

APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

1899.

BHAGAWAN RAMJI MARWADI, PLAINTIFF, *v.* GANU, DEFENDANT.*

February 27.

Dekkhan Agriculturists' Relief Act (XVII of 1879), Sec. 44—Agreement filed under section and becoming a decree—Default in payment of instalments due under decree—Application to make decree absolute under Section 89 of Transfer of Property Act (IV of 1882)—Limitation Act (XV of 1877), Sch. II, Art. 179.

On the 21st October, 1894, the plaintiff and the defendant entered into an amicable agreement before a conciliator for payment of a mortgage-debt due to the former by annual instalments. The agreement was forwarded to the Court on the 21st December, 1894, to be filed under section 44 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). Default having been made in the payment of the instalments, the first of which became due on the 25th January, 1895, and which also was not paid, the plaintiff applied for execution by sale of the mortgaged property. The application was made on the 6th September, 1897, and it was struck off the file for some formal defect on the 18th November, 1897. Subsequently on the 10th October, 1898, the plaintiff, having applied for an order absolute for sale under section 89 of the Transfer of Property Act (IV of 1882) questions arose as to the applicability of the section to agreements filed in Court under section 44 of the Dekkhan Agriculturists' Relief Act and as to limitation.

Held, that (1) agreements filed under section 44 of the Dekkhan Agriculturists' Relief Act, if relating to sale of mortgaged property, are subject to the provisions of section 89 of the Transfer of Property Act (IV of 1882).

(2) Article 179, Schedule II, of the Limitation Act (XV of 1877) applies to applications under section 89 of the Transfer of Property Act.

Held, further, that in the present case the application of September 1897 should be treated as a step in aid of execution.

REFERENCE by RAO SÁHEB JANARDAN DAMODAR DIKSHIT, Subordinate Judge of Khed in the Poona District, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The plaintiff and the defendant entered into an agreement under section 44⁽¹⁾ of the Dekkhan Agriculturists' Relief Act (XVII of

* Civil Reference, No. 1 of 1899.

(1) Section 44 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) as amended by Act VI of 1895:—

44. When the agreement is one finally disposing of the matter, the conciliator shall forward the same in original to the Court of the subordinate Judge of the lowest grade having jurisdiction in the place where the agriculturist who is a party thereto resides, and shall at the same time deliver each of the parties a written

1879) before the conciliator of Khed on the 21st October, 1894. The circumstances under which the agreement was made were as follows:—On the 12th June, 1885, the defendant passed a mortgage-bond to the plaintiff for fifty rupees. The bond was payable on the 12th June, 1887. The debt not having been paid as agreed, the parties appeared before the conciliator and entered into the aforesaid agreement, which ran thus:—

“That the defendant should pay to the plaintiff Rs. 100 by instalments, that the first instalment of Rs. 16 should be paid at the end of the month of Poush Shak 1816 (25th January, 1895), and that the remaining amount should be paid in six yearly instalments of Rs. 14 each, payable at the end of Poush of every subsequent year; that, in default of payment of any of the instalments, the plaintiff should recover the whole amount due by sale of the mortgaged property, and that the deficiency, if any, should be recovered from the defendant personally.”

The agreement was submitted to the Subordinate Judge, and the necessary steps having been taken as laid down by the Dekkhan

notice to show cause before such Judge, within one month from the date of such delivery, why such agreement ought not to be filed in such Court.

(2) The Court which receives the agreement shall in all cases scrutinize the same, and if it thinks that the agreement is a legal and equitable one finally disposing of the matter and that it has not been made in fraud of the stamp or registration laws, it shall, after the expiry of the said period of one month, unless cause has been shown as aforesaid, order such agreement to be filed; and it shall then take effect as if it were a decree of the said Court passed on the day on which it is ordered to be filed, and from which no appeal lies.

(3) If the said Court thinks that the agreement is not a legal or equitable one or that it does not finally dispose of the matter, or that it has been made in fraud of the stamp or registration laws, it shall of its own motion issue process for the attendance of the parties, and if after such inquiry as may be deemed necessary the Court finds that such agreement is a legal and equitable one finally disposing of the matter, and that it has not been made in fraud of the stamp or registration laws, it shall order such agreement to be filed; and it shall then take effect as if it were a decree of the said Court passed on the day on which it is ordered to be filed, and from which no appeal lies.

