances.

The Oudh Commercial Bank, Ltd., Fyzabad, the respondent in this appeal, obtained a decree for sale on foot of a mortgage executed by two persons, viz. Saliha Bibi and her husband Riasat Husain. Saliha

*First Appeal No. 313 of 1925, from a decree of Krishna Das, Additional Subordinate Judge of Azamgarh, dated the 18th of April, 1925.

(1) (1925) 24 A. L. J., 288.
(2) (1917) I. L. R., 39 All., 641.
(3) (1926) I. L. R., 8 Lah., 258.
(4) (1926) 24 A. L. J., 765.

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Bibi was a first paternal cousin of the plaintiff and, according to the Shia law to which Saliha Bibi was subject, on her death the plaintiff became the sole heir of her property. The decree was passed against Saliha Bibi and her husband and was followed by a final decree for sale on the 16th of December, 1915. When the final decree was passed, an appeal against the preliminary decree was pending in the court of the Judicial Commissioner, Lucknow. That court dismissed the appeal against the preliminary decree on the 26th of July, 1916. Riasat Husain died in June, 1916, and Saliha Bibi died in December, 1918. There was a dispute as to who should succeed to the estate of Saliha Bibi. It appears that nobody knew, at the time, not even the plaintiff herself, that the plaintiff Khair-un-nissa was the heir to Saliha Bibi. Khair-un-nissa was married to Riasat Husain as was her cousin Saliha Bibi. Khair-un-nissa has a son in Marahmat Husain, who is the defendant No. 2 in this suit, by Riasat Husain, her husband. Fearing that collateral relations would take the property of Saliha Bibi, Khair-un-nissa falsely set up her own son as the son of Saliha Bibi. There was a litigation, and ultimately it was established that Khair-un-nissa was the sole heir of Saliha Bibi. The respondents, the decree-holders, impleaded, for the purpose of the execution of their decree, a whole host of persons, viz., defendants Nos. 2 to 10 of the present suit. Marahmat Husain, being a minor, was impleaded under the guardianship of his mother Khair-un-nissa. The plaintiff brought the suit, out of which this appeal has arisen, to obtain a declaration that she was not made a party to the execution proceedings and her contention was that she, the only legal heir, not being before the court, the decree had become barred by time. She sought a declaration that the decree had become time-barred and the property mortgaged was not capable of being sold in execution of that

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decree. Evidently, this last prayer was meant to follow as a corollary to the main proposition that the decree was time-barred.

A number of other and subsidiary questions of fact and law were raised in the suit, but they have all been decided by the learned Subordinate Judge and they have not been re-agitated before us. The learned Subordinate Judge, on one of the points raised, held that the suit was not barred by section 47 of the Civil Procedure Code. It was conceded before us that the suit, as brought, would be barred by section 47 and we are of the same opinion. She must raise the question of limitation in the execution proceedings, and not by a separate suit. The learned counsel for the appellant, however, sought to raise a new point and it being a point of law he was allowed to raise it. His argument was that the final decree which is sought to be executed, dated the 16th of December, 1915, was a nullity and was not binding on the plaintiff. If this was so, the present suit was maintainable and the plaintiff could obtain a declaration to that effect. We have, therefore, to consider how far this contention is correct.

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The argument is based on this. As I have already pointed out, when the final decree was made in the mortgage suit on the 16th of December, 1915, an appeal against the preliminary decree was pending before the court of the Judicial Commissioner of Oudh. The appeal was dismissed on the 26th of July, 1916. It is contended that there could be only one final decree in the case and that decree could be passed only after the appeal from the preliminary decree had been disposed of. It was further urged that as the appeal was not decided till 1916, the final decree passed in 1915 was a nullity. A case decided by two learned Judges of this Court, viz. *Lalman* v. *Shiam Singh* (1), has been cited in support

(1) (1925) 24 A. L. J., 288.

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of this proposition. This case goes to the full length of supporting the appellant's case. If the learned Judges had decided the question of *res judicata*, feebly urged before them, after consideration, we would have thought it necessary to refer the present question before a larger Bench. But I take it that the question of *res judicata* was not pressed before the learned Judges and the learned Judges did not direct their mind to a full consideration of the same.

