APPELLATE CIVIL.

Before Page and Graham JJ.

FAKIR CHAND MANDAL

v.

DAIBA CHARAN PARNI*.

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Limitation—Ex parte Decree—Decree on appeal, when period of limitation commences—"Decree on appeal", meaning of—Application to set aside an ex parte decree, whether "keeps the decree open", and whether is an appeal from the decree itself.

Where an appeal has been preferred from a decree the period of limitation commences from the date of the decree on appeal.

Dewan Abdul Alim v. *Abdul Hakam* (1) and other cases followed.

"Decree on appeal" means decree on appeal from the decree to obtain execution of which the application is made.

An application to set aside a decree does not "keep the decree open", and is not to be regarded as an appeal from the decree itself.

Lutful Huq v. *Sumbhudin Patluck* (2) explained and dissented from.

MISCELLANEOUS APPEAL by Fakir Chand Mandal and another, the judgment-debtors.

This miscellaneous appeal arose out of an order of the learned District Judge of Jessore, affirming an order of the Munsif of Bongaon, who held that an application under Order IX, rule 13 of the Code of Civil Procedure kept the *ex parte* decree open until the orders of the Appellate Court were passed, and therefore, the application for execution was made within time.

Babu Mukunda Behary Mullick, for the appellants.

*Appeal from Appellate Order, No. 378 of 1926, against the order of S. K. Ghosh, District Judge of Jessore, dated June 25, 1926, confirming the order of Lalit Mohan Basu, Munsif of Bongaon, dated Oct. 24, 1925.

(1) (1926) I. L. R. 53 Calc. 901. (2) (1881) I. L. R. 8 Calc. 248.

Babu Manindra Mohan Bhattacharjee, for the respondents.

PAGE J. This is an appeal from an order of the learned District Judge of Jessore, affirming an order of the learned Munsif of Bongaon. The material facts are simple, and can be stated concisely. The respondent brought a suit against the two appellants and a third person, and obtained an *ex parte* decree against all the three defendants. No appeal has been preferred against that decree which was passed on the 2nd of March 1922. On the 27th of March 1922, the judgment-debtor other than the appellants applied under Order IX, rule 13 for an order setting aside the *ex parte* decree. That application was dismissed on the 9th of September 1922, and this judgment-debtor preferred an appeal against the order refusing to set aside the *ex parte* decree, but that appeal was dismissed on the 29th of January 1923. On the 27th of March 1925 the respondent as decree-holder applied for execution of the decree against all the three defendants. That application for execution, having been presented more than three years after the decree was passed, was barred by limitation. The decree-holder, however, contended that he was freed from that bar in two ways: (i) because on the 25th of February 1925 a sum of Rs. 5 had been paid by the judgment-debtors in part satisfaction of the decretal sum; (ii) as the application of the judgment-debtor who applied to set aside the *ex parte* decree was not finally dismissed until the 29th January 1923, and the *terminus a quo* for limitation is the date of that final decree, the application for execution was within time.

As regards the first point there was a finding of fact by the learned Munsif adverse to the judgment-creditor, but on appeal, inasmuch as the learned

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District Judge was minded to decide the appeal in the judgment-creditor's favour upon the second ground, he did not consider or decide the first ground upon which the judgment-creditor relied. We are not disposed to send back the proceedings in order that the learned District Judge may come to a finding upon the issue as to whether the Rs. 5 was paid as alleged, because the evidence upon the record is sufficient, and such that we feel that we are in a position to come to a conclusion ourselves upon that issue. The learned Munsif decided this issue against the judgment-creditor because he thought, having regard to the evidence that was adduced, that it could not reasonably be held that the judgment-creditor had established that the payment in question had been made. The parties were at arms length; there had been criminal proceedings between them; and if this alleged payment of Rs. 5 had been made nearly three years after the decree was passed in the circumstances one would have expected that the judgment-creditor would have obtained some record of this payment signed by the debtors or one or more of them in order that he might be in a position to prove this payment for the purpose of saving limitation. It was admitted at the hearing before the learned Munsif that the judgment-debtors could read and write, and yet no record of the payment of this sum of Rs. 5 alleged to have been made by the hostile defendants in favour of the judgment-creditor is to be found. On the other hand each of the judgment-debtors denied having made the payment, and upon that evidence the learned Munsif came to the conclusion that it was not proved that the payment had been made. After considering the evidence in this matter there can be no doubt that the decision at which the learned Munsif arrived was correct.

