

F. H. Pell Vs. M. Gregory

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Court : Kolkata

Decided On : Apr-21-1925

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Judge : Sanderson, C.J., ;Walmsley, ;Rankin, ;Buckland and ;Mukerji, JJ.

Appellant : F. H. Pell

Respondent : M. Gregory

Judgement :

Sanderson, C.J.

1. This is a reference by my learned brother, Walmsley J., and me to a Full Bench.
2. The facts of the case are set out in the referring judgment, and it is, therefore, not necessary for me to state them again.
3. My learned brother and I decided that Article 183 of the Limitation Act of 1908 does not apply to the appellant's application for a decree under Order XXXIV, rule 6 of the First Schedule to the Code of Civil Procedure, 1908.
4. We were of opinion that Article 181 is applicable, but we found that there is a decision of a Division Bench of this Court, viz., Bisivambhar Shaha v. Ram Sundar Kaibarta (1914) I. L. R. 42 Calc. 294, to the effect that Article 181 does not apply to an application under Order XXXIV, rule 6. The basis of that decision was that, in

a mortgage suit in which there has been a decree for sale and in which the plaintiff had his personal remedy at the date of the institution of the suit, no exception by way of limitation would arise with regard to an application under Order XXXIV, rule 6 and that such an application is not covered by Article 181.

5. As my learned brother and I were unable to agree with the decision in the abovementioned case, we referred the matter to a Full Bench. The reference is as follows:

This Court, therefore, having held that Article 183 of the Limitation Act does not apply to the appellant's application for a decree under Order XXXIV, rule 6, differs from the decision in the case of *Biswambhar Shaha v. Ram Sundar Kaibarta* (1914) I. L. R. 42 Calc. 294. upon the questions:

(i) Whether there is any period of limitation in 'respect of an application for a decree under Order 'XXXIV, rule 6.

(ii) Whether Article 181 of the Limitation Act ' applies to an application under Order XXXIV, rule 6, Civil Procedure Code, where no other Article applies, and refers to the decision of a Fall Bench---the question whether the case of *Biswambhar Shaha v. Ram. Sundar Kaibarta* (1914) I. L. R. 42 Calc. 294, so far as it decides that Article 181 of the Limitation Act does not apply to an application under Order XXXIV, rule 6, Civil Procedure Code, was rightly decided.

6. Having regard to the fact that my learned brother and I decided that Article 183 did not apply and no question with respect thereto having been referred to the Full Bench, it might be said that it was not open to the learned Counsel, who appeared for the appellant on the reference, to argue that Article 183 did apply. He submitted, however, that his argument was that Article 181 did not apply, because Article 183 did apply, and the learned Counsel was allowed by the Court to argue the point.

7. The learned Counsel for the appellant admitted, in view of the decisions of the Judicial Committee of the Privy Council, that it was not open to him to argue that there was no period of limitation as was stated in *Biswambhar Shaha v. Ram*

Sundar Kaibarta (1914) I. L. R. 42 Calc. 294; but he argued that the application for a personal decree under Order XXXIV, rule 6, was an application to enforce a judgment as being either a proceeding in execution or a proceeding for judicial relief under a decree, and consequently that Article 183 applied.

8. On behalf of the appellant reliance was chiefly placed upon the decision in *Amlook Chand Parrack v. Sarat Chunder Mukerjee* (1911) I. L. R. 38 Gale. 913, which was affirmed by the Judicial Committee of the Privy Council in *Munna Lal Parrack v. Sarat Chunder Mukerjee* (1914) I. L. R. 42 Calc. 776; L. R. 42 I. A. 88.

9. In the first place it is to be noted that the argument in the abovementioned case was that the application was 'free from the law of limitation' to use the words of the learned Chief Justice; that is the argument which it has been admitted cannot now be supported.

10. In the second place, the learned Chief Justice pointed out that the decree in that case was in a 'sense peculiar' for it included not only a decree for personal payment by the mortgagor but also a provision for sale of the property in default of payment. It was assumed, however, for the purpose of the judgment, that the decree was within the Transfer of Property Act, and that it was a decree made under Section 88 of that Act; and the learned Chief Justice drew attention to the fact that if it were a decree under Section 88 of the Transfer of Property Act no further decree was necessary and that all that was required was, under Section 89, an order for sale.

11. The conclusion arrived at was that the application for the order for sale might be regarded as an application for the realisation of the decree, and that being so it was not unfair to say that it was an application to enforce a judgment as being a proceeding in execution or a proceeding for judicial relief under a decree.

12. It was not contended that the present case is governed by the Transfer of Property Act, and it was argued on the basis that the Code of Civil Procedure is applicable.

13. It is, therefore, material to draw attention to the concluding portion of the learned Chief Justice's judgment in *Amlook Chand Parrack v. Sarat Chunder Mukerjee* (1911) I. L. R. 38 Calc. 913, 921, where he referred to the alterations created by the Code of 1908, and to the terms thereof, whereby it is now provided that the application which follows, a preliminary decree is not for an order for sale, but for a decree for sale.

