

Jogomaya Dassi Vs. Thackomoni Dassi

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Court : Kolkata

Decided On : Dec-10-1896

Reported in : (1897)ILR24Cal473

Judge : Francis William Maclean, ;C.J., ;Macpherson and ;Trevelyan, JJ.

Appellant : Jogomaya Dassi

Respondent : Thackomoni Dassi

Judgement :

Sale, J.

1. The plaintiff, who sues as widow and representative of her late husband, Radhajeebun Mustaba, claims administration and other relief in respect of the estate of one Brojo Nauth Dey, deceased.
2. The defendant Thackomoni Dassi is the widow and representative of Brojo Nauth.
3. The facts upon which the plaintiff bases her claim for administration are set out in her plaint, and as to these allocations there is in substance now no dispute. By consent the case was heard on settlement of issues, and the question really resolves itself into this: Whether the plaintiff, on the facts she alleges in her plaint, is entitled to a decree for administration of Brojo Nauth's estate.

4. The material facts relating to that issue are, I think, as follows:

5. Brojo Nauth Dey, on the 6th April. 1880, executed a mortgage in the Bengalee language and character in favour of Radhajeebun Mustafi, whereby ho mortgaged his undivided 2 annas 2 gundahs and 10 cowries shares in three zemindary properties which may be described as lot 1 Bankra Budarpore, lot 2 Sheakhala and lot 3 mouzah Begumpore, to secure payment to Radhajeebun of Rs. 10,000 and interest.

6. On the 22nd April 1882 Radhajeebun Mastafi instituted a suit in the Courts of the Subordinate Judge of Hooghly against Brojo Nauth Dey for recovery of Rs. 10,000 and interest duo under and by virtue of the said mortgage. It appears that at the time the suit was instituted Brojo Nauth Dey was dead, though the fact apparently was unknown to the plaintiff. However, the suit was revived in the name of his widow Thackomoni, and on the 29th September 1882 the plaintiff, Radhajeebun, obtained a decree for Rs. 14,928-10-6 with interest and costs against the defendant, the decree directing that the sum found duo should be realised from the properly mortgaged and other properties of the defendant.

7. On the 12th July 1883 an application was made by the plaintiff, Radhajeebun in the Hooghly Court, for execution. On the 27th July 1883 an order was made directing that the decree, with certificate of non-satisfaction, be transferred to this Court, on the ground that the properties mortgaged were in the possession of the Receiver of the High Court. The records of the suit and the certificate were subsequently transferred be this Court some time in the year 1884.

8. On the 8th September 1886 the plaintiff, Radhajeebun Mustafi, applied to this Court for execution by attachment of the mortgaged property, i.e., the share of Brojo Nauth, in the three properties which I have mentioned, and after notice, and in the same year, an order was made for attachment of those properties by issue of a notice under Section 272 of the Code of Civil Procedure, to the Receiver of this Court, in whose possession the properties then were.

9. Radhajeebun Mustafi died on the 17th April 1892, leaving the plaintiff his sole widow and heiress. The plaintiff obtained letters of administration to the estate and

effects of her husband on the 4th July 1892. Thereafter and on the 20th August 1894 she applied to this Court for an order absolute for sale of the mortgaged premises under Section 89 of the Transfer of Property Act. Notice was directed to issue to the defendant, and accordingly on the 29th August a summons was obtained, returnable on the 5th September 1894, and was served on the defendant on the 31st August 1894. The application was made (sic) 10th and 13th December 1894, and on the 5th January 1895 the application was refused, on the ground that the Court had no jurisdiction to (sic) with the mortgaged property, inasmuch as it was situate wholly outside territorial jurisdiction of this Court.

10. (sic) step, save the application for execution which resulted in the issue of a (sic) under Section 272 of the Code to the Receiver, and the subsequent (sic) for an order absolute for sale under Section 89 of the Transfer of Property Act, has been taken with the object of giving effect to the decree obtained on the 29th September 1882 in the Court of the Subordinate Judge of Hooghly. While these steps were being taken in the mortgage suit, and previous thereto, proceedings were instituted and carried on with the object of obtaining partition of the joint family properties, of which the three zemindaries I have mentioned formed a part. The suit for partition of the joint family properties was, instituted in this Court on the 18th February 1880, and is numbered suit No. 119 of 1880. In that suit Monmohinee Dassee is the plaintiff, and Brojo Nauth Dey was one of the defendants, On the 2nd April 1881 a decree was obtained by which Brojo Nath Dey was declared entitled to 901900 of the joint family property, and a partition was directed to be made in the usual terms.

