

service, in the present case he has made the performance of the service impossible by converting the tank into agricultural lands. In my opinion, however, this distinction is not material and the two cases are governed by the same principle. However that may be, as the learned District Judge has pointed out, the lands cannot be declared to be liable to be assessed with rent as no such prayer was made in the plaint. In fact it appears from several documents which were produced in this case that the defendants have all along contended that the lands in dispute cannot be assessed with rent.

Mr. A. B. Mukherjee, who appeared on behalf of the appellant, asked us to allow him to amend the plaint by including a prayer as to assessment of rent, but we think that the prayer should not be granted at this stage.

In my opinion, therefore, the appeal fails and must be dismissed with costs.

LUBY, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Fazl Ali and Luby, JJ.

HARLAL KAMTI

v.

JHARI SINGH.*

Execution—preliminary mortgage decree—first application for making the decree final dismissed for default—second application time-barred—decree made final—executing court, whether can go behind the decree—decree, whether a nullity—

*Appeal from Appellate Order no. 64 of 1935, from an order of S. Bashir-ud-din, Esq., District Judge of Darbhanga, dated the 12th December, 1934, affirming an order of Babu Umakant Prasad Singh, Munsif of Darbhanga, dated the 15th June, 1934.

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Court, power of, to restore first application and make the decree final—Code of Civil Procedure, 1908 (Act V of 1908), section 151.

A preliminary mortgage decree having been passed, the decree-holder made an application within time for making the decree final, but the application was dismissed for default as the decree-holder had omitted to take some steps with regard to the service of notice on the judgment-debtors. The decree-holder thereupon made a second application which was filed more than three years after the preliminary decree, and notwithstanding the bar of limitation the court made the decree final. The decree-holder having put the decree in execution, the judgment-debtors objected to the execution but the objection was not filed until six months after the sale. The executing Court upheld the objection and dismissed the execution case altogether on the ground that the decree was a nullity and incapable of execution, having been made final on an application which was time-barred.

Held, (i) that the executing court could not go behind the decree which was not a nullity; the mere fact that the court which made the decree final overlooked the bar of limitation, or acted wrongly in not applying it, could not make his order without jurisdiction.

Gora Chand Haldar v. P. K. Roy(1) and *Gobardhan Das v. Dau Dayal*(2), followed.

Jungli Lal v. Laddu Ram Marwari(3) and *Srimati Haridasi Ghosh v. Motihari Town Co-operative Society*(4), distinguished.

(ii) that even if the decree-holder's second application was time-barred, the court had power to restore the original application and make the decree final, for the ends of justice, under section 151 of the Code of Civil Procedure, 1908.

(1) (1925) I. L. R. 53 Cal. 166, F.B.

(2) (1932) A. I. R. (All.) 273.

(3) (1919) 4 Pat. L. J. 240, F. B.

(4) (1933) 15 Pat. L. T. 111.

Jodha Singh v. Gokaran Das(1), *Chandra Shekhar v. Amir Begum*(2), *Puran Lal v. Komal Singh*(3), *Tadepalli Sriramalu v. The Firm of Kollipara Sriramalu*(4) and *Lachmi Narain Marwari v. Balmakund Marwari*(5), followed.

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Appeal by the decree-holders.

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

B. N. Mitter and *B. K. Sinha*, for the appellants.

R. K. Jha, for the respondents.

LUBY, J.—Harlal Kamti and others, decree-holders, appeal against the order dismissing the execution case which they brought against Jhari Lal Singh and others judgment-debtors, now respondents. The facts are as follows:—

The Kamti appellants got a preliminary decree on a mortgage bond on January 27, 1927. Subsequently the appellant Anchu Singh purchased a portion of the decree from them. The mortgage decree was made absolute on November 25, 1930. Execution was taken out in June, 1933; and after the usual formalities the property was sold at auction and purchased by the decree-holders on November 7, 1933. Miscellaneous cases were then filed by the judgment-debtors. On June 5, 1934, the sale was set aside for failure to have notices served under Order XXI, rule 16, in respect of that portion of the decree which had been purchased by Anchu Singh. A few days later in another miscellaneous case the Munsif dismissed the execution case altogether, on the ground that the decree was time-barred and incapable of execution and in fact a nullity, having been made final on an application which was filed more than three years after the

(1) (1915) I. L. R. 47 All. 546.