14. It is interesting to observe that in the report of the case in the Judicial Committee of the Privy Council, 42 I. A. 88, at page 89, the interpretation placed upon that part of the learned Chief Justice's judgment is as follows: The learned Chief Justice was also of opinion that if the decree had been an incomplete one, a farther decree being required, then Article 181 of the Act of 1908 would have barred the application, since the difficulties of applying the corresponding Article of the Act of 1877 to an application for an order to sell had been removed in the case of Article 181 by the provisions of the Code of Civil Procedure, 1908.

15. It is not necessary for me to express any opinion in this case upon the question whether that is a correct interpretation of the learned Chief Justice's judgment, and I do not express any opinion.

16. It is, however, clear, in my judgment, that the decision in the abovementioned case is not any authority for the proposition advanced on behalf of the appellant that Article 183 applies to an application under Order XXXIV, rule 6.

17. Further, it cannot reasonably be argued, in my judgment, that there is any analogy between an application for a final decree for sale under Order XXXIV, rule 5(2), and an application for a personal decree against the mortgagor for the balance if legally recoverable under Order XXXIV, rule 6.

18. In the case of the final decree for sale, Order XXXIV, rule 5(2) provides that where such payment is not so made the Court shall, on application made in that behalf by the plaintiff, pass a decree that the mortgaged property be sold and that the proceeds of the sale be dealt with as is mentioned in rule 4.

19. Rule 1 deals with the preliminary, decree for sale, which in itself contains a direction for the sale of the property if the payment directed thereby is not made on or before the date specified in the decree (see form 4 in First Schedule, Appendix D). In the case, therefore, of an application for a final decree for sale, if it is made within the specified time, it may be said that the Court is bound, as a matter of course, to make the final decree for sale if the payment, which has been directed by the preliminary decree, is not made, and that the Court is merely giving effect to the order contained in the preliminary decree.

20. In the case of an application for a personal decree under Order XXXIV, rule 6, the position is different. The rule provides:

Where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such amount.

21. On such an application the Court has to be satisfied that the balance is legally recoverable from the defendant otherwise than out of the property sold, and if so satisfied the Court may pass a decree for such amount.

22. Form 11 of the First Schedule, Appendix D, is the form of a decree against the mortgagor personally. This read with the rule makes the point clear. The form contains the sentence and whereas it appears to this Court that the defendant is personally liable for the said balance.

23. For these reasons, in my judgment, the application under Order XXXIV, rule 6, dated the 18th April 1923, was an application for a new decree in the suit, and it cannot be said to be an application for enforcing a judgment or decree within the meaning of Article 183, and consequently Article 183 is not applicable to an application under Order XXXIV, rule 6.

24. It was admitted by the learned Counsel who appeared for the appellant, that if Article 183 does not apply, Article 181 must apply.

25. In my judgment, therefore, there is a period of limitation in respect of an application for a decree under Order XXXIV, Rule 6, and the answer to the question submitted to the Full Bench should be as follows:

Article 181 of the Limitation Act does apply to such an application, and the case of *Biswambhar Shaha v. Ram Sundar Kaibarta* (1914) I. L. R. 42 Calc. 294, in so far as it decided that Article 181 of the Limitation Act does not apply to such an application, was not rightly decided.

Walmsley, J.

26. I agree with my Lord the Chief Justice.

Rankin, J.

27. The special facts of this case need not be again detailed, but the facts which give rise to the single question argued before us may be stated as these:

28. That the suit is a suit brought in 1911 to enforce a mortgage on the Original Side of this High Court. That by consent a preliminary decree for sale was made therein which provided that if the money to arise by such sale should not be sufficient, the present appellant (mortgagee) should be at liberty to apply for a personal decree for the amount of the balance. That the present appellant made his application for a personal decree some nine years after the mortgaged property had been sold.

29. The application is made under Order XXXIV, rule 6 of the Code of 1908. Unless there is no period of limitation prescribed for such an application or Article 183 of the Limitation Act, 1908 applies, the present appellant is clearly out of time. Learned Counsel on his behalf disclaims and rejects the contention that no period of limitation has been prescribed. In that view it is clear that the case falls either under Article 181 or Article 183. If it falls under Article 181 the appellant is too late. It is contended on his behalf that it falls under Article 183, and this is the only contention which he desires to raise.

30. I am of opinion that the terms of reference to the Full Bench do not preclude us from deciding as to the correctness of this contention. Having regard to the frame of the Schedule to the Limitation Act, it would be quite impossible to hold that Article 181 is applicable without deciding that Article 183 is not, or to hold (in the abstract) that there is a period of limitation prescribed without stating the Article or Articles by which it is prescribed. Whether it is ever right to decide a point of law on an hypothesis of law which may or may not be correct, may be doubted; but it, would not be right in this case. The alternatives are, to decide upon the applicability of Article 183 or to make no answer to the reference. In my judgment we have jurisdiction to decide the question and should do so.

