Privy Council Appeal No. 4 of 1926.

Fitzholmes - - - - - - - - - *Appellant*

v.

The Bank of Upper India, Limited, in Liquidation - - - *Respondents*

Fitzholmes and another - - - - - - - - *Appellants*

v.

Same - - - - - - - - - - *Respondents*

(*Consolidated Appeals*)

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 9TH NOVEMBER, 1926.

Present at the Hearing:

LORD PHILLIMORE.
LORD SINHA.
LORD BLANESBURGH.
LORD SALVESEN.

[*Delivered by* LORD PHILLIMORE.]

Their Lordships need not trouble Counsel for the respondents.

The cases under appeal were two, one against husband and wife, and one against wife only, in respect of mortgages to the respondent bank. Decrees fixing a figure to be paid and giving six months within which it should be paid were passed in both suits, on 21st August, 1919, in one, and on 17th December, 1919, in the other. The mortgagors appealed and somehow or other the proceedings got so delayed that the judgment of the High Court in both of the suits was not passed till the 7th March, 1923, when the High Court dismissed both appeals. On the 13th March, the bank applied for a final decree. Objection was taken by the

mortgagors that six months had not expired since the decree of the High Court, and that objection prevailed. Thereupon the bank waited for six months and a little more and on the 10th October applied for a final decree for sale, and an order was made on 20th October. Thereupon the mortgagors appealed to the High Court, on the ground that, under Article 181 of the Limitation Act, the decrees of the Court of first instance were dead. They passed by the decrees of the High Court and contended that there could now be no sale. The District Judge dismissed this application and the High Court agreed with him; but the mortgagors, not being content, have appealed to this Board. It has now been definitely settled, in the case of *Jowad Hussain* v. *Gendan Singh* (53 I.A., 197), that

> " Where there has been an appeal from a preliminary mortgage decree under Order XXXIV, rule 4, sub-rule 1, and the Appellate Court has not extended the time for payment, the period of three years within which, under the Indian Limitation Act, 1908, Schedule I, article 181, an application for a final decree under Order XXXIV, rule 5, sub-rule 2, must be made runs from the date of the decree of the Appellate Court, not from the expiry of the time for payment fixed by the preliminary decree."

Therefore, in the first instance, it would seem quite simple that the mortgagors' point was a bad one. But a very ingenious suggestion was made with regard to the earlier of the two decrees. It was said that before the date of the High Court decision the three years and six months had passed and therefore that decree was dead before the High Court gave its decision and could not be revived, so no order for sale could be made. The point does not seem to have been taken in the Courts below, but it is open to the appellants to raise it. The answer is first, that no attempt has been made to discharge the order of the High Court. It stands unappealed from. The answer is next, that the jurisdiction of the High Court is not touched by the Limitation Act, and when an appellant appeals to the High Court, unless there is some rule dismissing the appeal for want of time or an order is procured dismissing it, his appeal stands till it is heard. Therefore the High Court had a right to determine the appeal, and when the judgment of the High Court is given, though in form it affirms the decree of the Judge of first instance, it works out at a different figure, because the amount of interest is not at the same figure that judgment was passed for in the first instance. Therefore the High Court having jurisdiction to pass its decrees, those decrees were sought to be enforced in plenty of time. The mortgagors were right in their objection that these decrees should not be enforced till six months had elapsed from the judgment of the High Court, and it is sufficiently cynical that they should now turn round and take a point which one is glad to think entirely fails.

These appeals will be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

FITZHOLMES

v.

THE BANK OF UPPER INDIA, LIMITED, IN LIQUIDATION.

FITZHOLMES AND ANOTHER

v.

SAME.

(*Consolidated Appeals.*)

DELIVERED BY LORD PHILLIMORE.

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