APPELLATE CIVIL.

Before Sir Stanley Batchelor, Kt., Acting Chief Justice and Mr. Justice Kemp.

NARSINGRAO KONHER INAMDAR AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 2), APPELLANTS *v.* BANDO KRISHNA KULKARNI (ORIGINAL PLAINTIFF), RESPONDENT.*

1918. *January* 15.

Indian Limitation Act (IX of 1908), Schedule I, Articles 181 and 182—Civil Procedure Code (Act V of 1908), section 48—Decree—Execution—Amendment of the decree—Date of judgment, the date of the amended decree—Right to apply to make the decree final under Civil Procedure Code (Act V of 1908), Order XXXIV, Rule 5—Limitation—Starting point—Procedure.

On 17th November 1897, a decree on an award was passed. The decree did not embody the terms of the award. Plaintiff applied for execution of the decree. It was opposed by the defendants on the ground that the decree did not specify the relief that was granted and was on that account incapable of execution. The Court then directed the plaintiff to obtain an amendment. On January 28th 1899, the decree was amended so as to bring it into consonance with the directions of the award and was dated 28th January 1899. Several applications for execution were made the last of which was dated 2nd December 1909. The lower Court held the application in time and allowed execution to proceed. On appeal it was contended (1) that the application was barred so far as it related to two sums of Rs. 575 and Rs. 6,000 which under the decree were to be paid forthwith, that is 17th November 1897, the date on which the decree was passed and which must be taken as the starting point for limitation; (2) that the application as a whole was barred by limitation, as the application must be treated as an application for a decree final for sale under Order XXXIV, Rule 5 of the Civil Procedure Code, 1908, and as such it was barred under Article 181 of the Limitation Act, 1908, for the right to apply accrued when default in payment was made and that was found to have been in 1902.

Held, (1) that the recovery of the two sums was barred as the decree was to be referred to 17th November 1897, the date of the judgment and not to 28th January 1899, the date of the amended decree.

(2) that the application was not barred as the right to apply under Order XXXIV, Rule, 5, never accrued to the plaintiff until the Code of 1908 conferred it upon him; the plaintiff was, therefore, entitled to claim that under

* First Appeal No. 163 of 1915.

1918.

NARSINGRAO KONHER INAMDAR v. BANDO KRISHNA.

Article 181 of the Limitation Act, 1908, he would have a period of three years from 1st January 1909, when the new Code of Civil Procedure came into force.

Amlook Chand Parrack v. *Sarat Chunder Mukerjee*[1], distinguished.

FIRST appeal against the decision of S. R. Koppikar, First Class Subordinate Judge at Belgaum in Darkhast No. 443 of 1909.

Execution proceedings.

The parties having referred their dispute to arbitration an award was made by the arbitrators on 5th November 1897. The plaintiff then applied to the First Class Subordinate Judge at Belgaum to pass a decree in terms of the award. On 17th November 1897 the Court directed that a decree should be passed. The decree, however, did not embody the terms of the award. Plaintiff applied for execution of this decree. The application was opposed by the 1st defendant on the ground that the decree did not specify the relief that was granted and was on that account incapable of execution. The Court then directed the plaintiff to obtain an amendment and stayed execution in the meantime. On 28th January 1899, the decree was amended so as to bring it in consonance with the award and was dated 28th January 1899. The principal terms of the decree were :—

"1. Defendants should pay Rs. 56,575 to the plaintiff. Of this Rs. 575 should be paid by the defendants to the plaintiff just now. This payment leaves a balance of Rs. 56,000. Out of this, Rs. 6,000 should be paid at the end of January 1898. If that amount is not paid by that time, that amount of Rs. 6,000 should carry interest at 4½ per cent. from 1st November 1897 till payment. The remaining Rs. 6,000 (out of the sum of Rs. 12,575 for costs and interest, included in Rs. 56,575) should be paid with interest thereon at 4½ per cent. The principal Rs. 44,000 to be paid off by annual instalments of Rs. 1,000, each payable before the end of January in each year; first instalment of Rs. 1,000 to be paid by the end of January 1898. If default be

[1] (1911) 38 Cal. 913.

made in the payment of these instalments, the whole balance of principal with interest thereon at 4½ per cent., should be recovered by the sale of the property mortgaged, without minding the aforesaid instalment clause ('Varil hapteche hujur na dharita'). The deficit, if any, to be recovered from the person and estate of the defendants.