(4) If, on the other hand, the said Court finds that the agreement does not constitute a legal or equitable agreement, or that it does not finally dispose of the matter, or that it has been made in fraud of the stamp or registration laws, it shall return the said agreement to the conciliator, and such conciliator shall thereupon be bound to furnish on demand to the parties or any one of them a certificate under section 46.

(5) The Court may in any case, for reasons to be recorded by it in writing, from time to time extend the period of one month allowed for showing cause under this section.

1899

BHAGAWAN

v.
GANU.

Agriculturists' Relief Act, it was filed on the 21st December, 1894, and under section 44 took effect as a decree passed by the Court.

The defendant not having paid any of the instalments, the plaintiff on the 6th September, 1897, applied for the sale of the mortgaged property by presenting an application for execution in the form prescribed by section 235 of the Civil Procedure Code (Act XIV of 1882). The application was registered, and a notice under section 248 of the Civil Procedure Code was served on the defendant, but the plaintiff having failed to produce an extract from *Vasubbáki Patrak*, the application was struck off the file on the 18th November, 1897. Though the Transfer of Property Act (IV of 1882) came into force in the Bombay Presidency in January, 1893, the practice of making an application for a decree absolute under section 89 of the Act was not observed in the Court of the Subordinate Judge at the time when the darkhást was struck off. That practice having been subsequently introduced, the plaintiff on the 10th October, 1898, applied to have his decree made absolute.

The Subordinate Judge, being doubtful as to whether section 89 of the Transfer of Property Act was applicable and also as to whether the application was within time, as no application of the kind was made within three years since the whole amount became payable on default in the payment of instalments, he submitted the following questions to the High Court :—

1. Are agreements filed under section 44 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), if relating to sale of mortgaged property, subject to the provisions of section 89 of the Transfer of Property Act ?
2. Does article 178 or 179 of Schedule II of the Limitation Act or any other rule of limitation apply to applications under section 89 of the Transfer of Property Act ?
3. Can the darkhást of September, 1897, be considered as an application for execution, or a step in aid of execution, for the purposes of clause 4 of article 179 of Schedule II of the Limitation Act ?
4. Can the execution of decrees proceed on applications for making decrees absolute ? If not, what is the period of limitation for presentation of darkhásts, after the order absolute is made under section 89 of the Transfer of Property Act ?

The opinion of the Subordinate Judge on the first question was in the affirmative, on the second in the negative, on the third in the negative, and on the fourth as follows :—

The execution cannot proceed upon an application for making a decree absolute under section 89, and that the period of limitation for presenting first dakhast for execution after the decree absolute is made is three years from its being made absolute under article 178 of Schedule II of the Limitation Act or article 179 of the said Act.

1899.

BHAGAWAN
D.
GANU.

Shivram V. Bhandarkar (amicus curiæ) for the plaintiff:—As to the first question we contend that the agreements mentioned therein are not subject to the provisions of section 89 of the Transfer of Property Act. The question as to the applicability of the section becomes important on the point of limitation. If section 89 applies, then the question arises, what is the period of limitation applicable to such an application as this. Under section 44 of the Dekkhan Agriculturists' Relief Act the agreement itself becomes a decree. No fresh decree need be passed as contemplated by section 89 of the Transfer of Property Act. The agreement in this case, which was filed and became a decree, was neither a suit for foreclosure nor for sale, while section 89 of the Transfer of Property Act clearly contemplates such a suit.

[PARSONS, C. J. (ACTING):—The plaintiff now asks that the property should be sold.]

No doubt the plaintiff asks for a sale, but we contend that the property can be sold by virtue of section 44 of the Dekkhan Agriculturists' Relief Act and not under section 89 of the Transfer of Property Act, because there was no decree absolute and there was no suit for sale.

Next as to limitation. If section 89 of the Transfer of Property Act applies, then there is no period of limitation provided for such an application. It has been held that applications under section 89 of the Transfer of Property Act are not applications under the Civil Procedure Code, and consequently they are not applications in execution of decrees.

