LETTERS PATENT APPEAL.

Before Addison and Din Mohammad JJ.

JODH SINGH (JUDGMENT-DEBTOR)—Appellant,

versus

BHAGWAN DAS-NANAK CHAND (DECREE-HOLDER)—Respondent.

1937

Feb. 4.

Letters Patent Appeal No. 118 of 1936.

Indian Limitation Act (IX of 1908), S. 14 (2) and Art. 182 (5): Mortgage — Application for final decree — Whether an application for execution or a step in aid of execution under Art. 182 (5) — Also whether applicant can claim extension of time under S. 14 (2).

On 16th April, 1929, the Court made an order in presence of both the plaintiff and the defendant that the preliminary mortgage decree of the 12th March, 1929, be made final and directed a decree sheet to be prepared. This was done and an entry to that effect was made in the Court Register. On 23rd February, 1932, the decree-holder put in an application under O. 34, r. 5, Civil Procedure Code, asking the Court to pass a final decree directing that the mortgaged property be sold. The *Ahlmad* made a report thereon to the effect that a decree had been passed, but while copying the entry in the register he did not put the word "final" before "decree" and ended his report by stating that the applicant applied for a final decree. On 19th May, 1932, the Court rejected the application, as a final decree had already been passed, and on the same day the decree-holder put in an application to execute the final decree, in which he stated that on account of the wrong report of the *Ahlmad* the decree-holder was prevented from making an application for execution on 23rd February, 1932.

Held, that the application of 23rd February, 1932, was an ordinary application for a final decree under O. 34, r. 5, Code of Civil Procedure, and was neither an application for execution nor a step in aid of execution under Art. 182 (5) of the Indian Limitation Act.

Held also, that the proceedings of 23rd February, 1932, being in a Court which did not suffer from any defect of

1937

JODH SINGH
v.
BHAGWAN DAS-NANAK CHAND.

jurisdiction or other cause *ejusdem generis*, the decree-holder could not take advantage of s. 14 (2) of the Act; and his application for execution was barred by time.

Case law, discussed.

Letters Patent Appeal from the judgment of Agha Haidar J., dated 25th May, 1936, passed in Civil Execution First Appeal No. 75 of 1936, affirming that of Sardar *Sewa Singh, Senior Subordinate Judge, Jhelum, dated 1st February, 1936, allowing the execution to proceed by sale of the Judgment-debtor's property.*

MEHR CHAND MAHAJAN, ACHHRU RAM and RATAN LAL CHAWLA, for Appellant.

QABUL CHAND MITAL, for Respondent.

The judgment of the Court was delivered by—

ADDISON J.

ADDISON J.—On the 12th March, 1929, the decree-holder obtained an *ex parte* preliminary decree against the judgment-debtor on the foot of a mortgage for Rs.7,000, dated the 24th May, 1922, for a sum of Rs.14,000 together with costs and future interest. The judgment-debtor was directed to deposit the decretal amount in Court on or before the 12th April, 1929. There was a public holiday on the last date and it was, therefore, ordered that the case should come up for hearing on the 16th April, 1929, and not on the 12th April, 1929, notice of this being served on the parties. On the 16th April, 1929, both parties appeared in Court. The judgment-debtor did not deposit the decretal amount, but put in an application asking the Court to set aside the *ex parte* decree which had been passed against him. This application was rejected by an order of that day, both parties being shown as present at the time the order was made. Another order was also made on the 16th April, 1929, both parties again being shown as present. This order

1937

JODH SINGH v. BHAGWAN DAS-NANAK CHAND.

directed the decree to be made final under the provisions of Order 34, rule 5 of the Civil Procedure Code, instructions being given for a final decree to be drawn up. This was accordingly done. The order was a proper one, except that under the provisions of Order 34, rule 5 (3) an application should have been made by the plaintiff to pass a final decree. There was no written application to this effect but there may well have been an oral one. In any case, judgment was given on the 16th April, 1929, passing a final decree and directing a decree-sheet to be prepared. The decree-sheet was prepared and in the Court Register the final decree was entered, but the preliminary decree of the 12th March, 1929, was not then entered in the Register.

