

Madho Ram and ors. Vs. Nihal Singh and ors.

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SooperKanoon Citation : sooperkanoon.com/464058

Court : Allahabad

Decided On : Jul-27-1915

Reported in : AIR1915All336; (1916)ILR39All21; 30Ind.Cas.494

Judge : P.C. Banerji and; Rafique, JJ.

Appellant : Madho Ram and ors.

Respondent : Nihal Singh and ors.

Judgement :

1. This appeal arises out of an application made under Order XXXIV, Rule 5, of the Code of Civil Procedure, for a final decree in a suit for sale upon a mortgage. The preliminary decree under Order XXXIV, Rule 4, was made on the 27th of February 1909. That decree allowed a period of six months to judgment-debtor to pay the amount of the decree, and that period expired on the 26th of August 1909. Meanwhile the judgment-debtor appealed, with the result that the decree of the Court of first instance was affirmed by the lower Appellate Court on the 25th of January 1911, and on second appeal, by the High Court on the 25th of January 1912. Neither the first Appellate Court nor this Court extended time, for payment of the mortgage-money. The present application was made on the 25th of April 1913. It was contended on behalf of the judgment-debtors, that is the mortgagors, that the application was beyond time. This contention was allowed by the Court of first instance and the decision of that Court was affirmed by the lower Appellate Court. The decree-holders have preferred this appeal and it is urged on their behalf that

limitation should be computed either from the date on which the decree of the Court of first instance was affirmed by the lower Appellate Court or when the decree of this Court was made. In order to consider whether the application is barred by limitation or not it is first, of all necessary to determine what Article of the first Schedule of the Limitation Act is applicable to the present case. It is clear that Article 182 does not apply and there being no other Article which is applicable, the only Article which can be applied is Article 181. Rule 5 of Order XXXIV provides that where payment is not made within the time fixed, the Court shall on application made in that behalf by the plaintiff pass the final decree for the sale of the mortgaged property or a sufficient part thereof. Therefore, it is necessary that an application should be made by the plaintiff in order to obtain a final decree under that Order. The application is thus an application in the suit and since the passing of the present Code of Civil Procedure it can no longer be said to be an application in execution or for the execution of a decree. It is, therefore, manifest that Article 182 cannot apply and as stated above, since there is no other Article which is applicable, the only Article which would govern an application of this kind would be Article 181, This has been held by the Bombay High Court in Datto Atmaram Hasabnis v. Shankar Dattatraya 21 Ind. Cas. 318 : 38 B. 32 : 15 Bom. L.R. 841 following the decision of Jenkins, C.J., in Amolak Chand Parak v. SHarat Chandra Mukherjee 11 Ind. Cas. 943 : 38 C. 913 : 16 C.W.N. 49. Under the old Limitation Act also it was held by this Court in Ali Ahmad v. Naziran Bibi 24 A. 242 : A.W.N. (1902) 160 and Udit Narain v. Jaqannah 1 A.L.J. 15 that an application for an order absolute for sale under the Transfer of Property Act was governed by Article 178 of the Limitation Act of 1877, which corresponds to Article 181 of the present Act. The next question to be considered is, when did the right to apply accrue as provided in the 3rd column of that Article? There can be no doubt that after the expiry of the six months allowed by the decree of the Court of first instance, the decree-holders-plaintiffs became entitled to apply for final decree. The mere fact that an appeal was preferred from the preliminary decree did not take away that right or postpone it. This is conceded by the learned Vakil for the appellants, but he urges that he also acquired the right to apply when the decrees of the Appellate Courts, namely, that of the first Court of Appeal and of the High Court were passed. It seems to us that limitation should be computed from the

time when the right to apply first accrued, That right accrued, as we have said above, when the six months granted by the Court of first instance to the judgment-debtors expired. The passing of the subsequent decrees by the Appellate Courts only affirmed that right and did not give rise to a fresh right, unless the decree of the Court of first instance was in any respect varied by the Appellate Courts. We think that the analogy of the decision of the majority of the Full Bench in *Gaya Din v. Jhumman Lal* 28 Ind. Cas. 910 : 13 A.L.J. 510 : 37 A. 400 applies. That was a case in which the question was, whether the money sought to be recovered became due under Article 132 of the first Schedule when default was first made in the payment of instalments. It was held that the money became due when the first default was made. On the same principle limitation must be computed, in a case like the present, from the time when the plaintiffs' right to make an application for a final decree first accrued. Admittedly the right first accrued in this case on the 26th of August 1909, and more than three years having expired from that date when the present application was made, it is beyond time. We accordingly dismiss the appeal with costs, including fees on the higher scale.