

1927.

KING-  
EMPEROR

v.

GHULAM  
NABI.MULLICK,  
A.C.J.

arranged for the delivery of the revolver on approval on the 25th March, and that it was he who settled the price between the 19th and the 23rd June the inference is irresistible that he had control over the revolver and was in joint possession of it on the 28th June. It is also quite clear that upon the evidence on the record a conviction for abetment under section 109 of the Indian Penal Code read with section 19 of the Indian Arms Act would be justifiable if by any chance the substantive charges failed.

In my opinion the evidence is quite sufficient to shew that both Ghulam Nabi and Ghulam Husain were in possession of the revolver in March and in June 1925 and that they sold the same to Brij Behari Lal.

Therefore the conviction of Ghulam Husain by the City Magistrate under section 19 of the Arms Act was, in my opinion, correct.

The result is that agreeing with the learned Sessions Judge we affirm the acquittal of Muhammad Hussain but disagreeing with him we set aside the acquittal of Ghulam Husain and Ghulam Nabi and restore the convictions entered by the City Magistrate and affirm the sentences passed by him.

WORT, J.—I agree.

## APPELLATE CIVIL.

*Before Kulwant Sahay and Ross, JJ.*

1927.

May, 20.

SOMAR SINGH

v.

DEONANDAN PRASAD SINGH.\*

*Limitation Act, 1908 (Act IX of 1908), Schedule 1, Articles 181 and 182—final decree in a mortgage suit, application to enforce, whether is an application for execution—proper article applicable—preliminary decree, appeal from—final decree, execution of—terminus a quo—Article 182(2) meaning of.*

\*Appeal from Original Order no. 168 of 1926, from an order of Babu Kamla Prasad, Subordinate Judge of Patna, dated the 17th May, 1926.

An application for enforcing a final decree for sale in a mortgage suit is an application for execution and is governed by Article 182, and not by Article 181 of the Limitation Act, 1908.

1927.

SOMAR  
SINGH  
v.DEGNANDAN  
PRASAD  
SINGH.

*Balwant Singh v. Budh Singh* (1), distinguished.

A preliminary decree in a mortgage suit was passed on 23rd August, 1921, and there was an appeal against this decree to the High Court. During the pendency of the appeal, the mortgagee decree-holder obtained a final decree for sale under Order XXXIV, rule 5, Code of Civil Procedure, 1908. The appeal to the High Court was dismissed on the 29th of October, 1925. The decree-holder filed the present application for execution of the final decree on 2nd February, 1926. The judgment-debtor contended that the application was barred by limitation.

*Held*, that limitation ran from the date of the final disposal of the appeal by the High Court, and, therefore, that the application for execution was within time.

*Held*, further, that the words "where there has been an appeal" in clause (2) of Article 182 do not mean that the appeal must be against the decree sought to be executed, but imply that if there has been an appeal which in any way imperils the decree sought to be executed then the date of the final disposal of the appeal should be the date from which the period of limitation ought to be computed.

*Christiana Sens Law v. Banarashi Prashad Chowdhury* (2), not followed.

*Rai Brijraj v. Nauratan Lal* (3), distinguished.

*Ashfaq Hussain v. Gauri Sahai* (4), followed.

Appeal by the judgment-debtors.

This was an appeal against an order of the Subordinate Judge of Patna, dated the 17th May, 1926, dismissing the judgment-debtors' objections to the execution of a decree. A preliminary mortgage decree was passed on the 23rd August, 1921. There was an appeal against this decree to the High Court by the defendants. During the pendency of the appeal the mortgagee decree-holder obtained a final

(1) (1920) I. L. R. 42 All. 564.

(2) (1914-15) 19 Cal. W. N. 287.

(3) (1918) 3 Pat. L. J. 119.

(4) (1911) I. L. R. 33 All. 264.

1927.

SOMAR  
SINGH  
v.  
DEONANDAN  
PRASAD  
SINGH.

decree for sale under the provisions of Order XXXIV, rule 5, of the Code of Civil Procedure on the 28th October, 1922. The appeal to the High Court against the preliminary decree was dismissed on the 29th of October, 1925. The present application for execution was made on the 2nd February, 1926. The principal objection of the judgment-debtors was that the application was barred by limitation. The learned Subordinate Judge has held that under clause (1) of Article 182 of the Schedule to the Limitation Act time began to run from the date of the decree of the High Court, and the application was, therefore, not barred by limitation.

It was contended on behalf of the appellants that the Article applicable was Article 181 and not Article 182. It was next contended that if Article 182 applied, then time should be computed from the date of the final decree, *i.e.*, 28th October, 1922, and not from the date of the decree of the High Court in the appeal against the preliminary decree.