11. The Receiver of this Court was appointed Receiver of the joint family properties on the 26th May 1881. Subsequently a supplemental suit was filed by some of the members of the joint family against the present defendant as the representative of Brojo Nauth Dey, and by the decree made in that suit it was declared that the share of Brojo Nauth Dey, in the joint family estate, was indebted to the members of the family other than Brojo Nauth Dey in the sum of Rs. 59, 975-11-5, Several separate returns were made by the Commissioners of partition in pursuance of the decree for the partition of the joint family property; and, finally, on the 22nd June 1894 the sole surviving Commissioner made a separate return,

whereby he partitioned the zemindary properties, including the properties the subject-matter of the mortgage in favour of Radhajeebun Mustafi.

12. By that return the entirety of one of the mortgaged properties, lot Bankra Budarpore, was allotted to the present defendant, but the other zemindary properties, which to the extent of the share of Brojo Nauth Dey, had been mortgaged to Radhajeebun Mustafi, were allotted to other members of the family.

13. Another suit, based on a mortgage executed by Brojo Nauth Dey in favour of one Lall Behary Dutt, was instituted in the year 1882 in this Court (being suit No. 155 of 1882), and in that suit a mortgage decree, in the usual terms, was made on the 23rd of July 1883. One of the properties covered by the decree made in suit No. 155 of 1882 is the share or interest of Brojo Nauth Dey in the zemindary lot Sheakhala, which is one of the properties included in the mortgage in favour of Radhajeebun Mustafi; and it appears that on the 6th December 1894 an order was obtained in the suit last mentioned, viz., suit No. 155 of 1882, for sale of so much of the immoveable properties allotted to the defendant by the three separate returns, dated 5th May 1888, 16th June 1888, and 22nd June 1894, as would be sufficient for the payment (inter alia) of the amount due to Ball Behary Dutt under his mortgage decree. Having regard to these various circumstances, the plaintiff alleges that she has been unable to obtain payment of the amount due to her under the decree of the 29th September 1882, and she therefore claims to be entitled to administration of the estate of Brojo Nauth Dey, with the object, in the course of that administration, of obtaining payment of the sum so due to her. As part of the relief she seeks in this suit she asks for a declaration of what properties are now subject to Radhajeebun's mortgage, and for an account of what is due to her under the said mortgage and decree, and what is due to the other incumbrancers and creditors of the estate; for the sale of such properties, as may be found subject to such mortgage, declaration of priorities, and so forth.

14. After the institution of the suit in the Court of the Subordinate Judge of Hooghly, and prior to the decree obtained in that suit, the Transfer of Property Act came into force. Therefore one of the questions which arises is as to whether the decree made on the mortgage executed in favour of Radhajeebun Mustafi is in its

terms a decree such as is contemplated by the provisions of Section 67 of the Transfer of Property Act, or whether, on the other hand, the decree is governed by Section 99 of that Act

15. Mr. Pugh, who appeared on behalf of the plaintiff, contended that the main question in this suit is whether the plaintiff is, on the facts stated in the plaint, entitled to a decree for the administration of the estate of Brojo Nauth Dey, The other relief sought in this suit involves admittedly serious questions, but it is contended that they would arise only at a subsequent stage of the suit, and do not affect, the plaintiff's right to a decree for administration.

16. On the part of the defendant several objections were relied upon as constituting a bar to the suit. In tire first place it is said that the matters in issue or sought to be raised in issue in this suit are the same as those which were in issue in the former suit, and that the plea of res judicata applies under Section 13 of the Civil Procedure Code. In the next place it is contended that the suit is not maintainable, having regard to Section 244, Clause (a) of the Civil Procedure Code.

17. The latter Section provides that certain questions shall be determined by order of the Court executing a decree and not by separate suit. Amongst those questions arc included, by Clause (c), questions relative to the execution, discharge or satisfaction of the decree, and the contention is that, inasmuch as the object of obtaining administration of Brojo Nauth's estate is to obtain satisfaction of the judgment debt, the right of the judgment-creditor is limited or restricted by this Section to proceedings in execution.

