

We ought, therefore, in my opinion, though for somewhat different reasons from those given by the learned Judge of first appeal, to confirm the decision of the lower appellate Court and to dismiss this second appeal with costs.

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Appeal dismissed.

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APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Hayward.

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MURLIDHAR NARAYAN GUJARATHI (ORIGINAL DEFENDANT No. 1),
APPELLANT V. VISHNUDAS BALMUKUNDDAS (ORIGINAL DEFENDANT),
RESPONDENT.*

October 11.

Transfer of Property Act (IV of 1882), sections 88, 89—Civil Procedure Code (Act XIV of 1882), section 244—Limitation Act (XV of 1877), Schedule II, Articles 178, 179—Civil Procedure Code (Act V of 1908), section 97, Order XXXIV, rules 1 and 5—Order passed under section 88 of the Transfer of Property Act if not appealed against cannot be questioned in an appeal from the decree absolute for sale.

In 1907, a suit was filed to recover the mortgage amount by sale of the mortgaged property. A preliminary decree was passed on the 30th of June 1910, as contemplated by Order XXXIV, rule 4, of the Civil Procedure Code (Act V of 1908), ordering among other things, defendants Nos. 1 and 2 to pay the mortgage amount within six months to the plaintiff and in default, directing a sale of the mortgaged property. The payment was not made; and a final decree for sale was made on the 15th March 1912. Defendant No. 1 appealed against the decree of 1912, and raised substantially points against the decree of 1910. The lower appellate Court held that the defendant not having appealed against the preliminary decree within time, was precluded, by section 97 of the Civil Procedure Code (Act V of 1908), from disputing its correctness in an appeal preferred from the final decree. The defendant appealed to the High Court contending that the suit having been filed in 1907, the right of appeal which he had under the Civil Procedure Code of 1882 was not taken away by the Civil Procedure Code of 1908 :—

Held, that, whether an order absolute for sale was treated as an order falling under section 244 of the Civil Procedure Code (Act XIV of 1882) and

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appealable on that footing or not, it was quite clear that even under the Civil Procedure Code of 1882 the correctness of the decree under section 88 of the Transfer of Property Act (IV of 1882), corresponding with Order XXXIV, rule 4 of the Civil Procedure Code of 1908, could not be questioned in an application for an order absolute under section 89 or in an appeal from an order absolute made on such an application.

SECOND appeal from the decision of G. B. Laghate, First Class Subordinate Judge, A. P., at Nasik, confirming the decree passed by S. A. Gupte, Second Class Subordinate Judge at Yeola.

Suit on mortgage.

The guardian of Murlidhar (defendant No. 1) passed the mortgage in dispute to the plaintiff on the 29th April 1897.

On the 4th June 1907, the plaintiff filed the present suit to recover the money due on the mortgage.

The Court of first instance passed a preliminary decree on the 30th June 1910, ordering defendants Nos. 1 and 2 to pay the plaintiff Rs. 3,367-8-0 and costs within six months; and directing the plaintiff, in default of payment, to recover the amount by sale of the mortgaged property. The payment not having been made, the Court passed a final order, on the 15th March 1912 that the mortgaged property be sold to satisfy plaintiff's claim.

The defendant No. 1 did not appeal against the preliminary decree; but he appealed from the final order and in that appeal disputed the correctness of the preliminary decree also.

The lower appellate Court held that the defendant No. 1 not having appealed from the preliminary decree in time, was barred, by section 97 of the Civil Procedure Code (Act V of 1908), from disputing its correctness in an appeal from the final order.

The defendant No. 1 appealed to the High Court contending *inter alia* that the substantial right of appeal possessed by him under the Civil Procedure Code of 1882 at the date of the written statement could not be taken away by the Civil Procedure Code of 1908.

Weldon, with *M. V. Bhat*, for the appellant:—The appellant had a right of appeal under the Civil Procedure Code of 1882, the suit having been filed in 1907. That right cannot be taken away by the Civil Procedure Code of 1908: see *Ratanchand Shrichand v. Hanmantrav Shivbakas* ⁽¹⁾; *Colonial Sugar Refining Company v. Irving* ⁽²⁾; *Nana v. Sheku* ⁽³⁾.

Until a decree *nisi* under the Transfer of Property Act is made absolute, there is no decree which is capable of execution: see *Sir Jehangir Cowasji v. The Hope Mills, Limited* ⁽⁴⁾. The substantial right of appeal cannot be taken away by section 97 as provided by section 154 of the Civil Procedure Code of 1908.