31. The appellant's argument is that an application under Order XXXIV, rule 6, is an application to enforce the preliminary or final decree for sale. He supports this argument by citing decisions to the effect that applications under Section 89 of the Transfer of Property Act for an order absolute come within the Articles of the Limitation Act which are now numbered 182 and 183. This argument from analogy takes us to debatable land. This High Court for years held that Articles 182 and 183 did not apply to applications under Section. 89. Other High Courts held that they did. In 1914, some years after the present Code had altered the aspect of the question, the Judicial Committee in two cases from Allahabad applied what is now Article 182 *Batuk Nath v. Munni Dei* (1914) I. L. K. 36 All. 284, and *Abdul Majid v. Jawahir Lal* (1914) I. L. R. 36 All. 350, Lord Moulton in the latter case describing the application under Section 89 as being 'for an order absolute to sell the mortgaged properties;' in other words 'for an order directing enforcement of 'the order nisi '. Meanwhile, in 1911 this Court in *Amlook Chand Parrack v. Sarat Chandra* (1911) I. L. R. 38 Calc. 913, dealt with a case in which a mortgagee applied for an order absolute for sale some 23 years after his suit had been decreed on the Original Side. The mortgagee's contention was that the case was governed by the Transfer of Property Act, and that there was no limitation whatsoever. Treating the case as one outside the present Code, Jenkins C. J. laid stress upon the fact that no further decree was requisite, and that all that was required was an order for sale. He regarded the application as a petition for realisation of the decree following Lord Davey in a previous case who had spoken of a similar proceeding as a matter of execution, i.e., as if Article 182 would cover

it. It was held accordingly that in a High Court Article 183 would apply. This case was affirmed in very general terms by the Judicial Committee in 1914, very shortly after the decision in the Allahabad cases already mentioned. *Munna Lal Parrack v. Sarat Chunder Mukerji* (1914) I. L. R. 42 Calc. 776.

32. Now if there were good and reliable authority in cases under Section 90 of the Transfer of Property Act for holding that applications thereunder were governed by the Articles now numbered 182 and 183, it would be unnecessary to trouble with analogies drawn from cases under Section 89. What was provided for by Section 90 was a decree, and it has frequently been called a supplementary decree. It is true that at different times in *Madras Mallikarjunadu Setti v. Lingamurti Pantulu* (1902) I. L. R. 25 Mad. 244, and in *Allahabad Durga Dai v. Bhagwat Prasad* (1891) I. L. R. 13 All. 356. *Musaheb Zaman Khan v. Inayatulla* (1892) I. L. R. 14 Jill. 513. *Ram Surup v. Gaurani* (1899) I. L. R. 21 All. 453, decisions have been given to the effect that an application under Section 90 is an application in execution, but these decisions never became accepted law, and decisions to the contrary were not lacking. In the case of *Puma Chandra v. Radha Nath* (1906) 4 C. L. J. 141, 148, these cases were dissented from, Mookerjee J. expressly stating that, 'even if the view maintained 'by the other High Courts as to the true nature of an 'application under Section 89 were adopted, it seems to' me that an application under Section 90 stands upon 'an entirely different footing'. Curiously enough in *Biswambhar Shaha v. Ram Sundar* (1914) I. L. R. 42 Calc. 294, the Court proceeded on the view that an application under Section 90 or rule 6 of Order XXXIV was exactly parallel to an application under Section 89 or rule 3. Thereat question is which of these two views is right? The Allahabad High Court in 1918 decided that Article 181 was applicable to Order XXXIV. rule 6, holding that such an application is one made in the original suit for a new decree, and that it cannot be regarded as an application in execution. This is exactly the view taken by Mookerjee J. of Section 90 in the case already cited, and in my opinion it is the correct view, both in substance and in form.

33. In India a mortgage does not necessarily import a personal obligation to repay. Prima facie this obligation is present in simple mortgages, and of course, in English mortgages. Prima facie it is not present in mortgages by conditional sale

and in usufructuary mortgages. In each case the question is one of construction of the mortgage instrument and the personal liability to repay may become barred before the right of recourse to the mortgaged property is barred. In these circumstances a decree for sale made in a mortgage suit, unless it contains an express decision as to personal liability, is not in any way an affirmation that such liability exists, or ever has existed. Even where it exists, the mortgagee is not in India allowed in a suit to enforce the security to have recourse to the personal covenant until he has first exhausted the security, and given credit for its proceeds.

34. This is the real meaning of Section 90 and of rule 6 of Order XXXIV, and this is very different from a mere claim to have the decree for sale enforced. Execution against the mortgagor's person or against his general assets can not begin in the absence of any decision as to his liability. To decide that he is personally liable is not to enforce or execute a decree for sale. There seems to be no force in the contention that an application is to enforce a decree because it is made under a liberty to apply reserved by the decree. This is the substance of the matter but in form there are, since the Code of 1908, still further difficulties in the way of the appellant's contention. I take it to be quite clear now that in the subordinate Courts an application for final decree for sale is governed by Article 181 and not by Article 182 cf. *Gajadhar Singh v. Kishan Jiwan Lal* (1917) 1 L.R 39 All. 641, *Saiyid Jowad Hussain v. Genda Singh* (1922) 1 L. R. 1 Pat. 444. In *Amlook Chand's case* (1911) 1 L. R. 38 Cal. 913, 921, *Jenkins C.J.*, whose authority is very special on this subject, observed: 'One object in view when the present Code was passed was to end, as far as possible, the conflict of decisions which embarrassed the Courts, and among those conflicting decisions were those which dealt with two points: First, whether an application for an order under Section 89 of the Transfer of Property Act was an application in execution or not; and, secondly, whether, if it was not an application in execution, Article 181 constituted a bar on the ground that the application was one not contemplated by the Code of Civil Procedure. And so it is now provided that the application which follows a preliminary decree for sale, is not for an order for sale, but for a decree for sale. And with the same end in view the provisions as to mortgage suits have been removed from the Transfer of Property Act to the Civil Procedure Code, so that it is no longer possible to