2. The yearly interest on the aforesaid principal amounts to Rs. 1,980. For the payment of this interest. the defendants to give possession of the mortgaged property to the plaintiff; or the plaintiff to take possession through Court. If there be any obstacle in getting possession, the defendants should remove it.

* * * * * *

7. If the above written sums of Rs. 6,000 (each) be not paid at the appointed time, the plaintiff should recover the same with interest by sale (of the mortgaged property), subject to the lien for the above mentioned mortgage amount; or the plaintiff may recover the same from the defendants personally or he may recover it in both ways.

8. The whole mortgaged property, including the whole Inam village Ashte, is subject to the aforesaid sum of Rs. 56,575 with interest thereon, till the whole amount with interest is repaid. The plaintiff has his mortgage lien thereon till satisfaction."

As the defendants did nothing to put the plaintiff in possession of the mortgaged property and as they did not pay the plaintiff's claim, the plaintiff applied in execution on 18th June 1898 to recover the whole amount with interest by attachment and sale of defendants' moveable property and by sale of the mortgaged property. He obtained by this application possession of some of the immoveable property and a small portion of his claim.

The next application was on 4th January 1901. Further execution was applied for on 13th August 1901, again on 1st August 1904 and on 26th July 1907. Finally the present application for execution was presented on 2nd December 1909.

The defendants raised several objections, among them being—

(1) The right to execute the decree first accrued on 17th November 1897, when the Court ordered that a

1918.

NARSINGRAO KONHER INAMDAR v. BANDO BIHNA.

decree should be passed in terms of the award. The Darkhast being presented more than twelve years from that date was untenable under section 48 of the Civil Procedure Code, 1908.

(2) The decree being a mortgage decree, the plaintiff should have applied for a decree absolute and as he did not do so within three years from its date under Article 181 of the 1st Schedule of the Limitation Act, 1908, the present execution application was barred.

The Subordinate Judge held on the first objection that upon a proper construction of section 48 of the Civil Procedure Code, 1908, time began to run against the plaintiff from the date of the amended decree, i.e., 28th January 1899; on the second he was of opinion that an order for making the decree absolute was not indispensably necessary; see *Phul Chand Ram* v. *Nursingh Pershad Misser*[1]; *Mancherji* v. *Thakordas*[2]; and moreover the objection being not raised in any of the previous Darkhast, it was not open to the defendants to raise it in the present Darkhast. He, therefore, set aside the objections and allowed execution to proceed.

The defendants appealed to the High Court.

Strangman, Advocate General, with *Nilkant Atmaram* for defendants Nos. 1 and 2 (appellants in First Appeal No. 163 of 1913):—We say so far as Rs. 575 and Rs. 6,000 are concerned the execution is barred by limitation. Under the terms of the decree these sums were made payable immediately. The decree was dated 17th November 1897. As it was not, however, in consonance with the award it was amended and the decree as amended was dated 28th January 1899. The present application for execution was made on 2nd December

(1) (1899) 28 Cal. 73. (2) (1903) 5 Bom. L. R. 389.

1909 and counting the period of limitation from 17th November 1897 it is barred under section 48 of the Civil Procedure Code, 1908. The lower Court takes the date of the decree as amended as the starting point for limitation. This is evidently wrong. We submit the date of the judgment must be taken as the date of the decree and the proper date would be 17th December 1897. It is true that on that date the decree cannot be said to have been drawn up. But whenever it was drawn up it must be taken as drawn on the date the judgment was delivered. On this point the provisions of Order XX, Rule 7 of the Civil Procedure Code, 1908, are imperative and must be followed.