As regards the second ground it is now well-settled law that, where an appeal has been preferred from a decree, the period of limitation commences from the date of the decree on appeal. *Dewan Abdul Alim* v. *Abdul Hakam* (1), *Gopal Chunder Manna* v. *Gosain Das Kalay* (2). But what is meant by "decree on appeal"? In my opinion to that question there can be but one answer. It means decree on appeal from the decree to obtain execution of which the application is made. Now, can it reasonably be contended that the decree of the 29th of January 1923 was passed on appeal from the decree to execute which the application was made? Clearly not. The appeal which the respondent prays in aid in support of his application for execution was not from the decree passed in the suit, but from an order refusing to set aside that decree under Or. IX r. 13. In my opinion the matter is clear upon principle. But it is also, I think, concluded by authority. See *Jivaji* v. *Ram Chandra* (3), *Baikanta Nath Mittra* v. *Aughore Nath Bose* (4), *Rai Brijraj* v. *Nauratn Lal* (5). The learned vakil on behalf of the respondents relied upon the decision of this Court in *Lutful Huq* v. *Sumbhudin Pattuck* (6). In that case there was an application by a judgment-debtor to revive a suit which had been decreed *ex parte* against him. The lower Appellate Court determined the case upon the footing that the judgment-creditor had been prevented from executing his decree by reason of a stay order that had been passed by that Court, but the learned Judges who decided the appeal in the High Court observed:

"The application to revive the suit really kept the decree open, and "that decree did not become final until the order of the appellate Court "was passed on the 19th December 1877".

(1) (1926) I. L. R. 53 Calc. 901.
(2) (1898) I. L. R. 25 Calc. 594.
(3) (1891) I. L. R. 16 Bom. 123.
(4) (1893) I. L. R. 21 Calc. 387.
(5) (1917) 3 Pat. L. J. 119.
(6) (1881) I. L. R. 8 Calc. 248.

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If it could reasonably be held that an application to set aside an *ex parte* decree "really kept the decree open", that case would be an authority which would conclude the matter in favour of the respondent. But, in my opinion, an application to set aside a decree does not "keep the decree open", and is not to be regarded as an appeal from the *ex parte* decree itself. The case of *Lutful Huq* v. *Sumbhudin Pattuck* (1) has been dissented from by the Patna High Court in the case of *Rai Brijraj* v. *Nauraatn Lal* (2), by the Bombay High Court in the case of *Jivaji* v. *Ram Chandra*, (3), and the *ratio* of the judgment in that case is inconsistent with the decision of this Court in the case of *Baikanta Nath Mittra* v. *Aughore Nath Bose* (4). In my opinion the case of *Lutful Huq* v. *Sumbhudin Pattuck* (1) was wrongly decided, and cannot now be regarded as law.

For these reasons the orders of the learned District Judge and of the Munsif in this case are wrong, and the appeal must be allowed. The order of this Court is that the orders appealed from be discharged, and the judgment-creditor's application for leave to execute the decree of the 2nd of March 1922, be dismissed. The appellants will have their costs in all the Courts.

Appeal allowed.

GRAHAM J. I agree.

B. M. S.

(1) (1881) I. L. R. 8 Calc. 248.
(2) (1917) 3 Pat. L. J. 119.
(3) (1891) I. L. R. 16 Bom. 123.
(4) (1893) I. L. R. 21 Calc. 387.