

and of Order VII, Rule 11 (c), after the learned Judge shall have required the appellants to supply the requisite stamp paper within a time to be fixed by the District Court.

The appellants must have the costs of this appeal.

Order set aside.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

BACHARAJ NYAHALCHAND MARWADI (ORIGINAL DEFENDANT),
APPELLANT, v. BABAJI TUKARAM AVATI (ORIGINAL PLAINTIFF),
RESPONDENT.*

1913.

August 5.

Limitation Act (IX of 1908), section 19, Schedule I, Article 182, clause 5
—Written acknowledgment—Application made for certifying payments on
the decree acknowledging the decree as an outstanding decree—Step-in-aid of
execution.

The plaintiff obtained a decree on the 3rd July 1900 whereby he was required to pay a sum of Rs. 600 by annual instalments of Rs. 50 and to redeem the mortgaged land. The decree also provided that on failure to pay any two instalments the plaintiff's right to redeem was to be foreclosed and the defendant was to be placed in possession of the land. The instalments for 1901 and 1902 were duly paid, while the one for 1903 was only paid in part. No other payments were made. On the 20th July 1905, the plaintiff made an application to the Court, which was consented to by the defendant, for certifying the above payments in satisfaction of the decree. This application referred to the decree as an outstanding decree. On the 14th December 1907, the defendant applied to foreclose the decree; but the application was dismissed for want of prosecution. He applied again on the 29th March 1909 for the purpose; but his application was dismissed as barred by limitation. The defendant having appealed:—

Held, that the application was within time, for the application of 1905 was sufficient to give a fresh starting point for limitation, either as an acknowledgment within the meaning of section 19 of the Limitation Act (IX of 1908), or as a step-in-aid of execution under Article 182, clause 5 of the First Schedule to the Act.

* Second Appeal No. 895 of 1912.

1913.

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SECOND appeal from the decision of G. D. Madgaonkar, District Judge of Ahmednagar, confirming an order passed by J. N. Atre, Subordinate Judge at Parner.

Proceedings in execution.

The plaintiff obtained a decree on the 3rd July 1900, in terms of an award, whereby it was provided as follows :—

“The plaintiff Babaji valad Tukaram Avati should pay Rs. 600 to the defendant Bachharaj Nyahalchand Marwadi by twelve instalments in the following manner :—*viz.*, he should pay Rs. 50 on the 30th of June 1901 and from that date onward he should pay an instalment of Rs. 50 every year on the said date or before it and thus pay off the (whole) amount due to the defendant. If the plaintiff fails to pay any two instalments to the defendant in time, his right to redeem the mortgaged lands shall for ever be foreclosed and then the said land should be taken by the defendant into his possession from that of the plaintiff. Till then the lands should be allowed to remain in the possession of the plaintiff himself.”

The first two instalments were paid in time. For the third one only Rs. 35 were paid on the 10th May 1903. No other payments were made.

The plaintiff applied on the 20th July 1905 to the Court for having the above payments certified in adjustment of the decree. The application was assented to in writing by the defendant ; and ran as follows :—

“Agreeably, to the order passed in the decree of the above mentioned No., the plaintiff has paid to the defendant Rs. 100 in all by the first and second instalments, and Rs. 35 out of the amount of the third instalment, that is, he has paid to the defendant Rs. 135 on account of the decree. The application is made for making this (fact) known. It is therefore requested that an endorsement to that effect may be made on the register of suits.”

On the 14th December 1907, the defendant applied to the Court for an order for foreclosure as provided in the decree. This application was dismissed as process fee was not paid. He applied again on the 29th March 1909, for an order for foreclosure.

The lower Courts dismissed the application on the ground that it was barred by limitation.

The defendant appealed to the High Court.

P. D. Bhide, for the appellant :—We submit that the application for execution is in time. First, because the application being for a decree absolute is not governed by any article in the First Schedule for the Limitation Act. See *Bakatram Nanuram v. Kharsetji*⁽¹⁾; *Madhabmani Dasi v. Lambert*⁽²⁾; *Bai Manekbai v. Manekeji Kavasji*⁽³⁾; *Ashfaq Husain v. Gauri Sahai*⁽⁴⁾; *Ajudhia Pershad v. Baldeo Singh*⁽⁵⁾; *Tihuck Singh v. Parsotein Proshad*⁽⁶⁾ and *Puran Chand v. Roy Radha Kishen*⁽⁷⁾. Secondly, the application (Exhibit 19) dated the 20th July 1905 is an acknowledgment within the meaning of section 19 of the Indian Limitation Act. See *Ahmad Ali Khan v. Husain Ali Khan*⁽⁸⁾ and *Janki Prasad v. Ghulam Ali*⁽⁹⁾. Thirdly, the application (Exhibit 19) is a step-in-aid of execution. See *Wasi Imam v. Poonit Singh*⁽¹⁰⁾; *Ghansham v. Mukha*⁽¹¹⁾; *Beni Madho v. Basdeo Patak*⁽¹²⁾; and *Koormayya v. Krishnamma Naidu*⁽¹³⁾.