Coyajee with *S. M. Kaikini* for the respondent in both appeals :—As regards section 48 of the Civil Procedure Code, 1908, though the judgment in the suit was dated 17th November 1897 and accordingly the original decree was also dated the same, the decree as actually drawn up contained simply the expression 'Decree to be in accordance with the award' and so was not executable. It was after an application for amendment was made, as objection on this score was taken by the judgment-debtor, that a proper executable decree was drawn up on 28th January 1899. From this date the present application as a whole is within time. The period is to be counted from the date when the decree becomes executable : see *Madhavrav Apaji* v. *Vithu bin Kedari* [1] ; *Narhar Raghunath* v. *Krishnaji Govind* [2] ; *Aiyasamier* v. *Venkatachela Mudali* [3].

On the question of the applicability of Article 181 of the Limitation Act, 1908, our contention is that the present decree is not a mortgage decree at all. Order XXXIV of the Civil Procedure Code, 1908, does

(1) (1886) P. J. 162.

(2) (1912) 36 Bom. 368.

(3) (1916) 40 Mad. 989.

1918.

NARSINGRAO KONHER INAMDAR v. BANDO KRISHNA.

not apply to it. There is no provision for payment within six months as required by section 88 of the Transfer of Property Act, 1882, that is present Order XXXIV, Rule 4 of the Civil Procedure Code, 1908. This is a consent decree complete in itself and capable of execution without any further proceedings being taken.

If this is held to be a mortgage decree then the present application may be treated as an application for order absolute: see *Mancherji* v. *Thakordas*[1]; *Venkatarazu* v. *Chinna Ramayya*[2]; *Appa Rao* v. *Krishna Ayyangar*[3]. And as regards the article of the Limitation Act applicable to such applications is Article 179 of the Limitation Act, 1877, corresponding to Article 182 of the Limitation Act, 1908: see *Batuk Nath* v. *Munni Dei*[4]; *Abdul Majid* v. *Jawahir Lal*[5]; *Hussain* v. *Karim*[6]; *Umabai* v. *Amritrao Anant*[7].

The present decree is of 1897 or 1899 (date of amendment) and at that time the Civil Procedure Code, 1908, was not in existence and so no application for a final decree could have been made. If it was necessary to make the application for making the decree final under the Civil Procedure Code, 1908, we submit the right to apply under Article 181 of the Limitation Act, 1908, accrued only after the New Code came into force, i.e., on 1st January 1909 and in that case the present application filed on 2nd December 1909, is clearly within time.

But really our application is not for an order absolute but to carry out the decree and this fact clearly distinguishes it from the case of *Datto Atmaram* v. *Shankar*

(1) (1903) 5 Bom. L. R. 389.
(2) (1901) 24 Mad. 695.
(3) (1901) 25 Mad. 537.
(4) (1914) 36 All. 284.
(5) (1914) 36 All. 350.
(6) (1915) 39 Mad. 544.
(7) (1914) 39 Bom. 80.

Dattatraya [1]. There the applicant specifically asked for an order absolute in 1910 of a decree passed in 1901 and no measures were taken to keep this decree alive. In our case we have made timely applications and under Article 179 of the Limitation Act, 1877, kept our decree in time.

Amlook Chand Parrack v. *Sarat Chunder Mukerjee* [2] is not against us. It primarily concerns a decree on the Original Side of the High Court and so has nothing to do with Article 179 of the Limitation Act, 1877.

Again the present Darkhast comes within the period of limitation under the provisions of section 20 of the Limitation Act, 1908. Admittedly we have been receiving some interest in the shape of the profits from the immoveable property in our possession on the decretal debt and so our claim is within time. Interest under this need not be the whole interest: see *Abdul Ahad* v. *Mahtab Bibi* [3].

Lastly, this being an instalment decree it was not obligatory on us to apply for the execution of the whole decree on failure to pay one instalment. Right to apply accrued at the failure of payment of every instalment: see *Ram Culpo Bhattacharji* v. *Ram Chunder Shome* [4]; *Shankar Prasad* v. *Jalpa Prasad* [5]; *Gaya Din* v. *Jhumman Lal* [6].