Vasudev G. Bhandarkar (amicus curiæ) for the defendant:—As the decree was passed after the Transfer of Property Act came into force, section 89 of the Act is applicable. Proceedings held before a conciliator stand on the same footing as an award made by arbitrators. It has been held that a decree passed on an award is governed by the provisions of section 89 of the Act. Unless a decree is made absolute, there can be no execution of it. The mort-

gagee must apply to the Court to pass an order for sale. Under section 235 of the Civil Procedure Code, the mortgagee cannot at once ask for an order for the sale of the property. When an order absolute is made under section 89 of the Transfer of Property Act, the mortgagor's right to redeem becomes extinguished.

As to limitation, we contend that the Allahabad rulings should be followed. An application to pass an absolute order would be a proceeding in execution, and, therefore, it would be governed by article 179, Schedule II, of the Limitation Act. The term "execution" should be construed in reference to the provisions of the Civil Procedure Code, section 214. The original decree is merely a decree *nisi*. Under it the mortgagor may offer to redeem at any time before an order absolute is passed. The former application being not in accordance with section 89 of the Transfer of Property Act, was not an application in accordance with law, and, therefore, it was not a step in aid of execution.

The following authorities were cited in argument :—*Bai Manekbai v. Manekji*⁽¹⁾; *Nandram v. Babaji*⁽²⁾; *Hafizuddin v. Abdulool*⁽³⁾; *Ajudhia Pershad v. Baldeo*⁽⁴⁾; *Tiluck Singh v. Parsotein Proshad*⁽⁵⁾; *Tara Prosad v. Bhobodeb*⁽⁶⁾; *Poresh Nath Mojumdar v. Ramjodu Mojumdar*⁽⁷⁾; *Ehlayadath v. Krishna*⁽⁸⁾; *Rambir Singh v. Drigpal*⁽⁹⁾; *Chunni Lal v. Harnam Das*⁽¹⁰⁾; *Muhammad Suleman Khan v. Muhammad Yar Khan*⁽¹¹⁾; *Ram Lal v. Narain*⁽¹²⁾; *Oudh Behari Lal v. Nageshar Lal*⁽¹³⁾.

PARSONS, C. J. (ACTING) :— The Subordinate Judge, in order to determine whether an application made to him was within time or not, has referred to this Court, under the provisions of section 617 of the Civil Procedure Code, the following four questions :—

1. Are agreements filed under section 44 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), if relating to sale of mortgaged property, subject to the provisions of section 89 of the Transfer of Property Act?

(1) (1880) 7 Bom., 213.

(2) (1897) 22 Bom., 771.

(3) (1893) 20 Cal., 755.

(4) (1894) 21 Cal., 818.

(5) (1895) 22 Cal., 924.

(6) (1895) 22 Cal., 931.

(7) (1889) 16 Cal., 246.

(8) (1889) 13 Mad., 267.

(9) (1893) 16 All., 23.

(10) (1898) 20 All., 302.

(11) (1894) 17 All., 39.

(12) (1890) 12 All., 539.

(13) (1890) 13 All., 278.

2. Does article 178 or 179 of Schedule II of the Limitation Act or any other rule of limitation apply to applications under section 89 of the Transfer of Property Act?

3. Can the darkhast of September, 1897, be considered as an application for execution, or a step in aid of execution, for the purposes of clause 4 of article 179 of Schedule II of the Limitation Act?

4. Can the execution of decrees proceed on applications for making decrees absolute? If not, what is the period of limitation for presentation of darkhasts, after the order absolute is made under section 89 of the Transfer of Property Act?

I am of opinion that such a general question as the 4th could not be referred, and that no one of the other questions can be said really to arise in the case.

The facts are these. The defendant had mortgaged his property to the plaintiff, and the plaintiff wanted his money. They applied to the conciliators, as they were bound to do under the provisions of the Dekkhan Agriculturists' Relief Act, and he effected an amicable settlement between them, the terms of which were as follows:—

“That the defendant should pay to the plaintiff Rs. 100 by instalments; that the first instalment of Rs. 16 should be paid at the end of the month of Poush Shak 1816 (25th January, 1895), and that the remaining amount should be paid in six yearly instalments of Rs. 14 each, payable at the end of Poush of every subsequent year; that, in default of payment of any of the instalments, the plaintiff should recover the whole of the amount due by sale of the mortgaged property; and that the deficiency, if any, should be recovered from the defendant personally.”

