1896

RAJKESHWAR DEO v. BUNSHIDHUR MARWARI.

after the judgment-debtor's death, we think that such decision was incorrect."

In the case now before us, the profits that the decree-holder seeks to attach for the satisfaction of his claim are profits due to the *ghatwal* after all the necessary outgoings during his lifetime; and they may well be regarded as his personal property, and as such liable to be seized and appropriated by the decree-holder.

Upon these considerations, we think that the order of the Court below is right, and that this appeal should be dismissed with costs.

H. W. *Appeal dismissed.*

1896
June 3.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Jenkins.

HARKANT SEN (DECREE-HOLDER) *v.* BIRAJ MOHAN ROY (JUDGMENT-DEBTOR).*

Limitation Act (XV of 1877), Schedule II, Article 179, clause (2)—Execution of decree—Final decree of the Appellate Court—A portion of the claim disallowed, appealed from, by the decree-holder.

A brought a suit against *B* for a sum of money, and obtained a decree for a portion of the amount claimed. On the 30th November 1891, the plaintiff appealed as to the balance of his claim; but the appeal was dismissed by the District Court on 1st June 1892, and by the High Court on 31st May 1894.

On an application, on 1st June 1895, by the assignee of the original decree-holder, to execute the said decree, an objection was raised by the judgment-debtor that execution was barred by lapse of time.

Held, that Article 179, Schedule II, clause (2) of the Limitation Act applied to the case; the period of limitation ran from the date of the final decree of the Appellate Court, and the application for execution, being within three years from that date, was within time.

Sakhalchand Rikhawdas v. *Velchand Gujar* (1) followed.

THE facts of the case, for the purposes of this report, appear sufficiently from the judgment of the High Court.

* Appeal from Order No. 81 of 1896, against the order passed by A. Pennell, Esq., District Judge of Backergunge, dated the 27th November 1895, affirming the order passed by Babu Dwarkanath Mitter, Subordinate Judge of that District, dated the 5th of July 1895.

(1) I. L. R., 18 Bom., 203.

Babu *Hara Prasad Chatterjee* for the appellant.—The question is whether, in the present case, execution is barred by limitation, or is saved by the provisions of Article 179, Schedule II of the Limitation Act. I submit limitation would run from the date of the decree of the Appellate Court; that being so, the present application for execution would be within time: See *Kristo Churn Dass* v. *Radha Churn Kur* (1), *Badi-un-nissa* v. *Shams-ud-din* (2), *Sakhalchand Rikhawdas* v. *Velchand Gujar* (3). I rely upon the wording of clause (2) of Article 179. It clearly lays down that where there has been an appeal, limitation would run from the date of the final decree or order of the Appellate Court. The only decree that could be executed was that of the Appellate Court: see *Nanchand* v. *Vithu* (4); even if the Appellate Court reverses, or modifies, or confirms the decree of the Court of first instance: *Muhammad Sulaiman Khan* v. *Muhammad Yarkhan* (5). Where the Appellate Court merely affirms the decree of the lower Court, and does not reverse or modify it, the effect is that the decree of the lower Court is superseded, and it becomes incorporated with the decree of the Appellate Court. There is no qualifying word in Article 179, clause (2) of the Limitation Act: See *Luchmun Persad Singh* v. *Kishun Persad Singh* (6). The cases cited in the judgment of the lower Appellate Court do not apply to the present case, as in those cases some of the defendants only were before the Appellate Court and not all the parties.