BATCHELOR, AG. C. J.:—This is an application in execution of a decree, and the facts and dates relevant to the appeal are these. The parties having referred their dispute to arbitration, an award was made by the arbitrators. On the 17th November 1897, the following order was made by the learned Subordinate Judge:

(1) (1913) 38 Bom. 32.
(2) (1911) 38 Cal. 913 at p. 917.
(3) (1913) 35 All. 378
(4) (1887) 14 Cal. 352.
(5) (1894) 16 All. 371.
(6) (1915) 37 All. 400.

1918.

NARSINGRAO KONHER INAMDAR v. BANDO KRISHNA.

"The plaintiff sues to obtain a decree on an award filed with the plaint. The defendants admit the claim. I order that the award be filed and a decree passed in accordance therewith." But the only attempt made by the Court to draw up the decree thus ordered is recorded in the following direction which was given on the 17th November 1897: "This suit coming on for final hearing on the 17th November 1897 before Rao Bahadur Gangadharrao Vishnu Limaye, First Class Subordinate Judge, in the presence of Mr. Vithalrao Kulkarni, pleader on behalf of plaintiff and of Mr. Bhaskarrao Manerikar, pleader on behalf of defendants Nos. 1 and 2, it is ordered that the award be filed and a decree be made in accordance with it." Thereafter an application to execute the decree was made by the successful plaintiff, who was met by the defendants' objection, filed on the 21st July 1898, that no executable decree had as yet been drawn up. That, apparently, was then recognised by the plaintiff who applied that the decree might be amended so as to bring it in accordance with the award, and a summons was issued for that purpose. On the 28th January 1899 the decree was amended so as to bring it into consonance with the directions of the award. This present application for execution was made on the 2nd December 1909. The actual provisions of the decree under execution are fully set out in the judgment of the learned Judge below, and need not now be recapitulated here.

Two objections are taken to the lower Court's order on behalf of the present appellants, the defendants Nos. 1 and 2. Both of these objections refer to the question of limitation, and the first of them relates to the two sums of Rs. 575 and Rs. 6,000, which under the decree were to be paid forthwith. I say they were to be paid forthwith because the decree directed their

payment, and provided no particular period within which, or before which, the payment was to be recovered. Now with regard to these particular sums the point is a simple one. The applicant is within the twelve years allowed to him if time is to be reckoned from the 28th January 1899, but he is beyond twelve years if the starting point is to be accepted as the 17th November 1897. I cannot myself doubt that the correct starting point is the 17th November 1897. The decree was made under the old Code of 1882, of which section 205 enacted that "The decree shall bear date the day on which the judgment was pronounced." That language seems to me to be imperative, and indeed to be designed to meet precisely a case of this sort where owing to certain oversights or irregularities a delay has intervened between the delivery of the judgment and the formal drawing of a correct decree. But if I am right in thinking that the decree is to be referred to the 17th November 1897, and not the 28th January 1899, then admittedly the application is out of time in regard to the sums I have specified. In my opinion the recovery of these two sums is now barred by limitation.

But then a more substantial point was taken under the same Statute, and it was contended that the application as a whole is barred by limitation. The argument was put in this way. When the application was made the new Code of Civil Procedure was in force, and since that Code prescribes procedure only, the application must be taken to have been subject to its provisions. One of these provisions is Order XXXIV, Rule 5, which lays down that where the payment required of the defendant is not made, 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

1918.

NARSINGRAO KONHER INAMDAR v. BANDO KRISHNA.

be dealt with as mentioned in the preceding rule. Therefore, the argument continues, the present application must be treated as an application for a decree final for sale, and as such it is barred under Article 181 of the Limitation Act, for the right to apply accrued when default in payment was made, and that is found to have been in 1902.

The first observation that I wish to make on this argument is that the respondent has been endeavouring to secure the fruits of his legal success ever since the decree was made in his favour, that is to say ever since 1898, and he has presented no less than six applications in order to obtain the relief which the Court's order awarded to him. It seems to me in these circumstances that it would be harsh if we were compelled at this stage to deprive the plaintiff of the fruits of his victory. Of course, if the law requires us to do so, we have no option. In my opinion, however, the law does not so require us.