On the 23rd February, 1932, the decree-holder put in an application under Order 34, rule 5, Civil Procedure Code, asking the Court to pass a final decree as the amount mentioned in the preliminary decree had not been paid into Court. This application was practically in the words of Order 34, rule 5. It asked for a final decree to be passed and that the mortgaged property, or a sufficient part thereof, should be sold. The words of the Code are " Shall pass a final decree directing that the mortgaged property or a sufficient part thereof should be sold," and the words in the vernacular would be the usual words to convey that idea. On the same date, the *Ahlmad* made a report to the effect that a decree had been passed. He copied the entry in the Register correctly except that he did not put in the word ' final ' before ' decree.' This may well have been due to an oversight. He ended his report by stating that the applicant applied for a final decree and this was correct. Notice issued to the judgment-debtor and the Court heard the matter

1937

JODH SINGH v. BHAGWAN DAS-NANAK CHAND.

on the 19th May, 1932. The records were then before the Court and it was clear that a final decree had been already passed on the 16th April, 1929. Accordingly on the 19th May, 1932, the Court rejected the application as a final decree had already been passed on the date mentioned. The Court put some blame on the *Ahlmad* for not reporting the matter correctly, but as has already been shown the report was correct in all respects except that the word "final" was not inserted before "decree."

On the same day, that is, the 19th May, 1932, the decree-holder put in an application to execute the final decree. It was in the prescribed form, but was not correct in every particular. For example, it gave the date of the decree as the 12th March, 1929, instead of the 16th April, 1929. In column 6 it was stated that a petition to make the decree final had been made on the 23rd February, 1932, but it was not then alleged that this was a petition for execution; while it was stated in the body of the application that on account of the wrong report of the *Ahlmad* the decree-holder was prevented from making an application for execution on the 23rd February, 1932. It may here be stated that if such an application had been made on the 23rd February, 1932, it would have been within the three years provided by Article 182 of Schedule II, whereas the 19th May, 1932, was beyond the three years provided.

On the 20th May, 1932, the Court passed an order that the application which had been made, on the 23rd February, 1932, was for a final decree to be passed and that application had been dismissed the previous day. The question of limitation was considered and the 27th May, 1932, was fixed for arguments on this point, without issuing notice On this date, the Court

1937

JODH SINGH
v.
BHAGWAN DAS NANAK CHAND

passed an order that *prima facie* the application appeared to be barred by time, but noted that the decree-holder sought to take advantage of the provisions of section 14 of the Indian Limitation Act. Notice was accordingly ordered to issue to the judgment-debtor to decide this matter, the date fixed being the 21st July, 1932. Service was not effected and the application was dismissed on the 25th August, 1932, the question of limitation being left open.

On the 7th February, 1935, another application for execution was made. In it, again, the date of the decree was given as the 12th March, 1929, instead of the 16th April, 1929. In column 6 an incorrect entry was made to the effect that the last application for execution was dated the 23rd February, 1932, which had been dismissed without any sum being realised. The application of that date was, as already shown, something else and the last application for execution was dated the 19th May, 1932. This application was again dismissed for default on the 10th May, 1935.

The last application for execution was made on the 10th May, 1935, the decree-holder apparently having turned up after the former one had been dismissed. In it again the date of the decree is given as the 12th March, 1929, but it was properly entered in column 6 that the last application for execution was dated the 7th February, 1935. The executing Court gave the decree-holder the benefit of section 14 (2) of the Indian Limitation Act and the judgment-debtor appealed to this Court. The appeal was heard by a Single Judge who held that the application of the 23rd February, 1932, was also an application for execution as well as an application for a final decree though, as an application for execution, it was defective; that in

1937

JODH SINGH
v.
BHAGWAN DAS-NANAK CHAND.

any case the application of the 23rd February, 1932, was a step-in-aid of execution; that as a corollary an application under Order 34, rule 5, would in itself be a step-in-aid of execution; while he was also inclined to give the decree-holder the benefit of section 14 (2) of the Limitation Act though his decision was not definite in this respect. Against this decision, the judgment-debtor has preferred this Letters Patent Appeal.

