

question of limitation may depend upon facts which are not before this Court and as the appellant has sworn an affidavit to the effect that the point was argued but not dealt with by the lower appellate court, it becomes a matter for determination by that Court.

In those circumstances the case will be remanded to the District Judge for the purpose of determining the question of limitation. The costs of this appeal will abide the result of the hearing in the court below.

VARMA, J.—I agree.

Appeal allowed.

Case remanded.

REVISIONAL CIVIL.

Before Khaja Mohamad Noor and Agarwala, JJ.

ISHWARI PRASAD SINGH

v.

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Decree—order postponing the passing of final decree till the disposal of appeal against preliminary decree, whether is appealable as “decree”—court, whether is precluded from passing final decree during the pendency of appeal against preliminary decree.

The pendency of an appeal against the preliminary decree does not preclude the court from passing the final decree.

Khair-un-nissa Bibi v. Oudh Commercial Bank, Ltd.(1) and *Satprakash v. Bahul Rai*(2), followed.

Lalman v. Shiam Singh(3), not followed.

Jowad Hussain v. Gendan Singh(4) and *Gajadhar Singh v. Kishan Jiwan Lal*(5), distinguished.

* Civil Revision no. 249 of 1933, from an order of Babu R. C. Mitter, Subordinate Judge of Gaya, dated the 26th of April, 1933.

(1) (1929) I. L. R. 51 All. 640.

(2) (1930) I. L. R. 53 All. 283, F. B.

(3) (1925) 92 Ind. Cas. 605.

(4) (1926) I. L. R. 6 Pat. 24, P. C.

(5) (1917) I. L. R. 39 All. 641.

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A court, however, has inherent power under section 151 of the Code of Civil Procedure, 1908, to stay the passing of the final decree in a proper case.

Janki Das v. Sheo Prasad(1), followed.

An order postponing the passing of the final decree till after the disposal of the appeal against the preliminary decree is not a "decree" and is not, therefore, appealable.

Kumar Ganganand Singh v. Rai Pirthi Chand Bahadur(2), *Akikunnissa Bibee v. Roop Lal Das*(3), *Hetem Ali Khundkar v. Abdul Gaffur Khan*(4), *Madho Ram v. Nihal Singh*(5) and *Subbatakshmi Ammal v. Ramalinga Chetty*(6), distinguished.

Application in revision by the defendants.

The facts of the case material to this report are set out in the judgment of Khaja Mohamad Noor, J.

A. B. Mukharji and *B. B. Mukharji*, for the petitioners.

Khurshaid Husnain and *Rajkishore Prasad*, for the opposite party.

KHAJA MOHAMAD NOOR, J.—This application is directed against an order of the Subordinate Judge of Gaya refusing to pass a final decree in a mortgage suit on the ground that an appeal against the preliminary decree was pending before this Court. The learned Subordinate Judge, on the basis of some decisions which I shall just refer to, has held that during the pendency of an appeal against a preliminary decree for sale final decree could not be passed.

A preliminary objection has been taken on behalf of the opposite party that the order of the learned Subordinate Judge is a decree and appealable, and, therefore, application for revision does not lie. Reliance is placed by Mr. Khurshaid Husnain who

(1) (1931) I. L. R. 54 All 344.

(2) (1920) 5 Pat. L. J. 342.

(3) (1897) I. L. R. 25 Cal. 133.

(4) (1903) 8 Cal. W. N. 102.

(5) (1915) I. L. R. 38 All. 21.

(6) (1918) I. L. R. 42 Mad. 52.