The repeal of an enactment does not affect proceedings already commenced, see section 6 of the General Clauses Act (X of 1897). The word "right" in section 7 of the Act includes a right of appeal. To disturb an existing right of appeal is not a mere alteration of procedure: see *Hurrosundari Dabi v. Bhojohari Das Manji* ⁽⁵⁾.

Coyaji, with *S. S. Patkar*, for the respondent:—If the decree of 1910 be regarded as one governed by the Civil Procedure Code of 1882, it would be a decree under section 88 of the Transfer of Property Act. The decree absolute for sale is an order passed under section 89 of the Act. That order would be appealable in virtue of section 244 of the Civil Procedure Code of 1882.

(1) (1869) 6 B. H. C. R. 166 (A.C.J.). (3) (1908) 32 Bom. 337.

(2) [1905] A. C. 369.

(4) (1908) 33 Bom. 273.

(5) (1886) 13 Cal. 86.

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It has been held that an application for order absolute for sale in default of payment was an application for execution of decree passed under section 88 of the Transfer of Property Act: see *Batuk Nath v. Munni Dei* ⁽¹⁾; *Abdul Majid v. Jawahir Lal* ⁽²⁾; *Munna Lal Parruck v. Sarat Chunder Mukerji* ⁽³⁾; *Amlook Chand Parrack v. Sarat Chunder Mukerjee* ⁽⁴⁾. The correctness of the decree under section 88 cannot be questioned in an application for order absolute, under section 89, which is regarded as an application to execute the decree.

SHAH, J.:—Several questions of law have been argued in this appeal, but it is necessary only to decide one of them as it is sufficient to dispose of the appeal.

The facts connected with that point are briefly these: The suit, out of which this second appeal has arisen, was filed on the 4th of June 1907 on a mortgage dated the 29th of April 1897. The mortgagee sought to enforce his mortgage claim by sale of the mortgaged property. A preliminary decree was passed on the 30th of June 1910 as contemplated by Order XXXIV, rule 4, of the Civil Procedure Code, ordering, among other things, defendants Nos. 1 and 2 to pay the mortgage amount within six months to the plaintiff and in default directing a sale of the mortgaged property. The defendants Nos. 1 and 2 failed to pay the amount, and a final decree for sale was made on the 15th of March 1912, apparently as contemplated by rule 5 of the same Order. The present appellant, who is defendant No. 1, had not appealed against the decree of the 30th of June 1910; but he appealed to the District Court from the decree of the 15th of March within the time allowed by law. In that appeal he substantially raised points against the decree of the 30th of June 1910. It was objected in the lower

⁽¹⁾ (1914) L. R. 41 I. A. 104.

⁽³⁾ (1914) L. R. 42 I. A. 88.

⁽²⁾ (1914) 36 All. 350.

⁽⁴⁾ (1911) 38 Cal. 913.

appellate Court that in virtue of the provisions of section 97 of the Civil Procedure Code the appellant could not raise any point against the preliminary decree in his appeal against the final decree of the 15th of March 1912. The lower appellate Court held that the appellant was precluded from disputing the correctness of the preliminary decree in the appeal preferred from the final decree.

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The learned counsel for the appellant before us has questioned the correctness of this view and has urged that the present suit having been filed before the new Code came into force, the right of appeal must be held to have accrued to him under the old Code of 1882, that it could not be taken away or modified in any way by the new Code, that under the old Code there was no distinction made between a preliminary and final decree and that it was open to him in appeal from the final decree to argue the whole case according to the repealed Code.

In support of the first part of this argument he has relied upon the cases of *Ratanchand Shrichand v. Hanmantrav Shivbakas*,⁽¹⁾ *Colonial Sugar Refining Company v. Irving*⁽²⁾ and *Nana v. Sheku*⁽³⁾ and urged that the right to appeal accrued to him within the meaning of section 154 of the new Code of Civil Procedure not at the date of the preliminary decree, but at the date of the suit. This point is not free from difficulty though the decided cases apparently support the appellant's contention.

But assuming, without deciding, in favour of the appellant, that his right to appeal accrued to him at the date of the suit and that that right is governed by the provisions of the old Code, it seems to me clear that

⁽¹⁾ (1869) 6 B. H. C. R. (A. C. J.) 166. ⁽²⁾ [1905] A. C. 369.

⁽³⁾ (1908) 32 Bom. 337.