(2) (1927) I. L. R. 49 All. 592.

(3) (1933) I. L. R. 8 Luck. 496.

(4) (1932) I. L. R. 56 Mad. 310.

(5) (1924) I. L. R. 4 Pat. 61, P. C.

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passing of the preliminary decree. This order was supported on appeal by the learned District Judge of Darbhanga, who held that the decree was time-barred and that the executing court could go behind the decree as had been done by the Munsif.

LUBY, J.

The first argument advanced in this appeal is that the decree was time-barred. The decree itself was not time-barred; but the application upon which the decree had been made final was filed more than three years after the date of the preliminary decree. And the period of limitation for such application would be three years under Article 181 of the Limitation Act. It must be noticed, however, that the decree-holders *had* applied within the three years for preparation of a final decree. Their first application was rejected for default as they had omitted to take some steps with regard to the service of notices on the judgment-debtors. It is somewhat doubtful whether the Munsif was right in rejecting the application. He might have done better to keep it pending until the decree-holders complied with his requirements. But as it *was* rejected, the decree-holders were quite at liberty to file another application for final decree within the three years allowed. The order rejecting the application did not amount to dismissal of the mortgage suit. After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. And even if the decree-holder's second application was filed after the expiry of the period of limitation, the court had full power to restore the original application and make its preliminary decree final, for the ends of justice, under section 151 of the Code of Civil Procedure. Ample authority for these propositions will be found in the following cases:—*Jodha Singh v. Gokaran Das Pande*⁽¹⁾, *Chandra Shekhar v. Amir Begam*⁽²⁾, *Puran Lal v. Komal Singh*⁽³⁾, *Tadepalli Sriramalu v. The*

(1) (1925) I. L. R. 47 All. 546.

(2) (1927) I. L. R. 49 All. 592.

(3) (1933) I. L. R. 8 Luck. 496.

Firm of Kollipara Sriramalu(¹) and *Lachmi Narain Marwari v. Balmakund Marwari*(²). In my opinion the decree was neither time-barred nor incapable of execution.

The other question to be decided is whether the executing court was entitled to go behind the decree, as has been done by the Munsif. The learned District Judge has referred to the remarks made by a Full Bench of this Court in the case of *Jungli Lall v. Laddu Ram Marwari*(³). In that case it was held that an executing court can refuse to execute a decree passed against a dead man because such a decree is a nullity. He has also referred to the case of *Srimati Haridasi Ghosh v. Motihari Town Co-operative Society*(⁴). In that case it was held that an executing court could refuse to execute a decree of the Registrar of Co-operative Societies made against a person who was not a member of the Co-operative Society concerned, because such a decree was beyond the Registrar's jurisdiction and therefore a nullity. But the case which we are now considering is somewhat different. We must remember that an order made without jurisdiction is not the same thing as an order made in erroneous exercise of jurisdiction. The former is null and void but the latter is only voidable. This distinction has been drawn by a Full Bench of the Calcutta High Court in the case of *Gora Chand Haldar v. P. K. Roy*(⁵). It was held in that case that an executing court can only question such decrees as have been made without jurisdiction. In the case which we are now considering, the Munsif was seised of the case and competent to pass orders on the application for final decree. The mere fact that he overlooked the bar of limitation or acted wrongly in not applying it would not make his order without jurisdiction. In my opinion the executing court was not

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(2) (1924) I. L. R. 4 Pat. 61, P. C.

(3) (1919) 4 Pat. L. J. 240, F. B.

(4) (1933) 15 Pat. L. T. 111.

(5) (1925) I. L. R. 53 Cal. 166, F. B.

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entitled to go behind this decree, which itself was not time-barred, and investigate the question whether the application upon which it had been prepared was time-barred.

It was contended for the respondents that the Munsif had no jurisdiction to dispose of the Miscellaneous Case no. 175 of 1934 (with which we are now concerned) after disposing of the other Miscellaneous Case no. 299 of 1934, in which he had passed the following order on June 5, 1934 :—

“ That the entire execution proceedings be declared to be void and a nullity and the sale held in the same on 7th November 1933 be set aside ”.

This argument does not appeal to me. The Munsif had jurisdiction over the execution case and over the miscellaneous cases filed in connection therewith, and he was not prevented by his order passed in one miscellaneous case from passing a final order in the other miscellaneous case. Moreover he had not disposed of the execution case by his earlier order, but only decided that the proceedings had been vitiated by a material irregularity, viz. the omission to serve notices under Order XXI, rule 16.