From the application of the 23rd February, 1932, it is clear that it was an ordinary application under Order 34, rule 5, Civil Procedure Code, for a final decree. Until such a decree is passed, the suit is still pending and no execution can proceed. No other interpretation can be given to the document, and this is our decision on the first question raised before us.

The next question argued before us was whether the application of the 23rd February, 1932, was a step-in-aid of execution. It seems to us that there cannot be a step-in-aid of execution until execution has become possible by the passing of a final decree. This is clear from the definition of "Preliminary" and "final" decrees in section 2 (2) of the Civil Procedure Code and from the provisions of Order 21, rules 10 and 11. The first rule mentioned is to the effect that "where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree to do so." The step which the decree-holder contemplated by his application of the 23rd February, 1932, was a step to further his suit. In *Chowdhry Paroosh Ram Das* v. *Kali Puddo Banerjee* (1), it was held that the application contemplated was an application for the execution of a decree within the terms of section 235 of the Civil Procedure Code, that is to say, setting

(1) I. L. R. (1890) 17 Cal. 53.

the Court in motion to execute a decree in any manner possible. But having so set the Court in motion, any further application during the continuance of the same proceedings was an application to take some step-in-aid of execution within the terms of column 5 of Article 182 of the present Limitation Act. In *Kuppuswami* v. *Raja Gopala* (1), it was held by a Division Bench that an application to be a step-in-aid of execution should be one made in a pending execution application.

Again, *Muhammad Masihullah Khan* v. *Jarao Bai* (2), it was held that under the present Code there can be no doubt that the proceedings for a final decree must be held to be proceedings in a suit, that is, not in execution. In *Ramji Lal* v. *Karam Singh* (3), it was held that an application for a final decree is not an application for execution. In *Nizam-ud-Din Shah* v. *Bohra Bhim Sen* (4), it was held that an application for a final decree is an application in the suit and not an application in execution. The same Court held in *Maqbul Ahmad* v. *Partab Narain Singh* (5), that an application for the preparation of a final decree was not an application for the execution of a decree but an application governed by Article 181 in a suit. This latter authority also went on to lay down that the time spent in proceedings for executing a preliminary decree could not be excluded under section 14 of the Limitation Act from the period of limitation for making an application for the preparation of a final decree, capable of execution, as the two reliefs were not the same.

We may here dispose of the argument based on section 14 (2) of the Limitation Act. It is to the effect

(1) I. L. R. (1922) 45 Mad. 466. (3) I. L. R. (1917) 39 All. 532.
(2) I. L. R. (1915) 37 All. 226. (4) I. L. R. (1918) 40 All. 203.
(5) (1929) 118 I. C. 670.

1937

JODH SINGH v. BHAGWAN DAS-NANAK CHAND.

that " in computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of Appeal, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a Court, which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it." Here the proceeding of the 23rd February, 1932, was in a Court which did not suffer from any defect of jurisdiction or other cause *ejusdem generis*. Nor can it be said that an application for a final decree is for the same relief as an application to execute a final decree. Section 14 (2) therefore does not help the respondent in any way.

The learned counsel appearing for the respondent contended that an application for execution may still be a valid application though defective, as was held in *Pitambar* v. *Damodar* (1). This is correct but the argument does not help him as in the present case there was no application for execution till the 16th May, 1932.

He principally, however, relied on *Desaiappa* v. *Dundappa* (2), *Gulappa* v. *Erava* (3), *Bindu Govind* v. *Hanmanth Govind* (4), and *Kunhammad Hajee* v. *Kozhuvammal* (5). In *Desaiappa* v. *Dundappa* (2), the decree was passed on the 18th February, 1899. The first application for execution was presented on the 20th March, 1907; another on the 31st March, 1910, and the third on the 12th September, 1910. On the last occasion the defence was raised that the application of the 31st March, 1910, was barred by time.

(1) I. L. R. (1926) 53 Cal. 664. (3) I. L. R. (1922) 46 Bom. 269.
(2) I. L. R. (1920) 44 Bom. 227. (4) 1924 A. I. R. (Bom.) 71.
(5) 1928 A. I. R. (Mad.) 38.

