

## **PRIVY COUNCIL**

Maqbul Ahmad

Vs.

Onkar Pratap Narain Singh

P.C.A.No.44 of 1932

(Lords Tomlin, Thankerton, CJ. Russell Of Killowen, J.Sir Lancelot Sanderson and Sir Shadi Lal JJ.)

07.02.1935

### **JUDGMENT**

#### **LORD TOMLIN J.**

1. This is an appeal from a decree of the High Court of Judicature at Allahabad dated 6th May 1929, by which a decree dated 29th April 1924, made by the Subordinate Judge at Basti was affirmed. The decree of the Subordinate Judge had dismissed the application of the decree-holder in a mortgage suit to have the preliminary decree in the suit made absolute. The present appeal is brought by representatives of the decree-holder since deceased, complaining of the decrees to which reference has been made. The facts of the case are shortly these. A preliminary mortgage decree was obtained on 7th May 1917, which was amended in some respects not material to be particularized on 22nd May 1917. There were a number of mortgagors interested in different villages comprised in the mortgage, and some of them appealed to the High Court against the preliminary decree. There were in fact two such appeals. One appeal succeeded, with the result that certain villages were excluded from the decree, and the suit of the mortgagee was dismissed as against those appellants. So far as they were concerned, that was the end of the matter. There was a second appeal, by which certain of the mortgagors sought to exclude other villages from the decree, and that appeal failed. The decrees of the High Court disposing of those appeals were made on 7th June 1920. After the decrees of the High Court dealing with the appeals in the way that has been indicated, the decree-holder proceeded to seek execution under the preliminary decree and between 23rd December 1920, and 8th November 1921, he was occupied with those proceedings. It was held that he was not entitled to proceed by way of execution under the preliminary decree, and that all he could do was to take

the proper steps to obtain a final decree in the suit. The Additional Subordinate Judge, before whose Court the mortgage suit was instituted and by whom the preliminary decree had been made, was, after the making of the preliminary decree, abolished and his jurisdiction was transferred to the Subordinate Judge at Basti.

2. At a later stage another Additional Judge was appointed, with specified jurisdiction, and on 20th June 1923, being the day after the end of the long vacation, the decree-holder made an application for a final decree for sale in the Court of the new Additional Subordinate Judge. His petition was returned to him on 6th August 1923, with intimation that he had presented it in the wrong Court, that the Additional Subordinate Judge had no jurisdiction, and that the Court of the Subordinate Judge at Basti was the proper Court in which to proceed. Accordingly, on the day on which he got back his petition, he presented it in the Court of the Subordinate Judge at Basti. When that application came on it was objected to upon the ground that it was out of time and barred by Article 181, Limitation Act, three years since 7th June 1920, having expired. The decree-holder however sought to escape from that defense by alleging that he was entitled to the exclusion of three periods in computing the prescribed period. The first period was from 23rd December 1920, to 8th November 1921, while he was seeking execution under the preliminary decree which he contended, ought to be excluded in computing the prescribed period under the provisions of Section 14 Limitation Act. The second period was from 20th May 1923, to 19th June 1923, being the period of the long vacation, which he claimed should have been excluded under the provisions of Section 4 Limitation Act. The third period was from 20th June 1923, to 6th August 1923, being the period between the date of the application to the Additional Subordinate Judge and the presentation of the petition to the Subordinate-Judge. That he urged should be excluded by virtue of section 14 Lim. Act.

3. The Courts in India have determined the matter against the appellants, the decree-holder's representatives, holding, that the period during which execution proceedings were proceeding cannot be excluded from the calculation under section 14, and that though the period from 20th June 1923 to 6th August 1923 ought to be allowed no allowance should be made in respect of the period which represents the long vacation, namely from 20th May 1923 to 19th June 1923. The result was that the application on 6th August 1923 was held to be out of time and barred by Article 181. The appellants before their Lordships' Board by their counsel have presented five propositions : firstly, that the period during which the execution proceedings were pending should be

excluded; secondly, that the vacation period should be excluded : thirdly, that the period up to 6th August which has in fact been allowed to the decree-holder was properly allowed to him; fourthly, that the application was in fact made to the proper Court on 20th June 1923 and that the Additional Subordinate Judge was the proper Judge to deal with it; and, lastly, that the Court had a general judicial discretion, outside the Limitation Act, to relieve a suitor from the provisions of the Act in a case where hardship is established. It will be convenient to call attention to the provisions of the relevant sections of the Limitation Act. They are Sections 3, 4 and 14 (2). By Section 3 it is provided :

" Subject to the provisions contained in Sections 4 to 25 inclusive, every suit instituted, appeal preferred and application made after the period of limitation prescribed therefor by the first schedule, shall be dismissed, although limitation has not been set up as a defence."