18. I am not prepared to say that either of these objections is well founded, so far as the question of the right to administration is concerned. The issue, or at least the main issue, which is sought to be raised in the present suit, was not as a fact raised in the former suit, and I have not been referred to any authority for the proposition that a creditor who has once obtained judgment upon his debt is thereby debarred from coming to a Court of Equity, and asking to have this debt paid to him in due course of administration. It is true that before a creditor is entitled to administration of his debtor's estate he must show that he has a debt

which is unsatisfied, and of which he is unable to obtain payment; and it is also true that the debt which is the foundation of the present action is in reality the debt which was the matter in issue in the former suit. But the present suit does not seek to put in issue the fact of the existence of the debt; on the contrary, the plaintiff relies on the former decree to show that no such issue can arise between the parties in the present suit. Besides, I am unable to see why on principle a creditor who has obtained a judgment on his debt, should be in a worse position, so far as a right to administration is concerned, than a creditor whose debt is unsecured by judgment.

19. As regards Section 244, Clause (c) of the Code, I should be inclined to hold that the words 'questions relating to the discharge or satisfaction of the decree' must be limited to questions of discharge or satisfaction arising in course of execution, or in connection therewith. I cannot think that a provision appearing in the chapter of the Code, relating to the execution of decrees, was intended to limit or cut down the jurisdiction of this Court in granting administration. A Court of Equity, in executing a decree, does not necessarily proceed upon the same principles as those which it adopts in administering the estate of a deceased debtor. The foundation of the jurisdiction in the latter case, that is, in administering the estate of a deceased debtor, is said to be the principle which is applied in enforcing the execution of trusts, the executor or administrator of the deceased debtor being regarded as a trustee who is bound to apply the debtor's estate in payment of his debts---Story, Eq. Jur., 2nd Edition (English), p. 352.

20. But a more formidable objection to the present suit remains to be considered, viz., the plea of limitation. A creditor to be entitled to ask for administration of his debtor's estate must show either that he has a debt which is enforceable by suit, or that he has obtained a judgment thereon, which is itself capable of enforcement by execution or by separate suit.

21. The plaintiff in the present case is a judgment-creditor, her judgment having been obtained on the 29th September 1882, i.e., more than 12 years from the date of institution of the present suit. Moreover, the decree is not a decree of this Court, but it is a decree of a mofussil Court, and no step in execution, strictly speaking, of

the decree has been taken since the attachment through this Court under Section 272 of the mortgaged properties in the hands of the Receiver.

22. Having regard to this fact, can the decree be considered as still alive for the purposes of execution? I am of opinion that it cannot. Mr. Pugh has contended that the attachment is still in full force and effect; and that, inasmuch as this suit may be said to be in aid or in continuation of that attachment, limitation cannot apply. I cannot adopt this view. The properties attached, being the mortgaged properties, could not be brought to sale under the attachment, and the only way of enforcing the lien on the mortgaged property, or the property which had been substituted for it, was, it seems to me, by a suit under Section 67 of the Transfer of Property Act. It would, I think, be impossible to say that an attachment made under the circumstances above-mentioned, and which attachment must, so far as I can see, remain ineffective and infructuous, is still sufficient to keep the decree alive indefinitely. The recent decision of this Court in the case of Chundra Nath Dey v. Burroda Shoondury Ghosa I.L.R. 22 Cal. 813 is an authority for saying that the decree in execution of which the attachment was made is not in the form contemplated by Section 67 of the Act, and that the attachment would therefore be governed by Section 99 of the Act. Moreover, if the present suit could be said to be a step in aid of that attachment in any sense, then I see no answer to the argument that Section 244, Clause (c) of the Code constitutes a bar to the plaintiff's present suit. For the reasons I have already indicated, I am not inclined to hold that a suit for administration by a judgment-creditor is a step in execution, or in aid of execution of his decree.

23. But even if it were, I do not see how this argument would assist the plaintiff, because the effect of the order for execution to issue made by this Court, after notice, was not to revive the original decree, inasmuch as that is not a decree of this Court, and therefore no new period of limitation runs from the date of the attachment. See the case of Tincowrie Dawn v. Debendra Nath Mookerjee I.L.R. 17 Cal. 491. On the other hand, the effect of Section 230 of the Code is, in my opinion, to render this judgment debt a barred debt in every respect, because no step in execution can now be taken, nor can the decree be revived.

