(1910) 05 CAL CK 0050

Calcutta High Court

Case No: None

Madhab Moni Dasi		APPELLANT
	Vs	
Pamela Lambert		RESPONDENT

Date of Decision: May 10, 1910

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 34 Rule 3
- Limitation Act, 1877 - Article 178
- Limitation Act, 1908 - Article 181
- Transfer of Property Act, 1882 - Section 86

Citation: 6 Ind. Cas. 537

Hon'ble Judges: Mookerjee, J; Carnduff, J

Bench: Division Bench

Judgement

1. The substantial question of law which calls for decision in this appeal is, whether an application for order absolute for foreclosure of a decree nisi in a mortgage suit made in favour of the appellant on the 30th March 1904, is barred by limitation. The circumstances under which the question arises for decision, are matters of record, and do not admit of any doubt or dispute. On the 30th September, 1901, one Amrita Nath Mitter and his sister-in-law Madhab Moni Dasi, as administrators of the estate of Dwarka Nath. Mitter, commenced an action to enforce a mortgage security against Pamela Lambert. They joined as parties defendants, the mortgagor and a purchaser of the equity of redemption, as also two daughters of the mortgagor, who subject to the life-interest of their mother, had apparently a right to maintenance out of the estate of their father held by her. On the 30th March 1904, the suit was decreed against the first two defendants, the mortgagor and her assignee, and the usual directions for foreclosure of the life-interest of the mortgagor in. the mortgaged premises were given, in the event of her failure to redeem the property within the 30th September 1904. The suit was, however, dismissed against the third and fourth defendants, the daughters of the mortgagor

and a decree was made in their favour for the costs of the litigation. The result was that there was a decree for foreclosure of the life-interest of the mortgagor in favour of the representatives of the mortgagee, and there was also a decree for costs against the latter in favour of the daughters of the mortgagor. An appeal was preferred against this decree by Amrita Nath Mitter, but on the 5th March 1907, the appellant obtained leave to withdraw the appeal. On the 9th September 1903, the other plaintiff Madhab Moni Dasi, who was not only the administratrix of the estate left by the mortgagee, but as his widow was beneficially interested therein, applied for an order absolute for foreclosure on the basis of the decree nisi. Notices were directed to be issued, with the result that on the 19th December 1908, one Livinia Ashton, the aunt of the daughters of the mortgagor, appeared and objected that the decree nisi had been purchased by her at a sale in.execution of the decree for costs held by the daughters of the mortgagor against the plaintiffs, representatives of the mortgagee that such sale had been held on the 11th August 1908 and had been confirmed on the 4th November 1903, so that as purchaser of the decree nisi, she alone was competent to apply for an order absolute for foreclosure. Madhab Moni Dasi, thus apprised for the first time of the execution-sale, applied, on the 2-3rd December 1908, for reversal of the sale on the ground that it had been brought about by fraud and was vitiated by grave irregularities. Livinia Ashton, meanwhile on the 19th and 21st December 1908, had applied for substitution for her name as decree-holder, and for order absolute for foreclosure on the basis of the decree purchased by her. In view of this application, the Subordinate Judge on the 19th December, dismissed the application of Madhab Moni for order absolute. On the 7th July 1909, the sale was set aside at the instance of Madhab Moni, and the application of Livinia Ashton made on the 31sfc December, 1908, for order absolute was dismissed. On the day following, the 8th July, 1909, Madhab Moni Dasi, as decree-holder, applied for order absolute, but no orders were passed on the application. Livinia, Ashton subsequently on the 13fch July, 1909, appealed to this Court against the order of reversal of the sale. This appeal was dismissed and the order of the Court below was affirmed on the 2nd February 1910 Livinia Ashton v. Madhab Moni Dasi 14 C.W.N. 560 : 11 C.L.J. 489 : 5 Ind. Cas. 390. On the 10th February 1910, Madhab Moni Dasi applied that the application of 8th July, 1909, might be taken into consideration, and an order absolute for foreclosure made in her favour. The judgment-debtors interposed the objection of limitation, and on the 5th March, 1910, this objection was allowed by the Subordinate Judge. The decree-holder has now appealed to this Court, and on her behalf the decision of the Subordinate Judge has been assailed substantially on two grounds: Namely, first, that the applications of the decree-holder made on the 8th July 1909, and 10th February, 1910, should be treated in substance as applications for revival or continuation of the original application for order absolute made on the 9th September, 1908; and, secondly, that, even if either of these two applications of 1909 and 1910, be treated as an independent application, it is not barred by limitation, as Article 181 of the First Schedule of the Limitation Act of 1908 does not

govern applications in pending suits by which the Court is invited to make the final decree. It has further been suggested that the Limitation Act of 190i, has not retrospective operation so as to affect vestad rights enjoyed by the appellant before the Act came into operation. In our opinion, the appellant is entitled to succeed on the first arid second grounds urged on her behalf, and that in this view it is unnecessary to examine her third contention.