*Pugh* (with him *B. C. Sinha* and *G. S. Lal*), for the appellants.

*N. C. Sinha* and *B. P. Sinha*, for the respondents.

KULWANT SAHAY, J:—The argument of the learned Counsel for the appellants is, that in a mortgage decree the application to enforce the decree is not an application in execution, but it is an application to carry out the decree, and as no period of limitation is provided elsewhere in the Indian Limitation Act for such an application, Article 181 is the only Article which can apply. The point for decision, therefore, is as to whether an application to enforce a mortgage decree for sale is an application in execution. It is contended that the provisions of the Transfer of Property Act relating to the passing of decrees for sale and making orders absolute for sale contained in sections 88 and 89 of the Act have been transferred to the Code of Civil Procedure and the provisions of

Order XXXIV are self-contained and the enforcement of a final decree for sale under Order XXXIV, rule 5, which took the place of the order absolute for sale under the Transfer of Property Act, is not an execution of the decree but simply amounts to carrying out the order for sale, and the application for carrying out the order for sale is governed by Article 181 of the Indian Limitation Act.

I am of opinion that this contention is not sound. The transfer of the provisions of the Transfer of Property Act to the Code of Civil Procedure did not in any way affect the period of limitation for execution of a decree passed under Order XXXIV, rule 5 of the Code. A final decree for sale under Order XXXIV, rule 5 stands in the same position as any other decree for sale that might be passed by a Civil Court. The provisions as regards execution of decrees are contained in part II and in Order XXI of the Code of Civil Procedure. Section 51 of the Code confers upon the Court the power to order execution of a decree by attachment and sale or by sale without attachment of any property. Order XXI, rule 11, sub-rule (2), prescribes the particulars which an application for execution should contain, and one of the particulars prescribed is contained in clause (j), viz., the mode in which the assistance of the Court is required, whether by the attachment and sale or by the sale without attachment of any property. The provisions of Section 51 and Order XXI, rule 11, therefore, contemplate the execution of a final decree for sale made under the provisions of Order XXXIV, rule 5, of the Code. Mr. Pugh contends that a final decree for sale itself contains an order for sale and it is not necessary to make an application to the Court executing the decree for an order for sale. It is, however, to be noted that an application for execution of a decree under Order XXI, rule 11, does not necessarily ask the Court to make an order for sale, it may merely ask the Court to effect the sale without attachment of the property which had been ordered to be sold in the final decree for sale under Order XXXIV, rule 5.

1927.

SOMAR  
SINGH  
v.DEONANDAN  
PRASAD  
SINGH.KULWANT  
SAHAY, J.

1927.

SOMAR  
SINGH  
v.  
DEONANDAN  
PRASAD  
SINGH.  
  
KULWANT  
SAHAY, J.

Reference is made to the decision of the Allahabad High Court in *Balwant Singh v. Budh Singh* (1). In that case an application for execution of a final decree for sale in a mortgage suit was pending, and during the pendency of that application a suit was instituted to set aside the decree on the ground of fraud. The execution was stayed by an order dated the 9th December 1914 during the pendency of the suit. The suit was dismissed in April 1915 and an appeal against the decree dismissing the suit was also dismissed in April 1917. The next application for execution was made on the 11th June 1918. Their Lordships of the Allahabad High Court observed: "If we assume (and we think that it may fairly be so assumed) that the present application is one in continuation of the former, even then Article 181 of the Limitation Act must apply, and it was necessary for the appellant to come into Court within three years of the removal of the bar which prevented his carrying on the execution of his decree. That bar was removed by the decision of the first Court on the 26th of April 1915". Now, their Lordships applied Article 181 not to the application to enforce the decree but to an application to continue a previous execution which had been stayed. I am of opinion that applications for enforcing final decrees for sale in mortgage suits are applications for execution and are governed by Article 182 and not by Article 181 of the Schedule to the Indian Limitation Act.

The second contention of the learned counsel for the appellants is that the words "when there has been an appeal" in Article 182 refer to an appeal against the decree which is sought to be executed, and that, in order to enable the decree-holder to compute the period of limitation from the date of the decree of the Appellate Court, it is necessary that the appeal should be against the decree which is sought to be executed and not against any other decree. In the present case the appeal to the High Court was against

(1) (1920) I. L. R. 42 All. 564.

the preliminary decree which had been made on the 23rd of August, 1921, and not against the final decree which was made on the 28th October, 1922, and which is now sought to be executed. Clause (2) of Article 182 prescribes :

" (where there has been an appeal) the date of the final decree or order of the Appellate Court, or the withdrawal of the appeal."