24. The case of *Hebblethwaile v. Peever* L. R. (1892) 1 Q. B. 125 seems to show that a judgment debt, which has become barred, cannot be made the foundation of a subsequent proceeding to recover the debt, nor can a creditor, who has allowed his judgment debt to become barred, obtain an adjudication in bankruptcy against his debtor; *Ex-parte Tynte* (L. R., 15 Ch. D., 125).

25. It would seem to follow that a judgment debt once barred is barred for all purposes, and cannot therefore be made the foundation of an administration action.

26. It is said, however, that the plaintiff's mortgage lien is still subsisting, and may be enforced as a collateral security for the judgment debt.

27. Assuming that to be so, the lien would be enforceable only as against specific properties, and would be available for the exclusive benefit of the plaintiff and not of the general body of creditors. This special and exclusive right, if it exists, would form no ground for the administration of the general estate of the debtor; and further, if the lien is still enforceable by suit, it does not appear that this Court would have jurisdiction to entertain any such suit, inasmuch as the original mortgaged properties, and the property which, under the separate return made in respect of the zamindary properties, was apparently allotted to Brojo Nath's estate in substitution of the undivided shares in the zemindaries mentioned in the mortgage deed, are alike situate outside the ordinary original jurisdiction of this Court.

28. For these reasons it seems to me that the plaintiff's mortgage debt and the decree which was obtained in respect thereof are alike barred; and, consequently, I must hold that this suit, which is founded on that debt, must be also barred, and cannot therefore be maintained.

29. The suit must therefore be dismissed with costs on scale 2.

30. From this decision the plaintiff appealed.

31. Mr. Pugh (with him Mr. Evans Pugh) for the appellant.-- The plaintiff's right as a mortgagee is still subsisting; and therefore she has undoubtedly a right to

maintain a suit under Sections 67 and 99 of the Transfer of Property Act. The right to bring such a suit could only be maintained by establishing the fact that her rights under the mortgage are still subsisting. As to her right to claim administration in respect of the mortgage, she would be proceeding, not simply against the property actually included in the mortgage, but also against the general estate or an unascertained part of it. The suit is not for administration only; it is also for enforcement of the mortgage. If the plaintiff were not entitled to administration and to judgment under the administration, then she could ask for a decree in the suit as upon a mortgage. With regard to the jurisdiction, also, the suit is not brought with reference to the mortgaged property only, but also to the rest of the estate, a largo portion of which is in Calcutta.

32. Again, the plaintiff has a right to maintain this suit as a judgment-creditor. The judgment of the 29th September 1882 is still in force, because of the attachment order in 1886. Therefore, limitation would run from 1886, not from 1882. This case is governed, not by Section 230 of the Civil Procedure Code or Article 179 of Schedule II to the Limitation Act, but by Article 180; because, when a decree has been transferred to the High Court, it is to be treated in every sense, and for all the purposes of execution, as a decree of the High Court. Besides, under Article 147, a mortgagee has sixty years within which to foreclose or sell; and to enforce that right he must bring a suit under Sections 67 and 99 of the Transfer of Property Act---Chundra Nath Dey v. Burroda Shoondury Ghose I.L.R. 22 Cal. 813.

33. This is not a 'suit upon a judgment'; that being a term well understood of which a suit upon a foreign judgment is an illustration. A suit by a judgment-creditor for administration and for the enforcement of a collateral security has never been considered, and cannot properly be called a suit upon a judgment. All the cases decided upon the article limiting suits upon judgments show that the meaning of the term is the one I have indicated. The cases of Chowdhry Paroosh Ram Das v. Kali Puddo Banerjee I.L.R. 17 Cal. 53 and Futteh Narain Chowdhry v. Chundrabati Chowdhrair I.L.R. 20 Cal. 551 were also cited and relied on.

34. Mr. Dunne for the respondent.---Whether this suit is brought on the debt or on the judgment, it is barred by limitation. The plaintiff asks for administration; but that

is not a cause of action, it is merely a form of the relief she prays for.

35. Again, the properties, the subject-matter of the suit, are wholly outside the jurisdiction of this Court. The properties in Calcutta allotted to the defendant in Calcutta cannot be treated as security for the mortgage debt; because the most that the plaintiff could claim on his mortgage would be the share of the zemindary properties allotted to the mortgagor; and those are all outside the jurisdiction.