The Court decided that the application of the 12th September, 1910, was in time and directed that the money due should be paid by instalments and Rs.220 were paid to the plaintiff on the 26th March, 1913. Finally, there was an application put in on the 19th November, 1915, to recover the balance. It was dismissed as time-barred on the ground that the decree was dead on 31st March, 1910, as that application was barred by time. It was held that the application of the 19th November, 1915, was within time as the order, made on the application of the 12th September, 1910, not having been reversed on appeal was valid. This decision followed a decision of the Privy Council reported as *Mungul Pershad* v. *Girja Kant Lahiri* (1), where it was held that, assuming that a decree was barred at the date of some order made for its execution, such order, though erroneously made, was nevertheless valid unless reversed upon appeal. These authorities are of no help in the present case.

In *Gullappa* v. *Erava* (2), a decree passed in a mortgage suit giving six months time for payment was dated the 25th February, 1904. On the 12th June, 1907, an application for execution was put in but was dismissed eventually. On the 13th June 1910, another application for execution was presented for sale of the property, but it was dismissed on the ground that the plaintiff had not applied for a final decree as required by the New Code of Civil Procedure, 1908. The plaintiff accordingly applied on the 7th October, 1912, for a final decree, but the application was dismissed for non-payment of process fees. A similar application was made on the 7th November, 1913, but was withdrawn later. The application under discussion was filed on the 7th September, 1915.

(1) (1881) L. R. 8 I. A. 123. (2) I. L. R. (1922) 46 Bom. 269.

1937

JODH SINGH v. BHAGWAN DAS-NANAK CHAND.

It was held that the application of the 7th October, 1912 and the 7th November, 1913, in which the plaintiff applied for a final decree were steps-in-aid of execution. The decision was based on the following grounds, namely, that the application of the 13th June, 1910, should not have been dismissed because the plaintiff had not applied for a final decree as required by the New Code of Civil Procedure, as that Code was not retrospective and that, therefore, when the plaintiff was endeavouring to get an order which he had been told to get when the previous application was dismissed, he must be held to be taking steps-in-aid of his execution. It was said that this followed from the decision in *Desaiappa* v. *Dundappa* (1), though what that decision laid down was that, if an application, which was barred by time, is held to be in time and that order is not appealed against, a subsequent application cannot be dismissed on the ground that the former order was a wrong one. This of course was an elementary proposition based on the general principles of *res judicata*.

The matter was again considered in *Bindu Govind* v. *Hanmanth Govind* (2). In that case a decree was payable by yearly instalments, the first of which was payable on the 31st March, 1914. On failure to pay any one instalment in time the decree allowed sale of the mortgaged property or a sufficient portion thereof to recover the amount of the instalment overdue. Each time default took place, the creditors sought to make the decree final instead of applying for sale, and final decrees were passed. Finally on the 30th October, 1919, the creditors again applied to make the decree final as regards the instalments due on the 31st

(1) I. L. R. (1920) 44 Bom. 227. (2) 1924 A. I. R. (Bom.) 71.

1937

JODH SINGH v. BHAGWAN DAS-NANAK CHAND.

March, 1917. This application was rejected on the ground that no final decree was necessary. It was nevertheless held in a later application that this application to make the decree final should be considered as a step-in-aid of execution. In this decision, however, it was said that an application to make a decree final may in one case be considered as a step-in-aid, although in another case it may be not so. Macleod C. J. was a party to all the decisions and he qualified his remarks in *Gulappa* v. *Erava* (1), in his later decision in *Bindu Govind* v. *Hanmanth Govind* (2). As already pointed out, *Gulappa* v. *Erava* (1), was based on *Desaiappa* v. *Dundappa* (3), and *Mungul Pershad* v. *Gerja Kant Lahiri* (4), which do not appear to be in point. The Bombay decisions, therefore, on the whole are not very useful.

