before the Court any contemporaneous record to prove when the goods were taken out of the wagon. Indeed, the learned Subordinate Judge in a considered judgment held that it had not been established by the Forwarding Railway that the goods were lost beyond the period of limitation. The correctness of this finding was not canvassed in the High Court, and for the reasons already mentioned, on the material produced, there was every justification for the finding. If so, it follows that the suit was well within time. In this view it is not necessary to express our opinion on the question whether there was a subsequent acknowledgement of the appellant's liability within the meaning of Art. 19 of the Indian Limitation Act.

In the result, the appeal fails and is dismissed with costs.

*B.R.T.*

APPELLATE CIVIL

*Before D. Falshaw and G. L. Chopra, JJ.*

AMAR NATH AND OTHERS,—*Appellants*

*versus*

BANKEY BEHARI,—*Respondent.*

**(R.F.A. Case No. 143/C of 1955).**

1959

Oct., 29th

*Limitation Act (IX of 1908) Section 15—Application for final decree in a suit on the basis of mortgage—Whether covered by Section 15—Application for passing final decree consigned in default, after the knowledge of injunction—Effect of—Subsequent application—Whether a revival of the first one.*

In a suit on the basis of mortgage a preliminary decree was passed. A son of the original mortgagor obtained an injunction restraining the decree-holder from taking any

step under the preliminary decree in the mortgagee suit. The injunction was brought to the notice of the Court and on the date fixed the court consigned the application of the decree-holder to the record room in default. After the suit of the mortgagor's son was dismissed and the temporary injunction came to an end, the decree-holder filed an application for passing of the final decree. This application was made after the expiry of 3 years from the date of the order consigning the first application in default.

*Held*, that it is clear that at the time the order consigning the application for passing of final decree to the record room was passed in July, 1948, both the decree-holder and the Court were aware that Prem Nath, a son of the mortgagor, had obtained a temporary injunction restraining the decree-holder from taking any action under the preliminary decree until the decision of the suit. It must necessarily be concluded from this that both the decree-holder and the Court treated the injunction as staying all further proceeings in connection with the passing of the final decree until Prem Nath's suit was decided. Such being the case, the order consigning the application for passing of the final decree to the record room, which would have been an illegal order if it had purported to dismiss the application outright, must be treated as being simply an order adjourning further proceedings on the application *sine die* until after the decision of Prem Nath's suit, and the application filed in 1953 soon after the dismissal of the suit must, therefore, be treated merely an as application for revival of the original application and continuation of the proceedings thereon. The injunction restrained him from taking any step whatever in pursuance of the preliminary decree and an application to revive the original application and continue proceedings thereon during the continuance of the injunction would clearly have amounted to a violation of the terms of the injunction.

*Held*, that in such a case the application for passing of the final decree must be deemed to fall within the term "application for execution" as used in section 15 of the Indian Limitation Act, 1908, and the decree-holder is entitled to exclude the time during which the injunction remained in operation as a result of which he was prevented from taking any steps under the preliminary decree.

*Regular First Appeal from the decree of the Court of Shri Pritam Singh, Commerical Sub-Judge 1st Class, Delhi,*

*dated the 18th day of July, 1955, ordering that the preliminary decree, dated the 15th December, 1947, passed in the suit is made the final decree for sale, and the applicant, Bankey Behari; can realise the decretal amount by execution of the final decree by sale of the mortgaged property.*

R. S. NARULA, AND D. K. KAPUR, for Appellants.

TARA CHAND, BRIJ MOHAN LAL, for Respondent.

JUDGMENT

FALSHAW, J.—This is an appeal against a final decree in a mortgage suit for Rs. 53,725. Falshaw, J.

The relevant facts are that a preliminary decree in a mortgage suit was passed in favour of the plaintiff, Bankey Behari, who was then a minor whose suit had been instituted and prosecuted through two persons who had been appointed as his guardians by the District Judge, Delhi. The preliminary decree fixed a period of three months for payment of the decretal amount and this was due to expire on 15th March, 1948. The amount was not paid within the specified period and an application was filed on behalf of the minor plaintiff for the passing of a final decree on the 8th of April, 1948.

In the meantime, however, one of the defendants in the suit, a son of the original mortgagor, had instituted a suit challenging the mortgage and on the 23rd of March, 1948, a temporary injunction was granted to the plaintiff restraining the principal defendant, i.e., the minor decree-holder in this case from taking any step under the preliminary decree in the mortgage suit pending the decision of the suit. Although the order granting this temporary injunction contained a direction that it should be communicated to the court seized of the mortgage suit this does not appear to have

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been done before the 10th May, 1948, when counsel for the parties were present in connection with the application for the passing of the final decree, and when a proclamation was ordered to be issued and the case was ordered to be fixed for 3rd of June, 1948. On that date the record shows that an application was filed on behalf of Prem Nath, the plaintiff in the suit who had obtained the temporary injunction, praying for stay of the proceedings on the ground that the temporary injunction had been issued to the decree-holder not to get a final decree passed. The case was adjourned to the 3rd of July, 1948, when an order was passed to the effect that the applicant was absent and that his application should be consigned to the record room in default. By that time it is clear that both the decree-holder and the Court were aware of the existence of the injunction.

