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Procedure, and that section provides that the Court shall issue a notice to the party against whom execution is applied for, requiring him to show cause, within a period to be fixed by the Court, why the decree should not be executed against him when more than one year has elapsed between the date of the decree and the application for its execution. In our opinion there was no necessity for the issue of a notice under section 248. Upon an application to transfer the decree under section 223, execution could not have been obtained upon the order of the 19th December 1893. The subsequent application to the Court to which the certified copy of the decree was transmitted was necessary, and this we think was the first application for execution. In the case of *Ashootosh Dutt v. Doorga Churn Chatterjee* (1) the order relied upon by White, J., as having the effect of reviving the decree within the meaning of Article 180 of Schedule II of the Limitation Act, was an order for execution by the arrest of the judgment-debtor, and was made by the Court which passed the decree. The view we take is confirmed by a decision in the case of *Nilmony Singh Deo v. Biressur Banerjee* (2).

The appeal must be allowed with costs.

S. C. G.

*Appeal allowed.*

*Before Mr. Justice Prinsep and Mr. Justice Ghose.*

TILUCK SINGH (JUDGMENT-DEBTOR) v. PARSOTEIN PROSHAD  
 (DECREE-HOLDER.)<sup>3</sup>

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*Limitation Act (XV of 1877), Schedule II, Art. 178—Transfer of Property Act (IV of 1882), section 89—Application for an order absolute for sale of mortgaged property.*

An application under section 89 of the Transfer of Property Act (IV of 1882) to have a mortgage-decree for sale made absolute is not governed by Art. 178, Schedule II of the Limitation Act, 1877. That Article is limited to applications under the Code of Civil Procedure. *Baimanekbai v. Manekji Kavasji* (3), *Ranbir Singh v. Drigpal* (4), approved.

<sup>3</sup> Appeal from Order No. 314 of 1894, against the order of W. H. Page, Esq., District Judge of Tirhoot, dated the 18th of May 1894, affirming the order of Babu Shoshi Bhusan Sen, Munsif of Muzafferpur, dated the 24th of February 1894.

(1) I. L. R., 6 Calo., 504.

(2) I. L. R., 16 Calo., 744.

(3) I. L. R., 7 Bom., 213.

(4) I. L. R., 16 All., 23.

In dealing, however, with such an application, the Court may be guided by considerations as to whether any delay on the part of the mortgagee has not been unreasonable, so as to bring it within the rules applied in such cases by Courts of Equity.

So long as the final order for sale is not passed the suit may properly be regarded as pending.

THIS appeal arose out of an application for an order absolute under section 89 of the Transfer of Property Act. The original mortgage-decree was passed on the 21st July 1887. An application for execution of the decree was made on the 19th July 1890, but it was struck off for default. A second application for execution, dated 16th February 1893, also failed on the ground that the decree had not been made absolute. The present application for an order absolute was made on the 14th September 1893, and the judgment-debtors objected that the application was barred by limitation. Both the lower Courts overruled the objection. The judgment-debtor preferred a second appeal to the High Court.

Babu *Dwarkanath Chakrabarti* for the appellant.—The application is barred by Art. 178 of the Limitation Act. [GHOSH, J.—That article refers only to the Code of Civil Procedure and the Limitation Act ; it does not refer to the Transfer of Property Act]. That is the only provision for the applications not expressly mentioned and it was meant to be general. Section 4 of the Limitation Act is wide enough, and the Act was never intended to exclude proceedings under the Transfer of Property Act. The provision of section 89 of the Transfer of Property Act is of the same class as the provision for an order for sale under section 284 of the Civil Procedure Code. [PRINSEP, J.—The application under section 89 is an application pending the suit and not one after the final decree.] The articles in the schedule deal with applications pending the suit. A plaintiff ought to be more diligent in bringing a suit to a termination than in executing a decree. In *Darbo v. Kesho Rai* (1), the article was held not to apply to cases where it is the duty of the Court to pass the order without being moved by the party ; here it was the duty of the party to apply for an order absolute. The case of *Baimanekbai v. Manekji Kavasji* (2) cited in the lower Court's judgment related to an application for pro-

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(1) I. L. R., 9 All., 364.