contend that these applications are not under the provisions of the Civil Procedure Code.

35. Now before one gets to Article 181 one must exclude Article 182. How did the Code of 1908 settle in the negative the old controversy as to whether Article 182 was applicable to Section 89 of the Transfer of Property Act Entirely by the new provision as to preliminary and final decrees: 'A decree is preliminary when further proceedings have to be taken 'before the suit can be completely disposed of. It is 'final when such adjudication completely disposes 'of the suit' (Section 2). Accordingly, when it was provided by Order XXXIV, rule 5, that the application which follows on a preliminary decree for sale is not for an order for sale but for a decree for sale, all question of 'execution' was removed. It was an undoubted part of the intentions of the Code of 1908 to prevent matters which might and should be decided in the suit from being left to Courts of execution.

36. It is now contended, as I understand, that applications for final decree are not in the Subordinate Courts governed by Article 182, but that in the High Courts they are governed by Article 183. Indeed, it is from this position that the whole argument on behalf of the appellant proceeds. It is not easy to wedge so great a difference in result between the words 'for the execution of a decree' and the words 'to' enforce a decree.' If a final decree for sale is necessary to dispose of the suit, the considerations applicable under Article 183, which allows for indefinite revivor, seem strangely out of place. I am content to say that as at present advised I am in no way satisfied that Article 183 does apply in a High Court to an application for final decree under Order XXXIV.

37. I concur in the answers proposed by the Chief. Justice.

Buckland, J.

38. The substantial question to be decided, once that learned Counsel for the appellant has been permitted to argue, as has been done, that Article 183 of the First Schedule to the Limitation Act is applicable, is whether that Article or Article 181 prescribes the period of limitation for an application for a decree under Order XXXIV, rule 6, of the Civil Procedure Code.

39. It was held by the Judicial Committee of the Privy Council in *Munna Lal Parrack v. Sarat Chunder Mukerji* (1914) I. L. R. 42 Calc. 776, that an application for an order absolute for sale under Section 89 of the Transfer of Property Act was within Article 183.

40. Order XXXIV, Rule 5 now takes the place of: that section, but in lieu of an order absolute it is provided that upon application made in that behalf by the plaintiff, the Court shall pass a decree that the property be sold.

41. It is contended on behalf of the appellant that in substance, there is no distinction between an application for a final decree under Rule 5 and an application for a personal decree under Rule 6 and that, therefore, upon the authority of the case cited above Article 183 applies.

42. For the respondent it has been argued that the law has been altered by the Civil Procedure Code and that in consequence *Manna Lal Parrack v. Sarat Chunder Muksrji* (1) is no authority for the appellant's contention. There is no need to consider this aspect of the case, unless one first comes to the conclusion -that applications under Rules 5 and 6 are such that no distinction can be made between them for the purpose of deciding which Article is the correct one to be applied.

43. For the principles of the decision in *Munna Lal Parrack v. Sarat Chunder Mukerji* (1914) I. L. R. 42 Calc. 770, one must turn to the judgment of Jenkins C. J. in *Amlook Chand Parrack v. Sarat Chunder Makerjee* (1911) I. L. R. 38 Calc. 913, 921, which their lordships of the Judicial Committee affirmed by a judgment which is contained in a few lines of the report. There one finds: If and so far as this can be regarded, in the words of Lord Davey, as an application for realisation of a 'decree,' it is not unfair to say that it is an application to enforce a judgment as being either a proceeding in execution or a proceeding for judicial relief under a decree.

44. The language used is wide and at first sight might appear to cover the point with which we are now concerned. But if the appropriate rules of Order XXXIV are analysed, it becomes clear that the analogy upon which the argument of the

learned Counsel for the appellant' depends is barely superficial.

45. If an application under Rule 6 is to be regarded as an application to enforce the preliminary decree made under Rule 4, similarly to an application made under Rule 5, the relation which decrees made under Rules 5 and 6 respectively bear to such preliminary decree becomes important. The preliminary decree proceeds upon the footing of rule 2, clauses (a), (b) and (c), and directs that in default of payment of the amount found due upon taking the account the property shall be sold and the proceeds shall be applied in paying such sum to the plaintiff. That decree is made after adjudication upon all questions which can be determined prior to a sale to be held for the purpose of realising the security, and nothing, is left upon which adjudication for such purpose is requisite. Hence, it is only to be expected that it should be provided by rule 5 (2) that the final decree shall be made upon the plaintiff's application. Once the amount due has been ascertained and the defendant is in default, nothing remains to be done, and the final decree for sale goes as a matter of course.