In *Kunhammad Hajee* v. *Kozharammal* (5), it was held that strictly speaking Order 34, Rule 5, has no application to a compromise decree, but that where the decree-holder, by applying for a final decree, was endeavouring to get an order which he thought at the time was necessary before executing his decree, but afterwards due to better advice he gave up that attempt and applied for the execution of the decree without obtaining a final decree, such an application was a step-in-aid of execution; for he was asking the Court to make an order which was thought necessary before taking out actual execution of the decree. With all respect, this amounts to a decision that the decree-holder can take any step, whether necessary or not, and, whatever that step may be, it will be counted as a step-in-aid of execution though unnecessary. This

(1) I. L. R. (1922) 46 Bom. 269.
(2) 1924 A. I. R. (Bom.) 71.
(3) I. L. R. (1920) 44 Bom. 227.
(4) (1881) L. R. 8 I. A. 123.
(5) 1928 A. I. R. (Mad.) 38.

1937

JODH SINGH v. BHAGWAN DAS-NANAK CHAND.

appears to us to go very far, and in any case this decision has no application to the facts before us where there was already a final decree in existence passed in the presence of the decree-holder. Further, the decree-holder accepted the fact that the decree was made final on the 16th April, 1919, for he did not appeal against the decision of the Court rejecting his application of the 23rd February, 1932, asking for a final decree to be passed.

The learned counsel appearing for the respondent further relied on *Kannan* v. *Arrulla Haji* (1). That was a case where an application was made by a decree-holder-purchaser for delivery of property purchased by him in execution, and it was held that that was a step-in-aid of execution within Article 182, clause 5, of the Limitation Act, and it was said that in order that an application by the decree-holder should serve as a step-in-aid, it was not necessary that it should be made in a pending execution application. The learned Judges followed *Kunhi* v. *Seshagiri* (2) and stated that in such matters the principle of *stare decisis* was applicable. This simply amounts to saying that, what had for a long time been acted upon, should be applied though of doubtful legality. The other Madras decisions on this point need not, therefore, be considered.

He also relied on *Sheo Sahay* v. *Jamuna Prasad Singh* (3), and certain other cases. In *Sheo Sahay* v. *Jamuna Prasad Singh* (3), it was said that any step taken by the decree-holder to remove an obstacle thrown by the judgment-debtor in the way of the execution of the decree was a step-in-aid of execution. Where the judgment-debtor raised an objection to the execution of the decree, and the decree-holder examined a

(1) I. L. R. (1926) 50 Mad. 403. (2) I. L. R. (1882) 5 Mad. 141.
(3) I. L. R. (1925) 4 Pat. 202.

witness in order to meet the objection, it was held that this action of his was a step-in-aid of execution. Such cases, however, cannot help the respondent before us, for he took no step which could be called a step-in-aid on the 23rd February, 1932. He merely applied for something which had already been done in the suit.

1937

JODH SINGH
v.
BHAGWAN DAS-NANAK CHAND.

On all grounds, therefore, we consider that the decision of the Single Judge was wrong and, accepting this appeal, we dismiss the application for execution as barred by time. The parties will bear their own costs throughout.

P. S.

Appeal accepted.

APPELLATE CIVIL.

Before Tek Chand and Skemp JJ.

GANPAT MAL-SUNDAR DAS—(PLAINTIFFS) Appellants

versus

KEHR SINGH-BALWANT SINGH & CO. (DEFENDANTS) Respondents.

1937

Feb. 4

Civil Appeal No. 1762 of 1935.

Commercial Relations — Pucca Arhti *and his constituent* — *Commercial usage in Lyallpur and Amritsar markets* — *Necessity of reasonable notice to constituent for cover, before settling the bargains on his account* — *Indian Contract Act (IX of 1872), S. 197* — *Silence* — *whether ratification of* Arhti's *act.*

Held, that the legal relationship between the constituent and the *pucca arhti* is that of a vendor and a purchaser, with this additional incident to the contract that the *arhti* is entitled to charge commission and brokerage in addition to the price. As between him and his constituent the business is finished when an order for sale or purchase is accepted. Where the *pucca arhti*, instead of allocating the order to himself, enters into a contract with another merchant, the constituent never inquires who the merchant is, and the *pucca arhti* never gives the name of the merchant to the