The Court to which this agreement was forwarded under section 44 of the said Act ordered it to be filed, and it then took effect as if it were a decree of the said Court. The defendant made default in payment of the first instalment, and the plaintiff, on the 6th September, 1897, asked for the sale of the property. Notice under section 248 of the Civil Procedure Code was given to the defendant, but in consequence of some formal defect the application was struck off the file on the 18th November, 1897. On the 10th October, 1898, the plaintiff made the present application to obtain an order absolute for sale under section 89 of the Transfer of Property Act, 1882.

The Subordinate Judge thinks that the application is within time, but, in order to know if he is right or not, he asks this

1899.

BILAGAWAN

v.

GANU.

1899.

BHAGAWAN

v.
GANU.

Court, first, whether agreements filed under section 44 of the Dekkhan Agriculturists' Relief Act are subject to the provisions of section 89 of the Transfer of Property Act. The only argument addressed to us against the operation of the section was based on the fact that there has been no suit for sale. I do not, however, see that that is a very important distinction. The case of *Tara Prasad v. Bhobodeb*⁽¹⁾ shows that the section applies to a decree passed on an award of arbitrators filed in Court, and there seems to me no reason why it should not apply to the award of a conciliator. The point, however, important as it may be on the question as to when the defendant's right to redeem becomes extinguished, has no bearing on the question of limitation which arises in this suit.

He next asks whether article 178 or 179 of Schedule II of the Limitation Act or any other rule of limitation applies to applications under section 89 of the Transfer of Property Act. There is a consensus of authority that article 178 does not apply—*Tiluck Singh v. Parsotein Proshad*⁽²⁾; *Ranbir Singh v. Drigpal*⁽³⁾ and *Bai Manekbai v. Manekji*⁽⁴⁾. The Allahabad High Court held that article 179 applies—*Oulh Behari Lal v. Nageshar Lal*⁽⁵⁾ and *Chunni Lal v. Harnam Das*⁽⁶⁾; while the Calcutta High Court held that there is no period of limitation for such applications (*Tiluck Singh v. Parsotein Proshad*). If I had to decide the point I should be inclined to agree with the Allahabad High Court and hold that the application to obtain an order absolute was a proceeding in execution falling within article 179, and had, therefore, to be made within the time allowed by that article, counting from the date of the decree. Any positive decision, however, on the point is unnecessary.

The third question—"Can the darkhást of September, 1897, be considered as an application for execution, or a step in aid of execution, for the purposes of clause 4 of article 179 of Schedule II of the Limitation Act?"—is based upon a misconception of the darkhást itself. If the Subordinate Judge had only avoided technicalities and treated it as what it really is, namely, an ap-

(1) (1895) 22 Cal., 931.

(4) (1886) 7 Bom., 213.

(2) (1895) 22 Cal., 924.

(5) (1890) 13 All., 273.

(3) (1893) 16 All., 23.

(6) (1898) 20 All., 302.

1890.

BHAGAWAN

V.
GANG.

plication to the Court for an order for sale of the mortgaged property, all his difficulties would have disappeared. There is no particular magic in the word "absolute," and it is not necessary that the application for the order should state the Act or the section thereof under which it is made. In the case of *Ajudhia Pershad v. Baldeo*⁽¹⁾, the application was in words identical with the present one, and it was held to be a good one. I would hold the same in the present case. The application of October, 1898, therefore, made within three years of the former one, is not time-barred even if article 179 be held to apply to it. If that article does not apply, then no limitation whatever applies, and the application cannot be time-barred. The above is, I think, a sufficient reply to all the questions put by the Subordinate Judge.

RANADE, J.:—The first question contained in this reference relates to the point whether agreements under section 44 of Act XVII of 1879, when filed in Court, are subject to the provisions of section 89 of Act IV of 1882. The Subordinate Judge was of opinion that section 89 of Act IV of 1882 was applicable, and I think his view is correct. It is true section 2 of Act IV of 1882 expressly provides that nothing herein contained shall be deemed to affect the provisions of any enactment not hereby expressly repealed. Act XVII of 1879 is not among the repealed enactments, and, therefore, its provisions are not repealed. Section 74 of Act XVII of 1879, however, provides that, except in so far as it is inconsistent with the provisions of the Civil Procedure Code, that Code shall apply to all suits and *proceedings* under the Act. Act IV of 1882 and Act XIV of 1882 have to be read together as far as they relate to procedure. The provisions of Chapter XXXI of the Civil Procedure Code apply to the service of notice under section 103 of Act IV of 1882. The prohibition contained in section 43 of the Civil Procedure Code is controlled by the special provision of section 67 of Act IV of 1882. Other parallel instances may be cited of the close relation that exists between the two Codes. (See sections 6, 136, 97 of Act IV of 1882, and sections 266, 292, 295 of Act XIV of 1882.) So far, therefore, as the provisions of Act IV of 1882 relate to procedure, and they are not inconsistent with the special enact-

(1) (1894) 21 Cal., 818.

