APPELLATE CIVIL.

Before Teunon and Newbould JJ.

UMESH CHANDRA ROY

v.

AKRUR CHANDRA SIKDAR.*

1918

March 4.

Limitation—Execution of Joint Decree—Decree set aside against one of several joint debtors, if it gives a fresh starting point of limitation against others.

A joint *ex parte* decree against several judgment-debtors, if set aside against only one of them, without notice to others, will not give a fresh starting point of limitation against others.

Khiarajmal v. *Daim* (1), *Suresh Chunder Wum Chowdhry* v. *Jugut Chunder Deb* (2) and *Hanuman Prasad* v. *Muhammad Ishaq* (3) followed.

Malkarjun v. *Narhari* (4), *Kali Prosunno Basu Roy* v. *Lal Mohun Guha Roy* (5), *Amar Chandra Kundu* v. *Asad Ali Khan* (6), *Gopal Chunder Manna* v. *Gosain Das Kalay* (7), *Abdul Khadir* v. *Ahammad Shaiwa Ravuthar* (8), *Vydianatha Aiyar* v. *Subramania Patter* (9) and *Ashfaq Husain* v. *Gauri Sahai* (10) distinguished.

APPEAL by Umesh Chandra Roy, the judgment-debtor No. 2.

On the 23rd December, 1908, a decree was passed *ex parte* against Dadhiram, Umesh Chandra and Ganesh Chandra Roy, who were three brothers. Then defendant No. 3, Ganesh, applied for rehearing which was granted so far as Ganesh was concerned, and the suit

* Appeal from Order, No. 37 of 1917, against the order of the Subordinate Judge of Alipore, 24-Parganas, dated Feb. 3, 1917.

(1) (1904) I. L. R. 32 Calc. 296 ; L. R. 32 I. A. 23.
(2) (1886) I. L. R. 14 Calc. 204.
(3) (1905) I. L. R. 28 All. 137.
(4) (1900) I. L. R. 25 Bom. 337 ; L. R. 27 I. A. 216.
(5) (1897) I. L. R. 25 Calc. 258.
(6) (1905) I. L. R. 32 Calc. 908.
(7) (1898) I. L. R. 25 Calc 594.
(8) (1911) I. L. R. 35 Mad. 670.
(9) (1911) I. L. R. 36 Mad. 104.
(10) (1911) I. L. R. 33 All. 264 ; L. R. 38 I. A. 37.

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was restored. After a rehearing of the suit, it was dismissed on the 26th September, 1913, against Ganesh and decreed *ex parte* against the other two brothers. No fresh summonses were served on Dadhiram and Umesh Chandra of the rehearing case. The decree-holder applied on the 1st July, 1916, for execution of the decree of the 26th September, 1913. Dadhiram and Umesh Chandra objected to the execution, contending that the decree sought to be executed was a nullity, as they had no notice of the rehearing, and that execution of the original decree was barred by limitation, which it clearly was. The Subordinate Judge overruled the contention of the objectors and held that the decree of the 26th September was not a nullity. Umesh Chandra thereupon appealed to the High Court.

Babu Akshay Kumar Banerji, for the appellant. Under the old Code, when an *ex parte* decree was to be set aside, it was to be set aside as a whole, but under O. IX, r. 13, a decree can be set aside in favour of the applicant only. In the present case, it was so done. No notice was given to defendants Nos. 1 and 2 of the application for setting aside the decree, or of the rehearing of the suit. The order on rehearing confirming the decree as against defendants Nos. 1 and 2 was therefore *ultra vires*. Under such circumstances, limitation as against them could at best run from the time when steps in execution were taken to execute the decree of 1908. The application to set aside the *ex parte* decree under O.IX, r. 13 of the Code cannot, under any circumstances, be said to be one for review of judgment or decree, nor an application for amendment of the decree.

Babu Manmathanath Roy, for the respondents, contended that if the present application for execution be regarded as an application for execution of the

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decree, dated the 26th September, 1913. the application was obviously in time. The Court was bound to execute the decree; it could not entertain any objection as to the legality, correctness or merits of the decree, which would be valid or binding on the parties to it, until annulled or set aside: *Chhoti Narain Singh* v. *Rameshwar Koer* (1), *Dhani Ram Mahta* v. *Luchmeswar Singh* (2), *Chintaman bin Vithoba* v. *Chintaman Bajaji Dev* (3), *Grish Chunder Lahiri* v. *Shoshi Shikhareswar Roy* (4). Moreover, by the order dated the 8th February, 1913, the application for rehearing being granted, "the suit was restored to the file," and the parties being the partners of a firm, the Court was competent, having regard to the provisions of the proviso to O. IX, r. 13 of the Code, to rehear—which it actually did—the case against all the parties to the suit. Assuming, however, that the decree of the 26th September, 1913, so far as it related to defendants Nos. 1 and 2 was *ultra vires*, and is therefore ignored, and that the executing Court was competent to entertain that objection, the time for execution of the original decree dated the 23rd December, 1908, runs from the 26th September, 1913, when there was an "amendment" (or a "review") of the original decree within the meaning of clauses 3 and 4 of Art. 182 of the Limitation Act. The dismissal of the suit against defendant No. 3 on the 26th September, 1913, resulted in an "amendment" or "review" of the original decree, as it had the effect of a decree being passed against defendants Nos. 1 and 2 only, and not against all the defendants: *Ashfaq Husain* v. *Gauri Sahai* (5), *Abdul Khadir* v. *Ahammad Shaiwa*

(1) (1902) 6 C. W. N. 796.

(2) (1896) I. L. R. 23 Calc. 639.

(3) (1896) I. L. R. 22 Bom. 475.

