

(1922) 04 CAL CK 0008
In the Calcutta High Court

Uma Charan Chakrabarti and Others

APPELLANT

Vs

Nibaran Chandra Chakrabarti

RESPONDENT

Date of Decision : 26-04-1922

Acts Referred:

Citation : AIR 1923 Cal 389 : 75 Ind. Cas. 2

Hon'ble Judges : Chotzner, J;Asutosh Mookerjee, J

Bench : Division Bench

Judgement

1. This is an appeal against the final decree in a mortgage suit for sale. The decree has been assailed on the ground that it was made on the basis of an application under Order XXXIV, Rule 5, Sub-rule (ii), of the CPC which was presented after the lapse of the prescribed time. To test the validity of this argument, it is necessary to refer to the salient facts in this case. The preliminary decree was made on the 16th July 1914 u/s 96 of the Code of Civil Procedure, an appeal lay against this decree. Indeed, u/s 97 if an appeal was riot preferred, the defendants would not be competent to challenge its correctness in an appeal against the final decree. An appeal was consequently lodged in this Court. The appeal was heard on the merits and the Court came to the conclusion that the decision of the Trial Court could not be successfully assailed. The result was that the decision of the Trial Court was affirmed and the appeal was dismissed with costs on the 30th May 1917. On the 24th March 1920, the present application was made under Order XXXIV, Rule 5, Sub-rule (ii), in order that a final decree might be passed. The defendants urged that the application was barred by limitation under Article 181 of the Schedule of the Indian Limitation Act, inasmuch as it had been presented more than three years after the 16th July 1914, when the preliminary decree had been made by the Primary Court. The Subordinate Judge overruled this contention on the authority of the decision in Gajadhar Singh v. Kishen Jiwan Lal 42 Ind. Cas. 93 : 39 A. 641 : 15 A.L.J. 734. It has not been disputed before us that the contention of the appellants is opposed to the decisions in Gajadhar Singh v. Kishen Jiwan. Lal 42 Ind. Cas. 93 : 39 A. 641 : 15 A.L.J. 734 Nizam-ud-din Shah v. Bohra Bhim Sen 43 Ind. Cas.

870 : 49 A. 203 : 16 A.L.J. 85 and Jayanti Venkayya v. Damiseti Sathiraju 64 Ind. Cas. 470 : 44 M. 714 : 41 M.L.J. 71 : 14 L.W. 180. These cases are authorities for the proposition that, when a preliminary decree in mortgage suit has been affirmed on appeal, an application made within three years of the date of the affirmance with a view to make a final decree is within the period prescribed under Article 181 of the Schedule of the Indian Limitation Act. We have been asked to hold, however, that these cases were erroneously decided and that they are contrary to the principle recognised by the Judicial Committee in *Hukum Chand Boid v. Pirthichand Lal* 50 Ind. Cas. 444 : 46 C. 670 : 30 C.L.J. 71 : 17 A.L.J. 514 : 36 M.L.J. 557 : C.W.N. 721 : 21 Bom. L.R. 632 : (1919) M.W.N. 258 : 36 M.L.T. 131 : 10 L.W. 416 : 46 I.A. 52 (P.C.). In our opinion, this contention is not well founded.

2. We shall assume, for the purposes of the present case, that an application to make final a decree in a mortgage suit is governed by Article 181 which provides that applications for which no period of limitation is provided elsewhere in the Schedule or by Section 48 of the Code of Civil Procedure, 1908, must be presented within three years from the date when the right to apply accrues. On behalf of the appellants, it has been contended that as by the preliminary decree the mortgagors were permitted to redeem within six months from the date of the decree, that is, on or before the 16th January 1915, the decree-holders were bound to apply to make the decree final within three years from the 16th January 1915, that is, on or before the 16th January 1918. It may be conceded that this contention is, *prima facie*, well founded. But that does not justify the conclusion that the appellants are entitled to succeed in their content on. We cannot overlook the events which have happened between the 16th January 1915 and 16th January 1918. The appeal preferred by the defendants in this Court had been dismissed on the 30th May 1917, and it is incumbent on the Court to consider the legal effect of the decision of this Court on the rights of the parties.

