

(1937) 09 BOM CK 0012
In the Bombay High Court
Case No : O.C.J. Suit No. 354 of 1930

Jesinglal Kalidas Shah

APPELLANT

Vs

Gangadhar Mahadeo Karandikar

RESPONDENT

Date of Decision : 14-09-1937

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 15, 75

Citation : AIR 1938 Bom 354 : (1938) 40 BOMLR 507

Hon'ble Judges : Engineer, J

Bench : Single Bench

Judgement

Engineer, J.—This is an application for a final decree for sale in a mortgage suit.

2. A preliminary decree for sale was passed on July 23, 1930, and a period of six months was given for payment of the mortgage amount. The date fixed for redemption was January 23, 1931, and on that date the right of the plaintiff to apply for a final decree for sale accrued. This notice of motion was taken out on August 23, 1937. The application is opposed by defendant No. 6 who stands in the shoes of the mortgagor, and he contends that the application is barred by the law of limitation. According to him Article 181 of the Indian Limitation Act applies to applications of this kind, and the period fixed by the article is three years.

3. The plaintiff contends in the first place that there is no limitation applicable to applications of this kind. It is contended that just as in partition and partnership suits final decrees can be made at any time without any bar of limitation, so too in mortgage suits no period of limitation applies. It is contended that the application should be regarded as one in a pending suit. Thus it was held in *Dwarka Nath Misser v. Barindra Nath Misser* ILR (1895) Cal. 425 which was a partition suit, that Article 182 did not apply, as it was a proceeding in the suit, and not a proceeding in execution, no final decree having been made in the suit. Similarly it was held in *Ramanathm Chetty v. Alagappa Chetty* ILR (1929) Mad. 378 which was a partnership suit, that a suit for dissolution of partnership and for accounts, in which a preliminary decree has been passed, must be considered

to be pending until the final decree. Hence an application to pass a final decree is not subject to limitation.

4. But the provisions in the CPC in respect of partition and partnership suits are different from these in respect of mortgage suits. In the case of partition suits Section 75 of the CPC provides that the Court may issue a commission to make a partition. Order XXVI, Rule 13, provides that a Commissioner may be appointed to make partition of Immovable property. The Commissioner then makes a report which is annexed to the commission and transmitted to the Court, and the Court may confirm, vary, or set aside the report. Where the Court confirms or varies the report, it shall pass a decree in accordance with the same as confirmed or varied. Order XX, Rule 18, Civil Procedure Code, provides that where the Court passes a decree for the partition of property, the Court may pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required. Similarly, in the case of partnership suits, Order XX, Rule 15, provides that the Court, before passing a final decree, may pass a preliminary decree declaring the proportionate shares of the parties, and directing such accounts to be taken, and other acts to be done, as it thinks fit. The provisions in the CPC as regards mortgage suits are different. Order XXXIV, Rule 5, provides that in a suit for sale where payment in accordance with Sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree directing that the mortgaged property be sold.

5. At one time it was held by the Calcutta High Court in *Biswambhar Shaha v. Ram Sunday Kaibarta* ILR (1914) Cal. 294 that to an application for a personal decree no limitation applied. That case was, however, overruled in *Pell v. Gregory* ILR (1925) Cal. 828. Similarly there is an obiter in *Madkabmani v. Lambert* ILR (1910) Cal. 796 to the effect that an application under Order XXXIV, Rule 3, is an application to terminate a pending proceeding, and is in fact an application to do an act which the Court is bound to do. Consequently no question of limitation arises. This was, however, dissented from by Chief Justice Jenkins in *Amlook Chand Parrack v. Sarat Chunder Mukerjee* ILR (1911) Cal. 913. There are observations in the case of *Ramanathm Chetty v. Alagappa Chetty* ILR (1929) Mad. 378 which have a bearing on this question. It was there observed as follows (p. 385) :-

It has no doubt been held that applications for a decree absolute and for a personal decree, under Order XXXIV, Rules 5 and 6, respectively, are subject to Article 181 : the decree-holder must apply within three years. See *Chulusam Bivi v. Ahamad-sa Rowther* ILR (1918) Mad. 296, *Mummadi Venkatiah v. Boganatham Venkata Subbiah* (1921) 42 M.L.J. 51, *Rama Venkata-subba Iyer v. Shmmukam Pillai* (1913) M.W.N. 867 and *Pell v. Gregory* ILR (1925) Cal. 828. I do not think, however, that from these special cases a general proposition can be deduced. The rules under the Code make express provision for such applications and the Court has no duty cast upon it in the absence of them. The view I take in the

present case is that the Court should itself have disposed of the suit, and that the Court, rather than the party, was responsible for further action.

It was on this ground that it was held that an application to pass a final decree in a partnership suit was not subject to any limitation. I hold that the contention that no limitation applies to a final decree for sale is not maintainable.

6. The next contention urged on behalf of the plaintiff is that if limitation does apply, it is Article 183 which applies and not Article 181. It is contended that the present application is to enforce a judgment or decree of a High Court, and that therefore the period of limitation is twelve years.