The suit of Prem Nath was dismissed on the 25th of February, 1953, which had the effect of terminating the temporary injunction and on the 20th May, 1953, the decree-holder filed an application for the passing of a final decree. The application was opposed by the judgment-debters on the grounds that the previous application had been rejected and the new application was not within time. On this an amended application was filed. In this the decree-holder claimed that the original application was illegally dismissed and the present application was merely a revival of his previous application dated 8th of April, 1948, and he also claimed the benefit of sections 6 and 15 of the Limitation Act on the grounds that he had only become a major on the 27th of October, 1950, and that he had been prohibited from pursuing the original application for final decree by the injunction which remained in force from March, 1948 to February, 1953.

The Lower Court held that the order of the 3rd of July, 1948, which purported to dismiss the application in default was an illegal order and that the application in 1953 must be treated merely as a revival of the original application; that since the minor decree-holder only attained his majority on the 27th of October, 1950, his application would be within time up to 27th of October, 1953 under the provisions of section 6 of the Indian Limitation Act. 1908, and that the decree-holder was also entitled to the benefit of section 15 of the Limitation Act in respect of the time for which the injunction restraining him from taking any steps in pursuance of the preliminary decree remained in force.

All these findings have been attacked before us in the appeal. On the first point relating to the effect of the order of 3rd July, 1948, it seems to me that the case has been unnecessarily complicated by the assumption made not only by the decree-holder himself but also by the lower Court that this order was one of dismissal. As a matter of fact the word 'dismissal' is not used in the English order nor is its Urdu equivalent used in the Urdu order on the file. All that is said in both the orders is that the applicant is absent and hence the application is consigned to the record room in default. As I have already observed above it is clear that at the time when this order was passed both the decree-holder and the Court were aware that Prem Nath had obtained a temporary injunction restraining the decree-holder from taking any action under the preliminary decree until the decision of the suit. It seems to me that it must necessarily be concluded from this that both the decree-holder and the Court treated the injunction as staying all further proceedings in connection with the passing of the final decree until Prem Nath's suit was

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decided. Such being the case, I am of the opinion that the order consigning the application for passing of the final decree to the record room, which admittedly would have been an illegal order if it had purported to dismiss the application outright, must be treated as being simply an order adjourning further preceedings on the application *sine die* until after the decision of Prem Nath's suit, and the application filed in 1953 soon after the dismissal of the suit must therefore be treated merely as an application for revival of the original application and continuation of the proceedings thereon. Thus the decision in *Mummadi Venkatiah V. Beganatham Venkata Subbiah* (1), which was relied on behalf of the applicants, and in which it was held that where an application for a final decree had been dismissed it could not be revived, and the only remedy of the party aggrieved was to appeal against the order, is distinguishable, and there is no need to discuss whether the law laid down therein is correct or not, and there is also no need to discuss the cases cited on the other side in which the dismissal of an application for a final mortgage decree in default was held to be illegal.

In the light of this finding it also does not seem to be necessary to discuss the effect of section 6 of the Limitation Act, which provides that when a person entitled to institute a suit or make an application for the execution of a decree is, at the time from which the period of limitation is to be reckoned, a minor, or insane, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefore in the third column of the first schedule. If the application for the final decree which was filed by the plaintiff's next friends was never dismissed and the subsequent

(1) A.I.R. 1922 Mad. 65

application was merely for its revival and continuation of the proceedings thereon, it is not necessary to discuss whether an application for a final decree could be filed by a minor within three years of his attaining his majority or whether for the purpose of this section an application for a final decree can be treated as an application for the execution of the decree, though the latter question will arise in connection with the application of section 15 in which also the words "any suit or application for the execution of a decree" are used.

The appellants' case regarding section 15 is that in any case even if the application filed in 1953 was to be treated as an application for reviving the original application which had been wrongly dismissed or not dismissed at all it should have been filed within three years from the 3rd of July, 1948. The contingencies have to be considered in this connection, namely, what is the position if the application was dismissed wrongly and an application had to be filed for restoration, and what is the position if, as I have already expressed my opinion as being the true position, the order consigning the application to the record room merely amounted to an adjournment *sine die* for the duration of the injunction.

In the latter case I am of the opinion that there is no doubt that not only was the decree-holder not bound to file an application for revival and continuation of proceedings of the original application within three years from the date of the order but actually he was debarred from doing so by the terms of the injunction. The injunction restrained him from taking any step whatever in pursuance of the preliminary decree and an application to revive the original application and continue proceedings thereon would clearly have amounted to

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a violation of the terms of the injunction. I am therefore of the opinion that in such a case no question of limitation could arise regarding the application for revival and continuation of the proceedings until after the injunction had been terminated, and the present application was filed within two or three months of the dismissal of the suit and consequent termination of the injunction.

