

1926.

PANDIT
DHANUKH-
DHARI
TEWARI
v.
MANI SONAR.

JWALA
PRASAD, J.

The assessment of court-fee should be in accordance with section 7, clause (4)(c), as observed above. The same result is arrived at by looking at the provisions of the Court-fees Act. There is no particular provision in the Court-fees Act applicable to a suit for assessment of fair and equitable rent and therefore ad valorem court-fee is to be paid under Schedule I of the Act which, as the heading shows, provides for fee payable on a plaint or written statement, etc., in cases

"not otherwise provided for in the Act."

I, therefore, hold that the fee payable upon the plaint and the memorandum of appeal in this Court as well as in the lower appellate Court should be assessed in accordance with section 7, clause (4) (c), treating the relief for assessment of fair and equitable rent as a consequential relief. Article 17 of Schedule II of the Court-fees Act, which applies to purely declaratory suits, does not apply to the present case.

PRIVY COUNCIL.

JOWAD HUSSAIN

v.

GENDAN SINGH.*

J. C.
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June, 15.

Mortgage Decree—Final Decree—Limitation for Application—Time from which Period runs—Appeal from preliminary Decree—Code of Civil Procedure 1908 (V. of 1908), Order XXXIV, rules 4, 5—Limitation Act, 1908 (IX of 1908), Schedule I, Article 181.

Where there has been an appeal from a preliminary mortgage decree under Order XXXIV, rule 4, sub-rule 1, and the appellate Court has not extended the time for payment, the period of three years within which, under the Indian Limitation Act, 1908, Schedule I, article 181, an application for a final decree under Order XXXIV, rule 5, sub-rule 2, must be made, runs from the date of the decree of the appellate Court, not from the expiry of the time for payment fixed by the preliminary decree. The above is the case, although the

* PRESENT: Viscount Dunedin, Lord Atkinson, and Mr. Ameer Ali.

appeal is by the mortgagee, and questions merely the amount for which the preliminary decree is made, and although the appeal is dismissed.

Gajadhar v. Kishan Jiwan Lal (1), approved.

Judgment of the High Court (2), affirmed.

APPEAL (No. 28 of 1924) from a decree of the High Court (March 22, 1922) affirming a decree of the Subordinate Judge of Gaya.

On February 23, 1915, the respondents obtained a preliminary mortgage decree under Order XXXIV, rule 4, sub-rule 1. In May, 1915, they appealed from that decree to the High Court, contending that two items had been erroneously excluded from the amount of the decree. On August 22, 1915, the time fixed for payment by the preliminary decree expired without any payment having been made. On May 21, 1917, the High Court dismissed the appeal from the preliminary decree without extending the time for payment. On February 21, 1919, the respondents applied for a final mortgage decree under order XXXIV, rule 5, sub-rule 2. The appellant filed an objection that the application was barred by limitation.

The trial judge held that the application was not barred by the Indian Limitation Act, 1908, Schedule I., Article 181, as it was made within three years of the date of the decree of the High Court upon appeal. The High Court (Das and Adami JJ.) affirmed the decision.

1926. May, 11. *Abdul Majid* for the appellant. The application was barred by article 181; the right to apply accrued on August 22, 1915, when the time for payment fixed by the preliminary decree expired. There was no appeal from the order for sale, the appeal being only against the finding that two sums had been repaid. But even if the appeal is to be regarded as an appeal against the preliminary decree

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(1) (1917) I. L. R. 39 All. 641. (2) (1922) I. L. R. 1 Pat. 444.

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as a whole, the decision was erroneous. Under article 181 the period of limitation runs from the date "when the right to apply accrues"; the article does not, like article 179 of the Act of 1877, refer to "the date of the final decree or order of the appellate Court." The appeal having been dismissed simply, the decree did not prevent the running of time from the date fixed by the preliminary decree: *Juscurn Bird v. Pirthichand Lal* (1). Nor did the presentation of the appeal have that effect: Order XLI, rule 5, sub-rule 1. There was nothing to prevent the mortgagees from applying for a final decree on or after August 22, 1915. The High Court followed *Gajadhar Singh v. Kishan Jiwan Lal* (2). In that case however the mortgagor apparently appealed from the preliminary decree. Further, it is submitted that that decision was erroneous, and the decision in *Madho Ram v. Nihal Singh* (3) was correct. The present question did not arise in *Abdul Majid v. Jawahir Lal* (4); in that case, article 179 of the Act of 1877 applied.