46. Though the relation of a decree under Rule 6 to the preliminary decree under Rule 4 is by no means the same as that which the decree under Rule 5 bears to the preliminary decree, yet the one has a relation to the other. That relation is due to the fact that by reason of the preliminary decree and proceedings; subsequently taken thereunder, the amount for which a personal decree may be made has been ascertained. Moreover, excluding cases under Order II, rule 2, in which the plaintiff has been permitted to postpone a suit on his security, no personal decree may be made until the plaintiff has exhausted his right under his security, and to obtain, it be must proceed as provided by Order XXXIV.

47. A decree made under rule 6 involves that the sale ordered by the final decree shall have taken place, for otherwise it would not have been ascertained, 'whether there was any balance still due which could form the subject matter of a decree under that rule. The preliminary decree has been succeeded by the, final decree, and without the interposition of the final decree no decree under Rule 6 for an ascertained sum could be made. I do not overlook the fact that a decree may take the form found in *Jeuna Bahu v. Parmeshwar Narayan Mahtha* (1918) L. R. 46 I.

A. 294, but that does not affect the point under discussion. It is clear that the position is not, as suggested, that of there being two coordinate, even if not wholly concurrent, methods of enforcing the preliminary decree.

48. But there is the further difficulty that a decree under Rule 6 involves an adjudication upon matters which up to that point have not been determined, for it is not in every case of mortgage that the plaintiff has a right to a personal decree. The sum due to him no doubt, has been ascertained, but for the purpose of a decree under Rule 6 matters have yet to be determined which would not have been relevant to an adjudication upon the plaintiff's rights against the property. Upon such further adjudication as the case may require, a decree under Rule 6 may be made, but that is not by way of enforcing any existing judgment or decree. This to my mind is the explanation of the use of the word 'may' in rule 6, which does not of itself necessarily exclude the application of Article 183.

49. The same comment may be made on the argument that because the application is for a decree Article 183 cannot apply. Though the form of relief asked for may be a factor in determining the nature of the application, it is not the sole or a conclusive factor when the real question is whether the application is to enforce an existing judgment or decree.

50. I concur with the learned Chief Justice in the replies to be given to the questions referred.

Mukeeji, J.

51. The facts of the case which has given rise to this reference are clearly set forth in the order of reference and need not be recapitulated. The question referred for our decision is whether the case of *Biswambhar Shaha v. Ram Sundar Kaibarta* (1914) I. I., B. 42 Calc. 294, so far as it decides that Article 181 of the Limitation Act does not apply to an application under Order XXXIV, Rule (3, Civil Procedure Code, was rightly decided. The learned Judges, who have made this reference, differed from the decision in that case upon the following questions:

(i) whether there is any period of limitation in respect of an application for a decree under Order XXXIV, rule 6; and

(ii) whether Article 181 of the Limitation Act applies to an application under Order XXXIV, rule 6, Civil Procedure Code, where no other article applies.

52. Much of the contentions of the parties in this case proceed upon the analogy or otherwise as between an application under Order III, Rule 5 (2), Civil Procedure Code, or rather what may be said to be its predecessor, that is to say, Section 89 of the Transfer of Property Act, and an application under Order XXXIV, rule 6, Civil Procedure Code. Consequently, it is necessary to examine the state of the law as regards limitation which relates to the former.

53. There were conflicting decisions on the question as to whether an application for an order absolute for sale under Section 89 of the Transfer of Property Act was governed by Article 178 or Article 179 of the Limitation Act of 1877, or whether there was any period of limitation for such an application. These Articles corresponded to Articles 181 and 182 of the Limitation Act of 1908. The preponderance of authority was in favour of the view that such an application was not governed by any Article of the Limitation Act: see *Ajudhia v. Baldeo* (1894) I. L. R. 21 Calc. 318. *Tilack v. Parsotein* (1895) I. L. R. 22 Calc. 924. *Tara Prasad v. Bhobodeb* (1895) I. L. R. 22 Calc. 931. (3), *Akikunnissa v. Roop Lal* (1897) I. L. R. 25 Calc. 133. *Ranbir v. Drigpal* (1893) I. L. R. 16 All. *Mahabir v. Sital* (1897) I. L. R. 19 All. 520. *Bai Manekbai v. Manekji* (1830) I. L. R. 7 Bom. 213. For a contrary view reference may be made to the cases of *Oudh Behari v. Nageshar* (1890) I. L. R. 13 All. 278, *Chunni v. Harnam* (1898) I. L. R. 20 All. 302. *Bhagawan v. Ganu* (1899) I. L. R. 23 Bom. 644. The former view proceeded mainly upon three propositions---first, that such an application was not one under the Code of Civil Procedure to which only Article 178 applied; secondly, that it relates to an action which the Court ought to take of its own motion whether the party applies or not; and, thirdly, that it is not an application for the execution of a decree, because until the order absolute was made under Section 89 of the Transfer of Property Act there was no decree capable of execution, and it was of the nature of an application in a pending suit the cause of action for which arose from day to day

until the suit was at an end.

