APPELLATE CIVIL.

Before Rankin C. J. and B. B. Ghose J.

NAGENDRANATH BANERJI

v.

AMBIKACHARAN CHAKRAVARTI.*

1929

May 14.

Decree—Amendment—Date—Appeal—Execution—Limitation—Computation —Assignment of decree—Code of Civil Procedure (Act V of 1908), s. 152; O. XXI, r. 16—Indian Limitation Act (IX of 1908), s. 5; Sch. I, Arts. 181, 182 (4).

Upon a strict construction of Article 182 of the Indian Limitation Act and on principle, the case of an appeal from an amended decree is not different from the case of an appeal from any other decree which postpones the date from which limitation runs for execution purposes.

The date of the decree is the date of the judgment and the fact that the decree is amended does not operate of itself to extend the time for appealing. That goes back to the date of the judgment and not to the date either of the drawing up of the decree or of the date of the amendment. Accordingly, when there has been an amendment and it is reasonable that the time for appealing should be extended, recourse has to be had to the power of the court under section 5 of the Indian Limitation Act.

Brojo Lal Rai Chowdhury v. *Tara Prasanna Bhattacharji* (1) referred to.

A decree operates as *res judicata*, but when it is appealed from, the matter becomes again *sub judice*, and for execution purposes, the party, although he is allowed to levy execution notwithstanding an appeal, is not, as a matter of limitation, required to do so until the appeal has been disposed of.

Ram Charan Bysak v. *Lakhi Kant Bannik* (2) followed.

The broad principle in India as regards execution matters is that time is not computed from the date when the right to apply accrues, but is postponed in cases where there is an appeal.

On a mere question, as to whether the plaintiff should get such and such a sum of money or a little more, no application to amend a decree ought to be entertained after so much as eighteen months; and the fact is to be observed that to amend a decree has consequences under Article 182 and otherwise.

Where a final mortgage decree passed on the 10th October, 1917, was amended on the 8th April, 1919, and further modified on appeal on the 21st January, 1922, the Second Appeal therefrom being dismissed by the High Court, on the 24th July, 1924,

held that the correct date for determining the time of limitation was the 24th July, 1924.

Hari Mohan Dalal v. *Parmeshwar Shau* (3) distinguished.

*Appeals from Appellate Orders, Nos. 101 and 134 of 1928, against the order of G. C. Sankey, District Judge of the 24-Parganas, dated Nov. 7, 1927, reversing the order of Hem Chandra Das Gupta, Subordinate Judge of Alipore, dated May 16, 1927.

(1) (1905) 3 C. L. J. 188. (2) (1871) 7 B. L. R. 704.
(3) (1928) I. L. R. 56 Calc. 61.

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Where during the pendency of an execution case, the decree-holder executed a mortgage with a specific provision that the mortgagee would be competent to realise the decretal debt by being added to the execution case and the mortgagee would be competent to withdraw the decretal money and on failure of the decree-holders to pay their mortgagee, he could *inter alia* execute the said decree in his own name,

held that the decree had been transferred by an assignment in writing to the mortgagee who was within the description of persons given by rule 16 of Order XXI, Code of Civil Procedure, and his application for execution could not be dismissed on the ground that he had no sufficient interest in the decree.

SECOND APPEALS FROM ORDER by Nagendranath Banerji and another, objectors.

The executing court having granted execution of a mortgage decree by the assignee thereof, the judgment-debtors, on appeal, contended *first* that the decree was time-barred and *secondly* that the applicant for execution had no *locus standi*. The final decree in the mortgage under execution was drawn up on the 10th October, 1917. A considerable time later, the decree-holder filed a petition before the trial court, asking for amendment of the decree in three respects. On the 8th April, 1919, this prayer was granted. There was an appeal by the judgment-debtor and on the 21st January, 1922, the lower appellate court confirmed the amendment. The Second Appeal by the decree-holder in the High Court was dismissed on the 24th July, 1924. The decree was first sought to be put into execution on the 18th November, 1925. There were also two assignments of the decree. The lower appellate court, having reversed the order of the executing court issuing execution, the two assignees of the decree preferred these separate Second Appeals from Order to the High Court.

Mr. Asitaranjan Ghosh (for *Mr. Pramathanath Mukherji*) and *Mr. Urukramdas Chakrabarti*, for the appellant in Miscellaneous 2nd Appeal No. 101 of 1928.

Mr. Brajalal Chakravarti, *Mr. Hiralal Chakravarti* and *Mr. Dwijendranath Datta*, for the respondent in No. 101.

Mr. Amarendranath Basu, *Mr. Arunchandra Basu* and *Mr. Dwijendranath Datta*, for the appellant in Miscellaneous 2nd Appeal No. 134 of 1928.

Mr. Brajalal Chakravarti and *Hiralal Chakravarti*, for the respondent in No. 134.

Appeal No. 101.