3. We may usefully recall here the lucid exposition given by Mr. Justice Dwarkanath Mitter in *Ram Charan v. Lukhi Kant* 7 B.L.R. 704 at p. 714 : 16 W.R. 1 of the true effect of the disposal of an appeal upon the decree of the Primary Court. If the decree of the lower Court is reversed by the Appellate Court, it is absolutely dead and gone; if on the other hand, it is affirmed by the Appellate Court it is equally dead and gone, though in a different way, namely, by being merged in the decree of the superior Court which takes its place for all intents and purposes; both the decrees cannot exist simultaneously. This is in accord with the view expounded by Scotland, C.J., in *Arunachella v. Veludayan* 5 M.H.C.R. 215 and was subsequently adopted by the majority of the Full Bench in *Muhammad Sulaiman v. Muhammad Yar Khan* 11 A. 267 : (1889) A.W.N. 55 : 13 Ind. Jur. 427 : 6 Ind. Dec. 598 where the observations of the Judicial Committee in *Kristo Kinkur Roy v. Rajah Burrodacaunt Roy* 14 M.I.A. 465 : 17 W.R. 292 : 10 B.L.R. 101 : 2 Suth. P.C.J. 564 : 3 Sar. P.C.J. 62 were explained.

4. This principle has been repeatedly approved and illustrations of its application will be found in Luchmun Persad Singh Kishun Persad Singh 8 C. 218 : 4 Sho L.R. 261 : 10 C.L.R. 425 : 4 Ind. Dec. 140 which was decided by a Full Bench of this Court and followed the decision of the Judicial Committee in Pitts v. La Fontaine (1881) 6 App. Cas. 482 : 50 L.J.P.C. 8 : 43 L.T. 519 in Muhammad Sulaiman v. Muhammad Yar Khan 11 A. 267 : (1889) A.W.N. 55 : 13 Ind. Jur. 427 : 6 Ind. Dec. 598 and Muhammad Sulaiman Khan V. Fatima 11 A. 314 : (1889) A.W.K. 107 : 6 Ind. Dec. 628 which were decided by two Full Benches of the Allahabad High Court; and in Rameswar v. Bhaba Sundari Debi 5 Ind. Cas. 304 : 11 C.L.J. 81 Aghora Kumar Ganguli v. Mahomed Musa 5 Ind. Cas. 723 : 11 C.L.J. 155 Brij Lal Singh v. Mahadeo Prasad 12 Ind. Cas. 669 : 15 C.L.J. 432 : 17 C.W.N. 133 Gajraj Mati v. Shami Nath 36 Ind. Cas. 307 : 39 A. 13 : 14 A.L.J. 853 Kailash Chandra Basu v. Girija Sundari Debi 14 Ind. Cas. 299 : 39 C. 925 : 16 C.W.N. 658 and Chandra Kanta v. Lakshman Chandra 36 Ind. Cas. 460 : 24 C.L.J. 517 : 21 C.W.N. 430; which review many of the earlier decisions on the subject and show that the doctrine is supported by the judgment of the Judicial Committee in Brij Narain v. Tejbai Bikram 6 Ind. Cas. 669 : 37 I.A. 70 : 11 C.L.J. 560 : 32 A. 295 : 14 C.W.N. 667 : 7 A.L.J. 507 : 12 Bom. L.R. 444 : 8 M.L.T. 57 : 20 M.L.J. 587 : (1910) M.W.N. 392 .

5. The decisions of the Judicial Committee in Batuk Nath v. Munni Dei 23 Ind. Cas. 644 : 41 I.A. 104 : 19 C.L.J. 574 : 36 A. 284 : 18 C.W.N. 740 : 12 A.L.J. 596 : 16 Bom. L.R. 360 : 27 M.L.J. 1 : 16 M.L.T. 1 : 1 L.W. 729 : (1914) M.W.N. 437 and Abdul Majid v. Jawahir Lal 23 Ind. Cas. 649 : 36 A. 350 : 12 A.L.J. 624 : 16 Bom. L.R. 395 : 18 C.W.N. 963 : 19 C.L.J. 626 : 27 M.L.J. 17 : (1914) M.W.N. 485 : 16 M.L.T. 44 : 1 L.W. 483 are clearly distinguishable, as based on a recognition of the principle that dismissal of an appeal for default is not an affirmance of the decree; to the same class belong the decisions in Patloji v. Ganu 15 B. 370 : 8 Ind. Dec. 252 Bhola Nath v. Kanti Chundra 25 C. 311 : 1 C.W.N. 671 : 13 Ind. Dec. 208 Kailash Chandra Basu v. Girija Sundarl Debi 14 Ind. Cas. 299 : 39 C. 925 : 16 C.W.N. 658 and Syam Mandal v. Satt Nath 38 Ind. Cas. 493 : 44 C. 954 : 24 C.L.J. 523 : 21 C.W.N. 776. These decisions do not militate against or weaken the effect of the two decisions of the Judicial Committee in Kristo Kinkur Roy v. Rajah Burrodacaunt Roy 14 M.I.A. 465 : 17 W.R. 292 : 10 B.L.R. 101 : 2 Sut P.C.J. 564 : 3 Sar. P.C.J. 62 and Brij Narain v. Tejbai Bikram 6 Ind. Cas. 669 : 37 I.A. 70 : 11 C.L.J. 560 : 32 A. 295 : 14 C.W.N. 667 : 7 A.L.J. 507 : 12 Bom. L.R. 444 : 8 M.L.T. 57 : 20 M.L.J. 587 : (1910) M.W.N. 392 . The decision of the Judicial Committee in Hukum Chand Boid v. Pirthichand Lal 50 Ind. Cas. 444 : 46 C. 670 : 30 C.L.J. 71 : 17 A.L.J. 514 : 36 M.L.J. 557 : C.W.N. 721 : 21 Bom. L.R. 632 : (1919) M.W.N. 258 : 36 M.L.T. 131 : 10 L.W. 416 : 46 I.A. 52 is also clearly distinguishable. In this case, a claim was put forward for compensation on the ground of failure of consideration by cancellation of the sale. It was ruled that the right to claim compensation had accrued on the date of the cancellation of the sale, by the Primary Court and that the person entitled to the compensation could not claim