appears on behalf of the opposite party on the decision in *Kumar Ganganand Singh v. Rai Pirthi Chand Bahadur*⁽¹⁾. In that case the objection of the judgment-debtor against the passing of the final decree was disallowed and a final decree was passed. The judgment-debtor preferred a miscellaneous appeal against that order. It was held by this Court that the order was a decree and was appealable as such and not as an order. The Court relied upon the decisions in *Akikunnissa Bibee v. Roop Lal Das*⁽²⁾, *Hetem Ali Khundkar v. Abdul Gaffur Khan*⁽³⁾, *Madho Ram v. Nihal Singh*⁽⁴⁾ and *Subbalakshmi Ammal v. Ramalinga Chetty*⁽⁵⁾. Mr. Abani Bhusan Mukharji on behalf of the petitioners contends that none of these cases is an authority for the proposition that where the Court has not absolutely refused to pass a final decree which amounts to a dismissal of the suit altogether, but has only postponed it on the ground that the passing of the final decree was not proper at that stage, the order amounts to a decree. An examination of the cases referred to will show that this contention is well-founded. In the case of *Akikunnissa Bibee v. Roop Lal Das*⁽²⁾ the passing of the final decree was altogether refused on the ground that the preliminary decree was passed against a dead man, and, therefore, no decree existed which could be made final. In the case of *Hetem Ali Khundkar*⁽³⁾ the passing of the final decree was refused on the ground that the decree was satisfied; and in the cases of *Madho Ram*⁽⁴⁾ and *Subbalakshmi Ammal v. Ramalinga Chetti*⁽⁵⁾ the Court held that the passing of the final decree was barred by limitation. In the case before us the learned Subordinate Judge has not absolutely refused to pass a final decree. He has held that the final decree could not be passed as long as an appeal against the preliminary decree was pending. In my opinion such an order cannot by any stretch of imagination be held to be a decree.

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(1) (1920) 5 Pat. L. J. 342.

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There is a good deal of difference between an absolute refusal to pass a final decree and postponement of the passing of it. Under the Civil Procedure Code

“Decree means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final.”

Now, the order complained of does not conclusively determine the rights of the parties with regard to any matters in controversy in the suit. It simply decides that the passing of the final decree is suspended till the disposal of the appeal against the preliminary decree. A decree can be either preliminary decree or final or partly one and partly other. A decree is preliminary “when further proceedings have to be taken before the suit can be completely disposed of”. It is final “when such adjudication completely disposes of the suit”. It is partly preliminary and partly final if it finally adjudicates the right in respect of some rights and directs further proceedings in respect of other rights, as for instance, when it decrees possession of property and directs an enquiry to ascertain the mesne profits. Now it is obvious that this order cannot be said to be a final decree because it has not completely disposed of the mortgage suit. It cannot be a preliminary decree either because it does not direct any further step to be taken. Mr. Khurshaid Husnain, however, contends that it is a second preliminary decree in the mortgage suit. I am unable to agree with this contention. There is no adjudication of the rights of the parties in the suit. Mr. Khurshaid Husnain contends that the order adjudicates that the petitioners were not entitled to a final decree at this stage. No doubt the Subordinate Judge has used language to this effect, but in effect he has only held that during the pendency of the appeal the power of the Court to pass the final decree is suspended; and I do not think that such an order comes within the definition of ‘decree’ as given in the Code. I, therefore, hold that the preliminary objection must be overruled.

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I now come to the main controversy, namely, whether the pendency of an appeal against the preliminary decree precludes the Court from passing a final decree. The learned Subordinate Judge has relied upon the decision in *Jowad Hussain v. Gendan Singh*(¹). The point for decision in that case was whether an application for making the decree final made more than three years after the passing of the preliminary decree by the trial Court was barred by limitation in a case where an appeal against the preliminary decree was disposed of within three years of the application. Their Lordships held that where there was an appeal from a preliminary decree and the appellate court did not extend the time under Order XXXIV, rule 4(1), the period of three years allowed to make an application for a final decree runs from the date of the decree of the appellate court and not from the initial time fixed for payment of the money in the preliminary decree. In that case Viscount Dunedin, in delivering the judgment of their Lordships, quoted with approval the observations of Banerji, J., in the case of *Gajadhar Singh v. Kishan Jivan*(²) where the learned Judge had said: "It seems to me that this rule—the rule regulating application for final decree 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." It is clear that the question whether the pendency of an appeal takes away the power of the court to pass a final decree during the pendency of the appeal was not in controversy either before the Allahabad High Court in the case from which I have cited the observations of Banerji, J., or before their Lordships of the Privy Council. The question was purely one of limitation. The question, however, came up before the Allahabad

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(1) (1926) I. L. R. 6 Pat. 24, P. C.

(2) (1917) I. L. R. 39 All. 641, 648.