Only one thing remains to be mentioned in this case and that is that the judgment-debtors should have raised this objection much earlier. They had their first opportunity when notices were served on them in 1930 in connection with the second application for preparation of final decree. They had another opportunity in 1933 when the execution case was started and notices were served on them under Order XXI, rule 22. But they did not take advantage of either opportunity. Their objection was not filed until six months after the sale.

In my opinion the execution was not time-barred and the decree was not incapable of execution. I would, therefore, allow the appeal and set aside the order of the District Judge, dated the 12th December,

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1934, affirming that of the Munsif, dated the 15th June, 1934, by which they dismissed the execution case on the ground of limitation; and I would award to the appellants their costs of these proceedings in all the Courts. The Munsif will now proceed to dispose of the execution case according to law.

FAZL, ALI, J.—I agree to the order proposed.

The principal question to be determined in this appeal is whether the final decree which is sought to be executed by the appellants can be regarded as a nullity on the ground that the application made by the decree-holders for making the preliminary decree final was made more than three years after the passing of the preliminary decree. In my opinion this question must be answered in the negative. It is not disputed that before the decree was made final a notice was issued to the judgment-debtors, but they did not appear and object to the decree being made final on the ground that the application made by the decree-holders was beyond time. Even after the passing of the final decree they took no steps to question that decree or to have it set aside. In *Gobardhan Das v. Dau Dayal*⁽¹⁾ Sulaiman, C.J., dealing with the question whether a decree passed in a suit which was time-barred was binding on the parties, observed as follows:—

“ A decree passed in a suit which was time-barred is binding on the parties and the question of limitation is by implication deemed to have been decided against the defendant..... It must be assumed that the court by oversight decided the question of limitation wrongly. But a wrong decision, whether express or implied on a question of limitation does not oust the jurisdiction. Limitation is a question of procedure and not one of jurisdiction: *See Nathu Ram v. Kallan Das*⁽²⁾. The Court was seised of the case and was competent to pass orders on the application ”.

(1) (1932) A. I. R. (All.) 273.

(2) (1904) I. L. R. 26 All. 522.

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With this view I respectfully agree and in my opinion, therefore, the decree sought to be executed was not a nullity and the executing court could not refuse to execute the decree on that ground.

Appeal allowed.

FAZL ALI,
J.

APPELLATE CIVIL.

Before Fazl Ali and Luby, JJ.

DAMODAR PRASAD

v.

MUSAMMAT WAKILUNNISSA.*

Revenue Sales Act, 1859 (Act XI of 1859), sections 2, 3 and 33—kistbandi date coinciding with latest date—unpaid amount, when becomes an arrear—liability to sale, when arises—sale without jurisdiction—appeal to commissioner before instituting civil suit, whether necessary.

Where, according to the terms of the *kabuliyat*, under which the estate was held, the whole of the revenue was payable once a year, that is, on the 28th March every year, and the latest date of payment fixed by the Board of Revenue under section 3 of the Revenue Sales Act, 1859, coincided with the kistbandi date, and the proprietor having made default in the payment of revenue for March 1927, the estate was sold on the 6th June, 1927.

Held, that the sum unpaid did not become an arrear until the 1st of April, 1927, and that the estate was not liable to be sold until the 28th March of the following year.

Haji Buksh Elahi v. Durlav Chandra Kar(1), Saraswati Bahuria v. Surajnarain Chaudhuri(2) and Krishna Chandra Bhoumik v. Patna Dhanabhandar Company(3), followed.

Jadunandan Singh v. Srimati Savitri Devi(4), explained.

*Appeal from Appellate Decree no. 531 of 1932, from a decision of D. P. Sinha Sharma, Esq., I.C.S., Additional District Judge of Monghyr, dated the 8th August 1931, reversing a decision of Babu Atal Bihari Saran, Munsif of Monghyr, dated the 20th January, 1930.

(1) (1912) I. L. R. 39 Cal. 981, P. C.

(2) (1931) I. L. R. 10 Pat. 496, P. C.

(3) (1931) I. L. R. 59 Cal. 1034, P. C.

(4) (1933) I. L. R. 12 Pat. 750, S. B.