

(1920) 12 AHC CK 0011
In the Allahabad High Court

Thakur Gayan Singh and Others

APPELLANT

Vs

Ata Husain and Others

RESPONDENT

Date of Decision : 08-12-1920

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 7, Order 41 Rule 33, Order 41 Rule 4

Citation : 60 Ind. Cas. 817

Hon'ble Judges : P.C. Banerji, J;Gokul Prasad, J

Bench : Division Bench

Judgement

1. This appeal arises out of an application for final decree in a mortgage suit. The application which is now the subject matter of controversy was presented on the 12th of June 1917. The question is, whether this application was time-barred. The preliminary decree in the suit was made on the 20th of April 1912. The suit was brought to enforce a mortgage against some of the properties comprised in the mortgage on the ground that the other properties had been purchased by the mortgagees themselves. The Court in making its decree declared the liability of each of the properties against which the mortgage was sought to be enforced, and it also declared in its decree that each of those properties would be liable for a proportionate part of the amount found to be due upon the mortgage. Those amounts were specified in the decree and the property which was to be liable for those amounts was also specified. Six months was granted to the mortgagors for payment of those amounts. There was a further provision in the decree that the decree-holders would not be entitled to bring the property to sale unless they paid the amount of a prior mortgage. The decree, however, did not fix any time within which the amount last mentioned was to be paid. It may be noted that the suit was brought upon a copy of the original mortgage which was alleged to have been lost. Three of the defendants appealed against this decree and their contention was that the loss of the original had not been cashed for and that the debt had been discharged. This appeal was preferred only in respect of the amount which the three appellants had been ordered to pay on account of the

ownership of the property which, was held to be liable for that amount. The Appellate Court, which was the High Court, held that the loss of the original had not been accounted for and that the suit was, therefore, not maintainable and on this ground dismissed the suit as against the appellants. As against the other defendants, to the suit who were no parties to the appeal to the High Court and who themselves had preferred no appeal, the High Court made no order. The decree of the High Court has passed on the 6th of July 1914. An application for a final decree was made on the 7th of April 1915 by all the decree holders except the Court of Wards. The Court of Wards, however, was named as an opposite party to the application. That application was dismissed for default and subsequent applications made with the object of having the application of the 7th of April 1915 restored and revived were also dismissed. After these proceedings had taken place, the present application of the 12th of June 1917 was presented by all the decree holders. The Court below has dismissed the application and we have to consider whether the decision of that Court is right. It is not disputed that the limitation applicable to an application of this kind is that provided by Article 181 of the First Schedule to the Limitation Act, and the period of limitation is three years from the date on which the right to apply accrued. We have, therefore, to determine when the right of the present decree holders to make an application for a final decree in the cause arose. It may be taken as settled law that the right to apply for a final decree accrued to the decree holders when the preliminary decree became conclusive between the parties. We have, therefore, to consider in this case when the decree of the Court of first instance became conclusive as between the decree-holders and the judgment debtors against whom the present application has been made. It is contended that the preliminary decree could not have become final as between the parties to the present appeal until the decision of the High Court in the appeal, which was preferred by the three judgment-debtors who obtained a decree in the High Court. This contention is based mainly upon the provisions of Order XLI, Rule 33, of the Code of Civil Procedure. It is urged that, since some of the judgment-debtors preferred an appeal to the High Court, the whole of the decree became sub judice and that it was competent to the High Court to dismiss the suit as against all the defendants and, until the final decision of the High Court, it could not be binding that the decree against those defendants who had not appealed had become final. We are unable to agree with this contention. Under Order XLI, Rule 4, the Appellate Court could, upon the appeal of some of the parties, reverse the decision of the lower Court if the appeal had been preferred against the whole decree and if the Court had proceeded upon a ground common to all the parties. In the present case the appeal that was preferred by three of the defendants was limited to that part of the decree which directed their property to bear a proportionate part of the decretal amount and it was not an appeal against the whole decree. Therefore, although the Court of first instance had proceeded upon a ground common to all the defendants, the Appellate Court could not have reversed the decree under Order XLI, Rule 4. Mr. Part Lal Banerji, who has ably argued this case on behalf of the appellants, concedes that Rule 4

of Order XLI would not apply, but, he rests his contention upon the provisions of" Rule 33 of that Order. We think that he cannot avail himself of the provisions of that rule and that the Appellate Court, in the appeal preferred by some of the defendants in respect if only a part of the could not, by virtue of the provisions of Rule 33, have dismissed the suit against those defendants which had in fact submitted to it. The principle of the Fall Benoh.ruling in Rang am Lal v. Jhandu 11 Ind. Cas. 640 : 34 A. 32 : 8 A.L.J. 1111 applies to this case. There being a distinct provision as to the power of an Appellate Court to interfere with the decision of the Court of fusty instance upon an appeal preferred by some of the defendants in certain cues the provisions of Rule 33 could not apply to cases for which clear provision is made in the order or to cases which would not come within the purview of the specific rule. We are, there fore of opinion that the decree of the Court of first instance did not become sub juice when an appeal was preferred to this Court by some of the defendants only. The appellants were, consequently, not entitled to reckon limitation from the date of the decision of the High Court, The decree of the Court of first instance was in fact a decree, which was a carbine ion of several decrees against separate sets of defendants for separate amounts. As regards those of the defendants who did not appeal, that decree become conclusive upon, the expiry of the period of limitation for an appeal from that decree. In the present case the decree allowed six months to the judgment-debtors to pay the amount decreed against each of them. That amount was payable on the 30th of October 1 12. The riearee, therefore, against the defendants who did not appeal became a final and conclusive decree as between the decree-holders an them on that date, the period of limitation for an appeal having expired before that date. As the present application was presented, more than three years after the day on which the preliminary decree became conclusive against the respondents, it is beyond time.

2. Another contention which was put forward on behalf of the appellants was, that the decree in directing (ho appellants to discharge the amount of a prior mortgage did not prescribe a particular period within which the prior mortgage was to be discharged and, therefore, as the decree holders could, not bring the mortgaged property to sale without payment of the amount of the prior mortgage their right (o apply for a final decree for the sale of the mortgaged property only accrued when they paid or tendered the amount of the prior mortgage. If this contention be carried to its legitimate length the decree-holders might wait for any number of years before they paid the amount of the prior mortgage. But Mr. Banerji fairly aonoedes that, although no date was fixed in the decree for payment of the amount of the prior mortgage, it ought to have been paid or tendered within a reasonable time. It is clear that the decree, in BO far as it directed payment of the amount no the prior mortgage, was a decree for the redemption of that mortgage. The period within which the amount of the mortgage could be paid for redemption, as prescribed in Order XXXIV, Rule 7, is a period within six months of the decree, so that the maximum period within which the amount of the prior mortgage could be paid for redemption of that

mortgage was six months. If we adopt Mr. Pearey Lal Banerji's contention that the period should be a reasonable period we are unable to hold that that period should be anything more than the period mentioned in Rule 7, Order XXXLV, i.e., a period of fix months. If limitation be computed from the expiry of that period the present application would be beyond tern, For these reasons, we hold that the Court below was right in dismissing the application made by the decree holders and this appeal must fail. We dismiss it with costs including fees on the higher scale.