1886
July 30.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

NUR-UL-HASAN (JUDGMENT-DEBTOR) *v.* MUHAMMAD HASAN AND OTHERS (DECREE-HOLDERS).*

Execution of decree - Limitation—Act XV of 1877 *(Limitation Act), sch.* ii, *No.* 179 (2).

Art. 179, cl. (2), of the Limitation Act (XV. of 1877) must be construed as intended to apply without any exceptions to decrees from which an appeal has been lodged by any of the parties to the original proceedings, and should certainly be applied to cases where the whole decree was imperilled by the appeal.

A suit for pre-emption was decreed against the vendors, the purchaser, and another set of pre-emptors, in March, 1882. The last-mentioned defendants alone appealed, and their appeal was dismissed in May, 1882. In May, 1885, the decree-holders applied for execution of the decree. The application was objected to by the purchaser as barred by limitation, having been filed more than three years from the passing of the decree, and it was contended that art. 179, cl. (2), did not apply to the case, inasmuch as the purchaser did not appeal from the original decree.

Held that art. 179, cl. (2), of the Limitation Act was applicable, and that the application, being made within three years from the date of the appellate Court's decree, was not barred by limitation.

Bur Proshaud Roy v. *Enayet Hossein* (1) and *Sangram Singh* v. *Bujharat Singh* (2) distinguished. *Mullick Ahmed Zumma* v. *Mahomed Syed* (3) and *Ram Lal* v. *Jagannath* (4) relied on.

THE decree-holders in this case, Muhammad Hasan and Miyan Muhammad, having brought a suit to enforce the right of pre-emption in respect of the sale of certain property, two persons named Amir Chand and Khurshed Husain brought a suit claiming a similar right in respect of the same sale. These persons were added as defendants in the suit of Muhammad Hasan and Miyan Muhammad. On the 7th March, 1882, Muhammad Hasan and Miyan Muhammad obtained a decree in respect of a moiety of the property in dispute against the vendors, the purchaser, and Amir Chand and Khurshed Husain, the rival claimants to the right of pre-emption. The vendors and the purchaser did not appeal from this decree, but the rival claimants to the right of pre-emption, Amir Chand and Khurshed Husain, did, and the decree of the 7th March, 1882, was affirmed by the Court of first appeal on the 12th

* Second Appeal No. 62 of 1886, from an order of T. Benson, Esq., District Judge of Sahâranpur, dated the 2nd April, 1886, reversing an order of Maulvi Tajammul Husain, Munsif of Shamli, dated the 27th June, 1885.

(1) 2 Calc. L. Rep. 471.
(2) I. L. R., 4 All. 36.
(3) I. L. R., 6 Calc. 194
(4) Weekly Notes, 1884, p. 138.

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May, 1882. Amir Chand and Khurshed Husain then preferred a second appeal to the High Court, but the appeal was dismissed and the decree of the Court of first appeal affirmed.

On the 12th May, 1885, Muhammad Hasan and Miyan Muhammad, decree-holders, applied for delivery of possession in execution of decree. This application was objected to by the purchaser judgment-debtor, Nur-ul-Hasan, on the ground that it was barred by limitation. He contended that it should have been made, so far as he was concerned, within three years from the date of the original decree, the 7th March, 1882, from which he had not appealed, and that not having been so made, it was made beyond time.

This contention the Court of first instance allowed, and dismissed the application. On appeal by the decree-holders the lower appellate Court held that limitation began to run from the date of the High Court's decree, and the application having been made within three years from that date was within time, and directed that execution should issue.

The judgment-debtor appealed to the High Court, again contending that limitation should be computed from the date of the original decree.

Mr. *Amir-ud-din* and Munshi *Hanuman Prasad*, for the appellant.

Pandit *Ajudhia Nath*, for the respondents.

