

Beni Singh Vs. Barhamdeo Singh

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Court : Kolkata

Decided On : Jan-22-1915

Reported in : 28Ind.Cas.211

Judge : Sharf-ud-din and; Coxe JJ.

Appellant : Beni Singh

Respondent : Barhamdeo Singh

Judgement :

Coxe, J.

1. The plaintiff-respondent in this appeal obtained a decree on a mortgage on the 28th July 1905. The date fixed for payment was the 28th January 1906. On the 31st May 1909, he applied, as the Courts below describe it, to make the decree absolute and his application was granted the same day. The defendant appealed, and the appeal was decreed and the case remanded to the Court of first instance on the 7th March 1910. An appeal was preferred to this Court against the order of remand probably about June 1910. The proceeding, however, continued in the first Court and was disposed of on the 19th September 1910. The Court of first instance held that the application to make the decree obsolete was barred by Article 181 of the Schedule to the Limitation Act. On the 21st April 1911, this Court dismissed the appeal against the order of the 7th March 1910, and on the 16th May 1911, the plaintiff appealed to the lower Appellate Court against the order of

the 19th September 1910. The appeal was decreed and the defendant has appealed to this Court.

2. It is contended on his behalf, firstly, that the appeal to the lower Appellate Court was barred by limitation and, secondly, that the application of May 1909 was barred by Article 181 of the Schedule to the Limitation Act. It appears to me that the appeal must succeed on both grounds.

3. With regard to the first point, the Subordinate Judge has held that limitation is saved by Section 14 of the Act. That section, however, has no application to appeals, nor do I think that the case comes within Section 5. We are informed that the plaintiff protested against the continuance of the proceedings in the Court of first instance after the presentation of his appeal to this Court. But the fact that this protest was overruled should have warned him that the lower Appellate Court also might take a similar view; and he ought, therefore, in my opinion, to have presented his appeal against the order of the 19th September 1910 within the period allowed by law.

4. On the second point, the Judge has held that Article 181 does not apply to an application under Section 89 of Act IV of 1882, and relies on the case of *Madhab Moni Dasi v. Pamela Lamber* 6 Ind. Cas. 537 : 12 C.L.J. 328 : 37 C. 796 : 15 C.W.N. 337 as authority for holding that there is no limitation for such an application. This view evidently cannot be sustained. In the first place, in May 1909, when this application was presented, Section 89 of the Transfer of Property Act had been repealed. In the second place, the decision that there is no limitation to such an application can no longer be regarded as good law, having regard to the decisions in *Batuk Nath v. Musammat Munni Dei* 23 Ind. Cas. 644 : 12 A.L.J. 574 : 16 Bom. L.R. 360 : 27 M.L.J. 1 : 16 M.L.T. 1 : 36 A. 284 : 1 L.W. 729 : 18 C.W.N. 740 and *Abdul Majid v. Jawahir Lal* 23 Ind. Cas. 649 : (1914) M.W.N. 485 : 21 M.L.J. 17 : 12 A.L.T. 624 : 16 Bom. L.R. 395 : 8 C.W.N. 963 : 19 C.L.J. 626 : 16 M.L.T. 44 : 1 L.W. 483 : 36 A. 350.

5. It remains to decide whether an application under Order XXXIV, Rule 5, Clause 2, comes within the scope of Article 181. On this point there appears to be some difference of opinion, one Bench of this Court in the case of *Madhab Moni Dasi v.*

Pamela Lambert 6 Ind. Cas. 537 : 12 C.L.J. 328 : 37 C. 796 : 15 C.W.N. 337 having thought that it does not so come, while another Bench in the case of Amolak Chand Parak v. Sarat Chandra Mukherjee 11 Ind. Cas. 943 : 38 C. 913 : 16 C.W.N. 49 having thought that it does, though neither judgment can be regarded as a definite decision on the point.

6. It appears to me that the question turns on the point whether the application relates to action which the Court ought to take of its own motion, whether the party applies or not. In the case of *Kylasa Goundan v. Ramasammi Ayyar* 4 M. 172 which was a case of the delivery of a certificate of sale to a purchaser, the Court observed. 'The provisions of the Limitation Act relating to applications, though in their terms doubtless most extensive, must be held to apply to applications for the exercise, by the authority to which the application is addressed, of powers which it would not be bound to exercise without such application, and not to applications to the Court to do what it has no discretion to refuse, nor to applications for the exercise of functions of a ministerial character,' and in the case of *Balaji v. Kushaba* 30 B. 415 : 8 Bom. L.R. 218 it was held that if any act imposes on a Court a duty to do an act which duty is in no sense conditional on an application being made for the purpose,' the Limitation Act has no application. The matter was considered in the Full Bench case of *Puran Chand v. Roy Radha Kishen* 19 C. 132 (F.B.) which was a case of an application to ascertain mesne profits, and there it was stated: The same principle was laid down in the case of *Kylasa Goundan v. Ramasami Ayyan* 4 M. 172 and *Vithal Janardan v. Vithojirav Putlajirav* 6 B. 586 in which it was held that to make the provisions of Article 178 applicable, the application must be of such a nature that the Court would not be bound to exercise the powers desired by the applicant without such an application being made. There are numerous sections in the Code which direct that for certain relief, an application must be made; but there is nothing in the Code compelling a person having the conduct of a pending suit to make formal applications from time to time asking the Court to proceed to judgment. The form of procedure and the manner of dealing with suits is amply provided for by the Code. In the present case, so far as we can see, the Court was bound on the oral application of appellant's Pleader, indeed without any such application at all, to fix a date for the first hearing of the inquiry, and after hearing the parties and fixing such issues as might be necessary

for the disposal of the subject-matter in dispute, to proceed with it as if it were dealing with a case based on a plaint. The principle laid down in this case was followed in the case of Dwarka Nath v. Barinda Nath Misser 22 C. 425 which related to an application for effecting a partition in accordance with a preliminary decree.

7. A Court is bound, in my opinion, to dispose of a pending suit, whether any application is made to it or not. In a case, for instance, of the assessment of mesne profits or of effecting a partition, the Court can, of course, adjourn the case under Order XVII, Rule 1, but otherwise must proceed with the case and dispose of it, whether any application is made to it or not. This duty seems to have been neglected in the case of Dwarka Nath Misser v. Barindra Nath Misser 22 C. 425 above cited; but the proceedings in that case seem to me to have been wholly irregular. But under Order XXXIV, Rule 5, the Court, not only is not bound to proceed with the case, but cannot do so unless an application is made to it. The parties are at perfect liberty to drop the proceedings, and if the plaintiff prefers not to make an application, the Court has no jurisdiction to direct a sale. This consideration seems to me to distinguish a case of this nature from the cases I have cited above and I think, therefore, that the application mentioned in Order XXXIV, Rule 5, Clause 2, is an application which comes within the scope of Article 181.

8. I would, therefore, decree the appeal and dismiss the application with costs of all Courts.

Sharf-ud-din, J.

9. I agree.