

CALCUTTA HIGH COURT

Pulin Chandra Sen

Vs.

Amin Miah Muzaffar Ahmad

(Guha, J.)

08.07.1932

JUDGMENT

Guha, J.

1. This appeal is directed against the decision of the learned Additional District Judge of Noakhali, affirming an order of the learned Subordinate Judge, Noakhali, passed on 17th March 1930, in Suit No. 104 of 1917, dismissing an application made by the appellant in this Court, for the passing of a final decree in the said suit for enforcement of a mortgage. The appellant was a minor at the time when the suit was instituted and was represented in the suit by his father as his next friend for the purpose of the suit. The preliminary decree in the suit was passed on 1st December 1917; and the period of grace expired on 1st June 1918. It appears that the father representing the plaintiff in the suit, the appellant before us, died and no step was taken to get a next friend appointed. The appellant, within three years from the date of his attaining majority, filed his application to the Court, on 30th November 1928, 1929? for a final decree in the suit. The primary Court, as mentioned above, dismissed the application on the ground that inasmuch as the application was not one for execution, Section 6, Lim. Act could not extend the time; that as the application was made more than three years after 1st June 1918, when the right to apply accrued, the application must be held to be barred by limitation. The learned Additional District Judge on appeal agreed with the view taken by the primary Court and dismissed the appeal before him.

2. There can be no doubt that the Courts below have rightly held that Section 6, Lim. Act, could have no application in the case before them: proceedings to obtain a final decree in a mortgage suit were not proceedings in execution, but were proceedings in the suit for enforcement of the mortgage: see *Ramji Lal v. Karan Singh*¹ and *Sital Singh v. Baijnath Prasad*², In the case before us, on [the death of the next friend after the passing of the preliminary mortgage decree, there was no appointment of any next friend to represent the minor plaintiff in the suit who attained majority on 4th January 1929. On the facts and in the circumstances of the case therefore regard being had to the provision contained in Clause 32, Rule 10, Civil Procedure Code, the

proceedings in the mortgage suit must be deemed to have remained in abeyance, as the position contemplated by law was the stay of proceedings in the suit, until the appointment of a next friend in the place of the next friend who was dead. The suit did not abate, and could not be treated as having been

¹(1917) 89 All 532

² AIR 1922 All 383: 75 Ind. Cas. 485

dismissed. It was incumbent upon the Court to appoint a new next friend or to treat the suit as a pending one, till the minor plaintiff attained majority: see *Venkateswara v. Chewseri*³ In the above view of the case before us, the application that was filed by the appellant on 30th November 1929, for a final decree for sale, and which was governed by Article 181, Sch. 1, Lim. Act, was within three years from the date when the right to apply accrued to him, on his attaining majority on 4th January 1929, up till which time the suit was to be deemed as a pending proceeding.

3. In our judgment the decision arrived at by the Courts below, that the application under Order 34, Rule 5, Civil Procedure Code, out of which this appeal has arisen, was barred by limitation is erroneous and unsustainable, and must be set aside, and we direct accordingly. In the result this appeal is allowed, the orders passed by the Courts below are set aside, and the case is remitted to the Court of the Subordinate Judge, so that the application made in that Court for the passing of a final decree for sale, in Suit No. 104 of 1917, may be dealt with on the merits, in accordance with law. The record of the case shows that there can be no objection to a final decree being passed in favour of the appellant, now that the decision of the Courts below on the question of limitation is set aside. The records of the case are to be returned without delay.

M.C. Ghose, J.

4. I agree.

³ AIR 1910 Mad 461