36. The appellant's decree was a mere money decree. It was not a decree directing any sale; it was certainly not a mortgage decree under the Transfer of Property Act. It cannot be treated as such now; and she has not attempted to treat it as one, because she applied to the Hooghly Court for execution of the decree. If it was a mortgage decree, there was nothing to prevent her from having the undivided share of the mortgagor in the zemindaries sold; she only applied for attachment of the property. There is no application pending for execution; and this distinguishes the case from the case of *Chowdhry Paroosh Ram Das v. Kali Puddo Banerjee* I.L.R. 17 Cal. 53.

37. The argument cannot prevail that Section 230 of the Civil Procedure Code does not apply, because this is in effect a decree of the High Court in its original jurisdiction, within the meaning of Article 180 of the Limitation Act. The decision in *Tincowrie Dawn v. Debendra Nath Mookerjee* I.L.R. 17 Cal. 491 is an answer to that contention. The former Code was entirely different from the present one on this subject. The old Code refers to the effect of a decree for the purpose of execution; the present one deals merely with the machinery by which the decree is to be executed, and does not make the decree of the lower Court a decree of the High Court.

38. If the right to execution is barred, no suit can in any event be brought on the judgment. *Fakirapa v. Pandurannapa* I.L.R. 6 Bom. 7 But whether the suit is barred by limitation or not, no such suit as this will lie at all. *Mahomed Aga Ali v. Widow of Balmakund* L. R. 3 I. A. 241 *Kisan Nandram v. Anandram Bachaji* 10 Bom. H. C. 433 *Ranganasary v. Shappani Asary* 5 Mad. H. C. 375, *Nasrudin v. Venkatesh Prabhu* I.L.R. 5 Bom. 382.

39. Finally, the mortgage lien cannot be subsisting. If the plaintiff has a mortgage decree, the lien is merged; if not, she is in a worse position than if she had. In the former case, the suit is barred under Section 13 of the Civil Procedure Code; in the latter, by Section 43.

Mr. Pugh in reply.

C. A. V.

40. The following judgments were delivered:

Maclean, C.J.

41. In this case the appellant, who is the plaintiff in the suit as the legal personal representative of her late husband Radhajeebun Mustafi, brings a suit against Thackomoni Dassi, as the heiress and representative of her deceased husband Brojo Nauth Dey, and the object of the suit is to have an account taken of what is due to her under a certain mortgage and decree, to have the estate of Brojo Nauth Dey administered by the Court, for the appointment of a Receiver, and for consequential relief. The facts briefly are as follows:

42. On the 6th April 1880 Brojo Nauth Dey mortgaged his shares in three properties, all outside the jurisdiction of this Court, and which I briefly refer to as (1) lot Bankra, (2) lot Sheakhala, (3) lot Begumpore, to the plaintiff's late husband to secure Rs. 10,000 and interest.

43. On the 22nd April 1882 Mustafi, the mortgagee, instituted a suit in the Court of the Subordinate Judge of Hooghly for the recovery of the debt, and on the 29th September 1882 (the defendant Brojo Nauth Dey having died in the meantime and the present defendants being entered as defendants), the decree set forth in paragraph 4 of the plaint was pronounced, I must refer to this decree. It is at page 15 of the paper book. [After reading the decree his Lordship continued]: In my opinion this was a mortgage decree, though not in the form prescribed by the Transfer of Property Act, which came into force on the 1st July 1882, but in the form in which, as I understand, such decrees had been for many years, and were drawn up in the Mofussil Courts. The decree provides for the payment of the

mortgage debt, for the realization of the mortgaged property and payment thereof of the mortgage debt. The claim, in this suit, it may be observed, asks that the claim, i.e., the money claim, should be realized out of the mortgaged property, and failing that from any other property of the defendant. I think the decree of 1882 was a mortgage decree, i.e., a decree made in a suit to enforce the mortgage in which the mortgagee asked, not merely for a personal judgment against his debtor, but for the realization of the mortgaged property to satisfy his claim.

