

given to the head of the *mutt* as trustee were trust properties and, therefore, no guardian in respect thereof could be appointed under section 7 of the Guardian and Wards Act. This case is on all fours with the present case; and, in my opinion, expresses the correct view of the law. In my opinion the decision of the learned District Judge is correct and I would dismiss this appeal with costs.

DAS, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Das and Adami, J.J.

RAJ KUMAR CHHOTAY NARAIN SINGH.

v.

KEDAR NATH SINGH.*

Code of Civil Procedure, 1908 (Act V of 1908), Order XXXIV, rule 3—Foreclosure suit—final decree, limitation for application for—Limitation Act, 1908 (Act IX of 1908), Schedule 1, Article 181 and Section 15—date on which right to apply accrues—appeal from preliminary decree dismissed for non-prosecution, effect of—Appointment of Receiver, whether operates as stay.

In a suit for foreclosure, where the defendant is in possession, the plaintiff is entitled to a decree, *first*, debarring the defendant and all persons claiming through or under him from all right to redeem the mortgaged property and, *secondly*, ordering the defendant to put the plaintiff in possession:

Sutcliffe v. Wood(1), *Best v. Applegate*(2), *Wills v. Luff*(3), and *Keith v. Day*(4) referred to.

* Appeal from, Original Decree No. 5 of 1919, from a decision of Babu Jitindra Chandra Basu, Subordinate Judge, First Court of Gaya, dated the 7th December, 1918.

(1) (1884) 53 L. J. Ch. 970.

(3) (1888) 38 Ch. D. 197.

(2) (1888) 37 Ch. D. 42.

(4) (1888) 39 Ch. D. 452.

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The application for a final decree for foreclosure is governed by Article 181 of the Limitation Act, 1908.

Bala Ram Naik v. Kanhai Bharan Mahapatra(1), followed.

[See *Saiyid Jowad Hussain v. Gendu Singh*(2). Ed.]

Where an appeal is preferred from a preliminary decree for sale on a mortgage and the appellate court passes a decree for foreclosure the right to apply for a final decree accrues on the date on which the appellate decree is passed, and the mere fact that an appeal was preferred from that decree to the Privy Council makes no difference if the latter appeal has been dismissed for non-prosecution.

Abul Majid v. Jawahir Lal(3), applied.

Madhab Mani Dasi v. Lambert(2), referred to.

Where, pending an appeal from a preliminary decree for foreclosure, a Receiver is appointed to take possession of the mortgaged properties with a direction to pay interest, *held*, that so long as the order appointing the Receiver stands the defendants are entitled to pay off the decretal amount and that consequently the order of appointment operates as a stay of the plaintiff's right to apply for a final decree or for possession, and that, therefore, the period between the making of the order and the date on which the bar is removed must be excluded in computing the period of limitation for an application for a final decree for foreclosure and for possession.

Appeal by the defendants.

The facts of the case material to this report are stated in the judgment of Das, J.

Hasan Imam (with him *Sultan Ahmed, Achalendra Nath Das* and *D. N. Das*), for the appellants.

Manuk (with him *H. L. Nandkeolyar* and *Tribhuan Nath Sahay*), for the respondent.

DAS, J.—This appeal is directed against the final decree for foreclosure passed by the learned Subordinate Judge of Gaya, under the provisions of Order XXXIV, rule 3, of the Code; and the only question which we have to determine in this appeal is whether the application of the plaintiffs was barred by limitation.

(1) (1916) 1 Pat. L. J. 364.

(3) (1914) I. L. R. 36 All. 350, P. C.

(2) *Post*, 444.

(4) (1910) I. L. R. 37 Cal. 796.

On the 3rd of July, 1913, the Calcutta High Court, modifying the decree of the learned Subordinate Judge which was a decree for sale, passed a foreclosure decree *nisi* in favour of the plaintiffs whereby it fixed the 3rd of January, 1914, as the date for payment of the mortgage money by the defendants to the plaintiffs. On the 22nd December, 1913, defendants 1 and 2 presented an application and in due course obtained a certificate for leave to appeal to His Majesty in Council. On the 9th January, 1914, defendants 1 and 2 presented another application to the Calcutta High Court. They stated in that petition that they were negotiating for a loan to pay off the mortgage, and had also preferred an appeal to His Majesty in Council from the decree passed by the High Court. They asserted that the opposite parties were,

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"Contemplating to apply for the final decree of foreclosure and for the delivery of possession of the property to them";

and they asked as follows :—

"It is therefore prayed that your Lordships will be pleased to stay the passing of the final decree for foreclosure for such period as to your Lordships appear proper, and, in the alternative, to stay the delivery of possession over the said mortgage property on your petitioners furnishing security, and, in case of their being unable to do so, to appoint a Receiver for the management of the property and to pass such order or orders as to your Lordships appear just and proper".