(2) I. L. R., 7 Bom., 213.

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bate or letters of administration, and was a different case; and the case of *Ranbir Singh v. Drigpal* (1) was decided upon the ground that Art. 178 applied to applications under the Civil Procedure Code only, which does not seem to be correct. The case of *Anando Kishore Dass Bakshi v. Anando Kishore Bose* (2) supports my contention. [GHOSH, J.—But that case was dissented from in a Full Bench decision in *Puran Chand v. Roy Radha Kishen* (3).]

Babu *Jogesh Chandra Dey*, for the respondent, was not called upon.

The judgment of the High Court (PRINSEP and GHOSH, JJ.) was as follows:—

This is a matter relating to the execution of a decree on a mortgage passed under the Transfer of Property Act. It seems that an application for execution of that decree was made and abandoned, and again renewed, without the plaintiff having obtained an order under section 89 for the sale of the mortgaged properties. On the second application to execute, the mortgagor, judgment-debtor, objected that the decree could not be executed without such an order, and he succeeded in getting the application to execute dismissed on this ground. On this, the mortgagee has applied to have his decree made absolute by an order for sale of the mortgaged properties. The objection was renewed by the mortgagor on the ground that more than three years have passed since the original decree, and that, therefore, the application now made was barred by Art. 178, Schedule II of the Limitation Act of 1877. Both the Courts have overruled this objection and have concurrently given the mortgagee the order that he desires. They have both proceeded on the judgment of the Allahabad High Court in the case of *Ranbir Singh v. Drigpal* (1), which followed the judgment of the Bombay High Court in the case of *Baimanekbai v. Manekji Kavasji* (4). In both these cases, the object of Art. 178 was considered. In the Bombay case it was sought to apply Art. 178 to an application for probate or letters of administration, and it was there held that that article was limited to applications made under the Code of

(1) I. L. R., 16 All., 25.

(3) I. L. R., 19 Cal., 133.

(2) I. L. R., 14 Cal., 50.

(4) I. L. R., 7 Bom., 213.

Civil Procedure. The learned Chief Justice proceeds: "An examination of all the other articles in the second schedule, relating to applications, that is to say, of the third division of that schedule, shows that the applications therein contemplated are such as are made under the Civil Procedure Code. Hence, it is natural to conclude that the applications referred to in Article 178 are applications *ejusdem generis*, i.e., applications under the Code of Civil Procedure. The preamble of the Act, moreover, purports to deal with certain applications only and not with all applications." The judgment of the Allahabad High Court, to which reference has been made, is also to a similar effect. In that case, as in this, the application related to an order for sale under a decree passed on mortgage. Mr. Justice Burdett, after following the judgment of the Bombay Court, pointed out that the Limitation Act was enacted some years before the passing of the Transfer of Property Act, and he says: "I cannot find, nor has my attention been called to any rule of limitation *aliunde* which could be applied to an application under section 89 of the latter Act. I am accordingly obliged to hold that there is no limitation rule under which the application made by the appellant in March 1890 can be considered to fall." We approve of the view taken in both these judgments of Article 178, and agree that it should be limited to applications under the Code of Civil Procedure. The result, therefore, is that an application, such as that now before us, is not governed by any limitation. We do not, however, mean to say that, in dealing with such matters, the Court will not be guided by considerations as to whether any delay on the part of the mortgagee has not been unreasonable, so as to bring it within the rules applied in such cases by Courts of Equity. We may further observe that no final order for sale having been passed, this suit may properly be regarded as being still pending. The appeal is, therefore, dismissed with costs.

S. C. C.

*Appeal dismissed.*

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