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The question of *res judicata* arises in this way. Granting for the sake of argument, that the final decree in a mortgage suit could not be passed till the appeal from the preliminary decree had been decided, we find it to be a dead fact that a final decree was passed as between the parties. The court that did pass the final decree was seised of the case and had the jurisdiction, therefore, to pass it. It may be, if the contention of the plaintiff be right, that the court acted wrongly in making the final decree and in disregarding the fact that an appeal from the preliminary decree was pending. The decree being there, rightly or wrongly passed, it binds the parties to it. The plaintiff's predecessor in title being bound by the decree, it is not open to the plaintiff to say that the decree is a nullity. This aspect of the case was presented before the learned Judges in 24 A. L. J., 288, but it was presented very feebly. The learned Judges brushed aside the argument by pointing out that the decree-holder sought execution not only of the final decree but also sought to realize the costs which had been granted by the appellate court in dismissing the appeal against the preliminary decree. If this was so, it would have been enough to dismiss that portion of the application for execution as sought to execute, by sale of the property, the decree for costs passed by the appellate court. If the decree-holder wanted a few rupees more than was warranted by the final decree, that would

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be no ground for saying that the final decree was a nullity.

I will now consider the argument of the plaintiff's counsel as apart from authority furnished by the case already discussed. The learned counsel relied on the case of *Gajadhar Singh* v. *Kishan Jiwan Lal* (1) and *Fitzholmes* v. *Bank of Upper India, Ltd.* (2) decided by their Lordships of the Privy Council, in which a certain statement of the law made by BANERJI, J., in the case in I. L. R. 39 All., 641, was approved. Both the cases were of limitation and the question arose whether for the purpose of applying for a final decree the decree-holder had three years from the date of the preliminary decree passed by the first court or from the date of the decision of the appellate court where there was an appeal from the preliminary decree. It appears that in an earlier case BANERJI, J., of this Court had held that limitation began to run from the date of the passing of the preliminary decree by the first court. In the case of *Gajadhar Singh* v. *Kishan Jiwan Lal* (1), the learned Judge modified his opinion and held that limitation would begin to run from the date of the final decision in appeal. In stating the law the learned Judge said that the law contemplated the passing of only one final decree and that final decree could be made only after the appellate court had decided the appeal from the preliminary decree. It is this dictum which has been approved of by their Lordships of the Privy Council.

As already pointed out, the point before the Full Bench in the case in I. L. R. 39 All., and the point in the case before their Lordships of the Privy Council in I. L. R., 8 Lah., 253 were ones of limitation. The question that we have to decide is not one of limitation but is whether a mortgagee who has obtained a decree

(1) (1917) I. L. R., 39 All., 641. (2) (1926) I. L. R., 8 Lah., 253.

for sale is not entitled to ask for a final decree for sale, for the simple reason that an appeal has been preferred against the preliminary decree. Suppose for example, a suit for sale is brought for recovery of Rs. 52,000. The defendant contends that Rs. 4,000 claimed as interest was not recoverable. The contention is disallowed by the court of first instance and a decree is passed for the entire sum of Rs. 52,000. The defendant appeals only in so far as the decree was for recovery of Rs. 4,000, as interest. If it be the law that till the question of Rs. 4,000 is decided by the appellate court (it may take three years to decide the point) the decree-holder must wait and cannot realize the balance of the decretal amount as to which there is no dispute and must be content with the reduced rate of interest at 6 per cent. per annum, although the stipulated interest might be much larger, that law would surely be very very ungenerous and irksome. Surely, unless there be any express law to the effect, we must not deduce it from the dicta already quoted which fell from eminent Judges on a pure question of limitation.

Order XL, rule 5 of the Civil Procedure Code expressly lays down that the fact that an appeal is filed shall not, by itself, operate as a stay of execution. If we are to accept the appellant's contention that by virtue of preferring an appeal, for however small a portion of the decree it may be, a judgement-debtor can put off the execution of a mortgage decree, we must surely have an authority for that. No such authority is quoted. The case of a mortgage decree does not stand apart. The same remarks apply to decrees for, say, dissolution of partnership and accounts, decrees for partition, a decree against an agent for rendition of account and so on.

