

APPELLATE CIVIL.*Before Chatterjea and Panton JJ.*

KRISHNA LAL BURMAN

v.

SATYABALA DEBI.*

1923

Aug. 9.

Limitation—When time begins to run where decree is appealed against.

A decree-holder is entitled to wait until the decision of the lower Appellate Court before applying for execution of the decree of the Court of first instance and the period of limitation commences to run from the date of the decree of the lower Appellate Court.

APPEALS from Appellate Orders by Krishna Lal Burman and another, the judgment-debtors.

Purna Chandra Burman, the husband of the executing decree-holder, Satyabala Debi, obtained two decrees against the judgment-debtor. He appealed against those decrees during the life time of the said Purna Chandra, making him the respondent. The respondent having died during the pendency of the appeal, Sarat Chandra Burman, the respondent No. 3, applied for substitution of Purna Chandra's wife Satyabala as his heir; and Binode Behari Burman, respondent No. 4, and father of Purna Chandra, applied for substituting himself as Purna's heir, on the 6th March, 1917. On the 3rd April following, at the prayer of the appellant, the father was substituted and the Court directed that the question of the wife's heirship was not decided and that she would not be affected by that decision. On the next day, Binode

* Appeals from Orders, Nos. 110 and 132 of 1923, against the orders of P. E. Cammiade, District Judge of Burdwan, dated Feb. 7, 1923, affirming the orders of Rebati Ranjan Mukherjee, Munsif of that place, dated Aug. 14, 1922.

filed a *solenama* giving up his right to the property in the suits and consenting to the decrees of the lower Court being set aside and the decrees were accordingly set aside. Satyabala, the wife, then executed the decrees of the original Court, asserting that she was not affected by the *solenama* entered into by Binode and that, she being still a minor, her petition was not barred by limitation. The judgment-debtor mainly contended, under section 47 of the Code of Civil Procedure, that the decrees of the original Court having merged in those of the Appellate Court, there were no decrees which Satyabala could execute and that her applications for execution were barred by limitation, as the period of limitation had commenced to run during her husband's lifetime. The Court of first instance overruled the objections of the judgment-debtor, holding that the appeals had abated against the deceased respondent Purna and that the decrees of the original Court had not merged in those of the Appellate Court so far as she or her husband was concerned and were outstanding in her favour and she had every right to execute them. It was also held that limitation for execution began to run from the disposal of the appeal on the 4th April, 1917, after the death of Purna, when his legal representative, Satyabala was a minor. The appeals by the judgment-debtors were dismissed by the District Judge, he having held that the widow was admittedly the actual legal representative of the deceased decree-holder and it was obvious that the widow could not be affected by a decree to which she was not a party. The judgment-debtors thereupon preferred these appeals in the High Court.

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Babu Surendra Chandra Sen (with him *Babu Sitaram Banerji*), for the appellants. The period of

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limitation commenced to run from the date of the decree of the first Court, inasmuch as the respondent's husband died during the pendency of the appeal preferred by my client, and after such death, instead of the respondent's name, the name of a person who is found to be a stranger was substituted. Therefore the date of the decree of the Appellate Court was not the starting point. True it is that the respondent's husband died during the pendency of the appeal and, as such, the appeal abated, but the decree of the Appellate Court cannot be considered to be the date of the abatement, for there was no decision at all.

Dr. Dwarkanath Mitter (with him *Babu Prakashchandra Pakrashi* and *Babu Pramathanath Mukherji*), for the respondent. As there was an appeal against the entire decree of the first Court and my client's husband was alive then, he could wait to execute the decree till the appeal was disposed of. He having died and his heir's name not being substituted, the appeal abated and his heir is entitled to apply for execution within three years from the date of abatement.

Babu Surendra Chandra Sen, in reply.

CHATTERJEA AND PANTON JJ. The question involved in this case is whether the application for execution of the decree is barred by limitation. The question arises in the following manner. The husband of the respondent Srimati Satyabala Debi, obtained a decree for possession of certain immovable properties on the 14th March, 1915. The defendants-appellants before us preferred an appeal against the said decree. Pending the appeal Purna Chandra Burman, the husband, died on the 20th February, 1917. There was then a contest between Satyabala, the widow of the deceased, and the father of Purna

Chandra, as to who was the legal representative of the deceased. The father was substituted as the legal representative on the 3rd April, 1917, and the Court observed that as the question of heirship was not decided, she would not be affected by the order. On the next day, the father of the deceased filed a *sole-nama* giving up his right to the property in suit and consenting to the decree of the Court of first instance being set aside. That decree was accordingly set aside. Satyabala, the widow, was at that time and is still a minor. She applied for execution of the decree and an objection was taken on the ground that the application was barred by limitation. The Court of first instance decided the question in her favour.

On appeal, the District Judge did not consider the question of limitation. He held that as the widow was the legal representative of the deceased, it was obvious that she would not be affected by the decree passed between the parties.

The defendant judgment-debtor has appealed to this Court. There are conflicting affidavits as to whether the question of limitation was argued before the learned District Judge. It is unnecessary to decide that question; but assuming that it was raised, we do not think that the application is barred.

It has been contended on behalf of the appellant that as the widow of the deceased was not to be affected by the decision of the lower Appellate Court, the period of limitation should run from the date of the decree of the Court of first instance and as the husband was alive at that time, he should have applied for execution of that decree. It is urged that time commenced to run from the life-time of the husband, and the question of limitation therefore was not affected by his widow being a minor. But the decree obtained by the husband was appealed against. That appeal

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imperilled the whole decree and there was a risk of that decree being set aside on appeal. In these circumstances the husband was entitled to wait until the decision of the lower Appellate Court before applying for execution of the decree of the Court of first instance. The question of limitation discussed in the Court of first instance, as well as in this Court, is whether the period of limitation commenced to run from the date of the decree of the lower Appellate Court or from the date of the decree of the Court of first instance. It seems to us, however, that when the husband of the respondent died, the appeal abated by reason of a proper legal representative not being placed on the record. Up to that time, the period of limitation did not run against him, because, as we have already stated, he was entitled to wait until the decision of the lower Appellate Court. That being so, the limitation did not commence to run so long as he was alive; and upon his death the appeal abated and the widow was then entitled to execute the decree. As already stated she was then and is still a minor. In these circumstances, the application for execution was not barred.

The appeal is accordingly dismissed with costs, the hearing fee in this appeal being assessed at one gold mohur.

This judgment governs Appeal from Appellate Order No. 132 of 1923, which is also dismissed, but without costs.

Appeals dismissed.

S. M.