

## APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

M.A.L.M. CHETTIAR FIRM

v.

MAUNG PO HMYIN AND OTHERS.\*

1935

Mar. 11.

*Limitation—Mortgage suit—Application for final decree—Preliminary decree—Right of sale—Transfer of Property Act (IV of 1882), ss. 88, 89—Civil Procedure Code (Act V of 1908), O. 34, r. 3—Limitation Act (IX of 1908), art. 181, 183.*

An application for a final decree in a mortgage suit is not an application to enforce the preliminary decree that has already been passed. In ~~the~~ old form of mortgage decree under s. 88 of the Transfer of Property Act the decree directed that the property should be sold on default being made by the mortgagor, but under O. 34, r. 3, of the Civil Procedure Code the preliminary decree does not direct that in case of default the property shall be sold nor does any right of sale thereunder accrue to the mortgagee. The right that is given under the preliminary decree to the mortgagee is a right, subject to any order that may be made in respect of redemption, to apply to the Court for a final decree for sale of the property. Such an application falls within art. 181 and not art. 183 of the Limitation Act.

The appellant obtained a preliminary mortgage decree on the Original Side of the High Court on the 21st November 1930. The period fixed for payment of the amount due ended on the 21st May 1931. The appellant applied for a final decree for sale on the 23rd August 1934.

*Held*, that the application was time-barred.

*Kalyanwalla* for the appellants. An application for a final decree in a mortgage suit is an application to "enforce" the preliminary decree that has already been passed, and is governed by art. 183 of the Limitation Act. *Anlook Chand v. Sarat Chunder* (1); this decision was affirmed by the Judicial Committee in *Munna Lal Parrack v. Sarat Chunder* (2). Article 181 of the Limitation Act would apply only if there was no other article applicable to the case; in the case

\* Civil First Appeal No. 198 of 1934 from the order of this Court on the Original Side in Civil Regular Suit No. 375 of 1930.

(1) I.L.R. 38 Cal. 913.

(2) I.L.R. 42 Cal. 776.

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of an application for a final decree in the High Court special provision is made in art. 183. Article 181 applies to applications in the mofussil courts only. Different considerations apply to an application for a personal decree. *F. H. Pell v. M. Gregory* (1).

An application for a final decree in a mortgage suit is not an application for a new decree; the aid of the Court is sought to "enforce" the decree that is already in existence, that is to say to "give full effect to" the decree. *Brij Lal v. Damodar Das* (2). The preliminary decree itself says that the mortgagee is entitled to apply for and obtain a final decree for sale; and if the defendant fails to deposit the requisite amount due under the mortgage in Court within the time limited it is obligatory on the Court to pass a final decree.

No appearance for the respondents.

PAGE, C.J.—This case raises an interesting question of limitation.

The appellant obtained a preliminary mortgage decree on the 21st of November 1930. The period fixed for payment of the amount due ended on the 21st of May 1931. The appellant applied for a final decree for sale on the 23rd of August 1934. Leach J. has held that the application for a final decree was governed by article 181 of the First Schedule to the Limitation Act, and has dismissed the application as being out of time.

The appellant contended in the trial Court and also at the hearing of the appeal that the application for a final decree was governed by article 183 and not by article 181, and therefore that the application was within time.

(1) I.L.R. 52 Cal. 828.

(2) I.L.R. 44 All. 555, 564.

The question that falls for determination is whether an application for a final decree for sale in a mortgage suit is an application to "enforce a judgment, decree or order" of the High Court passed in the exercise of its original civil jurisdiction within article 183.

Now, under sections 88 and 89 of the Transfer of Property Act (IV of 1882) the decree directed "that in default of the defendant paying as therein mentioned the mortgaged property or a sufficient part thereof be sold", and further that on default being made "the plaintiff or the defendant, as the case may be, may apply to the Court for an order absolute for sale of the mortgaged property, and the Court shall then pass an order that such property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in section 88; and thereupon the defendant's right to redeem and the security shall both be extinguished."

It has been held that an application for an order absolute for sale under section 89 was an application to "enforce the decree" that had been passed under section 88; because, as Jenkins C.J. pointed out in *Amlook Chand Parrack v. Sarat Chunder Mukerjee* (1),

"no further decree was requisite. All that was required was, under section 89, an order for sale."

His Lordship then proceeded to refer to the following observations by Lord Davey in *Harendra Lal Roy Chowdhri v. Maharani Dasi* (2):

"Under the circumstances, it is not surprising that the respondents were not able to find the money on the stipulated day ;

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(1) (1911) I.L.R. 38 Cal. 913.

(2) (1901) I.L.R. 28 Cal. 557; 28 I.A. 89, 97.

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and thereupon the present appellant presented a petition for realization of his entire decree by sale of the mortgaged properties . . . The learned Subordinate Judge in the first instance gave the appellant execution for the whole amount of his decree";

and the learned Chief Justice added,

"so it appeared to the Privy Council in that case that an application for an order for sale was a petition for realization by the mortgagee of his decree."

When the Civil Procedure Code was enacted in 1908, however, sections 88 and 89 among other sections of the Transfer of Property Act were remodelled and embodied in Order 34 of the Code, and instead of there being but one decree to be enforced in case of default by an application for an order absolute for sale there were substituted two decrees, a preliminary mortgage decree to be followed in case of default by a final decree for sale. The question, therefore, is whether, having regard to the form of the decrees which are now passed in a mortgage suit the application for a final decree is an application to enforce the preliminary decree that has already been passed. In my opinion the answer depends upon the terms of the preliminary decree. Under Order 34, rule 3 (2), it is provided that

"the Court shall pass a preliminary decree declaring the amount so found due and further declaring that the plaintiff shall, subject to the proviso hereunder stated, be entitled to apply for and obtain a final decree for sale of the mortgaged property or a sufficient part thereof",

subject to any order extending the time within which redemption may be made. Is the application for a final decree in such a case an applica-

cation to enforce the preliminary decree that has already been passed? In my opinion it is not; because in order to be a mode of enforcing the preliminary decree it must, in my opinion, be an application to enforce a right that accrued to the mortgagee under the preliminary decree. In the old form of mortgage decree under section 88 of the Transfer of Property Act the decree directed that the property should be sold on default being made by the mortgagor, but under Order 34, rule 3, of the Code the preliminary decree does not direct that in case of default the property shall be sold nor does any right of sale thereunder accrue to the mortgagee. The right that is given under the preliminary decree to the mortgagee is a right, subject to any order that may be made in respect of redemption, to apply to the Court for a final decree for sale of the property. In my opinion such an application does not fall within article 183, but within article 181 of the Limitation Act.

For these reasons, in my opinion the appeal fails and must be dismissed.

MYA BU, J.—I agree.

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