Section 4 provides :

" Where the period of limitation prescribed for any suit, appeal or application, expires on a day when the Court is closed, the suit, appeal or application, may be instituted, preferred or made on the day when the Court re-opens."

Section 14 (2) provides :

" In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court appeal, against the same party for the same relief, shall be excluded where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it."

4. If the appellants were entitled to succeed in regard to the first period, that is, from 23rd December 1920 to 8th November 1921, having regard to the length of that period, that would be sufficient for them. Their Lordships however are of opinion that the Courts in India were clearly right in the way they dealt with the point. It is impossible to say, apart from any other objection, that the application to obtain execution under the preliminary decree was an application for the same relief as the application to the Court for a final mortgage decree for sale in the suit. That being so, it is not permissible, on the basis of Section 14 in computing the period of limitation prescribed, to exclude that particular period. The second period is the period of the long vacation. In regard to that matter, the appellants seem to their Lordships to be in a position which is in the nature of a dilemma. It is to be noted that there is a marked distinction in form between Section 4 and Section 14. The language employed in

Section 4 indicates that it has nothing to do with computing the prescribed period. What the section provides is that, where the period prescribed expires on a day when the Court is closed, notwithstanding that fact, the application may be made on the day that the Court reopens; so that there is nothing in the section which alters the length of the prescribed period; whereas in Section 14, and other sections of a similar nature in the Act, the direction begins with the words : "In computing the period of limitation prescribed for any application," certain periods shall be excluded. It therefore seems to their Lordships that, where there is ground for excluding certain periods under Section 14, in order to ascertain what is the date of the expiration of the prescribed period, the days excluded from operating by way of limitation have to be added to what is primarily the prescribed period; that is to say, if the prescribed period is three years, and twenty days ought to be excluded in order to determine when the prescribed period expires, twenty days have to be added to the three years, and the date of the expiration of the prescribed period is thus ascertained. That being so, the appellants appear to be in this difficulty. They have been allowed, and (as their Lordships think), properly allowed, the period from 20th June 1923 to 6th August 1923. At p. 33 of the record, this passage in the judgment of the High Court appears :

" Even therefore if the three years and forty-eight days are counted from that date, the time, expired some time about 25th July 1923. That did not fall within the long vacation. It therefore follows that the plaintiffs are not entitled to the benefit of Section 4."

5. That view of the way to calculate the prescribed period seems to their Lordships to be correct; but, even if it were not correct and it were necessary to turn to Section 4, the language of Section 4 is such that it seems to their Lordships to be impossible to apply it to a case like the present. What it provides is that, where the period of limitation prescribed expires on a day when the Court is closed, the application may be made on the day when the Court reopens. In their Lordships' view that means the proper Court in which the application ought to have been made and, on that view of it, it is impossible to say that this application was made to the proper Court on the day on which that Court reopened. Therefore on either view of the case, the appellants necessarily fail in regard to that period. That would be enough to dispose of the appeal but for the fact that two further points have been put before their Lordships : First that the application was in fact made to the proper Court on 20th June.; and that the Additional Subordinate Judge was the proper Judge. The point does not appear to have been raised in the Courts in India. It was assumed, as a fact, that the Additional Subordinate Judge had no jurisdiction. There is no material before their Lordships

upon which they could entertain the suggestion that they should interfere with that finding and, in their view, that is a point which cannot be made here.

6. Secondly, it was urged that there was some sort of judicial discretion which would enable the Court to relieve the appellants from the operation of the Limitation Act in a case of hardship and that this was a case of hardship, and in particular because it was alleged that the decree-holder was in regard to the proceedings which he took by way of execution in some way misled by some mistake in the form of the preliminary decree. It is enough to say that there is no authority to support the proposition contention for. In their Lordships' opinion it is impossible to hold that in a matter which is governed by Act, an Act which in some limited respects give the Court a statutory discretion, there can be implied in the Court, outside the limits of the Act, a general discretion to dispense with its provisions. It is to be noted that this view is supported by the fact that Section 3 of the Act is peremptory and that the duty of the Court is to notice the Act and give effect to it, even though it is not referred to in the pleadings. Their Lordships only desire to add one other word, and it is this: that the decision which has been referred to in the case of *Basvanappa v. Krishnadas Govandhandsa*, cannot, in their view, be supported, having regard to the provisions of Sections 3, 4 and 14, Lim. Act. As counsel for the appellants referred to Section 5 of the Act and suggested that there was some discretion under that section which could be exercised by the Court in this case, it is right to say that in their Lordships' view that section has no application at all to the circumstances of this case. In the result therefore their Lordships are of opinion that the appeal should be dismissed, and they will humbly advise His Majesty accordingly. The costs of the appeal must be paid by the appellants.

Appeal dismissed.

Cases Referred.

1921 Bom 379=59 IC 743=45 Bom 443.