If we consider what was the position of affairs between these parties up to the coming into force of the new Code, that is to say up to the 1st January 1909, we notice, in the first place, that under various decisions of the Privy Council, of which I need specify only that in *Abdul Majid* v. *Jawahir Lal*[a], the Article of the Limitation Act which applied to such circumstances was the old Article 179, corresponding to the present Article 182. That was the Article which governed applications then to be made after a preliminary decree for sale had once been obtained. The application then to be made was, under sections 88 and 89 of the Transfer of Property Act, an application for an order absolute for sale, and to such applications Article 179 was held to apply. Now it is clear on this record, and

[a] (1914) 36 All. 350.

1918.

NARSINGRAO KONHER INAMDAR v. BANDO KRISHNA.

indeed this Court has already held, that up to the 31st December 1908, the plaintiff was in time with his applications to execute his decree, nor indeed, as I understand the argument, has this proposition been challenged by counsel for the appellants. By timely applications, renewed on various dates, the plaintiff had secured himself up to the 31st December 1908. On the following day the new Code came into force. Is there anyting in that Code which must be held to have deprived the plaintiff of the position which up till that moment he held in law? I think there is not. I will take it that, as counsel for the appellants have argued, after the introduction of the new Code, the Article applicable to such applications as these was no longer Article 182 but Article 181. Let us assume that that is the Article which governed the application now required by the Code, i.e., an application for decree final for sale, in substitution of the previously required application for an order absolute for sale. On that footing we must see exactly what it is that Article 181 lays down. That Article gives to applicant three years from the time "when the right to apply accrues." The words "right to apply" must, I take it, here be understood to mean the right to make the application which the Code requires, that is to say, the right to apply to the Court for a decree final for sale. But, as it seems to me, that right never accrued to the plaintiff until the Code of 1908 conferred it upon him. It was indeed a right which up till the passing of the new Code, was, as I have indicated, unknown to the law. Previous to the new Code, the right which the decree-holder possessed was a right to enforce his judgment, not by means of an application for a decree final, but by means of an application for an order absolute. Upon this footing, therefore, it seems to me that the plaintiff is entitled to claim that under

1918.

NARSINGRAO KONHER INAMDAR v. BANDO KRISHNA.

Article 181 of the Limitation Act he would have a period of three years from the 1st January 1909 when the new Code of Civil Procedure came into force. It is quite true that the last payment made under the decree was made in 1902, but I cannot concede the argument that the plaintiff would be limited to a period of three years from the year 1902. If that argument were sound, we should be bound to hold that in 1905 the plaintiff was under obligation to make an application which no law then required of him, which indeed was not recognised by any law till the new Code came into force four years later. I do not think that this is a fair construction of Article 181 as applied to the present facts. And the view which I am taking does not, so far as I am aware, conflict with any decision of our Courts. As to the decision in *Amlook Chand Parrack* v. *Sarat Chunder Mukerjee*[1], that, I think, is clearly distinguishable upon two grounds. In the first place, the only question then before the Court was whether the facts called for the application of Article 181 or Article 183 of the Indian Limitation Act, and no question was raised, or could be raised, in favour of the applicability of Article 182. But further, in that case the appellant's decree was obtained on the 16th December 1898, and it was not till the 3rd July 1909 that he made any application to execute the decree. The learned Chief Justice, Sir Lawrence Jenkins, held that the governing Article of the Limitation Act was Article 183 which provided a period of twelve years from the time "when the present right to enforce the judgment, decree, or order accrues," to some person capable of realising the right. That Article, therefore, was applied, and the result of such application was clearly that the decree obtained in 1886 became unexecutable after 1898, no application for execution

[1] (1911) 38 Cal. 913.

having in the meantime been made. In other words the execution of the decree had become barred by limitation long before the coming into force of the new Code. Here the facts are otherwise, and for the reasons which I have stated, it appears to me that this application considered as a whole, and apart from the items of Rs. 575 and Rs. 6,000, is not obnoxious to the bar of limitation. While, therefore, I would modify the lower Court's order in regard to the two items I have specified, thus reducing the sum of Rs. 64,345-13-1 decreed by the lower Court to Rs. 54,516-3-1, I would in other respect confirm it.

