

## APPELLATE CIVIL.

*Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Ba U.*

A.L.S.S. CHETTIAR

v.

MAUNG TUN YIN AND ANOTHER.\*

1935

Jan. 29.

*Limitation—Sale under High Court's mortgage decree—Personal decree for balance—Application not an enforcement of preliminary or final decree—Limitation Act (IX of 1908), art. 181, 183.*

The preliminary decree of the High Court in a mortgage suit provided that "if the proceeds of sale shall not be sufficient for the payment in full of the amount due, then the plaintiff shall be at liberty to apply for a personal decree against the defendants for the balance."

*Held*, that in such a case an application for a personal decree against the mortgagor is not a mode of enforcing the preliminary decree or the final decree in the mortgage suit, but is an application for a new decree imposing liability upon the mortgagor personally. Such an application is governed by art. 181, and not by art. 183 of the Limitation Act.

*Muhammad Husain v. Alim-Un-Nissa Bibi*, I.L.R. 40 All. 551; *Pill v. Gregory*, I.L.R. 52 Cal. 828; *V.E.R.M.N.C.T. Chettyar v. A.R.A.R.R.M. Chettyar Firm*, I.L.R. 12 Ran. 370—*referred to*.

*Jenna Bahu v. Parameshwar Narayan Maltha*, 46 I.A. 294—*distinguished*.

*Aiyar* for the appellant. A mortgage decree passed by a High Court consists of two parts, one directs payment of the debt due by a certain date, and the other provides for the sale of the property in the event of non-payment of the debt within the time allowed. The second part further provides that if the sale proceeds are insufficient to satisfy the debt the mortgagee is entitled to apply for a personal decree. The first part of the decree, if it stood alone, can be enforced under art. 183 within 12 years from the date fixed for payment as an ordinary decree for money. A mortgage decree, which as a decree is not distinguishable from any other

\* Civil First Appeal No. 203 of 1934 from the order of this Court in Civil Regular Suit No. 258 of 1930.

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form of decree, can also be enforced [that is, given effect to, *Brij Lal v. Damodar Das* (1)] within the period laid down in art. 183. The second part of the decree, being merely in the nature of directions for the enforcement of the first part, should be read as part of the decree; and limitation for its enforcement will commence only when the mortgaged properties have been sold and the deficiency is ascertained. The starting point of limitation for an application for a personal decree therefore is the date of sale, and the application will be in time if filed within 12 years from such date. *Banku Behari v. Naraindas* (2); *Jenna Bahu v. Parmeshwar* (3).

Even considered as an "order" of the High Court the second part of the preliminary decree will still be governed by art. 183. Art. 181 has no application, because art. 183 makes special provisions in this behalf.

The decision in *F. H. Pell v. M. Gregory* (4) should be held to be overruled by reason of the judgment in *Banku Behari's* case. *Muhammad Itifaf v. Alim-Un-Nissa Bibi* (5) relates to the decree of a Court other than a Chartered High Court, and has no application to this case. The application for personal decree in this case was made within five years from the date of the preliminary decree and within four years from the date of sale, and was therefore within time.

No appearance for the respondent.

PAGE, C.J.—This appeal raises a question of general importance in respect of the law of limitation.

(1) I.L.R. 44 All. 555.

(2) 54 I.A. 129.

(3) 46 I.A. 294.

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

(5) I.L.R. 40 All. 551.

The appeal is brought from an order of Leach J., sitting on the Original Side of the Court, dismissing an application by the appellant for a personal decree in a mortgage suit. The appellant obtained a preliminary mortgage decree on the 14th July 1930. The final decree was passed on the 13th February 1931, and the property was sold pursuant to the final decree on the 1st August 1931. On the 10th September 1934 the appellant filed the present application for a personal decree in respect of the balance of the mortgage debt outstanding against the mortgagor. The learned trial Judge dismissed the application upon the ground that the application was time-barred under article 181 of the first schedule to the Limitation Act (IX of 1908). It was conceded by the learned advocate who appeared on behalf of the appellant that if article 181 applied the present application was out of time. On behalf of the appellant, however, it was contended that the appropriate article was not article 181 but article 183, and if that was so the application for a personal decree was not barred by limitation. In my opinion the case depends upon the form of the preliminary decree in the suit. In *Jenna Bahu and others v. Parmeshwar Narayan Mahtha and others* (1) a decree in a mortgage suit was passed in favour of the mortgagee *inter alia* in these terms :

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"It is also ordered and decreed that if the sale proceeds be not sufficient to cover the whole of the decretal amount, then the defendant do pay to the plaintiff the balance of the decretal amount, with interest at 6 per cent per annum till the date of realization from the estate of the aforesaid Balkrishan, deceased, and if the defendant does not admit the estate to be sufficient to cover the decretal amount then a statement be

(1) (1918) 46 I.A. 294.

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prepared of the properties of the aforesaid Balkrishan and that the estate be kept under the management of the Court."

In that case no question of limitation was argued, and it may well be that a sale in execution of such a decree would be "enforcing the decree" within article 183. But where a preliminary decree in a mortgage suit is passed in the ordinary form in my opinion the appropriate article is 181 and not 183. As was pointed out by a Full Bench of this Court in *V.E.R.M.N.C.T. Chettyar v. A.R.A.R.R.M. Chettyar Firm* (1)

"the Court when it passes a preliminary decree or a final decree in a mortgage suit in favour of the mortgagee does not lay any obligation upon the mortgagor to do or to refrain from doing anything. It merely gives the mortgagor and any other party entitled in that behalf an option, which he may or may not elect to exercise, to redeem the property in the manner therein prescribed. Neither the preliminary nor the final decree in such a suit can be executed by attachment of the mortgagor's person or his property generally . . . It is only when the proceeds of the sale of the mortgaged property are insufficient to liquidate the amount due to the plaintiff that the Court is entitled to pass a personal decree for the balance (if any) against the mortgagor."

In the present case it is provided in the preliminary decree *inter alia* that "if the proceeds of sale shall not be sufficient for the payment in full of the amount due, then the plaintiff shall be at liberty to apply for a personal decree against the defendants for the balance."

The learned advocate who appeared for the appellant properly and inevitably conceded that the plaintiff-appellant could not execute the preliminary decree or the final decree against the mortgagor

personally, and that before he could do so he would have to obtain a further decree against the mortgagor. In such circumstances it appears to me that an application for a personal decree against the mortgagor is not a mode of enforcing the preliminary decree or the final decree in the mortgage suit, but is an application for a new decree imposing liability upon the mortgagor personally. It follows, therefore, that such an application is not governed by article 183, but by article 181. The view which I take upon this question is in consonance with that held by the High Courts of Allahabad and Calcutta [*Muhammad Iltifat Husain v. Alim-Un-Nissa Bibi and others* (1) and *F. H. Pell v. M. Gregory* (2)], with which I respectfully agree.

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

BA U, J.—I agree.

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(1) (1918) I.L.R. 40 All. 551.

(2) (1925) I.L.R. 52 Cal. 828.