1869.

BHAGAWAN

GANU.

ment of 1879, these provisions control proceedings under the special Act. Of course, where, as in sections 15A, 15B, 15C, 15D, 16, 20, 22, 70, the Dekkhan Agriculturists' Relief Act contains provisions directly inconsistent with those of the Transfer of Property Act, they are saved by section 2 (a) of Act IV of 1882.

There is no such inconsistency between section 44 of the Dekkhan Agriculturists' Relief Act and section 89 of the Transfer of Property Act. When an agreement effected by conciliators in respect of a mortgage-debt is filed in Court, it has the effect of a decree, and, as such decree, it is amenable to the provisions which relate to other decrees directing the foreclosure or sale of mortgaged property. The substantive effect of these sections 85—99 is to make ordinary decrees for foreclosure and sale decrees *nisi*, which allow an interval to the debtor to make the payment by requiring the creditor to apply for an order absolute before the mortgagor's right to redeem is for ever extinguished. This kind of relief it is one of the main objects of the Dekkhan Agriculturists' Relief Act to afford. There is, therefore, nothing inconsistent in the two sets of provisions. I would accordingly answer the first question in the affirmative.

The second question contained in the reference is whether article 178 or 179 applies to applications made by a judgment-creditor under section 89 for an order absolute. There has been no decision of this Court on the point. In *Bai Manekbai v. Manekji*⁽¹⁾, it was, however, held that article 178 only applies to applications under the Civil Procedure Code. The Calcutta and Allahabad High Courts have ruled that article 178 does not apply to applications under section 89. As regards article 179, there is an apparent conflict of opinion between the decisions of the Allahabad and Calcutta High Courts. After a careful consideration of the authorities which were cited before us, I am inclined to accept the view of the Allahabad Judges. The Calcutta High Court, while laying down in *Puran Chand v. Roy Radha Kishan*⁽²⁾, that articles 178 and 179 did not apply to applications which were not made under the Code, has itself been led to observe in *Tiluck Singh v. Parsotein Proshad*⁽³⁾, that if there is undue delay, the

(1) (1880) 7 Bom., 213.

(2) (1891) 19 Cal., 132.

(3) (1895) 22 Cal., 924.

Courts will hold it to be a proof of laches, and disallow such applications. There seems to be no sufficient reason for holding that an application under section 89 is not an application for, or a step in aid of execution, and, as such, it must be treated as an application to which article 179 applies. In the present case this second question does not properly arise, as the application of September, 1897, was admittedly made within three years from the date of the decree, and it prevents the bar of limitation. It was indeed contended that as that application did not expressly pray for an order absolute, but was made under section 235, Civil Procedure Code, it was an order which had no legal effect, and did not save limitation. This contention seems too technical to be entitled to any support. The judgment-creditor's present application of October 1898, is obviously within time by reason of the proceedings he took in September, 1897.

The third question has been answered above.

The fourth question is apparently of a speculative character, and does not arise from the facts of the case. It, therefore, calls for no answer. It may, however, be suggested that there is nothing to prevent applications for an order absolute and for the execution of the dawkhast from being made together or at short interval.

Order accordingly.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

PRANSUKHRAM DINANATH, A LUNATIC, BY HIS NEXT FRIEND HIS WIFE BAI FULKOR (ORIGINAL PLAINTIFF), APPELLANT, v. BAI LADKOR AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

1899.

March 1.

Lunatic—Suit by wife as next friend, alleging husband to be a lunatic—Husband not an adjudged lunatic—Civil Procedure Code (Act XIV of 1882), Sec. 462—Act XXXV of 1858—Practice—Procedure.

Where a wife, alleging her husband to be of unsound mind, brought a suit as next friend, the Court ordered an inquiry (1) as to whether the husband was of unsound mind and (2) as to whether the suit was for his benefit.

* Second Appeal, No. 529 of 1898.