Each party will pay and receive costs in proportion to his success in the appeal.

KEMP, J. :—Plaintiff's application is to execute a decree passed on an award by the sale of the immoveable property declared by the award to be mortgaged for the amount of principal and interest due by defendant to plaintiff.

The debt is made up thus :—

12,575	for interest and costs.
44,000	for principal money.
56,575	

The award dated 5th November 1897 declared that out of the interest and costs Rs. 575 should be paid on 1st November 1897 and Rs. 6,000 on 31st January 1898. The remaining Rs. 6,000 was also to be paid on 1st November 1897. Out of the principal amount Rs. (44,000), Rs. 1,000 was to be paid on 31st January 1898 and every year thereafter. In payment of the interest on Rs. 44,000 the immoveable property of defendants mortgaged by defendants to plaintiff for providing for that interest (viz., 1980) was to be given by the defendants to the

1918.

NARSINGRAO KONHER INAMDAR v. BANDO KRISHNA.

plaintiff by way of mortgage *with possession*, if the interest were not paid by plaintiff.

The decree embodying the award bears date 28th January 1899 and it provides, shortly, that the interest on the Rs. 44,000 should be secured by defendants delivering over possession of mortgaged immoveable property to the plaintiff, and on failure by the defendants to pay the annual instalments of Rs. 1,000 of the principal the mortgaged property should be sold for payment of the unpaid balance of principal and interest accruing thereon, and the balance left over after crediting the sale proceeds should be recovered from the defendants personally and from their remaining estate. After mentioning that the sum of Rs. 12,575 mentioned in the award should be paid as directed by the award the decree goes on to say that in default of payment as so directed the plaintiff should have the right to recover this amount and interest thereon by sale of the mortgaged property subject to the mortgage for the amount due for the principal sum of Rs. 44,000 and the interest thereon or from the defendants personally or both. The decree finally concludes by saying that plaintiff's "right over the abovementioned mortgaged property subsits" till the whole sum together with interest is paid off as directed.

On 17th November 1897 the Court directed that a decree should be passed in terms of the award. That decree did not embody the terms of the award. Plaintiff applied for execution of this decree. It was opposed by 1st defendant on 21st July 1898 on the ground the decree did not specify the relief that was granted and was on that account incapable of execution (Exhibit 12). The Court then directed plaintiff to obtain an amendment and stayed the execution proceedings in the meantime. On 28th January 1899 the decree was amended in the terms I have set forth and it was dated

1918.

NARSINGRAO KONHER INAMDAR v. BANDO KRISHNA.

as of 28th January 1899. That was the date on which the decree was ordered to be so amended. The learned Subordinate Judge's record of his order is "It appears that the decree has not been properly framed by embodying in it the terms of the order passed by the award. I, therefore, order that the decree be now framed in accordance with the award. Parties to bear their own costs." It will be seen that this order is merely a repetition of his order of 17th November 1897. I fail to see how it can start a fresh point for limitation. An order is made on an award directing that a decree should be passed in terms of the award. Apparently the decree is not drawn up in accordance with the award, and on a later application to the Court the judge repeats his former order and the decree is then prepared according to the award. The date the decree should bear is in my opinion the 17th November 1897. It must bear the date of the judgment (section 205 of the old Code) which was 17th November 1897.

It is the duty of a successful plaintiff to see that the decree is drawn up correctly against the defendant. I fail to see how the defendant should be held to blame if the decree does not correctly represent the judgment unless he has been a party to inducing the error in the decree. The Subordinate Judge cannot repeat his judgment so as to give a fresh starting point for limitation. I, therefore, think that the 17th November 1897 must be taken as the date of the decree sought to be executed.

The present application for execution is dated 2nd December 1909. So that it is out of time under section 48 of the Code of Civil Procedure as regards the two items of Rs. 575 and 6,000 payable on 1st November 1897.

As the defendants did nothing to put plaintiff in possession of the mortgaged property and as they did

1918.

NARSINGRAO KONHER INAMDAR v. BANDO KRISHNA.

not pay the plaintiff's claim the plaintiff applied in execution on 18th June 1898 to recover the whole amount with interest by attachment and sale of defendants' moveable property and by sale of the mortgaged property. He obtained by this application possession of some of the immoveable property and a small portion of his claim.