54. To take the last ground first, the Privy Council in the case of Harendra Lal Roy Chowdhry v. Maharani Dasi (1901) L. R. 28 I. A. 89, took the view that an application under Section 89 was a petition for realisation of the decree by the sale of the mortgaged properties. In so far as it could be so regarded, 'it was', to quote the words of Sir Lawrence Jenkins C. J., not unfair to say that it is an application to enforce a judgment as being either a proceeding in execution of a decree, or a proceeding for judicial relief under a decree: Amlook Chand Parrack v. Sarat Chunder Mukerjee (1911) I. L. R. 38 Calc. 913, 921. This was a case in which the decree had been passed by the High Court, and it was held in the case that the application came under Article 188 of the Limitation Act of 1908-An appeal was preferred to the Privy Council against this decision, but it was dismissed: Munna Lal Parrack v. Sarat Chunder Mukerji (1914) I. L. R. 42 Calc. 776. An application for an order absolute under Section 89 has also been held by the Judicial Committee to be an application for the execution of the preliminary decree or decree nisi under Section 88, Batuk v. Munni (1914) I. L. R. 36 All. 284, and Abdul Majid v. Jawahir Lal (1914) I. L. R. 36 All. 350, and so governed by Article 179 of the Limitation Act of 1877; and in the latter case an application for an order absolute for sale under Section 89 was treated as an application for directing enforcement of the order nisi. The third ground, therefore, can no longer be maintained as sound.

55. Then as to the second ground, if the application be one for the execution of the decree nisi or for enforcement of a relief granted thereby, it stands to reason that it is optional with a party to seek for it or not. In this connection I entirely agree with the opinion expressed by Coxe J. in the case of Beni Singh v. Barhamdeo Singh (1915) 22 G. L. J. 66, where he observed as follows: Under Order XXXIV, rule 5, the Court is not only 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 the sale.

56. As regards the first ground, the provisions as to the mortgage suits having been removed from the Transfer of Property Act to the Code of Civil Procedure 1908, it is no longer possible to contend that applications of this class are not under the provisions of the Civil Procedure Code.

57. Some of the results of the decisions of the Judicial Committee referred to above may thus be summed up: The preliminary decree or decree nisi passed under Section 88 of the Transfer of Property Act is executable; in order to obtain the order absolute under Section 89 steps have to be taken in execution; and to such an application Article 182 or Article 183 will apply as the decree happens to be of a mofussil Court or of the Original Side of the High Court *Hussain v. Karim* (2). The result attained by the transference of the provisions of the Transfer of Property Act relating to suits on mortgages into Order XXXIV of the Civil Procedure Code, 1908, and the amendments made, by requiring a decree for sale to be passed, in Order XXXIV, Rule 5 (2) instead of an order absolute for sale in Section 89, and the distinction made in the explanation to the definition of 'decree' as contained in Section 2 as between a preliminary and a final decree has been to make, in the case of a mofussil decree, Article 181 applicable, instead of Article 182, to an application for a decree for sale under Order XXXIV, Rule 5 (2), Civil Procedure Code, such an application being an application in the suit for a final decree and not an application for execution *Gajadhar Singh v. Kishan Jewan Lal* (1917) I. L. R. 39 All. 641.

58. Similar conflict existed as to the period of limitation, if any, for a decree for the balance under Section 90 of the Transfer of Property Act. In Allahabad the view was taken that an application to obtain a decree under Section 90 cannot by any straining of language be considered to be an application for the execution of a decree under Section 88, that it is an application for a subsidiary decree, that it is undoubtedly an application in execution proceedings but is not an application for the execution of the principal decree, and that Article 178 of the Limitation Act of 1877 applied to it: *Ram Sarup v. Gaurani* (1899) I. L. K. 21 All 453, and the cases cited in the judgment in that case. In *Muhammad Itifat Hussain v. Alimannissa* (1918) I. L. R. 40 All. 551, it was held that an application under Order XXXIV, rule 6, Civil Procedure Code, is not one for the execution of the original decree for sale,