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High Court for consideration in at least three cases. One of them *Lalman v. Shiam Singh*⁽¹⁾ has been referred to by the learned Subordinate Judge. Perhaps it was not brought to his notice that the decision in that case was expressly overruled by the Full Bench of the Allahabad High Court in *Satprakash v. Bahal Rai*⁽²⁾. The earliest case which has been brought to our notice in this connection in which the question about the competency of the Court to pass a final decree when an appeal against the preliminary decree was pending was decided, is *Lalman v. Shiam Singh*⁽¹⁾ already referred to. The learned Judges of the Allahabad High Court held that where an appeal against a preliminary decree in a mortgage suit had been preferred, a final decree could only be passed after the preliminary decree had been confirmed or varied by the appellate Court and had become conclusive between the parties. This decision came up again for consideration before the same Court in the case of *Khair-un-nissa Bibi v. Oudh Commercial Bank, Ltd.*⁽³⁾, where the learned Judges distinguished the first case and held that "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, was valid and binding on the parties and was capable of execution". Apparently there was conflict between the two decisions of the same Court and the matter came up for consideration before a Full Bench in the case of *Satprakash v. Bahal Rai*⁽²⁾ already referred to. The decision in *Khair-un-nissa Bibi v. Oudh Commercial Bank, Ltd.*⁽³⁾ was approved and *Lalman v. Shiam Singh*⁽¹⁾ was overruled. In my opinion this Full Bench decision must be followed. Under the Civil Procedure Code pendency of an appeal is no bar to the execution of a decree, though under some circumstances the appellate Court may stay execution of it and the executing court itself may stay the sale of an

(1) (1925) 92 Ind. Cas. 608.

(2) (1930) I. L. R. 53 All. 283, F. B.

(3) (1929) I. L. R. 51 All. 640.

immovable property. No provision of law has been shown to us in support of the contention that the pendency of an appeal takes away the force of a decree which has already been passed. A decree does not lose its force simply on account of the fact that an appeal against it is pending. Till the appeal is disposed of the decree passed by the trial court is in full force. I see no reason why an exception should be made in case of mortgage suits. The learned Advocate for the opposite party has pointed out that complications are likely to arise if the preliminary decree is eventually varied or set aside. This contingency is always present when a decree under appeal is executed and then the decree is either varied, modified or set aside. But this cannot be a ground for holding that in every case when an appeal is pending the execution of the decree appealed against must as a matter of law be stayed. As was pointed out in the case of *Khair-un-nissa Bibi*⁽¹⁾, a number of complications and delay in the realization of the decretal amount for an indefinite period will be the result if the passing of the final decree is stayed as a matter of course in every case of appeal against the preliminary decree. The judgment-debtor will have simply to prefer an appeal which may take years in disposal and delay the payment of the money. Order XXXIV, rule 5(3), provides that

“Where payment in accordance with sub-rule (1) (that is, payment to be made under the preliminary decree) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in sub-rule (1) of rule 4.”

Here is a mandatory provision of law which does not say that this rule will have no effect if there is an appeal against the preliminary decree. If the contention of the opposite party is sustained and we hold that an appeal takes away the force of a decree which has been passed, it will contravene the provisions of the Code of Civil Procedure which clearly indicate that a decree though appealed against is enforceable.

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In my opinion the order of the learned Subordinate Judge cannot be upheld and must be set aside.

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Mr. Khurshaid Husnain has, however, drawn our attention to the case of *Janki Das v. Sheo Prasad*⁽¹⁾ where their Lordships held that the Court had under section 151 of the Code power to stay the passing of the final decree when an appeal against the preliminary decree was pending. Nobody disputes that proposition. No doubt the appellate court has got the power and in a proper case that power can be exercised. Mr. Khurshaid Husnain asks us to exercise that power and stay the passing of the final decree till the disposal of the appeal. But such an order can only be passed on the circumstances of the particular case. Nothing is before us which will justify the passing of this order. It was urged on behalf of the petitioners that the mortgaged property was in danger of being sold for arrears of mukarrari rent. These are matters which we are unable to decide on materials before us. The learned Subordinate Judge refused to pass a final decree, holding that he had no power to do so when the appeal was pending and in this view he was wrong. Whether on any other ground the passing of the final decree should have been stayed is a matter which is not before us. It will be open to the opposite party, judgment-debtors, if so advised, either to apply to the learned Subordinate Judge for extension of the period for payment of the money and the learned Subordinate Judge can then grant the prayer on such terms as he thinks fit; or they may, if they like, move this Court in the appeal itself for the stay of passing of the final decree till its disposal; and the matter will then be dealt with on its merits.

The application is allowed, the order of the learned Subordinate Judge is set aside. He is directed to dispose of the application for making the decree final according to law. The petitioners will get their costs: hearing fee two gold mohars.

AGARWALA, J —I agree.

Rule made absolute.

(1) (1931) I, L, R, 54 All. 344.