The next application was on 4th January 1901. Further execution was applied for on 13th August 1901, again on 1st August 1904, and on 26th July 1907. Finally, the present application for execution was presented on 2nd December 1909. The First Class Subordinate Judge held it was time-barred on the ground that as none of the previous applications for execution were in accordance with law the decree was not kept alive. This order was reversed by the High Court on 16th July 1912 and the Darkhast was ordered to be disposed of on its merits. The First Class Subordinate Judge has held that the decree was kept alive by timely applications for its execution and that as the last application was made within twelve years of 28th January 1899, the sums of Rs. 575 and 6,000 were not barred. I have already pointed out that those sums are barred as they were payable on 17th November 1897 which I consider is the correct date to be taken for computing the period of limitation. That disposes of one point raised in this appeal.

The next point to consider is whether with regard to the Rs. 44,000 the decree being a mortgage decree, the decree-holder can sell mortgage property without first obtaining a final decree for sale. That the decree with regard to the Rs. 44,000 is a mortgage decree I think cannot be doubted. The decree directs that the plaintiff should be put in possession of the mortgaged property to secure the interest on the Rs. 44,000. The defendants' contention is that by Order XXXIV, Rule 5

the decree-holder must first obtain a final decree for sale before the property can be sold. The defendants say such an application must under Article 181 of the Indian Limitation Act, 1908, be made within three years from the date on which the right to apply accrues. Now admittedly the last payment by the defendants of the annual instalments was in January 1902. Thereupon, the defendants say, the plaintiff became entitled to apply under the decree for sale of the immoveable property and as he did not do so within three years the present application is barred.

Now, before 1st January 1909—the date when the new Code of Civil Procedure came into force—the mortgagee was bound to apply for an order absolute for sale and it was held that such an application was an application to execute the decree and that the period of limitation was therefore three years from the date of the decree as provided by Article 179 of the Indian Limitation Act of 1877 (Limitation Act, 1908, Article 182). This was the view taken by the Privy Council: *Abdul Majid* v. *Jawahir Lal*[1]; *Batuk Nath* v. *Munni Dei*[2]. No doubt if there had been no applications for execution before 2nd December 1909 that application might have been barred under Article 179 of the Indian Limitation Act of 1877, but there were several applications which have kept the decree alive. The High Court has already held in this case on this point that the decree was kept alive by timely applications. Therefore at the date the new Code came into force, viz., 1st January 1909, execution of this decree was not barred. Order XXXIV, Rule 5 requires the mortgagee to obtain a final decree which by Article 181, Limitation Act, must be within three years of when the right to apply accrues. It introduces a new step to be taken in the execution. If, however, the

(1) (1914) 36 All. 350. (2) (1914) 36 All. 284.

1918.

NARSINGRAO KONHER INAMDAR v. BANDO KRISHNA.

mortgagee's right to execute the decree was not barred on 1st January 1909 I fail to see how Order XXXIV, Rule 5 can bar it. Order XXXIV, Rule 5 requires an application for a final decree whereas before 1st January 1909 it was enough to apply for an order absolute for sale or, which was the same thing, an application to execute the decree. The necessity to apply for a final decree only arose on 1st January 1909. Before then section 89 of the Transfer of Property Act applied. The right to apply for a decree final therefore only arose on 1st January 1909 and if this application of 2nd December 1909 can be treated as such an application it is not barred. I see no reason why it should not be so treated as the Court may make a final decree for sale on it. In conclusion I would say I question whether on a true construction of this decree the plaintiff's right by the decree to have the mortgaged property sold in default of payment of any one instalment did not accrue afresh at the time of making default in payment of any one instalment. A similar case is reported in *Shankar Prasad* v. *Jalpa Prasad*[a].

I, therefore, agree that the appeal succeeds only as to the sums of Rs. 575 and 6,000 payable on the date of the decree. Each party will pay and receive costs in proportion to his success in the appeal.

Decree varied.

J. G. R.

[a] (1894) 16 All. 371.