Even, however, assuming that the order amounted to one of dismissal the decree-holder would be entitled to the benefit of section 15 of the Limitation Act. Sub-section (1) of Section 15 reads:—

> "In computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded."

There is undoubtedly some conflict of authority on the question whether an application for a final decree in a mortgage suit can be regarded for the purpose of this section as an execution application. In *Ahmad Khan and others (objectors) V. Musammat Gaura* (1), it was held that an application for a final decree in a suit for sale on a mortgage was an application in the suit and not an application in execution, and the fact that one such application had been made within the prescribed period of limitation did not operate to extend the period of limitation in favour of a second application, the first having been dismissed for default. This case does not deal with section 15 but it lays down the

(1) I.L.R. 40 All. 235

principle, which is generally accepted, that for most purposes an application for a final decree is not an execution application. In *Pulin Chandra Sen* v. *Amin Miah Muzaffar Ahmad and others* (1), the matter was considered in relation to section 6 of the Limitation Act and it was held that section 6 could have no application in the case of proceedings to obtain a final decree in a mortgage suit as such proceedings were not proceedings in execution, but were proceedings in the suit for enforcement of the mortgage.

On the other side, however, there is the view taken by Beaument C.J. and Sen J. in *Govindnaik Gurunathnaik Kalghatgi* v. *Basawannewa Parutapna Karaigi* (2). In that case it was held that where after the passing of a preliminary mortgage decree in favour of a minor represented by his next friend, the next friend died and the suit was stayed under Order 32, Rule 10, Civil Procedure Code, the period during which the suit was stayed should be excluded in computing the period of limitation for the making of an application for final decree on the ground that the right to apply for a final decree was suspended during the period in which the suit was stayed, and that although section 6 had no application to such a case the principle underlying section 15 was applicable. In that case the Calcutta decision was cited and approved, but nevertheless the learned Judges applied the principles of section 15 to the case.

Another case cited was the *Managing Committee Sunder Singh Malha Singh Rajput High School* v. *Sunder Singh Malha Singh Sanatan Dharam Rajput High School* (3). This ws a case

(1) A.I.R. 1933 Cal. 508
(2) A.I.R. 1941 Bom. 203
(3) A.I.R. 1945 Lah. 227

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in which a question had arisen whether an application under section 144, Civil Procedure Code, for restitution was an application for execution or not. This question was referred to a Full Bench consisting of Harries C.J. and Din Mohhammad and Abdur Rahman JJ. and it was held that an application under section 144, Civil Procedure Code, was not an application for execution within the meaning of article 182 of the Limitation Act. After this decision of the Full Bench the case went back to the Division Bench consisting of Harries C.J. and Abdur Rahman J. and it was held that although the provisions of section 15 could not be attracted to proceedings for restitution as an application for restitution was not an application for execution and the time during which a party was precluded by the orders of the Court from making the application for restitution could not be excluded under that section but there was no reason why the same principle on which section 15 was based should not be extended to an application for restitution as well. Finally there is a case of *Umrao and another* v. *Behari Lal* (1), in which also the Acting Chief Justice Allsop C.J. and Mathur J. held that an application for a final decree in a suit on the basis of a mortgage was in effect an application to obtain execution of the decree for recovery of money by the sale of property, although in form it was a preliminary step before actual execution could be taken out and such an application fell within the provisions of section 15.

With these views I am in respectful agreement. It seems to me that it would be highly unfair that a person seeking to execute a mortgage decree should, in the event of an injunction being issued restraining him from taking any steps to execute the decree, be in a worse position than a person

(1) A.I.R. 1947 All. 187

seeking to execute any other kind of decree, and I am therefore of the opinion that although in the most technical sense an application for passing a final decree may not be an execution application it must be deemed to fall within the term "application for execution" as used in section 15 of the Limitation Act, or in other words, this term is not used in its most technical sense in the section.



For these reasons, I am of the opinion that the present appeal must fail and I would accordingly dismiss it, but taking into consideration the points involved I would leave the parties to bear their own costs.

CHOPRA, J.—I, agree



*R.S.*

APPELLATE CIVIL.

*Before D. K. Mahajan, J.*

RAM SINGH AND OTHERS,—*Appellants.*

*versus*

GURNAM SINGH,—*Respondent.*

**Regular Second Appeal No. 510 of 1958.**

1959

Oct., 29th

*Pre-emption—Nature of the right—Vendee, whether can defeat the pre-emptor by exchanging a part of the property with another person having a better or equal status with the pre-emptor.*

*Held,* that the right of pre-emption is a right of substitution. The decree in a suit for pre-emption substitutes the pre-emptor in the place of the vendee in a transaction of sale. The effect of such a decree is as if the name of the vendee is rubbed out of the sale-deed and that of the pre-emptor is substituted in its place.

*Held,* that the property acquired by exchange is substituted for the property given in exchange. In other