There is nothing here to show that the appeal must be against the decree sought to be executed. In my opinion the intention of the Legislature in making this provision was that if an appeal in any way imperils the decree sought to be executed then the date of the final disposal of the appeal should be the date from which the period of limitation ought to be computed.

Mr. Pugh refers to *Christiana Sen's Law v. Banarashi Proshad Chowdhury* (1). In that case the plaintiff sued a number of defendants on a mortgage, and obtained a decree against all the defendants excepting defendants nos. 24-26 whose property was exempted from liability and the plaintiff was directed to pay their costs. Therefore, there were two decrees in the suit: (1) a mortgage decree in favour of the plaintiffs against all the defendants other than the defendants 24-26, and (2) there was another decree for costs in favour of the defendants 24-26 against the plaintiff. The defendants, other than the defendants 24-26, preferred an appeal against the decree which was passed against them. The defendants 24-26 applied for execution of their decree for costs against the plaintiff after the disposal of the appeal of the other defendants. The application was made beyond three years from the date of the original decree. It was held that the appeal of the other defendants did not save the decree of the defendants 24 to 26 from the bar of limitation, and their Lordships observed that the words "where there has been an appeal" in Article 182, clause (2), mean "where there has been an appeal against a decree or order for the execution of which the application is made". This is reading

1927.

SOMAR  
SINGHDEONANDAN  
PRASAD  
SINGH.KULWANT  
SARAY, J.

(1) (1914-15) 19 Cal. W. N. 287.

1927.

SOMAR  
SINGH  
v.  
DEONANDAN  
PRASAD  
SINGH.

something into the Article which is not there. The rest of the judgment of their Lordships, however, in that case goes to show that when the appeal imperils the whole decree, such an appeal will prevent limitation running against the judgment debtors who have not appealed.

KULWANT  
SAHAY, J.

Reference has also been made to *Rai Brijraj v. Nauratan Lal* (1). In that case it was held that the words "where there has been an appeal" in clause (2) of Article 182 means "where there has been an appeal against a decree in the suit" and do not include an appeal against an order made on an application to set aside that decree. This case also does not help the appellants in the present case inasmuch as the appeal to the High Court in the present case was against the decree in the suit.

In *Ashfaq Husain v. Gauri Sahai*(2) a decree for sale was made against several defendants on the 25th of August, 1900, and an order absolute for sale under the provisions of the Transfer of Property Act was made on the 21st December, 1901. An application was made to set aside the decree by one of the defendants against whom the decree was ex parte, and it was set aside as against him on the 11th March, 1902. Subsequently the suit was tried as against him and a decree was made against him on the 15th of August, 1902, and an appeal against that decree was dismissed on the 16th November, 1904. On the 27th November, 1905, another order absolute for sale was made against this defendant. On the 21st December, 1905, application for execution was made against all the defendants based on the original decree of the 25th August, 1900, on the appellate decree made against one of the defendants after restoration of the suit against him on the 16th November, 1904, and on the two orders absolute for sale dated the 21st December, 1901, and 27th November, 1905. Objection was taken that the application was barred, and it was held by their Lordships of the Privy Council that the decrees

(1) (1918) 3 Pat. L. J. 119.

(2) (1911) I. L. R. 33 All. 264.

of the 25th August, 1900, and the 16th November, 1904, were steps in granting the plaintiff the relief to which he was entitled. The latter decree supplemented and completed the former and for the first time justified the plaintiff in applying for the joint execution of the decree, and time under the Limitation Act began to run from the date of the latter decree or rather from the date it was made absolute, i.e., the 27th November, 1905, and consequently the application was not barred. In the case now before us the final decree for sale which was made on the 28th of October, 1922, during the pendency of the appeal against the preliminary decree was clearly imperiled by the appeal and the decree made by the High Court on the 29th October, 1925, clearly supplemented and completed the decree of the 28th of October, 1922. In my opinion the learned Subordinate Judge was right in holding that time began to run from the 29th of October, 1925, and the application was not barred by limitation.

The other objections taken by the judgment-debtors related to certain mistakes in the application for execution and to the fact that the decree under execution was passed against certain dead persons. The learned Subordinate Judge disallowed these objections. It now appears that the application for execution, which is now before us, has been allowed to be dismissed and a fresh application has been made correcting the errors which had crept into the present application for execution. It is not necessary, therefore, to consider those objections; and the other objections raised by the judgment-debtors need not, therefore, be inquired into in the present appeal and they must be left open for consideration in the fresh application for execution which has been made.

The result is that this appeal is dismissed with costs.

Ross, J.—I agree.

*Appeal dismissed.*

1927.

SOMAR  
SINGH  
v.  
DEONANDAN  
PRASAD  
SINGH.

KULWANT  
SARAY, J.