

## APPELLATE CIVIL.

Before Das and Adami, J.J.

SAIYID JOWAD HUSSAIN,

1922.

v.

GENDA SINGH.\*

March, 22.

*Mortgage Suit—final decree, limitation for application for—Limitation Act, 1908 (Act IX of 1908), Schedule I, Article 181—appeal from preliminary decree dismissed, effect of.*

The right to make an application for a final decree on a mortgage accrues on the date fixed by the decree for payment of the mortgage money, but if the preliminary decree is appealed from time begins to run from the date of the appellate court's decree even when the appeal is dismissed *in toto*.

*Gajadhar Singh v. Kishan Jiwan Lal*(1), followed.

*Abul Mujid v. Jawahir Lal*(2), referred to.

[See *Raj Kumar Chhotey Narain Singh v. Kedar Nath Singh*(3). Ed.]

The facts of the case material to this report were as follows:—

The mortgagee sued on a mortgage for recovery of Rs. 52,751-3-6 and obtained a decree for Rs. 19,302-12-9 on the 22nd February, 1915. A period of six months was allowed to the mortgagors for payment of the decretal amount. The preliminary decree was signed by the Court on the 12th March, 1915, and provided that if the decretal amount was not paid into court on or before the 22nd August, 1915, the mortgaged property or a sufficient part of it was to be sold.

The plaintiff appealed to the Calcutta High Court in respect of that portion of his claim which was

\* Appeal from Original Decree 139 of 1919, from a decision of Babu Radhakanta Ghosh, Second Subordinate Judge of Gaya, dated the 30th April, 1919.

(1) (1917) I. L. R. 39 All. 641, F. B. (2) (1914) I. L. R. 36 All. 350, P. C.

(3) *Ante*, p. 435.

disallowed. The appeal was transferred to the High Court at Patna and was dismissed on the 21st May, 1917.

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The present application for a final decree was made on the 22nd February, 1919, under Order XXXIV, rule 5. The defendant pleaded that the application was barred by limitation. The first court held that the application was not barred.

The defendant appealed to the High Court.

*Sultan Ahmed* (with him *Md. Tahir* and *Hasan Jan*), for the appellant.

*Hasan Imam* (with him *Abani Bhusan Mukerjee*), for the respondent.

DAS, J.—The material facts are all stated with precision in the judgment of the Court below; and, as I agree with the conclusion at which the learned Subordinate Judge has arrived, it is unnecessary to recapitulate these facts. The learned Counsel for the appellants contends that the right to apply accrued to the plaintiffs on the 22nd August, 1915, the date fixed for payment of the mortgage money by the preliminary decree passed by the Court of first instance, and that as the respondents did not apply for a final decree until the 22nd of February, 1919, the application presented on that date was barred under the provision of Article 181, First Schedule, of the Limitation Act. The learned Counsel for the respondents, on the other hand, maintains that as there was an appeal to the High Court by his clients from the decree of the Court of first instance and that as that appeal was disposed of on the 21st May, 1917, the right to apply accrued to the respondents on the 21st May, 1917, and the application was not accordingly barred by limitation. To this, the learned Counsel for the appellants replies that, as the decree of the High Court did nothing more than dismiss the appeal with costs, time began to run from the 22nd August, 1915.

I confess that the question is not free from difficulties. It is conceded that Article 181 of the

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Limitation Act, applies; and I think that it is a matter of regret that there are no provisions in the Limitation Act which would govern applications for a final decree analogous to those contained in the third column of Article 182 of the Limitation Act. It is conceded that if the appellate Court at all varies the decree of the primary Court, time would begin to run from the date of the decree of the appellate Court, and not from the decree of the Court of first instance; but it is contended that if the appellate Court dismisses the appeal without extending the time for payment fixed by the decree of the primary Court, time would begin to run from the date so fixed. It seems to me that, if the argument be a good one, it is possible for a mortgagor to defeat the mortgagee by carrying an appeal from one appellate Court to another; and ultimately suffering the appeal to be dismissed. But the mere fact that the argument may have that result is no ground for holding that it is a bad one; but it is a ground for hoping that the Legislature may find it possible to deal with the subject by providing a period of limitation for applications for final decrees in mortgage actions, and the time from which such period would begin to run, on principles analogous to those contained in the third column of Article 182 of the Limitation Act. Though not strictly pertinent to this subject. I may point out that, under Article 182 of the Limitation Act, the period of three years limited for an application for the execution of a decree or order begins to run from the date of the decree or order, unless there has been an appeal, in which case the time begins to run from the decree or order of the appellate Court or the withdrawal of the appeal. But where there is an appeal, and the appeal is dismissed for want of prosecution, since the order dismissing the appeal neither adopts nor confirms the decision appealed from, nor is it an order passed on the withdrawal of the appeal, time begins to run from the date of the decree or order appealed against, as in the opinion of the Judicial Committee, the party appealing must be regarded in the circumstances as being in the same position as if

he had not appealed at all [See *Abdul Majid v. Jawahir Lal* (1)]. This obviously puts the decree-holder at a great disadvantage, where the appeal is by the judgment-debtor. If the matters are at all reconsidered by the Legislature, and applications for final decrees in mortgage actions are put on the same footing as applications for executions of decrees, then the case where a mortgagor or a judgment-debtor carries an appeal to the appellate Court and then suffers the appeal to be dismissed for want of prosecution ought not to be overlooked by the Legislature.