2. In support of the first contention of the appellant, it has been argued that under the law as it stood, before the CPC of 1908, and the Limitation Act of 1908, came into operation, there was no rule of limitation applicable to an application for order absolute of a decree nisi made u/s 86 of the Transfer of Property Act. This position has not been and cannot be controverted on behalf of the respondent, in view of the decision of this Court in Tiluck Singh v. Parsotein Proshad 22 C. 924, which has been accepted as good law in Rahmab Karim v. Abdul Karim 6 C.L.J. 119 : 34 C. 672 : 11 C.W.N. 674. It is manifest, therefore, that the application of the 9th September, 1908, was not open to objection on the ground of limitation. It is contended, however, by the learned Vakil for the respondent that that application was properly dismissed, and the subsequent applications of the 8th July, 1909, and 10i.h February, 1910, are open to objection on the ground of limitation as they were made after the CPC of 1908 had come into force, by which, it is suggested, a fundamental alteration was effected in the law. In answer to this contention, it has been urged by the learned Vakil for the appellant that the applications of 1909 and 1910, should be treated in substance as applications for revival or continuation of the application of the 9th September 1908. In our opinion, this contention is well-founded and must prevail. It is clear, as shown by subsequent events, that on the 9th September, 1908, the decree-holder was competent to apply for order absolute. No doubt, by reason of a fraudulent execution sale, her title had vested in the auction-purchaser, but when the sale was subsequently reversed, the parties were restored to the position which they would have occupied if the sale had never taken law. In other words, although the order of the 19th December, 1908, by which the application of the appellant for an order absolute was dismissed, was right, when tested in the light of the facts then apparent on he record, he order was in substance erroneous to put the matter in another way, the Court would have acted prudently and with the least chance of hardship to the petitioner if the appeal on had been adjourned so as to enable the petitioner to have the validity of the sale tested by an appropriate proceeding In all such matters, we must look more to the substance of the proceeding than to the mere form of it. In our opinion, the present case is within the principle recognised in numerous cases of high authority, that an application for execution of a decree may be treated as in continuation or for revival o a previous application similar in scope and character, the consideration of which Ws been interrupted by the intervention of ob Sections and claims subsequently proved to be groundless or has been suspended by reason of an injunction or like obstruction In support of this view, reference may be made to the decision of the Judicial Committee in the case of

Sheikh Kamaruddin Ahmad v. Jawahir Lal 1 C.L.J. 381 : 27 A 334 : 32 I.A. 102 : 15 M.L.J. 258 : 9 C.W.N. 601 : 2 A.L.J. 397 : 7 Bom. L.R. 433 and to the cases of Rudra Narain Guria v. Pachu Maity 23 C. 437; Narayan v. Sono 24 B. 348, and Rahim Ali Khan v. Phulchand 18 A. 482. This view is really not inconsistent with that taken in Miraj-ud-din 11 B.H.C.R. 206, which was decided under the Limitation Act of 1859, and merely ruled that in the period during which it has remained under attachment cannot be deducted. Reference may be made particularly to the case of Suppa Reddiar v. Avudai Ammal 28 M. 50 (F.B.), which shows that a second application for execution may be treated as a continuation of the previous application, even though such application was formally dismissed as the result of an order adverse to the decree-holder in a claim ease, and the consequent necessity for a suit by him which ultimately succeeded. See also Paras Ram v. Gardner 1 A. 355. The present case is, from one point of view, much stronger than any to which reference has been made. Here, as soon as the application by the original decree-holder was dismissed on the ground that her interest had passed by execution sale to Livinia Ashtou, she forthwith applied for an order absolute; this remained pending till the disposal of the application for reversal of the sale and as soon as that application succeeded arid her application for order absolute was dismissed, the original decree-holder again applied for order absolute. The result was that from the 9th September, 1908, there has been before the Court, without any interruption, an application for order absolute by either the original decree-holder or by the purchaser of her interest at the execution sale. The Court did not await the result on the application for reversal of the sale, but dismissed the first application, and as soon as the sale was reversed, dismissed the second application by the purchaser, and entertained at the same time an application by the original decree-holder. The only reasonable view we can take of the proceedings, under such circumstances, is that the application of the 10th February, 1910, was in continuation of the application of the 8th July, 1903, which was in substance for revival of the application of the 9th September 1903, which had been dismissed on the 19th December, 1903. In this view, no question of limitation arises, and the Court below was clearly in error when it dismissed the application for order absolute as barred by limitation. It is not necessary, however, to rest our decision upon this ground alone, and we shall proceed to examine the second ground urged on behalf of the appellants.