44. On the 12th July 1883 the mortgagee applied to the Mofussil Court for execution of the decree, and on the 27th July 1883 that Court ordered that the decree should be transferred to the High Court for execution. On the 18th January 1887 an order for attachment was made by Mr. Justice Trevelyan and the plaintiff alleges that that order is still in force. From the date of the order in January 1887 the plaintiff did nothing whatever until 29th August 1894, nearly 8 years after, when she took out a summons in her suit for a sale of the mortgaged property under Section 89 of the Transfer of Property Act, and on the 5th January 1895 that application was dismissed with costs. On the 19th March 1895 she instituted this suit. In the meantime proceedings had been taken in this Court for the partition of the entirety of the property, the shares in which of the original defendant Brojo Nauth Dey had been mortgaged by the deed of the 6th April 1880. The facts as to these proceedings may be referred to very briefly. The suit was instituted on the 18th February 1880, and a decree made on the 2nd April 1881, which directed the partition of the estate with a declaration as to what Brojo Nauth Dey's share in the estate was.

45. On the 20th May 1891 a Receiver was appointed in the last-mentioned suit.

46. On the 30th June 1885 a decree was pronounced, the effect of which is stated in paragraph 18 of the plaint.

47. In pursuance of that decree the Commissioners made various returns which were duly confirmed by the Court, and by a return, dated the 22nd June 1894, lot Bankra, valued at Rs. 38,393, and other property valued at 10,167, was allotted to the defendant, while lot Sheakhala and lot mouzah Begumpore were allotted to the other members of the family. The only other fact to which I need refer is that by a

decree of this Court, dated the 23rd July 1883 in a mortgage suit by one Lai Behary Butt against the present defendant, the decree mentioned in paragraph 30 of the plaint was made.

48. This decree shows that if the proper steps were taken by a mortgagee of Brojo Nauth Dey, the Receiver in the partition suit would be ordered to pay the mortgage debt, assuming, of course, he had the funds properly so applicable, and that directions would be given for the realization of the mortgaged property to meet that debt. The only other order to which I need refer is that of the 6th December 1894 set out in paragraph 33 of the plaint. These are, shortly, the facts of the case; and upon them the plaintiff asks for the order I have mentioned. The question is whether she is entitled to it or to any other order. The defence is the Statute of Limitation, and the learned Judge in the Court below upheld 'that defence. Section 4 of the Limitation Act is as follows:

Subject to the provisions contained in Sections 5 to 25 (inclusive), every suit instituted, appeal presented, and application made, after the period of limitation prescribed therefore by the second schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence.

49. The cause of action arose originally when the mortgage debt was created 16 years ago in 1880. If the plaintiff be suing on that debt, her remedy *prima facie* is clearly barred.

50. In 1882, under the decree in that year, the original debt became a judgment debt, and if the plaintiff be suing on that, her remedy is equally barred. The plaintiff cannot obtain a decree for administration, unless she can show she is a creditor in respect of a debt, the remedy for the recovery of which is not barred by the Statute. If the debtor had been living, could the plaintiff have sued him for the debt and its realization out of the mortgage estate? I do not think she could successfully have maintained such an action; the Statute of Limitation would have been a bar, and not improbably the plea of *res judicata* under Section 13 of the Code. But it was not seriously contended that she could have successfully brought such an action.

51. Mr. Pugh for the plaintiff relies upon the attachment order of 1886, and contends that that order kept alive the decree of 1882, and that the period consequently runs from 1886 and not from 1882.

52. He relies, as I understood his argument, on Article 180 of the second schedule of the Limitation Act. But that article does not apply.

53. This suit is not an application to enforce a judgment or decree or order of any Court established by Royal Charter, i.e., one of the High Courts; it is not suggested that it is an application to enforce the attachment order of 1887, nor can it be regarded as an application for the execution of a decree or order under Article 179.

54. As I do not think Article 180 applies, it becomes immaterial to consider whether the attachment order of 1886 revived the decree of 1882, or to consider the various authorities which have been cited upon that point, or the dictum of Chief Justice Peacock, reported at page 971, Bengal Law Reports, Full Bench Rulings.

55. The plaintiff appears to me to be upon the horns of this dilemma. If she be suing as a creditor for administration on the original debt, she is, apart from the effect of the order of 1886, clearly barred by the Statute; and if she rely on the attachment order of 1886 as keeping the original debt alive, she is at once confronted with Section 230 of the Code, which makes it obligatory upon her, if she desire to enforce her decree, to apply to the Court which made the decree, and, in face of that provision, she is not entitled, in my opinion, to institute a separate suit.