No doubt, where a preliminary decree has been interfered with by the appellate court, the final decree is affected to that extent. It is also clear that where a

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decree-holder proceeds to obtain a final decree in spite of the fact that an appeal against a preliminary decree is pending, he takes some risks in having to apply for a fresh final decree if the appellate court modifies the preliminary decree. But that is the case even where a simple money decree is passed. A simple money decree, say for Rs. 5,000, is passed. The decree-holder will have an absolute right to execute the decree at once although the defendant may prefer an appeal. If the appeal succeeds and if in the meanwhile the plaintiff has realized the decretal amount, he will have to refund the amount; but certainly nobody would argue that simply because the original decree stands the chance of being modified on appeal no execution could be taken out. Where a decree is passed by parts, as in the case of a suit on a mortgage, the decree can be executed only after a final decree has been made. There must be some clear authority for holding that the mere fact that an appeal against the preliminary decree is pending is a sufficient justification for postponing the passing of the final decree.

I am, therefore, clearly of opinion that the contention of the learned counsel for the appellant has no force and the final decree passed is not a nullity.

I need not go back to the question of *res judicata*. The final decree, whether it should or should not have been passed, has been passed and therefore no valid objection can be taken to its execution. The appellate decree has not in any way modified this final decree. There may be, but we do not know if it is the case, a decree for costs passed by the appellate court. That decree for costs may be a decree directing that the costs should be realized from the mortgaged property or it may be a decree directing that the unsuccessful respondent should pay the costs personally. If it is a personal decree, it will have to be executed independently. If

the appellate decree directs that the costs should come out of the property mortgaged, that decree will not be executed till a final decree is made including the appellate costs. In any view, the final decree as it stands is capable of execution and nobody who is a party to the execution, or his representative, can object to it.

The result is that the appeal must fail. I would dismiss the appeal with costs.

NIAMAT-ULLAH, J. :—I am in complete agreement with the view taken by my learned brother and with the reasons assigned by him in support of it. I would add a few words of my own as I feel strongly on the question whether the final decree passed during the pendency of an appeal from the preliminary decree which is eventually affirmed by the court of appeal is a nullity. Reliance is placed on behalf of the appellant on *Lalman* v. *Shiam Singh* (1) for the proposition that such a final decree is not capable of execution. This view, if accepted, will lead to some startling results. Order XXXIV, rule 5, runs as follows :—

"(1) Where on or before the day fixed the defendant pays into court the amount declared due as aforesaid together with such subsequent costs as are mentioned in rule 10, the court shall pass a decree—

(*a*) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up, and, if so required—

(*b*) ordering him to retransfer the mortgaged property as directed in the said decree, and also, if necessary,—

(*c*) ordering him to put the defendant in possession of the property.

(1) (1925) 24 A. L. J., 288.

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(2) Where such payment is not so made, 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."

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As soon as a suit for sale terminates in favour of the mortgagee a preliminary decree must follow. On the expiry of the usual period of grace, when payment is not made, the court "shall" pass a final decree "on application made in that behalf by the mortgagee." No notice of such application need be issued to the mortgagor, though one is usually issued. In view of the mandatory character of these provisions no court can refuse to pass a final decree if the mortgagee applies therefor. The mortgagor cannot be heard to say that he has preferred an appeal and therefore no final decree can be passed. This *reductio ad absurdum* becomes more marked if the provisions of order XXXIV, rules 2 and 3 are examined. When a preliminary decree is passed in a foreclosure suit it directs payment "on a day within six months from the date of declaring the amounts due to be fixed by the court" (rule 2) and "if such payment is not so made, the court *shall*, on application made in that behalf by the plaintiff, pass a decree that the defendant . . . be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property." Then follows the proviso which proves the incorrectness of the view contended for, to demonstration. It is this :—"Provided that the court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day fixed for such payment."

If the preliminary decree has been appealed from there is, in that view, little room for the court to exercise a discretion given by the proviso, nor is there any

need for a mortgagor to apply for an extension of time as he can help himself to an extension if he has only preferred an appeal and in many cases to an extension for an inordinate length of time. If a case involves a substantial question of law an appeal to the Privy Council will afford great facilities for preventing the mortgagee from reaping the fruits of his decree. Where the mortgage money already exceeds the value of the mortgaged property, as it may do in many cases, the delay in passing a final decree in a foreclosure suit is calculated to deprive him of any return for the interest accruing in the meantime.