3. The second ground urged on behalf of the appellants is that, even if the application of the 8th July, 1909, or that of the 19th February, 1910, be treated as an independent application for order absolute, it is not open to objection on the ground of limitation, because, Article 181 of the Schedule of the Limitation Act, even if it be assumed that the provisions of the Limitation Act of 1908 are applicable to a decree nisi made before the Act came into force, does not apply to an application of the character now before us. In answer to this contention, it has been argued by the learned Vakil for the respondent, that the transfer of Sections 86 and 87 of the Transfer of Property Act to the CPC of 1908 (Order XXXIV, Rules 2 and 3) has effected

a substantial alteration in the law in this respect, and that as one of the reasons given in cases decided, under the former law Ajudhia v. Baldeo 21 C. 818, Akikunnissa v. Roop Lal 25 C. 133; Wadia Gandhy v. Purshotam. Sivji 32 B. 1 : 9 Bom. L.R. 508; Tiluck Singh v. Porsotein 22 C. 924 Nagar v. Saudagar 57 P.R. 1908 : 115 P.W.R. 1908, in support of the view that Article 178 of the Limitation Act of 1877, did not govern applications for order absolute, namely, that Article 178 did not apply to applications not made under the provisions of the Civil Procedure Code, has ceased to be applicable, it ought to be held that Article 181 of the Limitation Act of 1908, applies to applications for order absolute under Order XXXIV, Rule 3, of the CPC of 1908. In our opinion, this argument is unsound and ought not to prevail. It may be conceded that Article 178 of the Limitation Act of 1877 did not apply to applications beyond the scope of the Civil Procedure Code, but it does not follow that that article or corresponding article of the Limitation Act of 1908, applies to all applications made in the course of a suit. It may be pointed out, in the first place, that the preamble to the Limitation Act of 1908 states expressly that the object of the Legislature was to consolidate and amend the law of limitation relating to only certain applications to Courts. In other words, the Limitation Act does not profess to provide for all kinds of applications to Courts whatsoever Govind Chunder Goswamy v. Rungunmoney 6 C. 60 : 6 C.L.R. 345; Sital Prosad v. Abdul Rashit 11 O.C. 208. The Act certainly does not apply to applications to the Court to do what the Court has no discretion, to refuse Kylasa Goundan v. Ramasami Ayyan 4 M. 172; Balaji v. Kushaba 30 B. 415 : 8 Bom. L.R. 218, nor can the provisions of the Act be held to apply to an application to the Court to terminate a pending proceeding, the final order in which has been postponed for the benefit of the defendant or for the convenience of the Court Puran Chand v. Roy Radha Kishen 19 C. 132. In cases of this class, it has been suggested that the right to make the application may indeed be deemed to accrue from moment to moment; if this view is adopted, any exception on the ground of limitation cannot obviously be supported. Govind Chunder v. Rungum Money 6 C. 60 : 6 C.L.R. 1908 : 115 P.W.R. 1908; Kedarnath Dutt v. Hara Chand Dutt8 C. 420; Ram Nath Bhattacharjee v. Uma Charan, Sircar 8 C.W.N. 756; Surender Keshub v. Khetter Krishto 30 C. 609; Chola Vadi Kotiah v. Polori Alamelamma 31 M. 71 : 3 M.I.T. 328 : 18 M.L.J. 46; Rahmat Karim v. Abdul Karim 6 C.L.J. 119 : 34 C. 672 : 11 C.W.N. 674. In our opinion, Article 181 of the Limitation Act of 1908 does not govern an application for order absolute under Order XXXIV, Rule 3, of the CPC 1908. In this view also, the application made by the appellant for order absolute of the decree nisi is not barred by limitation.

4. As the appellant is entitled to succeed on the first and second grounds taken on her behalf, it is needless to examine the third ground which raises a question of considerable nicety about the retrospective operation of the CPC and Limitation Act of 1908, whether they affect rights created by mortgage decrees made under the Transfer of Property Act before the legislation of 1908 came into force Konsilla v. Ishri Singh 7 A.L.J. 420 : 6 Ind. Cas. 18.

5. The result, therefore, is that this appeal is allowed, the order of the Court below is discharged, and as, it is admitted that nothing has been paid to the decree-bolder in satisfaction of the mortgage-decree, an order absolute for foreclosure is made in her favour. The appellant is entitled to her costs both here and in the Court below. We assess the hearing fee in this Court at five gold mohurs.