

# SUPREME COURT OF INDIA

Bhawanipore Banking Corporation, Ltd.

Vs.

Gouri Shankar Sharma

C.A.No. LI of 1949

(H.J.Kania,CJI., Saiyid Fazal Ali and M.Patanjali Sastri,JJ., M.C. Mahajan and S.R.Dass,JJ.,)

14.03.1950

## JUDGMENT

**Fazl Ali,J.,**

1. The only question to be decided in this appeal, which arises out of an execution proceeding, is whether the decree under execution is barred by limitation. The first court held that the decree was not barred, but the High Court has come to the opposite conclusion, and the decree-holder has, after obtaining a certificate under Section 110 of the Civil Procedure Code, appealed to this Court.

2. The facts may be briefly stated as follows. On the 21st August, 1940, a preliminary mortgage decree was passed ex parte in a suit instituted by the appellant to enforce a mortgage. On the 19th September, 1940, the judgment-debtor made an application under Order IX, rule, 13, of the Civil Procedure Code for setting aside the ex parte decree, but this application was rejected on the 7th June, 1941. On the 11th July, 1941, the judgment-debtor filed an application under Section 36 of the Bengal Moneylenders Act, for reopening the preliminary decree, but this application was dismissed for default of appearance on the 20th December 1941. Thereafter, a final mortgage decree was passed in favour of the appellant, on the 22nd December. The judgment-debtor then made an application under Order IX, rule 9, of the Civil Procedure Code for the restoration of the proceedings under Section 36 of the Moneylenders Act. The application was however dismissed on the 1st June, 1942, both on the ground that no sufficient cause for the nonappearance of the applicant and his failure to take steps in the proceedings was shown and on the ground that no purpose would be served by reopening the preliminary decree after the final decree had been passed. The judgment-debtor thereafter preferred an appeal to the High Court at Calcutta from the decision dismissing his application under Order IX, rule 9, but the appeal was dismissed for non-prosecution, on the 3rd July, 1944. On the 9th April, 1945, the appellant filed an application for executing the decree against the original judgment-debtor, though he had died previously, and this application was dismissed for default on the 11th May, 1945. On the 2nd June, 1945, the present application for execution was filed, and the question which we have to decide is whether this application is in time.

3. It is quite clear that the application for execution having been made more than three years after the date of the final decree, it must be held to be time-barred, unless, as has been contended before us, the case falls under either clause 2 or clause 3 of article 182 of the Indian Limitation Act. Under these clauses, time to make the application begins to run from

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"2. (Where there has been an appeal) the date of the final decree or order of the appellate Court, or the withdrawal of the appeal, or

3. (Where there has been a review of judgment) the date of the decision passed on the review....."

4. It is contended that the case is covered by clause 3, and the ground urged in support of this contention is that the application made by the judgment-debtor for the reopening the preliminary mortgage decree under Section 36 of the Moneylenders Act must be regarded as an application for review and time should be held to run from the date of the final order passed in the proceedings connected with that application. In our opinion, there is no substance in this contention. The important words in clause 3 of article 182 are : (1) "where there has been a review" and (2) "the decision passed on the review". These words show that before a case can be brought under article 182, clause 3, it must be shown firstly that the court had undertaken to review the relevant decree or order and secondly, that there has been a decision on the review. In the present case, even if it be assumed that the word "review" has been used in article 182 in a large sense and that the application for reopening the decree under Section 36 of the Bengal Moneylenders Act was an application for review, the appellant cannot succeed, because the court never undertook or purported to review the decree in question. What actually happened was that the application under Section 36 for reopening the preliminary decree (not the final decree which is the decree sought to be executed) was dismissed for default and the application under Order IX, rule 9, of the Civil Procedure Code for the restoration of the proceedings under Section 36 of the Moneylenders Act was also dismissed. Even if the fact that the judgment-debtor's application under Section 36 was directed against the preliminary mortgage decree is overlooked, that application having been dismissed for default, the court never had occasion to apply its mind to the question as to whether the decree could or should be reopened, and hence it cannot be said that the "there has been a review" of the decree. The proceedings under Order II, rule 9, of the Code of Civil Procedure are not material to the present discussion, because they did not involve a review of the decree under execution but a review, if it is at all possible to call it a review, (which, in our opinion, it is not), of the order dismissing the judgment-debtor's application under Section 36 for default.

5. It was also suggested by the learned counsel for the appellant that the case might be held to be covered by clause 2 of article 182 on the ground that, even though no appeal was preferred from the final mortgage decree, the words "where there has been an appeal" are comprehensive enough to include in this case the appeal from the order dismissing the application under Order IX, rule 9, of the Civil Procedure Code, made in connection with the

proceedings under Section 36 of the Moneylenders Act. This argument also is a highly far-fetched one, because the expression "where there has been an appeal" must be read with the words in column 1 of article 182, viz., "for the execution of a decree or order of any civil Court....", and, however broadly we may construe it, it cannot be held to cover an appeal from an order which is passed in a collateral proceeding or which has no direct or immediate connection with the decree under execution.

6. In our view, this appeal has no substance, and we accordingly dismiss it with costs.  
Appeal dismissed.

Agent for the appellant : P. K. Chatterji.

Agent for the respondent : R. R. Biswas.