P. B. Shingne, for the respondent :—Exhibit 19 is not an acknowledgment. It contains no mention of the defendant's right to get a decree absolute. Nor is the application a step-in-aid of execution. See *Shib Lal v. Radha Kishen*⁽¹⁴⁾ and *Wasi Imam v. Poonit Singh*⁽¹⁰⁾.

SHAH, J. :—The facts which give rise to this appeal are as follows :—

On the 3rd July 1900, the plaintiff obtained a decree in the terms of an award, whereby he was required to

(1) (1903) 27 Bom. 560.

(2) (1910) 37 Cal. 796.

(3) (1880) 7 Bom. 213.

(4) (1911) 33 All. 264.

(5) (1894) 21 Cal. 818.

(6) (1895) 22 Cal. 924.

(1891) 19 Cal. 132.

(8) (1887) 10 All. 109.

(9) (1882) 5 All. 201.

(10) (1893) 20 Cal. 696.

(11) (1880) 3 All. 320.

(12) (1890) 12 All. 99.

(13) (1893) 17 Mad. 165.

(14) (1885) 7 All. 898.

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pay a sum of Rs.,600 by annual instalments of Rs. 50 and to redeem the mortgaged property. It was further provided in the decree that "if the plaintiff failed to pay any two instalments to the defendant in time, his right to redeem the mortgaged lands should for ever be foreclosed and then the said lands should be taken by the defendant into his possession from that of the plaintiff. Till then the lands should be allowed to remain in the possession of the plaintiff himself." Subsequent to this decree, two instalments in full for 1902 and one instalment in part for the year 1903 were paid by the plaintiff to the defendant. No other instalment was paid thereafter. An application was made on the 20th July 1905 to the Court for certifying those payments in satisfaction of the decree. This application was signed by the plaintiff and was consented to by the defendant. On the 14th December 1907, an application was made by the defendant for an order of foreclosure in terms of the decree; but that application was dismissed, because no steps to prosecute the same were taken. The present application was made on the 29th of March 1909. The defendant by this application seeks to have an order of foreclosure in the terms of the decree.

The plaintiff raised objections to this application and urged that the application was barred by limitation. Both the lower Courts have found in favour of the plaintiff and held that the application is barred by time.

The defendant has preferred the present Second Appeal and has urged in support thereof that the lower Courts have wrongly decided the question of limitation. It is contended that the present application for an order for foreclosure is really an application under section 93 of the Transfer of Property Act, and that there is no period of limitation applicable to such an application. It is further urged that even assuming

that there is a period of limitation to which this application is subject, still having regard to the application of the 20th of July 1905 and to the previous *darkhast* of December 1907, the present application is in time.

With regard to the first point, we express no opinion in this appeal. Having regard to the view which we take of the second contention urged on behalf of the appellant, it is unnecessary to come to a definite conclusion on the first point.

Assuming that the application under section 93 of the Transfer of Property Act, or rather the application seeking foreclosure, is subject to the same rules of limitation which govern an ordinary application for execution, we are clearly of opinion that in the present case, the two previous applications, which we have already referred to, are sufficient to save the present application. The determination of this question depends upon the construction which is to be placed upon the application of the 20th July 1905. Both the lower Courts have found that this application is not an acknowledgment. It is urged here that having regard to the terms of the application, it amounts to an acknowledgment within the meaning of section 19 of the Limitation Act. Having regard to the terms in which the decree is referred to in this application by the plaintiff, we think that it clearly contains an acknowledgment within the meaning of section 19. The decree, as we read the application, is referred to therein as an outstanding decree, and the payments mentioned in the application are mentioned as payments made on account of the decree.

It was also urged on behalf of the appellant that this was an application for a step-in-aid of execution and as such was sufficient to save limitation. Having regard to the form and purpose of the application and having regard to the fact that it is consented to by the defend-

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ant, we think that it must be treated in effect as a joint application by the plaintiff and the defendant for the purpose of having the payments duly certified. We take the same view of this application and of the effect thereof as was taken of a somewhat similar application in the case of *Wasi Imam v. Poonit Singh* ⁽¹⁾. In either view of this application, it is clear that it is sufficient to give a fresh starting point for limitation. The subsequent application of December 1907 was made within three years from this date, and the present application is made within three years from the date of the preceding application. The trial Court has referred to certain circumstances as showing that the application of July 1905 (Exhibit 19) loses much of its 'evidential value'. The appellate Court has not gone into this question. But after considering these circumstances, we see no reason to think that the application was not duly made by the plaintiff and that he is not responsible for the contents thereof. In fact the learned Pleader for the respondent fairly conceded that he could not support the view taken by the trial Court on this point.

We, therefore, come to the conclusion that the present application is not time-barred.

The result, therefore, is that this appeal is allowed, the order of the lower Court set aside and the case sent back to be dealt with according to law. The appellant to have his costs throughout.

Appeal allowed.

R. R.

(1) (1893) 20 Cal. 696.