7. On this question decisions which were given at the time when the provisions for passing mortgage decrees were contained in the Transfer of Property Act are no longer applicable. There is a decision of the division Court in *Harjivan Devraj Vs. Gajanan Kashinath Naik*, which is binding on me. It was there held that an application to make the decree final under Order XXXIV must under Article 181 be made within three years and six months. Sir Norman Macleod C.J. observes as follows (p. 461) :-

... it is clear under the provisions of the Code that there has been only a preliminary decree, which must be made final before it can be executed.

That case, however, came to the High Court of Bombay on appeal from the Thana Court. It is contended for the plaintiff that the position is different as regards suits filed on the Original Side of the High Court. It is argued that the words in Article 183 are "to enforce a judgment, decree or order of a High Court," while the words in Article 182 are "for the execution of a decree or order of any civil Court not provided for by Article 183." It is, therefore, argued that an application to make a decree final for sale comes within the words "to enforce a judgment, decree or order of a High Court." The case of *Amlook Chand Parrack v. Sarat Chunder Mukerjee* ILR (1911) Cal. 913 : 17 Bom. L.R. 408 throws some light on this question. In that case it was assumed that the decree was within the Transfer of Property Act, and that it was a decree made u/s 88 of that Act. The conclusion arrived at was that the application for order for sale might be regarded as an application for the realization 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. But the concluding portion of the judgment of Sir Lawrence Jenkins at p. 981 shows that he would have come to a different conclusion if the case had been one for making the decree final under the Code of Civil Procedure. Sir Lawrence Jenkins at p. 921 refers to the alterations created by the CPC 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. The case of *Amlook Chand Parrack v. Sarat Chunder Mukerjee* was confirmed by the Privy Council in AIR 1914 150 (Privy Council) the Privy Council judgment puts an interpretation on the judgment of Sir Lawrence Jenkins in *Amlook Chand Parrack*

v. Sarat Chunder Mukerjee, at p. 921, in the following terms :--

The learned Chief Justice was also of opinion that if the decree had been an incomplete one, a further decree being required, then Article 181 of the Act of 1908 (Limitation Act) 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.

8. I may add that in *Amlook Chand Parrack v. Sarat Chunder Mukerjee* the suit was on the Original Side of the High Court.

9. In *Pell v. Gregory* ILR (1925) Cal. 828 it was held that Article 183 did not apply to an application under Order XXXIV, Rule 6, that is, for a personal decree against the mortgagor for the deficit. It was held that that was not an application for the enforcement of a judgment, decree or order of this Court. It was pointed out that the preliminary decree did not contain a decree for payment by the mortgagor personally of the balance which would be found due. It merely gave liberty to apply for a personal decree, and that the application was really an application in the original suit for a new decree. No doubt in that case it was stated that there was no analogy between an application for a final decree for sale under Order XXXIV, Rule 5(2) and an application for a personal decree under Order XXXIV, Rule 6. But the observations of Mr. Justice Rankin in his judgment in that suit, in my opinion, show that the argument of the plaintiff that as the words in Article 183 are different from those in Article 182 the former article applies to an application for final decree for sale must be rejected. Mr. Justice Rankin there observes as follows (p. 846) :-

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.

10. In a recent case it was held in *M.A.L.M. Chettiar Firm v. Maung Po Hmyin* ILR (1935) Ran. 325 where the suit was on the Original Side of the Rangoon High Court, that an application for a final decree in a mortgage suit is not an application to enforce a preliminary decree that has already been passed. It was pointed out that under the Transfer of Property Act the decree directed that the property should be sold on default being made by the mortgagor, but under the CPC no right of sale accrues under the preliminary decree to the mortgagee. The right that is given is to apply for a final decree for sale. It was held that such an application fell within Article 181. It is interesting to note that the argument which is now advanced on behalf of the plaintiff was there advanced in support of the contention that Article 183 applies, but that argument was not accepted.

11. I held that the present application is not governed by Article 183.

12. Both the above contentions of the plaintiff failing, it is not disputed that the

case must fall under Article 181 of the Indian Limitation, Act. That being so, I hold that the present application is barred by the law of limitation.

13. The plaintiff applies that final orders on this application may be deferred for a short time in order to enable the plaintiff to consider his position in the light of the above judgment and to make such application to the Court as he may be advised. I accordingly defer passing final orders to September 16, 1937.

14. September 21, 1937. After I delivered the above judgment on September 14, 1937, the plaintiff applied that I should defer passing final orders on the notice of motion in order to enable the plaintiff to consider his position in the light of the judgment. Accordingly, I deferred passing final orders on the notice of motion. To-day counsel for the plaintiff applies under Order XXIII, Rule 1, for leave to withdraw the suit. This is opposed by counsel for defendant No. 6 on the ground that no formal application for that purpose is before the Court, and that he has received no notice of this application. I cannot deal with any such application now. Any right which the plaintiff may have to apply for withdrawal of the suit or to make any other application or to take any other proceeding to enforce any right which he may still have, in my opinion, will not be affected by the order which I make on the notice of motion for final decree for sale. The motion having been argued, and I having found that the application is barred by the law of limitation, I must dismiss the notice of motion with costs which I do. In view of two adjournments which were asked for by the plaintiff for his own convenience and which have necessitated further costs to defendant No. 6, I fix the costs of the notice of motion at Rs. 250.