RANKIN C. J. In this case, it appears, that one Nagendranath Banerji has appealed from an order dismissing the application for execution of one Kartikchandra Sen. This appeal cannot be sustained and must be dismissed with costs—hearing-fee two gold mohurs.

Appeal No. 134.

In this case, an application for execution has been made by one Kartikchandra Sen, who is a sub-mortgagee of the decree, of which execution is sought. The first question is the question of limitation. The lower court has found that execution is time-barred. The facts are these: The decree in question, which appears to have been a final mortgage decree, was passed on the 10th of October, 1917. On the 8th April, 1919, on the application of the decree-holder, that decree was amended. It was amended upon more than one point. It was amended in respect of *interim* interest; it was amended upon some questions of costs and there was a further question of *post diem* interest at six *per cent.*, upon which it was also amended by the trial court. From that decree, as amended, the judgment-debtor appealed and the learned District Judge modified the amended decree in this way that, while a part of the matter which had been added to the decree by way of amendment was retained, another part, namely, that relating to *post diem* interest was set aside. From that decision of the District Judge, an appeal was taken to this High Court, which was dismissed on the 24th of July, 1924.

Now, the petition for execution in this case was presented on the 18th November, 1925. The question is, what is the *terminus a quo*, from which time has to be computed under Article 182 of the First Schedule to the Limitation Act of 1908. It seems reasonably

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clear that the date, 10th October, 1917—the date of the original decree—cannot be the period of time from which limitation runs, because that decree was modified in various ways by subsequent orders, and so to hold would be contrary to the fourth clause of Article 182. The next date which may be considered is the 8th April, 1919, on which date the decree was amended. It has been contended before us that, on a strict interpretation of Article 182, that really is the correct date. I am of opinion that that too cannot be the correct date, because it is quite clear, that, from that amendment or from the decree as amended on the 8th April, 1919, an appeal was brought and the decree was subsequently modified, so that it ceased to be in all respects the test of the liability of the parties. The question, therefore, is whether the next date—the 21st January, 1922—the date on which the District Judge modified the amended decree—can be regarded as the date from which limitation runs. No doubt, it would be the date from which limitation would run, but for the fact that an appeal was brought from that decree of the District Judge, which appeal was dismissed on the 24th July, 1924. We have to consider whether it is true to say that the case of an appeal from an amended decree is different from the case of an appeal from any other decree, so that, while it is clear law that an appeal from any other decree postpones the date from which limitation runs for execution purposes, an appeal from an amended decree has no such operation. In my judgment, there is no ground either upon a strict construction of Article 182 or on principle for that contention. The matter may be looked at in this way: When a decree is amended—and for this purpose it matters nothing whether in amending the decree the court has confined itself within the powers given by section 152, Code of Civil Procedure, or not—the only decree that exists is the decree as modified by the amendment and the only decree from which an appeal can be brought is the existing decree by which the proposed appellant is aggrieved. For the purpose of computing limitation

for appeals, the law is clear enough. Under the Civil Procedure Code, a decree has to be dated as of the date of the judgment. The appeal has to be brought within a certain time from the date of the decree. Whether a decree is amended or is not amended, the date of the decree is the date of the judgment and the fact that the decree is amended does not operate of itself to extend the time for appealing. That goes back to the date of the judgment and not to the date either of the drawing up of the decree or of the date of the amendment. Accordingly, when there has been an amendment and it is reasonable that the time for appealing should be extended, recourse has to be had to the power of the court under section 5 of the Limitation Act. There is no appeal from an order granting an amendment as such, unless indeed it be considered, as sometimes it has been considered, as a question of review, in which case it may be possible to maintain an argument that there can be an appeal from that order. But the view taken in such a case as *Brojo Lal Rai Chowdhury* v. *Tara Prasanna Bhattacharji* (1) is that the correct course is to get an extension under section 5 of the Limitation Act and that the appeal, that is brought, is brought from the decree, that is to say, from the amended decree, because there is no other decree in existence. In this case, we have to remember that, when the appeal was brought to the District Judge, it was an appeal from the final decree of the 10th October, 1917, the circumstance that it had been amended being a circumstance which has no fundamental importance in this case—though it might have had importance if any question had arisen about the appeal being in time. The District Judge, when on the 31st of January, 1922, he modified the amendment really modified the decree, dated the 10th October, 1917—the only decree that existed in the case. Under these circumstances, we have to ask ourselves whether there is any ground in logic or in the language of the Limitation Act for refusing to apply the broad general principle that a