OLDFIELD, J.—The matter in this appeal relates to the execution of a decree obtained for a right of pre-emption. It appears there were two sets of pre-emptors. The first set are respondents before us. They brought a suit against the vendors, the vendee (who is the appellant before us), and the other set of pre-emptors, and obtained a decree for a moiety of the property. This decree is dated the 7th March, 1882. Out of the defendants, the second set of pre-emptors alone appealed, and their appeal was dismissed on the 12th May, 1882. The decree-holders (respondents) applied to execute their decree on the 12th May, 1885, and this application, being objected to by the purchaser, the appellant before us, was disallowed by the Munsif, but on appeal to the lower appellate Court the Munsif's order was reversed, and execution granted against Nur-ul-Hasan, the purchaser of the property. He has now

preferred this appeal on the ground that the application for execution is barred, having been filed more than three years after the passing of the decree. In my opinion the appeal fails, because art. 179, cl. (2), being the limitation law applicable, the time should run from the date of the decree of the appellate Court. It is contended that that law is inapplicable because the appellant did not appeal from the original decree; and so far as he is concerned, the respondents ought to have executed the decree irrespectively of the fact that an appeal had been preferred by some of the defendants. On this point certain decisions have been brought to our notice.—*Hur Proshaud Roy* v. *Enayet Hossein* (1); *Sangram Singh* v. *Bujharat Singh* (2). I think those cases are distinguishable from the present case: as in this case, although only one set of defendants appealed against the original decree, the grounds of such appeal imperilled the rights of the plaintiffs-respondents which they had obtained by a decree against all the defendants. Had the appeal of the second set of pre-emptors succeeded, the property decreed to the respondents would have passed away from them, and there would have been no decree for them to execute against the present appellant. I think this circumstance marks the distinction between the present case and the cases cited; but for my own part I think the terms of art 179, cl. (2), are so clear and distinct that they scarcely admit of any such distinction being drawn. Under that law the period for the execution of a decree will begin to run, where there has been an appeal, from the date of the final decree or order of the appellate Court. It contains nothing as to whether the appeal shall have been made by all the parties, or by one, or how far the appellate Court's order may or may not affect the rights of parties who have not appealed. It seems to me to give a plain and clear rule that in all cases where there has been an appeal, the date of the final decision of the appellate Court shall be the date from which the time for execution will begin to run. In support of the view I am taking, that in the present case limitation should run from the date of the appellate Court's decree, I may refer to *Mullick Ahmed Zumma* v. *Mahomed Syed* (3) and *Ram Lal* v. *Jagannath* (4).

I would dismiss the appeal with costs.

(1) 2 Calc. L Rep 471.
(2) I. L R., 4 All 36.
(3) I. L R., 6 Calc. 194.
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MAHMOOD, J.—I have arrived at exactly the same conclusion as my learned brother, but I wish to say that the ground of distinction which he has drawn between the present case and those referred to is, to my mind, very clear. The present case is not necessarily inconsistent with what was ruled there. In the 2nd clause of art. 179 there are no words limiting or qualifying the application of those words to decrees in which only one or more of the parties have appealed; the clause as framed must be looked upon as intended to apply, without any exceptions, to decrees from which an appeal has been lodged by any of the parties to the original proceedings; and I should say the clause should certainly be applied to cases such as the present, where the whole decree was imperilled by the appeal.

I think the decree-holders in this case might, as a consequence of the appeal by the rival pre-emptors, claim, by analogy, the same footing with reference to limitation for executing their decree as a decree-holder who has taken a step in aid of execution, which is another ground for extending the time for execution, as provided in the 4th clause of the same article. This I mention only by way of analogy, and regarding it as such, I think it was sufficient to justify the decree-holders not applying for execution before the appeal was decided.

Under these circumstances the application for execution is within time, and I agree with my learned brother's order dismissing this appeal with costs.

Appeal dismissed.

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August 2.

FULL BENCH.

Before Mr. Justice Straight, Offg. Chief Justice, Mr. Justice Oldfield, Mr. Justice Mahmood and Mr. Justice Tyrrell.

JADU RAI AND ANOTHER (DEFENDANTS) *v.* KANIZAK HUSAIN AND OTHERS (PLAINTIFFS).*

Hearing of suit—Trial—Death or removal of Judge during suit—Procedure to be followed by new Judge—Power of new Judge to deal with evidence taken by his predecessor—Civil Procedure Code, s. 191.

The trial of a suit before a Subordinate Judge was completed except for argument and judgment, and a date was fixed for hearing argument. At this

* Second Appeal No. 1155 of 1885, from a decree of F. E. Elliot, Esq., District Judge of Allahabad, dated the 18th July, 1885, confirming a decree of Babu Abinash Chandar Banarji, Subordinate Judge of Allahabad, dated the 24th June 1884.