On the 20th January, 1914, the High Court appointed Babu Siva Nandan Roy, pending the disposal of the appeal to His Majesty in Council, Receiver of the disputed mortgaged properties in suit, and directed the Receiver to pay all the rents as they fell due and also the interest on the mortgage debt. On the 1st of June, the Receiver was discharged as he declined to act on the remuneration fixed for him. On the 1st of September, 1914, some of the mortgagees applied for an order that, as there was no fresh order for the appointment of a Receiver, they were at liberty to apply for the final decree for foreclosure and delivery of possession of the mortgaged properties in accordance with the decree of the High Court, dated the 3rd July, 1913. This application had the effect of compelling the defendants to make another application for the

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appointment of a Receiver; and this they did on the 2nd September, 1914. On the 3rd September, 1914, the High Court made an order on the Subordinate Judge to appoint a fit and proper person as the Receiver of the mortgaged properties. It is not disputed that, in pursuance of this order, the Subordinate Judge appointed a person as the Receiver of the properties and directed the Receiver to pay the interest on the mortgage debt. The next date of importance is the 9th of October, 1916, when the Judicial Committee dismissed the appeal of the mortgagors for non-prosecution of the appeal. On the 20th December, 1917, the plaintiffs applied to the High Court for the discharge of the Receiver and for an order on the Receiver to make over the mortgaged properties to them. On this application the High Court passed the following order:—

“We direct that the Receiver do forthwith pass his accounts, but that he be not discharged until a further application. The mortgagees will be at liberty to proceed with a view to obtaining a final decree notwithstanding the fact that the Receiver is in possession”.

This order was passed on the 18th March, 1918; and on the 3rd April, 1918, the mortgagees presented their application out of which the present appeal arises for a final decree in the foreclosure action under the provisions of Order XXXIV, rule 3, of the Code. It is to be remembered that the preliminary decree for foreclosure was passed on the 3rd July, 1913; and the fact that the present application was presented on the 3rd of April, 1918, encouraged the mortgagors to raise a plea of limitation. The learned Subordinate Judge has rejected the plea; and the only question which we have to determine in this appeal is whether the plea put forward on behalf of the mortgagors was a good plea.

Mr. *Manuk*, on behalf of the respondents, argues that his right to apply for a final decree in a foreclosure action accrues from day to day and that the statute of limitation is inapplicable to such an application, and he relies on *Madhab Mani Dasi v. Lambert* (1). As

(1) (1910) I. L. R. 37 Cal. 796.

has been pointed out more than once, that was not a decision on the question which we have now to determine, for the learned Judges in that case held that the Code of Civil Procedure, 1908, did not apply to the case at all. It is conceded that the Code of Civil Procedure, 1908, does apply to the present case, and I have no doubt whatever that the question, as it has now arisen, is somewhat different from the question which the learned Judges in *Madhab Mani Dasi v. Lambert* (1), had to try. Now there was considerable difference of opinion at one time on the question as to whether orders under sections 87 and 89 of the Transfer of Property Act were orders in the suit itself or in execution, and whether the Limitation Act, and, if so, whether Article 178 or 179 of the old Limitation Act governed an application for obtaining such orders. It was with a view to put an end to the conflict of decisions that provisions as to mortgage suits have been removed from the Transfer of Property Act to the Code of Civil Procedure and applications which follow preliminary decrees either for sale or for foreclosure are now described as applications for a decree for sale and a decree for foreclosure and not applications for an order for sale or for an order for foreclosure. It is impossible now to contend that these applications are not applications under the provisions of the Code of Civil Procedure. If that be so, Article 181 of the Limitation Act clearly governs such an application and the period of limitation is three years from the time when the right to apply accrues. This was the view which was taken by this Court in *Bala Ram Naik v. Kanhai Bharan Mahapatra* (2).

The next question is, when did the right to apply accrue? It will be remembered that the preliminary decree was passed on the 3rd July, 1913, and that through the mortgagors carried an appeal to His Majesty in Council that appeal was dismissed on the 9th October, 1916, not on the merits, but for non-prosecution of the appeal. Mr. *Hasan Imam*, on

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(1) (1910) I. L. R. 37 Cal. 792.

(2) (1916) I. P. R. L. J. 264.

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behalf of the appellants, contends that the result of the dismissal of the appeal for non-prosecution was to place the parties in the same position as if there was no appeal and that accordingly the right to apply accrued on the 3rd July, 1913. That was certainly the view which was taken by the Judicial Committee in *Abdul Majid v. Jawahir Lal* (1). That case was decided under the Transfer of Property Act and the old Limitation Act before the new Civil Procedure Code made a change in the procedure relating to mortgage actions. In that case the Court of first instance passed a decree in favour of the mortgagee on the 12th May, 1890, for the sale of the mortgaged property unless payment was made on or before the 12th August, 1890. There was an appeal to the Allahabad High Court and that appeal was dismissed on the 8th April, 1893. The mortgagor obtained leave to appeal to the Privy Council, but did not prosecute his appeal, and on the 13th May, 1901, the appeal was dismissed for want of prosecution. The Judicial Committee held that Article 179 of the Limitation Act governed the application which was then presented by the decree-holder for an order absolute for sale and that limitation began to run, not from the dismissal of the appeal for want of prosecution, but from the order of the High Court confirming the decree. The Judicial Committee in the course of its judgment said as follows, "The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognised authoritatively that the appellant had not complied with the conditions under which the appeal was open to him, and that therefore he was in the same position as if he had not appealed at all. To put it shortly, the only decree for sale that exists is the decree, dated the 8th April, 1893, and that is a decree of the High Court of Allahabad". That case was of course decided on the

(1) (1914) I. L. R. 36 All. 350, P. C.

view that an application for an order absolute for sale under the Transfer of Property Act was an application in execution of the decree. The position now is different; but we are entitled to hold by analogy that the right to apply in the present case accrued on the 3rd July, 1913, and that the application is accordingly barred by limitation unless the operation of the preliminary decree was stayed by an order and injunction of the Court.