56. Apart from this, I think all questions arising between the parties to the original suit, ought, under Section 244 of the Code, to have been decided, and could have been decided, by the Court executing the decree. A separate suit ought not to be instituted unless all questions between the parties or their representatives cannot be decided in the original suit. The plaintiff's right is, if she be now not too late, to enforce the decree of 1882, and any questions arising as to that ought to be determined, and can only be determined, by the Court executing that decree. I am prepared, to hold that, quite apart from any question as to the Statute of Limitation,

the plaintiff is not entitled to maintain this suit, having regard to Sections 230 and 244 of the Code.

57. One other point remains. It is said that under Article 147 of the schedule to the Act the mortgagee has sixty years within which to foreclose or sell, and that to enforce that claim she must, under the conjoint operation of Sections 99 and 67 of the Transfer of Property Act, institute a suit for sale under the latter Section. But these Sections cannot apply if the mortgagee have already obtained a decree for sale, as in my opinion she has, viz., the decree of 1882.

58. But (sic) this as it may, the present suit is not such as is contemplated by Sections 99 and 67 of the Transfer of Property Act, nor was it intended to be; and if it were, having regard to the locality of the property, and to Section 12 of the Letters Patent, this Court could not entertain it.

59. In this case the plaintiff has for many years slept upon her rights, and if she have lost her remedy against the defendant, it is entirely her own fault. Litigation in this matter has been going on since 1882, and for nearly 8 years the plaintiff did nothing, and has never taken any steps to enforce her attachment order of 1886; and now, some 13 years after the institution of the original suit, she comes and asks that the whole matter may commence de novo, and the flood gates of litigation be re-opened. I think it would be lamentable if such a claim could succeed; if so, the chances of finality in litigation would be very small.

60. For the reasons I have given, I think the appeal has failed, and must be dismissed with costs.

Macpherson, J.

61. Whether this suit is to be regarded as based on the original debt, the mortgage, or the judgment or decree of 1882, it is not, I think, maintainable. The debt has passed into a judgment debt; and under Article 122

[Article 122:

Description of suit. Period of limitation. Time from which period begins to run.

Upon a judgment obtained. Twelve years... The date of the judgment or recognizance.]

in British India, or a

recognizance.

62. Then it is said that the mortgage lien still subsists, and that under Section 99 of the Transfer of Property Act the plaintiff could still bring a suit for the sale of the mortgaged property. Even if this can be regarded as a suit for that purpose, I agree with Mr. Justice Sale, for the reasons stated by him, that the Court had no jurisdiction to entertain it. But it seems to me that the decree of 1882 is in substance a decree for the sale of the mortgaged properties. It sets out those properties, and directs that the sum decreed should be realized from them, which can only mean by the sale of them; and that was the relief asked for in the suit. Assuming that Sections 88 and 89 of the Transfer of Property Act, which came into force while the suit was pending, applied to the suit, the decree was not, it is true, made in conformity with them as, instead of making a decree nisi, followed by a decree absolute, the Court at once made a decree absolute. But the decree has never been questioned, and is now a final decree as between the parties. The case of *Chundra Nath Dey v. Burroda Shoondury Ghose* I.L.R. 22 Cal. 813 is distinguishable, as the Court there in effect held that there was no decree for sale. No second suit to enforce the lien would therefore lie.

63. Mr. Pugh further argued that the decree of 1882 being still alive and capable of being executed there is a debt, the remedy for the recovery of which is not barred, and that the plaintiff can on this ground maintain the suit. The decree of 1882 is said to be still alive, because the application which was made in September 1886 for the execution of it is still pending, and because the attachment which followed on that application is still in force, and it would not therefore be necessary for the plaintiff to make any fresh application for execution, to which the 12 years' rule laid down in Section 230 of the Civil Procedure Code would apply. Whether there is a pending proceeding, and whether the plaintiff can get anything out of it, are matters to be determined by the Court in which the proceeding is said to be

pending, viz., the Court executing the decree. Assuming for argument's sake that there is a pending proceeding, it is only in that proceeding, and by reason of its being a pending proceeding, that the plaintiff could get any relief in the way of execution, as any fresh application for the execution of the decree would be barred by Section 230 of the Code. This is not a suit in aid of execution; it has nothing to do with the execution of the decree; and if there is an execution proceeding pending in which, and in which alone, the plaintiff could, putting her case at the highest, get some relief, this does not, I conceive, help her in bringing this suit.

