

PRIVY COUNCIL

Saiyid Jowai Hussain

Vs.

Gendan Singh

Privy Council Appeal No. 28 of 1924
(Viscount Dunedin, J. Lord Atkinson and Mr. Ameer Ali JJ.)

15.06.1926

JUDGMENT

VISCOUNT DUNEDIN J.

1. In this case the plaintiffs were mortgagees under a registered mortgage bond granted by the defendant. They raised action for the sum of Rs. 52,000 odd, said to be due under the mortgage. The defendant denied that the whole sum was due, as he said the plaintiffs had not given him credit for two sums of Rs. 11,000 odd and Rs. 8,000 odd, which he had paid, such payments having originally been endorsed on the bond, but the endorsements having been erased by the plaintiffs.

2. The Subordinate Judge gave effect to this contention, but made the ordinary preliminary decree for the sum of Rs. 19,000, being the sum due, with proper computation of interest, after allowing credit for the above-mentioned two sums. The date of this decree was 22nd February 1915. The six months of grace for payment would, therefore, expire on the 22nd August 1915. The mortgagees appealed against the decree. The appeal was heard, and the appeal dismissed on 21st May 1917.

3. On the 21st February 1919, application was made for a final decree. The defendants opposed the application on the ground that it was time-barred under Article 181 of the Schedule to the Limitation Act, 1908. The terms of that article of the Schedule are : Applications for which no period of limitation is provided elsewhere in this Schedule ; period of limitation three years ; time from which period begins to run, when the right to apply accrues.

4. The three years had expired or had not expired according as computation fell to be made, as the defendants urged, from the time fixed for payment by the original decree,

or, as the plain tiffs urged, from the date of the dismissal of the appeal. The Subordinate Judge gave effect to the contention of the plaintiffs.

5. On appeal the Court of appeal upheld the decision of the Subordinate Judge. The present appeal is against that judgment. The point, therefore, is simply whether the time runs, from the expiry of the time fixed by the original preliminary decree or from the date when on appeal against that decree the appeal was dismissed.

6. The appellant's counsel strenuously urged that the appeal was not against the decree, but only against the items in the decree. This is a complete mis understanding. An appeal must be against a decree as pronounced. It may be rested on an argument directed to special items, but the appeal itself must be against the decree and the decree alone. Which date is then to be preferred? Their Lordships, agree entirely with what was said by Banerji, J., in the case of *Gajadhar Singh v. Kishan Jiwan Lal*,

7. It seems to me that this rule - the rule regulating application for final decree in mortgage actions - contemplates the passing of only one final decree in a suit for sale upon a mortgage. The essential condition to the making of a final decree is the existence of a preliminary decree which has become conclusive between the parties. When an appeal has been preferred, it is the decree of the appellate Court which is the final decree in the cause.

8. These words are all the more weighty that previously the learned Judge had in the case of *Madho Ram v. Nihal Singh* held that when there had been an appeal against a preliminary decree, the limitation period applicable to an application for final decree ran from the expiry of the time for payment fixed by the original decree, and not from the disposal on appeal, a view which he candidly confessed in this case was erroneous. The point is put with admir able brevity by Tudball, J. :

When the Munsif passed the decree it was open to the plaintiff or the defendant to accept that decree or to appeal. If an appeal is preferred, the final decree is the decree of the appellate Court of, final 'jurisdiction. When that decree is passed, it is that decree and only that which can be made final in the cause between the parties.

9. The same view was incidentally taken without comment by this Board in the case of *Abdul Majid v. Jawahir Lal*, 10. Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal with costs.

Appeal dismissed.

Cases Referred.

[1917] 39 All. 641 : 42 I. C. 93 : 15 A. L. J. 734 (F. B.)

[1916] 38 All. 21 : 30 I. C. 494 : 13 A.L.J. 985

[1914] 36 All. 350 : 23 I. C. 649 : 12 A. L. J. 624 : 27 M. L. 3. 17 (P. C).