Mr. *Manuk* contends that the order for the appointment of a Receiver, coupled with the direction upon the Receiver to pay the interest on the mortgage money, operated in effect as an order staying further proceedings, and that he is, accordingly, under section 15 of the Limitation Act, entitled to exclude the period between the 3rd September, 1914, and the 18th March, 1918, on which date the High Court gave him liberty to apply for the final decree notwithstanding the fact that the Receiver was not discharged. The argument involves an examination of the nature of a final decree in a foreclosure action. Order XXXIV, rule 3, of the Code, after dealing with the case where the defendant pays into Court the amount declared due to the plaintiff, provides as follows.

"Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the defendant and all persons claiming through or under him 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."

The form of a final decree for foreclosure is to be found in *Appendix D* to the Code of Civil Procedure and is No. 10. Under that Form the decree to which the plaintiff is entitled, is as follows,

"That the defendant and all persons claiming through or under him be debarred from all right to redeem the mortgaged property set out and described in the schedule hereunto annexed. (Where the defendant is in possession add "and shall put the plaintiff in possession of the said property")."

There is no doubt at all, on a perusal of the Form as provided by the legislature in No. 10 of *Appendix D*.

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that the words "if necessary" in Order XXXIV, rule 3(2), refer to a case where the defendant is in possession and that, where the defendant is in possession, the plaintiff is entitled to a decree first debarring the defendant and all persons claiming through or under him from all right to redeem the mortgaged property; and, secondly, ordering the defendant to put the plaintiff in possession of the property. Mr. *Manuk* contends that, in the events which have happened, he was not entitled to either of these orders until the 18th March, 1918.

I will first consider the question whether the plaintiffs were, in the events which happened, entitled to an order debarring the defendants from the right to redeem the mortgaged property. Now it will be remembered that the Receiver was appointed on an application by the defendants in which they stated that they were negotiating for a loan in order to pay off the mortgage money and that they were confident that they would be able to raise such a loan within two months from the date of that application. The Court appointed a Receiver and directed the Receiver to pay the interest due on the mortgage money to the plaintiffs. In my opinion, so long as the order of the High Court stood, the defendants had the right not only to pay the interest on the mortgage money to the plaintiffs but also, to quote their own words, "to pay off the decree". In other words, the appointment of a Receiver and a direction upon him to pay the interest due to the plaintiff operated in substance, though not in form, as an order staying further proceedings in the suit until the disposal of the appeal by the Privy Council.

In the next place so long as the Receiver was in possession of the mortgaged properties, it was clearly incompetent to the plaintiffs to ask for an order that the defendants do put the plaintiffs in possession of the property. The Code of Civil Procedure recognizes the right of the plaintiff who is out of possession to be put in possession of the mortgaged properties; in

other words, he is in the same action entitled not only to a decree for foreclosure, but also to a decree for possession. At one time it was doubted in England whether a Court of Equity could grant the mortgagee leave to join an action for the recovery of land with the action for foreclosure [See *Sutcliffe v. Wood* (1)]. It was in order to remove the difficulty raised by such cases as *Sutcliffe v. Wood* (1) that a proviso was added to Order XVIII, rule 2, of the Rules of the Supreme Court in December, 1885. That proviso now permits a plaintiff to join a claim for possession in an action for foreclosure or redemption. There is no doubt at all that an order for foreclosure absolute in a foreclosure action may now include an order for delivery of possession by the defendant to the plaintiff [See *Best v. Applegate* (2)]. It is quite true that an order for delivery of possession may be given after the final decree. This was established in *Keith v. Day* (3), though the proposition was not accepted in *Wills v. Luff* (4). It may, be assumed, however, that the plaintiffs were entitled to have an order as to delivery of possession not as part of the foreclosure decree, but after the decree; but the fact that the plaintiffs may obtain such an order after the final decree does not take away their right to claim such an order as part of the foreclosure decree. That order they could not have obtained so long as the Receiver was in possession of the mortgaged properties. The Calcutta High Court removed the bar on the 18th March, 1918, and in my opinion the plaintiffs became entitled to apply for the final decree on the 18th March, 1918.

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In my opinion the conclusion at which the learned Subordinate Judge has arrived is right and I would dismiss this appeal with costs.

ADAMI, J.—I agree.

Appeal dismissed.

(1) (1884) 53 L. J. Ch. 970.

(3) (1888) 39 Ch. D. 452.

(2) (1888) 37 Ch. D. 42.

(4) (1888) 38 Ch. D. 197.