(4) (1900) I. L. R. 27 Calc. 951, 967; L. R. 27 I. A. 110.

(5) (1911) I. L. R. 33 All. 264; L. R. 38 I. A. 37.

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Ravuthar (1), *Vydianatha Aiyar* v. *Subramania Patter* (2), *Gopal Chunder Manna* v. *Gosain Das Kalay* (3), *Venkata Jogayya* v. *Venkatasimhadri Jagapatirazu* (4), *Kali Prosanna Basu Roy* v. *Lal Mohun Guha* (5). The words "amendment" and "review" should have a liberal construction: *Kali Prosanna Basu Roy* v. *Lal Mohun Guha* (5).

Babu Akshay Kumar Banerji, in reply, contended that an order under O. IX r. 13 cannot be construed to be an order for amendment or review. The cases cited by my friend are not in point.

[TEUNON J. We need not trouble you farther.]

Cur. adv vult.

TEUNON AND NEWBOULD JJ. This appeal arises out of execution proceedings.

It appears that on the 23rd December, 1908, a decree for a sum of Rs. 6,473 was made *ex parte* against three brothers, Dadhiram, Umesh and Ganesh.

On the 2nd July, 1912, defendant No 3, Ganesh, applied for an order to set aside the *ex parte* decree. On the 8th of February, 1913, the Court made an order in these terms: "Application for rehearing being granted, the *ex parte* decree is set aside against the applicant Ganesh Chandra Roy."

Of the rehearing, no notice was given to defendant judgment-debtors Nos. 1 and 2, but on the 26th September, 1913, after taking the evidence adduced by the plaintiff and defendant No. 3, the Subordinate Judge delivered judgment and made an order as follows: "The suit is dismissed against defendant No. 3 and is decreed *ex parte* against defendants 1 and 2 with costs." Thereafter a decree in the said terms was drawn up.

(1) (1911) I. L. R. 35 Mad. 670, 675.
(2) (1911) I. L. R. 36 Mad. 104.
(3) (1898) I. L. R. 25 Calc. 594.
(4) (1900) I. L. R. 24 Mad. 25.
(5) (1897) 2 C. W. N. 219.

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The present application was made on the 1st July, 1916, and is one for execution of the decree of the 26th September, 1913, against judgment-debtors 1 and 2.

A prior application for execution against all three defendants had been made in the year 1911, the proceedings taken thereon terminating on the 14th June, 1912. It follows that notwithstanding that application, the present application if it is to be regarded as one for the execution of the decree of the 23rd December, 1908, is barred by the 3 years' rule of limitation, unless some other fresh starting point can be obtained.

The question for determination then is, whether the order and decree of the 26th September, 1913, are to be regarded as binding on defendants 1 and 2 until set aside by proceedings properly taken for that purpose, or whether they are to be regarded as mere surplusage, or as without jurisdiction and void. In support of the position taken by the decree-holder respondent, we have been referred to the case of *Malkarjan* v. *Narhari* (1). It has also been contended that the decree or order of the 26th September, 1913, in effect amends or reviews the decree of the 23rd December, 1908, and that limitation should run from the date of the amendment under Article 182, clauses 3 and 4 of the schedule to the Limitation Act In support of this view have been cited the cases in *Kali Prosanna Basu Roy* v. *Lal Mohan Guha Roy* (2), and *Amar Chandra Kundu* v. *Asad Ali Khan* (3) and also to the case of *Gopal Chunder Manna* v. *Gosain Das Kalay* (4), *Abdul Khadir* v. *Ahammad Shaiva Ravuthar* (5), *Vydianatha Aiyar* v. *Subramania Patter* (6), and *Ashfaq Husain* v. *Gauri Sahai* (7). The case

(1) (1900) I. L. R. 25 Bom. 337; L. R. 27 I. A. 216.
(2) (1897) I. L. R. 25 Calc. 258.
(3) (1905) I. L. R. 32 Calc. 908.
(4) (1898) I. L. R. 25 Calc. 594.
(5) (1911) I. L. R. 35 Mad. 670.
(6) (1911) I. L. R. 36 Mad 104.
(7) (1911) I. L. R. 33 All. 264; L. R. 38 I. A. 37.

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last mentioned is perhaps the one most in point, but while in that case the later decree granted against one of the defendants was necessary to the execution of the decree-holder's mortgage decree, here, it is to be remembered, as against the defendants 1 and 2, the decree of the 23rd December, 1908, remained untouched throughout and has been from that date enforceable against them. To the proceedings taken on defendant No. 3's application on the 2nd July, 1912, and to the subsequent proceedings taken on and after the order of the 8th February, they were not made parties. On the principles laid down, therefore, in the cases of *Khiarajmal* v. *Daim* (1), *Suresh Chunder Wum Chowdhry* v. *Jagut Chunder Deb* (2), and *Hanuman Prasad* v. *Muhammad Ishaq* (3), it would seem that the order of the 26th September, 1913, in so far as it purports to be one made against defendants 1 and 2, is a mere nullity. Further, the decree of the 23rd December, 1908, against defendants 1 and 2 having continued in force throughout, the order of the 23rd September, 1913, in so far as defendants 1 and 2 are concerned, may be regarded as merely an intimation that the decree of the date first mentioned, in so far as it was one against defendants 1 and 2, was not affected by the order of the later date. The formal decree then drawn up was thus a mere surplusage and a ministerial irregularity.

On the whole we are of opinion that the contentions of the appellant should prevail. We therefore decree this appeal but, in the circumstances, without costs.

S. M. *Appeal allowed.*

(1) (1904) I. L. R. 32 Calc. 296 ; L. R. 32 I. A. 23.

(2) (1886) I. L. R. 14 Calc. 204.

(3) (1905) I. L. R. 28 All. 137.