

# ALLAHABAD HIGH COURT

Gajadhar Singh

Vs

Kishan Jiwan Lal

(Pramada Charan Banerji, J. Tudball and Piggott , JJ.)

24.05.1917

## JUDGMENT

### **Pramada Charan Banerji, J.**

1. The question in this case is whether the application of the plaintiff decree holder for a final decree for sale under -order XXXIV, Rule 5, of the Code of Civil Procedure is or is not barred by limitation. The preliminary decree for sale was passed by the court of first instance on the 16th of May, 1911. The mortgagors were allowed six months from that date to pay the mortgage amount, so that the date fixed for payment was the 15th of November, 1911. The plaintiff, whose claim had only been partially decreed by the court of first instance, preferred an appeal to the lower appellate court, but that appeal was dismissed on the 3rd of November, 1911. He appealed to the High Court, and this Court affirmed the decree of the lower court on the 3rd of July, 1912. The present application was filed on the 22nd of June, 1915. Among the pleas raised on behalf of the defendants was the plea of limitation, and it was contended that the application had been filed beyond time. If limitation is to be computed from the date of the High Court's decree of the 3rd of July, 1912, the application is certainly within time. If, however, limitation is to be reckoned from the 16th of November, 1911, when the date fixed for payment by the court of first instance expired, the application would be beyond time. It is not disputed by either party that the article in schedule I of the Limitation Act applicable to the present application is Article 181. The present application being an application in the suit for a final decree, it is not an application for execution, and therefore the article applicable to an application for execution of decree does not govern it. We have, therefore, to consider whether the right of the plaintiff to apply for a final decree accrued when the decree of the High Court was passed or on the expiry of the six months allowed for payment by the court of first instance. Order XXXIV, Rule 5, provides that where payment is not made as directed by the preliminary decree for sale, "the court shall, on application made in that behalf by the plaintiff, pass a decree that the mortgaged property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in Rule 4." It seems to me that this rule 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. This is beyond controversy having regard to the decisions of the Full Bench of this Court in *Shohrat Singh v. Bridgman*<sup>1</sup> and *Muhammad Sulaiman Khan v. Muhammad Far Khan*<sup>2</sup>. The view taken in those cases was affirmed by their Lordships of the Privy Council in *Abdul Majid v. Jawahir Lal*<sup>3</sup> As has been already stated, if an appeal is preferred and the case is decided by the appellate court, the decree of the appellate court takes the place of the decrees of the subordinate courts where it affirms the decrees of those courts and the decrees of the subordinate courts are merged in the decree of the final court of appeal. Therefore, where a preliminary decree for sale is appealed to the High Court it is the decree of the High Court which must be deemed to be the preliminary decree that may be made final under Order XXXIV, Rule 5. In the present case the decree of the High Court, no doubt, affirmed the decree of the lower courts: but whether the decree of this Court is a decree of affirmance or modification of the decrees of the courts below, it is the final decree in the cause. It is this decree which in a suit for sale the plaintiff can seek to be made absolute and final. In the present case the plaintiff's application was to the effect that the decree of this Court should be made final. He applied for interest for the period subsequent to the decree of the first court and subsequent costs which could be added to the amount of the mortgage under Rule 10. These he could not have claimed before the decree of the High Court was passed. In the case of *Madho Ram v. Nihal Singh*<sup>4</sup> to which I was a party, it was no doubt held that the right of the decree-holder to apply for a final decree accrued upon the expiry of the term fixed for payment. I must confess that the considerations to which I have referred were overlooked in that case. Upon further consideration, I think the view taken in that case was not correct. It is impossible to hold that there can be more final decrees than one in a suit for sale upon a mortgage. Unless it be held that the right to apply for a final decree accrues when the decree of the appellate court is passed in a case in which an appeal has been preferred to the final court of appeal, it may be open to a party to apply for several final decrees in the same cause. That surely was not contemplated by the Legislature. In this view the appeal must prevail. I would allow it, set aside the orders of the courts below and remand the case to the court of first instance for disposal of the application of the plaintiff according to law.

**Tudball, J.**

2. I fully agree and there is very little that I can with advantage add to the judgement which has just been delivered, 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.

**Piggott, J.**

3. I concur.

4. The order of the Court is that the appeal is allowed the orders and decrees of the courts below are set aside, and the case is remanded to the court of first instance with directions to re-admit it under its original number in the register and to dispose of it according to law. Costs here and hitherto will be costs in the cause.

#### Cases Referred.

- 1(1882) I.L.R. 4 All. 376
- 2(1888) I.L.R. 11 All. 267
- 3(1914) I.L.R. 36 All. 350
- 4(1915) I.L.R. 38 All. 21