but is an application in the original suit for a new decree. This Court in the case of *Rahmat Karim v. Abdul Karim* (1907) I. L. R. 34 Calc. 672, held that that Article was not applicable as the application was not under the Civil Procedure Code. In the case of *Biswambhar Shaha v. Ram Sundar Kaibarta* (1314) I. L. R. 42 Calc. 294, which was a case decided under the Code of 1908, it was contended that the decision in the case of *Rahmat Karim v. Abdul Karim* (1907) I. L. R. 34 Calc. 672, could no longer be regarded as good, in view of the transference of the provisions relating to mortgage suits from the Transfer of Property Act to the Civil Procedure Code in 1908. This contention was overruled on the authority of certain observations contained in the decision of *Madhabmani Dasi v. Pamela Lambert* (1910) I. L. R. 37 Calc. 796. In that case it was laid down that previous to the passing of the Limitation Act (IX of 1908) and the Civil Procedure Code (V of 1908) there was no rule of limitation applicable to an application for order absolute of a decree nisi made under Section 86 of the Transfer of Property Act (IV of 1882), that the Limitation Act (IX of 1908) does not profess to provide for all kinds of applications whatsoever, that it does not apply to an application to a Court to do what the Court has no discretion to refuse, and that it is not applicable to an application to the Court to terminate a pending proceeding the final order in which had been postponed for the benefit of the defendant or the convenience of the Court. As regards these propositions it may be observed that the reasons that were given by the learned Judges as to why the Limitation Act (IX of 1908) should not be taken as applying to an application of this nature can no longer be regarded as sound in the view that has been taken of an application under Section 89 as mentioned above, with regard to which it used to be held upon similar-reasons at one time that no period of limitation was applicable. The judgment in the case, after expressly-stating that it was not necessary to decide whether the-Civil Procedure Code and the Limitation Act of 1908 applied to the case or not, went on to lay down that Article 181 of the Limitation Act of 1908 did not govern an application for order absolute under Order XXXIV, rule 3 of the Civil Procedure Code of 1908. This part of the decision, therefore, was clearly obiter. The learned Judges who decided the case of *Biswambhar Shaha v. Ram Sundar Kaibarta* (2) (1914) I. L. R. 42 Calc. 294, were of opinion that what had been held in *Madhabmani Dasi's* case (1910) I. L. R. 37 Calc. 796, to apply to Order XXXIV,

rule 3, was also applicable to Order XXXIV, Rule 6, as both the cases were strictly parallel and the rule of law and justice which was the ratio decidendi applied equally to both the cases. The decision in the case of Biswambhar Shaha v. Ram Sundar Kaibarta (1914) I. L. R. 42 Calc. 294, is founded upon the observations in Madhabmatii Basis case (2), in to which I have already referred and which for the reasons I have given cannot now be regarded as sound.

59. Thus, then, we arrive at the conclusion that it is no longer possible to contend that there is no period of limitation for an application under Order XXXIV, Rule 6, just in the same way as it cannot be contended that there is none for an application under Order XXXIV, Rule 5 (1910) I. L. R. 37 Calc. 796. The application is governed by the Limitation Act; and Section 89 of the Civil Procedure Code not applying to it, Article 181. would apply unless some other Article applies.

60. Sir Benode Mitter appearing for the appellant conceded that he was unable to contend that there was no period of limitation in respect of an application for a decree under Order XXXIV. Rule 6. He, however contended that Article 181 was not applicable, because Article 183 applied to the case.

61. The question referred to us is not whether the decision in Biswambhar Shaha's case (1914) I. L. R. 42 Calc. 294, in so far as it decides that there is no period of limitation for such -an application, is right. If that was the question, we might have answered it without any further discussion. The question is, whether that decision is right in so far as it says that Article 181 does not apply, To decide this question, we must go further and decide whether Article 183 applies or not; for Section 48, Civil Procedure Code, admittedly not applying, we must find that no other Article applies, and Article 183 is said to be the only Article which applies.

62. Article 183 runs thus: To enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its Ordinary Original Civil Jurisdiction or an order of His Majesty in Council.

63. To attract the operation of this Article there must be a judgment, decree or order capable of being enforced; and the real question, therefore, is whether an application for a decree under Order XXXIV, Rule 6, is one for enforcing the

preliminary decree passed under Order XXXIV, Rule 4. It is contended 'that the relation between a decree under Rule 4 and one under Rule 5 (2) is the same as between a decree under the former rule and one under Rule 6, and it is urged that if an application for a decree under Rule 5 (2) [may be regarded as one for enforcement of the judgment or decree under Rule 4, as it must be in view of the decision in *Amlook Chand Par rack v. Sarat Chunder Mukerjee* (1911) I. L. R. 38Calc. 913, affirmed by the Judicial Committee in *Munna Lal Parrack v. Sit rat Chunder Mukerji* (1914) I. L. R. 42 Calc. 776, an application for a decree under Rule 6 must also be similarly regarded. It is urged that if there is no liberty reserved in the preliminary decree for applying for a decree for the balance, that relief must be treated as having been refused and would be barred in view of Section 11, Expl. 5 of the Code; and that, therefore, when the mortgagee makes the application for a decree under Rule 6, he exercises the liberty granted to him by the judgment or decree previously passed, and is, therefore, enforcing the same.

64. Now, we are not concerned in the present case with a decree of the character that was before the Judicial Committee---a combined decree not following the forms in the Appendix in the First Schedule to the Code---in the case of *Jeuna Bahu v. Parmeshwar Narayan Mahtha* (1918) I. L. R. 47 Calc. 370, and we are not in the present case concerned with those considerations which may, perhaps, arise in the case of such a combined decree. The relevant passage in the decree before us runs in these words: And it is further ordered with a like consent that if the money to arise by such sale shall not be sufficient for the payment in fail of the amount payable to the plaintiff and the defendant Harry Jones under this decree, the plaintiff or the defendant Harry Jones as the case may be shall be at liberty to apply for a personal decree' for the amount of the balance.