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decree operates as *res judicata* but, when it is appealed from, the matter becomes again *sub judice*, and for execution purposes the party, although he is allowed to levy execution notwithstanding an appeal, is not, as a matter of limitation, required to do so until the appeal has been disposed of—a principle which dates so far back as 1871 and was enunciated in the judgment of Mr. Justice Dwarkanath Mitter in *Ram Charan Bysak* v. *Lakhi Kant Bannik* (1). The sole special feature is that the decree, which the District Judge modified, was a decree which had been amended. I am of opinion that, on principle, such a decree is exactly like any other decree and it is of no materiality for the present purpose whether the decree of the 10th October, 1917, had been amended or had not been amended. If we look at the language of Article 182, it is quite true that the fourth clause merely says that where a decree has been amended, the time runs from the date of the amendment, but there is no provision in the second clause, which deals with the question of appeals, to say that appeals in the case of amended decrees are any different in their effect upon limitation from appeals in the case of other decrees. The only thing that was necessary in 1908 was to deal with the simple case of a decree which afterwards was amended and to give an extension of time for that. Mr. Brajalal Chakravarti in a very able argument has referred to the case of *Hari Mohan Dalal* v. *Parmeshwar Shau* (2). That was a case where the question arose under Article 181 of the first schedule to the Limitation Act. Now, there is this broad contrast between Article 181 and Article 182, that, under the residuary Article 181, time runs from the date, to use the exact language of the statute, "when the right to apply accrues." In execution matters, that is not usually the case. It never is the case for execution purposes that an appeal by itself operates as a stay. There is the right to execute the moment a decree is passed; but if there is an appeal, the time of limitation is postponed and

(1) (1871) 7 B. L. R. 704.

(2) (1928) I. L. R. 56 Calc. 61.

does not run until the decree determining the appeal is made. So, the broad principle in India as regards execution matters is that time is not computed from the date when the right to apply accrues, but is postponed in cases where there is an appeal. It does not, therefore, seem to me that any case under Article 181 can be expected to throw light upon the true position on a question of execution under Article 182. The case in question was a case under section 144 of the Code and the question was whether the right to apply for restitution arose under Article 181 on the date of the order or on the date of the decree dismissing the appeal. It seems to me that there is a very broad distinction which would prevent us from regarding that case as being in point. In my judgment, therefore, there is no escape from the conclusion that the correct date for determining the time of limitation is the 24th of July, 1924.

I would here observe that the fact that to amend a decree has consequences under Article 182 and otherwise is very well worth bearing in mind when courts are asked, after an interval of eighteen months, to amend a decree. On a mere question as to whether the plaintiff should get such and such a sum of money or a little more, I should have thought that no application to amend a decree ought to be entertained after so much as eighteen months. If a person came three weeks afterwards, I would not be surprised that his application was entertained. If he came three months afterwards, one might think it a bad case, but be open to consider whether there was reason which could justify the delay. When a person comes eighteen months afterwards to ask that a provision about interest be added to his decree, it would be a very good thing if the lower courts would appreciate the consequences of entertaining such an application and would refuse to entertain an application of this character. If it be true that the appeal to the District Judge was an appeal from the amended decree bearing the date 10th October, 1917, though amended by an order of the court, dated the 8th April, 1919, it may be the right view that the court of appeal had

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only to consider whether the decree as it stood was a proper decree to have been passed. I understand that, in this case, the view, which was ultimately taken by the High Court, was not that *post diem* interest was an improper thing to order in itself, but that it was a thing which was improperly added under section 152, Code of Civil Procedure. Whether that is a matter proper to be considered when an appeal is brought from an amended decree is a question of some importance upon which I do not desire now to pronounce any opinion.

The next question which we have to determine is whether Kartikchandra Sen is a proper person having regard to Order XXI, rule 16, Civil Procedure Code, to make an application in execution. If he is, then a further question will arise in the course of the execution proceedings as to whether Nagendranath Banerji, who appears to have been a subsequent transferee of the decree, has or has not got priority. We have only to decide whether Kartikchandra Sen is a proper person, at whose instance the decree can be executed; in other words, whether he is a person to whom the decree has been transferred by an assignment in writing. We have before us the document under which he takes his interest in this decree. It is a mortgage for a certain sum of money, Rs. 900, carrying a certain rate of interest and the mortgage is not a mortgage in general terms, but has a certain specific provision. At the time apparently, an application for execution had been made by the original mortgagee and the mortgage provided that Kartikchandra Sen would be "competent to realise the above "sum by being added as a party to the above execution "case jointly with us." It was further provided that, if the defendant deposited the sum due under the decree, Kartikchandra would be competent to withdraw the sum due to him together with interest and costs. It was further provided that, should the original mortgagees fail to pay the money lent within a certain period, Kartikchandra Sen would be competent to realise the sum due to him by bringing a suit

against his borrowers or by execution of the above decree in his own name. In these circumstances, it appears to me that Kartikchandra Sen is within the description of persons given by rule 16 of Order XXI, Code of Civil Procedure, and that this application for execution cannot be dismissed on the ground that he has no sufficient interest in the decree.

In these circumstances, this case must go back to the court of execution and it will be for that court of execution to see that any sum, that is recoverable in the process of execution, is properly distributed between the parties entitled to get it and to make such order as regards payment of money out of court as may seem necessary.

The present appeal must succeed. The appellant must have his costs against the judgment-debtor. The hearing-fee in this Court is assessed at three gold mohurs.

B. B. GHOSE J. I agree.

G. S. *Appeal allowed, case remanded.*