It is true a decree passed by a court of first instance, when affirmed on appeal, is merged in the appellate decree. But so long as no decree has been passed by the court of appeal it continues in full force, and the mortgagee can take action according to its tenor. It is open to a mortgagee to obtain a final decree, if otherwise entitled to it, even where an appeal is pending from the preliminary decree. But such a course entails some disadvantages, e.g. interest at contract rate is to be awarded up to the date fixed for payment by the preliminary decree and thereafter at such rate as the court may allow and if he waits for the appellate decree he would be entitled to interest at the contract rate for a longer period. Whether a decree passed by a court of first instance will merge in the decree of the appellate court affirming it when a final decree intervenes and the mortgagee insists on executing the final decree already obtained or whether he can throw up such final decree and obtain another on foot of the preliminary decree passed by the appellate court affirming that of the court of first instance, are questions which do not call for decision in this case. It is, however, clear to my mind that where a final decree was actually passed pending an eventually unsuccessful appeal from the preliminary decree, it is binding on the

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parties and is capable of execution. Since it cannot include costs of the appellate court and possibly interest at a higher rate for a certain period, the mortgagee seeking to execute it cannot insist on including such costs and such interest, as he can do if he obtains a final decree on foot of the preliminary decree on appeal. The case of *Lalman* v. *Shiam Singh* (1) is distinguishable for the reason last mentioned. The learned Judges in repelling the argument that the final decree passed rightly or wrongly was binding between the parties, observed: "The simple answer to it is that the mortgagee does not come merely on the basis of that decree as having been passed in his favour rightly or wrongly. He includes in his application for execution costs awarded to him by the High Court as well and it is clear that he has in contemplation the correct final decree which ought to be passed in the suit. Such a correct decree has not yet been passed, so there can be no question of its execution." In the case before us there is no suggestion, and the question having been raised for the first time in this Court there is no evidence, that the mortgagee is, in effect, seeking to execute the supposed final decree based on the preliminary decree passed on appeal. It is true there are *dicta* in this and other cases, which, taken apart from the facts to which they refer, lend support to the appellant's contention. *Gajadhar Singh* v. *Kishan Jiwan Lal* (2), *Jowad Husain* v. *Gendan Singh* (3) and *Fitzholmes* v. *The Bank of Upper India, Limited* (4), decide no more than that an application, made after the decision on appeal, for a final decree to be passed on foot of the preliminary decree passed on appeal, is not barred by article 181, Indian Limitation Act, if it is within three years from the date of the appellate decree, though beyond three years from the date of the preliminary decree passed by the court of first instance. They

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(1) (1925) 24 A. L. J., 288.
(2) (1917) I. L. R., 39 All., 641.
(3) (1926) 24 A. L. J., 765.
(4) (1926) I. L. R., 8 Lah., 253.

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can be no authority for the proposition that no final decree can be passed before the appeal is decided and, if passed, cannot be executed.

For the reasons stated above, I concur in the order dismissing the appeal with costs.

BY THE COURT:—The appeal is dismissed with costs.

Before Mr. Justice Mukerji and Mr. Justice Niamat-ullah.

HANWANT RAI (DEFENDANT) *v.* CHANDI PRASAD AND OTHERS (PLAINTIFFS) AND UMAN DATTA AND OTHERS (DEFENDANTS).*

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Act No. IV of 1882 (*Transfer of Property Act*), *section* 55 (2) *—Implied covenant—Covenant running with the land—Indemnity clause—Vendees from pre-emptor of original vendee entitled to the benefit—Act No. IX of* 1908, (*Limitation Act*), *article* 116*—Applicability to implied covenant.*

On the 12th of February, 1912, *H* sold some zamindari property to *M* and others. By this sale-deed *H* agreed to indemnify the vendees if by any act of himself or by any claim of his children or the members of his family any defect arose in the property. *K* sued for pre-emption and on the 25th of January, 1913, obtained a decree and, thereafter, possession. On the 6th of August, 1916, *K* and his joint brothers sold half the pre-empted property to the plaintiffs Nos. 1, 2 and three others. No indemnity clause was inserted in this sale-deed. Subsequently the sons of *H* sued for cancellation of the sale-deed of 1912, and got a decree and obtained delivery of possession of the whole property on the 12th of March, 1921.

The present suit was filed, in 1925, for compensation for breach of contract, based on the indemnity clause contained in the earlier sale-deed of 1912, by the brothers and survivors of *K* and two of the five vendees.

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* First Appeal No. 96 of 1926, from a decree of Krishna Das, Additional Subordinate Judge of Azamgarh, dated the 21st of November, 1925.