65. Now the forms prescribed in the Appendix D of the First Schedule of the Civil Procedure Code for a preliminary decree for sale and a decree for balance are respectively forms Nos. 4 and 11.

66. Form No. 4 runs thus: It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of 19 is Rs (sic)

and that such amount shall carry interest at the rate of per cent, per annum until realisation; and it is decreed as follows:

(i) That if the defendant pays into Court the amount so declared due on or before the said day of 19, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him (where the plaintiff claims by derived title and by those under whom he claims.) ('Where the plaintiff is in possession and shall put the defendant in possession of the property.)

(ii) That if such payment is not made on or before the said day of 19, the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying there out the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid together with the subsequent interest and subsequent cost, and that the balance, if any, be paid to the defendant.

(iii) That if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the plaintiff shall be at liberty to, apply for a personal decree for the amount of the balance.

67. Form No. 11 runs thus: Whereas the net proceeds of the sale held under the final decree for sale passed in this suit on the day of 19, and now in Court to the credit of this suit, amount to Rs. Y and there is now due to the plaintiff the sum of Rs. X mentioned in the said decree together with the further sum of Rs. ...interest thereon at the rate of 6 per cent. per annum from the day of 19 to this day, and also the sum of Rs. for his costs of this suit subsequent to the decree, making a balance due to the plaintiff of Rs. Z. And whereas it appears to this Court that the defendant is personally liable for the said balance:

68. It is hereby declared as follows:

(i) That the said sum of Rs. Y be paid out of Court to the plaintiff.

(ii) That the defendant do pay to the plaintiff the said sum of Rs. Z with interest thereon at the rate of 6 per cent, per annum from this day to the date of realisation of the said sum.

69. It is clear from these forma as well as from the rules 4, 5 and 6 of Order XXXTV that the decree passed under Rule 4 directs that in default of the defendant paying in accordance with the decree mentioned in clauses (a),(b) or (c) of rule 2, the Court shall pass a decree for sale and also directing that in default of the defendant paying as mentioned therein, the mortgaged property or a sufficient part thereof be sold and the direction thus given takes effect on the happening of the contingency, and when the contingency happens it is obligatory on the Court to pass a decree under Rule 5(2). Under a decree passed under Rule 4 a liberty is also reserved to the plaintiff to apply for a decree under Rule 6. When such an application is made, the question whether such a decree should or should not be passed has to be decided. It is not as if the latter decree has to be passed as a matter of course; it has to be found that the net proceeds of the sale held under the decree under Rule 5 are insufficient and that the balance is legally recoverable; and this may give rise to such questions as whether the mortgagor is under a personal liability or whether the mortgagee is not precluded by the terms of the mortgage from realising his dues otherwise than out of the property sold or whether the right to enforce such liability has been extinguished by the statute of limitations at the time the suit was instituted. The relations, therefore, as between decrees under Rule 4 and under Rule 5 (2) and as between decrees under the former rule and under Rule 6 are fundamentally different. In one case it is an enforcement of the decree or the judgment previously passed, and in the other case though the mortgagee comes under the decree to avail of a liberty, he seeks to obtain something which the previous decree did not give him. He comes to enforce a right or seek a relief which he had independently of the previous decree. He comes under the previous decree only in the sense that the right or relief has been put off by it until the happening of certain events. Seeking to avail of a liberty for applying for a relief is different from enforcing a judgment or decree, the judgment or decree not having granted the relief but only the liberty to apply for it.

70. As regards the contention that the right is created by the decree because in the absence of a liberty reserved thereby the right to make an application for a decree under Rule 6 is lost to the mortgagee, there is authority for the proposition that the Court cannot refuse an order under this rule simply because no provision is made for it in a decree for sale: *Sonatun v. Ali* (1889) I. L. R. 16 Calc. 423. *Musaheb v. Inayatulla* (1892) I. L. R. 14 All. 513. These cases were decided when Expl. (iii) to Section 13 of the Civil Procedure Code of 1882 corresponding to Expl. (V) of Section 11 of the present Code was in force. This explanation, in my opinion, does not stand in the way, for the proper time for granting the relief according to the rules is only after the conditions requisite for a decree under Rule 6 come into being. The position, of course, would be different if the issue has been considered and the relief granted or refused at the time of the first decree. For these reasons I am of opinion that the application is not one for enforcing a decree or judgment or order and is not governed by Article 183.

71. That being so, in my opinion, Article 181 must apply to such an application; and in so far as the case of *Biswambhar Shaha v. Ram Sundar Kaibarta* (1914) I. L. R. 42 Calc. 294, decided that it did not, it was not rightly decided.

Sanderson, C. J.

72. The result is that in pursuance of the provisions of rule 2, Chapter VII, of the High Court Rules, we return the case with an expression of our opinion upon the point of law referred to the Full Bench for final adjudication by the Division Court which referred it.

73. The appellant must pay to the respondent her costs of this reference.