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even then his appeal to the District Court, so far as it related to the decree of the 30th of June 1910, would be barred. Even if the decree be treated as one falling under the old Code, and the provisions of the Transfer of Property Act which were then in force, it is clear that the decree of the 30th of June 1910 for payment within six months would be a decree contemplated by section 88 of the Transfer of Property Act, and the order absolute for sale in default of payment would be made under section 89 of that Act. Such an order is not referred to in section 89 as a decree, though the first adjudication is described as a decree in section 88. This order under section 89 would be appealable in virtue of the provisions of section 244 of the old Code read with the definition of the term 'decree' as given in that Code. Whatever doubts there may have been on this point in virtue of the conflict of decisions as to whether an application for an order absolute for sale on default of payment by the mortgagor was one "for execution of decree" governed by Article 179 or "to enforce judgment" under Article 180 of the Limitation Act of 1877, or it was an application under section 89 of the Transfer of Property Act not subject to any period of limitation or governed by Article 178 of the Limitation Act of 1877, recent decisions of the Privy Council have placed the point beyond all doubt and controversy. The cases of *Batuk Nath v. Munni Dei*⁽¹⁾, *Abdul Majid v. Jawahir Lal*,⁽²⁾ and of *Munna Lal Parruck v. Sarat Chunder Mukerji*⁽³⁾, in the last of which their Lordships of the Privy Council affirmed the decision of the Calcutta High Court in *Amlook Chand Parrack v. Sarat Chunder Mukerjee*⁽⁴⁾, show that an application for an order absolute would be really an application to execute the decree passed in accordance with section 88

⁽¹⁾ (1914) L. R. 41 I. A. 104.⁽²⁾ (1914) 36 All. 350.⁽³⁾ (1914) L. R. 42 I. A. 88.⁽⁴⁾ (1911) 38 Cal. 913.

of the Transfer of Property Act. But whether an order absolute for sale is treated as an order falling under section 244 and appealable on that footing or not, it is quite clear that even under the old Code the correctness of the decree under section 88 of the Transfer of Property Act could not be questioned in an application for an order absolute under section 89 or in an appeal from an order absolute made on such an application. The decree under section 88 of the Transfer of Property Act which is now called a preliminary decree under Order XXXIV, rule 4, is the decree which must be appealed from, if the party concerned feels aggrieved by it and which, if not appealed from, must be accepted as determining the rights of the parties for the purposes of all subsequent proceedings. It is clear, therefore, that the defendant No. 1 was precluded from disputing the correctness of the decree of the 30th of June 1910 in the lower appellate Court whether his right of appeal was governed by the new Code of 1908 or the old Code of 1882.

On this ground alone the present appeal must fail. The result is that the decree of the lower appellate Court is affirmed with costs.

HAYWARD, J. :—I concur. I have no doubt that the question sought to be raised here cannot be litigated in this appeal. Even assuming that the old Code of 1882 has application, the decree of 1910 ordering payment of the mortgage money and in default sale of the property would be a decree under section 88 of the Transfer of Property Act, and the order absolute for sale of the property in default of payment of the mortgage money would be an order under section 89 of the Transfer of Property Act. If the appellant had desired to call in question the decree of 1910, he should have appealed against that decree, and he cannot now in an appeal against the subsequent order bring into question

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matters decided in that decree. There can be no question, in my opinion, that the latter order would be an order in execution and not a decree and would have been governed by Article 179 of the old Limitation Act of 1877 corresponding to Article 182 of the present Limitation Act according to the decision of the Privy Council in the case of *Abdul Majid v. Jawahir Lal* ⁽¹⁾. This view has been confirmed by the subsequent decision of the Calcutta High Court holding that a similar case from the Original Side of that Court was governed by Article 183 of the Schedule of the present Limitation Act. This decision was in the case of *Amlook Chand Parrack v. Sarat Chunder Mukerjee* ⁽²⁾ and was confirmed on appeal by the Privy Council in *Munna Lal Parrick v. Sarat Chunder Mukerji* ⁽³⁾.

This proceeds on the assumption that the old Code of 1882 had application. The authorities quoted would certainly appear to support that contention. But it is not necessary to decide that question here in view of the foregoing remarks and of the fact that this appeal would in any case be barred as an appeal under the new Code of 1908 being an appeal upon matters decided in a preliminary mortgage decree under rule 4 which could not be argued in appeal from the final decree for sale under rule 5 of Order XXXIV of the Schedule by reason of the provisions of section 97 of the present Code of Civil Procedure.

This appeal must, therefore, be dismissed with costs.

Decree affirmed.

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⁽¹⁾ (1914) 36 All. 350.

⁽²⁾ (1911) 38 Cal. 913.

⁽³⁾ (1914) L. R. 42 I. A. 88.