

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Heaton.

1913.

July 23.

DATTO ATMARAM HASABNIS (ORIGINAL APPLICANT), APPELLANT, v.
SHANKAR DATTATRAYA (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), Order XXXIV—Limitation Act (IX of 1908), Schedule I, Article 181—Consent decree—Instalments—Application for decree absolute for sale—Limitation.

An application for a decree absolute for sale of a mortgage charge under the terms of a consent decree, which provided for satisfaction of the decretal debt by instalments, is an application under the Civil Procedure Code (Act V of 1908), Order XXXIV, and is governed by Article 181, Schedule I, of the Limitation Act (IX of 1908). Such application must be made within 3 years from the time the right to apply accrues.

SECOND appeal against the decision passed by V. M. Ferrers, District Judge of Satara, confirming an order passed by K. N. Bhide, Subordinate Judge of Islampur, in an execution proceeding.

The facts were as follows:—

An instalment decree passed in the terms of an award provided *inter alia* as under:—

If any one of the instalments remain unpaid at proper time, the plaintiff should wait for 2 months and then the plaintiff do recover the instalment which has already become due either by the sale of the properties on which the defendant held a right of mortgage, or from the defendant personally or both ways as he likes.

The decree was dated the 3rd November 1901. None of the instalments was paid on its due date or within 2 months afterwards and the last instalment which became due on the 12th May 1907 not having been paid at all, the decree-holder on the 13th September 1910 presented a darkhast, No. 204 of 1910, for the recovery of the balance of the decretal amount by sale of the land specified in the darkhast and he also prayed for making the decree absolute.

* Second Appeal No. 648 of 1911.

The judgment-debtor replied that the darkhast was time-barred.

The Subordinate Judge relying on the decision in *Tarvadi v. Bai Kashi*⁽¹⁾ found the decretal debt to be moveable property and dismissed the darkhast as time barred under Article 182, Schedule I of the Limitation Act (IX of 1908).

On appeal by the applicant decree-holder the District Judge confirmed the order.

The applicant decree-holder preferred a second appeal.

S. R. Bakhle, for the appellant (applicant decree-holder):—The decree obtained by us was on a sub-mortgage. It was, therefore, a mortgage decree under which we were entitled to recover the decretal amount by sale of the mortgagee's interest. The form of the decree being one as provided for by Order XXXIV, Rule 5, we could only bring the mortgage interest to sale by following the procedure laid down, that is, by getting the order for sale made absolute. The lower Courts erred in holding that the interest sought to be sold was interest in moveable property and, therefore, no order absolute was necessary. The decision in *Tarvadi Bholanath v. Bai Kashi*⁽¹⁾ has no application. That case only lays down that the mortgaged property need not be attached under the provisions of the Civil Procedure Code relating to attachment. We are not seeking to sell the lands themselves but only the mortgagee's interest therein, and we can do so only when the order for sale is made absolute.

There is no period of limitation laid down for an application for making the order absolute. It has been held by this Court that there is no period provided for under the Limitation Act : *Ganu v. Narayan*⁽²⁾, *Bhaga-*

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(1) (1901) 26 Bom. 305.

(2) (1903) 5 Bom. L. R. 540.

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wan v. Ganu⁽¹⁾. The present application is not really one for the execution of the decree but for making a decree in accordance with the order of the Court, and no period of limitation will begin to run until there is a decree capable of execution.

K. N. Koyaji, for the respondent (opponent judgment-debtor):—The rulings which laid down that no period of limitation applied to an application for making an order for sale absolute were passed before the new Civil Procedure Code of 1908 came into force. Under the new Code the provisions for making an order absolute are now transferred from the Transfer of Property Act to the Civil Procedure Code. Therefore the reason on which those rulings were based is no longer in existence. The Courts had held that the Limitation Act applied to applications under the Civil Procedure Code and not to other applications. Such applications now come under the Civil Procedure Code and therefore the Limitation Act will govern them: *Amlook Chand Par-rack v. Sarat Chunder Mukerjee*⁽²⁾. We, therefore, contend that an application for moving the Court to make the sale absolute must be made within three years from the day when the judgment-creditor became entitled to it.

Further, the property sought to be sold being the mortgagee's interest, it is merely a money claim, therefore, it was not necessary to attach it, nor was any proceeding for an order absolute necessary. The original mortgagor was not a party to the suit and in his absence the decree-holder cannot sell his interest. He cannot merely choose to sell the mortgagee's interest. In the forms given in Seton on Decrees, the form of a decree for such cases contains the name of the mortgagor, and he being a party the decree-holder is entitled

⁽¹⁾ (1899) 23 Bom. 644.

⁽²⁾ (1911) 3 Cal. 913.

to sell the mortgaged property. The decree in the present case is, therefore, not a proper decree and the judgment-creditor cannot execute it. By framing the suit in the manner he did, he missed his remedy.

Bakhle, in reply:—By framing the suit in the manner indicated we could have got the right to sell the mortgaged property itself. But that was not the only relief open to us. We are entitled to sell, if we choose, the lesser interest, namely, the mortgagee's interest. The original mortgagor being not a party, the decree will not affect his rights.

As to the applicability of the Limitation Act to such applications the rulings have so long been consistent and the change made by transferring the sections to Civil Procedure Code cannot affect the question. The making an order absolute is the act of the Court which, when an application is made, the Court cannot refuse. To such application, therefore, the provisions of the Limitation Act cannot apply: *Ishwardas Jaggivandas v. Dosibai*⁽¹⁾, *Chunni Lal v. Harnam Das*⁽²⁾, *Madhabmani Dasi v. Lambert*⁽³⁾.

Such applications seek to move the Court what the Court is bound to do in order that there should be a final decree in the litigation. The transfer of the sections to the Civil Procedure Code removes one of the reasons for the non-applicability of the Limitation Act, but the other reasons still remain.

SCOTT, C. J.:—The application in this case is for a decree absolute for sale of a mortgage charge, the property of the defendant, under the terms of a consent-decree. The consent-decree provided for satisfaction of the decretal debt by instalments. Three years from the due date of the last instalment becoming payable

(1) (1883) 7 Bom. 316 at p. 322.

(2) (1898) 20 All. 302.

(3) (1910) 37 Cal. 796.

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expired in July 1910. The application which we are now considering was made subsequent to that date. The question is whether it was barred by limitation. The lower Courts have held that the debt due to the plaintiff was moveable property, and that, therefore, there was no need for an application for a decree absolute. They based the decision upon *Tarvadi Bholanath v. Bai Kashi*⁽¹⁾. The question there turned upon whether the execution proceedings had been initiated under the right section of the Civil Procedure Code. That question does not arise in the present case. But although we cannot accept the reasons of the lower Courts, we think that the application must fail. The reason is that this is an application in form for a decree under Order XXXIV, of the Civil Procedure Code, and it is contended on behalf of the appellant that it must be treated as under Order XXXIV, and no other Order. That being so, it is an application under the Civil Procedure Code, and as such falls within the scope of Article 181 of the Limitation Act: see *Amlook Chand Parrack v. Sarat Chunder Mukerjee*⁽²⁾. The application under Article 181 must be made within three years from the time when the right to apply accrues. It has not been made within that period, and is, therefore, barred. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

G. B. R.

(1) (1901) 26 Bom. 305.

(2) (1911) 38 Cal. 913.