The question which has been argued before us is not free from difficulties; but it is difficult to resist the argument employed by Banerji, J., in the case of *Gajadhar Singh v. Kishan Jiwan Lal* (2), upon which the learned Subordinate Judge relied. In giving effect to the arguments advanced on behalf of the mortgagees, that learned Judge said as follows, "It seems to me that this rule", that is to say the 5th rule of Order XXXIV, the rule regulating applications for final decrees in mortgage actions, "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 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 has become conclusive between the parties". The decision of the Judicial Committee in the case of *Abdul Majid v. Jawahir Lal* (1), was relied on by Mr. Justice Banerji. The facts of that case were these: by the preliminary decree passed by the Court of first instance the 12th of August, 1890, was fixed for payment of the mortgage money. An appeal was taken from that decree to the High Court, and that appeal was dismissed on the 8th of April, 1893. The mortgagor obtained leave to appeal to the Judicial Committee, but did not prosecute his appeal, and on the 13th of May, 1901, the appeal was dismissed for want of prosecution. On the 11th of June, 1909,

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the mortgagee applied to the Subordinate Judge for an order absolute to sell the mortgaged properties. The Judicial Committee came to the conclusion that the application was barred under section 179 of the Limitation Act of 1877, at the expiry of three years from the date of the decree of the High Court, and therefore before the passing of the Code of Civil Procedure of 1908, and that, as the right had once been barred, no provision of the Code of 1908 could operate to revive it. With this portion of the judgment of the Judicial Committee, we are not concerned, except in so far as it held that, before the passing of the Code of 1908, an application for an order absolute to sell the mortgaged properties was regarded as an application for execution of the preliminary decree; for on no other hypothesis could Article 179 of the Limitation Act of 1877 be regarded as applicable to such an application. The Judicial Committee, however, held that the time for making such an application began to run from the 8th of April, 1893, the date of the decision of the High Court dismissing the appeal. Mr. Justice Banerji took the decision of the Judicial Committee in the case cited to establish that, when an appeal has been preferred, it is the decree of the appellate Court which is the final decree in the case. But it may be pointed out that, on the hypothesis that Article 179 of the old Limitation Act was applicable to such an application, under the express provision of Article 179, time would begin to run from "the date of the final decree or order of the appellate Court"; and it is doubtful whether we can apply a decision under Article 179 of the old Limitation Act to a case under Article 181 of the new Limitation Act, except by analogy. All that Article 181 condescends to tell us is that limitation begins to run from the date "when the right to apply accrues". The question is, when does the right to apply accrue? Under Article 179 of the old Limitation Act, it accrued on the date of the final decree or order of the appellate Court. This provision is not to be found in Article 181: But neither is there anything in Article 181 to contradict

the view that the right to apply accrues on the date of the final decree or order of the appellate Court where there is an appeal from the decision of the Court of first instance. Now the essential character of an application which follows a preliminary decree for sale remains the same, though the provisions as to mortgage suits have been removed from the Transfer of Property Act to the Civil Procedure Code, and the order passed on such an application is now called a decree for sale and not an order for sale. The change effected by the Code of 1908, was a change in procedure so as to shut out such contentions as used to be raised that such applications were not under the provisions of the Civil Procedure Code. Neither the Civil Procedure Code of 1908 or the Limitation Act of 1908 has answered the question, when the right to make the application accrues. That being so, we are, I think, entitled, by analogy, to apply the provision of Article 179, third column, in answering the question, when the right to apply accrues. As I have said before the question is not free from difficulty; but, on the whole, I think, with great respect, that the view of Banerji, J., in the case I have cited is right.

I must dismiss this appeal with costs.

ADAMI, J.—I agree.

*Appeal dismissed.*

## APPELLATE CIVIL.

*Before Das and Ross, J.J.*

INDRA CHAND BOTHRA,

*v.*

SURENDRA NARAYAN SINGH.\*

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March, 24.

*Rent Decree—sale of patni in execution of money decree—whether purchaser personally liable to satisfy rent decree obtained by landlord against patnidar.*

\* Appeal from Original Order No. 226 of 1920, from an order of Jadu Nandan Prashad, Esq., District Judge of Purnea, dated the 6th October, 1920.