

**(1913) 08 BOM CK 0003**  
**In the Bombay High Court**  
**Case No : Second Appeal No. 895 of 1912**

Bacharaj Nyahalchand Marwadi

APPELLANT

Vs

Babaji Tukaram Avail

RESPONDENT

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**Date of Decision :** 05-08-1913

**Acts Referred:**

Limitation Act, 1963 — Section 19

**Citation :** (1913) 15 BOMLR 930

**Hon'ble Judges :** Shah, J;Heaton, J

**Bench :** Division Bench

**Final Decision :** Allowed

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## Judgement

Shah, J.—The facts which give rise to this appeal are as follows :-

On the 3rd July 1900 the plaintiff obtained a decree in the terms of an award, whereby he was required to pay a sum of Rs. 600 by annual instalments of Rs. 50 and to redeem the mortgaged property. It was further provided in the decree that "if the plaintiff failed to pay any two instalments to the defendant in time, his right to redeem the mortgaged lands should for ever be foreclosed and then the said lands should be taken by the defendant into his possession from that of the plaintiff. Till then the lands should be allowed to remain in the possession of the plaintiff himself." Subsequent to this decree, two instalments in full for 1902 and one instalment in part for the year 1903 were paid by the plaintiff to the defendant. No other instalment was paid thereafter. An application was made on the 20th July 1905 to the Court for certifying those payments in satisfaction of the decree. This application was signed by the plaintiff and was consented to by the defendant. On the 14th December 1907 an application was made by the defendant for an order of foreclosure in terms of the decree ; but that application was dismissed, because no steps to prosecute the same were taken. The present application was made on the 20th of March 1909. The defendant by this application seeks to have an order of foreclosure in the terms of the decree.

2. The plaintiff raised objections to this application and urged that the application was barred by limitation. Both the lower Courts have found in favour of the plaintiff and held that the application is barred by time.

3. The defendant has preferred the present Second Appeal, and has urged in support thereof that the lower Courts have wrongly decided the question of limitation. It is contended that the present application for an order for foreclosure is really an application u/s 93 of the Transfer of Property Act, and that there is no period of limitation applicable to such an application. It is further urged that even assuming that there is a period of limitation to which this application is subject, still having regard to the application of the 20th of July 1905 and to the previous darhast of December 1907, the present application is in time.

4. With regard to the first point, we express no opinion in this appeal. Having regard to the view which we take of the second contention urged on behalf of the appellant, it is unnecessary to come to a definite conclusion on the first point.

5. Assuming that the application u/s 93 of the Transfer of Property Act, or rather the application seeking foreclosure, is subject to the same rules of limitation, which govern an ordinary application for execution, we are clearly of opinion that in the present case, the two previous applications, which we have already referred to, are sufficient to save the present application. The determination of this question depends upon the construction which is to be placed upon the application of the 20th July 1905. Both the lower Courts have found that this application is not an acknowledgment. It is urged here that having regard to the terms of the application, it amounts to an acknowledgment within the meaning of Section 19 of the Limitation Act. Having regard to the terms in which the decree is referred to in this application by the plaintiff, we think that it clearly contains an acknowledgment within the meaning of Section 19. The decree, as we read the application, is referred to as an outstanding decree, and the payments mentioned in the application are mentioned as payments made on account of the decree. It was also urged on behalf of the appellant that this was an application for a step-in-aid of execution and as such was sufficient to save limitation. Having regard to the form and purpose of the application and having regard to the fact that it is consented to by the defendant, we think that it must be treated in effect as a joint application by the plaintiff and the defendant for the purpose of having the payments duly certified. We take the same view of this application and of the effect thereof as was taken of a somewhat similar application in the case of Wasi Imam v. Poonit Singh ILR (1893) Cal. 696 In either view of this application, it is clear that it is sufficient to give a fresh starting point for limitation. The subsequent application of December 1907 was made within three years from this date, and the present application is made within three years from the date of the preceding application. The trial Court has referred to certain circumstances as showing that the application of July 1905 (Exhibit 19) loses much of its "evidential value." The appellate Court has not gone into this question. But after considering these circumstances, we see no reason to think

that the application was not duly made by the plaintiff and that he is not responsible for the contents thereof. In fact the learned pleader for the respondent fairly conceded that he could not support the view taken by the trial Court on this point.

6. We, therefore, come to the conclusion that the present application is not time-barred.

7. The result, therefore, is that this appeal is allowed, the order of the lower Court set aside and the case sent back to be dealt with according to law. The appellant to have his costs throughout.