extension of time on the ground that an appeal had been preferred from the proceedings for reversal of the sale for there was no suspension of the right as in *Hemendra Mohan Khashnabis v. Noresh Chandra Battacharjee* 62 Ind. Cas. 418 : 33 C.L.J. 260 : 25 C.W.N. 376 which followed *Ranee Sumo Moyee v. Shooshee Mokhee Burmonta* 12 M.I.A. 244 : 11 W.R.P.C. 5 : 2 B.L.R.P.C. 10 : 2 Suth. P.C.J. 173 : 2 Sar. P.C.J. 424 : 20 E.R. 331 : 1 Ind. Dec. 489 *Prannath Roy Chowdhury v. Rookea Begum* 7 M.I.A. 323 : 4 W.R.P.C. 37 : 1 Suth P.C.J. 367 : 1 Sar. P.C.J. 692 : 19 E.R. 331 and *Nrityamoni Dassi v. Lakhan Chunder Sen* 33 Ind. Cas. 452 : 43 C. 660 : 20 C.W.N. 522 : 30 M.L.J. 529 : (1916) 1 M.W.N 332 : 3 L.W. 471 : 18 Bom. L.R. 418 : 34 C.L.J. 1 : 20 M.L.T. 10 (P.C.).

6. In the case before us, the facts are entirely different. The plaintiffs seek to make final a preliminary decree in a mortgage suit. The question is, which is the preliminary decree that can be made absolute at the date of the application? In the first place, it is manifest that the only decrees which is operative and can be affirmed or the date of the application is the decree of the High Court made on the 30th May 1917, and, consequently, time ran not from the 16th July 1914, but from the 30th May 1917. The common principle which governs all the cases is, that the time runs from the date of the ultimate decree which termates the litigation and becomes, as soon as it is passed, the only operative decree between the parties, as was pointed out in *Sashikanta Acharyya V. Sarat Chandra* 70 Ind. Cas. 6 : 34. C.L.J. 415 at P. 427. If a contrary view were adopted, it would be impossible to reconcile the cases on the subject. Our attention has finally been drawn to the case of *Basanta Kumar v. Radha Rani Dasi* 70 Ind. Cas. 735 : 26 C.W.N. 440 : 36 C.L.J. 159 : AIR 1922 C. 329 which appears to be an authority for the proposition that, when time is allowed by the decree of the Court of first instance for the performance of an act, the time is not extended by the dismissal of the appeal preferred against that decree. This view does not touch the question in controversy before us. But we may point out that there is much divergence of judicial opinion on the subject, as pointed out in the case of *Sashikanta Acharyya v. Sarat Chandra* 70 Ind. Cas. 6 : 34. C.L.J. 415 at P. 427. The balance of judicial opinion is in favour of the view that, when time is fixed by the lower Court for payment of money and the decree of the lower Court is confirmed on appeal, the time for payment runs from the date of the decree of the Appellate Court though the latter decree does not expressly provide that the time for payment should be calculated from the date of the appellate decree. We need not, for the purpose of the present case, discuss whether the decisions which take the contrary view may be defended on principle.

7. We hold accordingly, that the view taken in *Gajadhar Singh v. Kishen Jiwan Lal* 42 Ind. Cas. 93 : 39 A. 641 : 15 A.L.J. 734 *Nizam-ud-din Shah v. Bohra Bhim Sen* 43 Ind. Cas. 870 : 49 A. 203 : 16 A.L.J. 85 and *Jayanti Venkayya v. Damiseti Sathiraju* 64 Ind. Cas. 470 : 44 M. 714 : 41 M.L.J. 71 : 14 L.W. 180 is well-founded and should be adopted.

8. The result is, that the decree made by the Court below is affirmed and this

appeal dismissed with costs.

9. The order for stay of sale will stand discharged.