Dunne K. C. and *E. D. Raikes* for the respondents were not called upon to argue, but called attention to *Bhup Indar Bahadur Singh v. Bijai Bahadur Singh* (5).

June 15. The judgment of their Lordships was delivered by—

VISCOUNT DUNEDIN.—In this case the plaintiffs were mortgagees under a registered mortgage bond granted by the defendant. They brought a suit for the sum of Rs. 52,000 odd, said to be due under the mortgage. The defendant denied that the whole sum was due, as he said the plaintiffs had not given him credit for two sums of Rs. 11,000 odd and Rs. 8,000 odd, which he had paid, such payments having

(1) (1918) I. L. R. 46 Cal. 670; L. R. 46 I. A. 52.

(2) (1917) I. L. R. 39 All. 641.

(3) (1915) I. L. R. 38 All. 21.

(4) (1914) I. L. R. 36 All. 350.

(5) (1900) I. L. R. 28 All. 152; L. R. 27 I. A. 209.

originally been indorsed on the bond, but the indorsations having been erased by the plaintiffs.

The Subordinate Judge gave effect to this contention, but made the ordinary preliminary decree for the sum of Rs. 19,000, being the sum due, with proper computation of interest, after allowing credit for the above mentioned two sums. The date of this decree was February 23, 1915. The six months of grace for payment would, therefore, expire on August 22, 1915. The mortgagees appealed against the decree. The appeal was heard, and dismissed on May 21, 1917.

On February 21, 1919, application was made for a final decree. The defendants opposed the application on the ground that it was time-barred under article 181 of Schedule I, to the Indian Limitation Act, 1908. The terms of that article are :

“ Applications for which no period of limitation is provided elsewhere in this schedule; period of limitation, three years; time from which period begins to run, when the right to apply accrues.”

The three years had expired or had not expired according as computation fell to be made, as the defendants urged, from the expiry of the time fixed for payment by the original decree, or, as the plaintiffs urged, from the date of the dismissal of the appeal. The Subordinate Judge gave effect to the contention of the plaintiffs.

On appeal the High Court upheld the decision of the Subordinate Judge. The present appeal is against that judgment. The point, therefore, is simply whether the time runs from the expiry of the time fixed by the original preliminary decree, or from the date when on appeal against that decree the appeal was dismissed.

The appellant's counsel strenuously urged that the appeal was not against the decree, but only against the items in the decree: This is a complete misunderstanding. An appeal must be against a decree as pronounced. It may be rested on an argument

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directed to special items, but the appeal itself must be against the decree, and the decree alone.

Which date is then to be preferred? Their Lordships agree entirely with what was said by Banerji J. in the case of *Gajadhar Singh v. Kishan Tiwan Lal* (1): "It seems to me that this rule"—i.e., the rule regulating application 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 is the final decree in the cause."

These words are all the more weighty since previously the learned judge had in *Madho Ram v. Nihal Singh* (2) held that when there had been an appeal against a preliminary decree the limitation period applicable to an application for final decree ran from the expiry of the time for payment fixed by the original decree, and not from the disposal on appeal, a view which he candidly confessed in this case was erroneous. The point is put with admirable brevity by Tudball J.: "When the Munsif passed the decree it was open to the plaintiff or the defendant to accept that decree or to appeal. If an appeal is preferred, the final decree is the decree of the appellate Court of final jurisdiction. When that decree is passed, it is that decree and only that which can be made final in the cause between the parties."

The same view was incidentally taken without comment by this Board in the case of *Abdul Majid v. Jawahir Lal* (3).

Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal with costs.

Solicitor for appellant: *Page Thomas*.

Solicitors for respondents: *W. W. Box & Co.*

(1) I. L. R. 39 All. 641, 643, 644. (2) (1915) I. L. R. 38 All. 21.

(3) (1914) I. L. R. 36 All. 350.