64. Lastly, it is argued that Article 180 of the Limitation Act, applies as the decree, when sent to this Court for execution, became in effect a decree of this Court. I think it is sufficient to refer to the case of *Tincowrie Dawn v. Debendra Nath Mookerjee* I.L.R. 17 Cal. 491 and to the reasons there given for holding that this contention cannot prevail.

65. In my opinion the appeal fails, and must be dismissed with costs.

Trevelyan, J.

66. In my opinion the appeal and the suit both fail.

67. It is, I think, perfectly clear that the plaintiff has not a better right of suit against Brojo Nauth Dey's representative than she would have had against Brojo Nauth Dey himself, if he had been alive. His death cannot, have altered her right of suit, although it may have changed the character of the relief.

68. It is equally clear to my mind that a suit similar to the present suit could not have succeeded against Brojo Nauth Dey, if he had been alive. His based partly upon the mortgage and partly upon the decree. So far as it is based upon the mortgage, the right was merged in the decree of the 29th of September 1882, which was a mortgage decree drawn in the form prevalent in Mofussil Courts before the passing of the Transfer of Property Act, and directed the realization of the amount of the debt from the property mortgaged and other properties of the defendant. There could be no further rights on the mortgage, the right of the creditor having become that of a judgment-creditor. This suit, as based on the

judgment debt, is barred by Article 122 of the Limitation Act; but, even apart from that provision, a suit would not lie to enforce a judgment debt, the execution of which is barred by the law of limitation.

69. It may be that the proceedings which have been commenced under Section 272 of the Civil procedure Code are capable of being carried on to some conclusion, but the mere fact that those proceedings are not extinct would not keep alive the decree so as to render it capable of execution otherwise than by way of continuation of the proceeding so commenced. The terms of Section 230 of the Civil Procedure Code would expressly prevent another application for the execution of this decree.

70. Article 179 of the second schedule of the Limitation Act is also, in my opinion, applicable; more than three years have elapsed since there has been any step in aid of execution, and therefore an application would now be barred. It has been contended that Article 180 applies. In my opinion the law of limitation is not altered by the transfer of the proceedings in execution. The decree does not become a decree of the High Court, although it may have to be enforced in the same manner as decrees of the High Court.

71. The argument is based upon an obiter dictum of Sir Barnes Peacock with reference to the meaning of another Act. The dictum was not approved of by the other four Judges who sat with the Chief Justice. The dictum is not now in point, as we have now to deal with Acts containing a different phraseology. I think it would be impossible to apply that dictum to the present case, The words of Article 180 of the Limitation Act are, to my mind, too plain to be capable of the interpretation which Mr. Pugh seeks to put upon them, and there is nothing in the Civil Procedure Code to limit those terms.

72. Section 227 of the Civil Procedure Code directs this Court to execute the decree sent to it, in the same manner as if it had been made by this Court in the exercise of its Ordinary Original Civil jurisdiction. The 'manner' of execution refers to the procedure under which the execution is to be had, and has no reference to the limitation. It simply applies the High Court machinery to the execution of the decree.

73. In my opinion the execution of the decree is, except perhaps in continuation of the proceedings already taken (a matter which we have not to deal with here), barred by limitation. That being so, the title of the plaintiff to bring this suit must fail. Moreover, I am inclined to think that the terms of Section 244 (c) of the Civil Procedure [Code] would have prevented this suit being brought against the judgment-debtor, and therefore would bar the present suit; although having regard to the view. I entertain as to the suit being barred by limitation, it is not actually necessary to decide this point. The only questions which are raised in this suit are 'questions arising between the parties to the suit in which the decree was passed or their representatives,' and they relate to the execution of the decree. The object of this suit is apparently to obtain execution of the decree against some property other than that which was actually mortgaged. I cannot see why this question cannot, as between the parties, be determined by the Court executing the decree, and in the execution proceeding. The case of *Prosunno Coomar Sanyal v. Kali Das Sanyal* I.L.R. 19 Cal. 683: L. R. 19 I. A. 166 shows that a narrow construction ought not to be placed upon Section 244, but that all questions which can possibly be determined in the execution proceedings should be so determined.

74. I would dismiss this appeal with costs.