Dr. *Rash Behary Ghose* (Babu *Jogesh Chunder Roy* with him) for the respondent.—The question is concluded by authorities. It is true that the words of Article 179 of the Limitation Act are very general. The words mean "an appeal which had the effect of imperilling the decree which the successful litigant obtained in the first Court." The words "from the final decree of the Appellate Court" do not mean an appeal by the person who got the decree, but an appeal by the person against whom the decree is passed. The proposition that the decree of the first Court is merged into that of the Appellate Court does not apply to the present case. The decree of the Appellate Court can only supersede the decree of the first Court, where the whole decree is under

(1) I. L. R., 19 Calc., 750.
(2) I. L. R., 17 All., 103.
(3) I. L. R., 18 Bom., 203.
(4) I. L. R., 19 Bom., 258.
(5) I. L. R., 11 All., 267.
(6 I. L. R., 8 Calc., 218.

1896

HARKANT SEN v. BIRAJ MOHAN ROY.

appeal; but when the whole decree is not before the Appellate Court, that Court has no jurisdiction to deal with it: see section 540 of the Code of Civil Procedure and *Raghu Nath Singh Manku* v. *Pareshram Mahata* (1). I rely on *Raghunath Pershad* v. *Abdul Hye* (2) and *Nundun Lall* v. *Rai Joykishen* (3). If the question was *res integra*, the arguments advanced by the other side would have been correct. Section 540 of the Code of Civil Procedure shows that there may be an appeal from a decree as a whole or from a part of a decree. In this case, although there was no appeal as regards the part of the decree under execution, the appeal preferred by the plaintiff would imperil the whole decree: See *Hur Proshaud Roy* v. *Enayet Hossein* (4), *Mashiat un-nissa* v. *Rani* (5), *Muthu* v. *Chellappa* (6), *Mullick Ahmed Zumma* v. *Mahomed Syed* (7), and *Kristo Kinkur Roy* v. *Burrodacaunt Roy* (8). The case of *Nanchand* v. *Vithu* (9) is clearly distinguishable, as well as the other cases cited for the appellant. The case of *Sakhalchand Rikhawdas* v. *Velchand Gujar* (10) does not seem to have been fully argued.

Babu *Hara Prasad Chatterjee* in reply.—The case of *Kristo Kinkur Roy* v. *Burrodacaunt Roy* (8) was under the old Act in which clause (2), Article 179, did not occur. The defendant respondent may, in an appeal by the plaintiff against a part of the decree, attack the portion decreed to the plaintiff by preferring a cross-objection, and thus imperil the whole decree in a case where all the parties are before the Appellate Court. The cases cited by the other side do not apply to the facts of this case. There all the defendants were not parties to the appeal; and in a case like this, where all the parties are before the Court of appeal, the Court has jurisdiction to pass any decree it deems fit, and Article 179, clause (2), will apply. The cases *Raghunath Persad* v. *Abdul Hye* (2) and *Nundun Lall* v. *Rai Joykishen* (3) follow the case of *Wise* v. *Rajnarain Chuckerbutty* (11), where the decrees were held to be separate decrees as against the several defendants,

(1) I. L. R., 9 Calc., 635.
(2) I. L. R., 14 Calc., 26.
(3) I. L. R., 16 Calc., 598.
(4) 2 C. L. R., 471.
(5) I. L. R., 13 All., 1.
(6) I. L. R., 12 Mad., 479.
(7) I. L. R., 5 Calc., 191.
(8) 14 Moo. I. A., 465 (490).
(9) I. L. R., 19 Bom., 258.
(10) I. L. R., 18 Bom., 203.
(11) 16 B. L. R., 258; 19 W. R., 30.

although they were drawn up on one paper. Explanation I of Article 179 provides for such cases.

The judgment of the High Court (PETHERAM, C.J., and JENKINS, J.) was as follows :—

This appeal is brought from an order refusing an application for execution on the ground that it was barred by lapse of time. A suit was brought against the present defendant for Rs. 4,472-11-0, and a decree was, on the 30th of November 1891, obtained for Rs. 1,207. The plaintiff appealed as to the balance of his claim; but his appeal was disallowed on the 1st of June 1892 by the District Court, and on the 31st of May 1894 by the High Court. On the 1st of June 1895, the present appellant, who claims under the original decree-holder, applied to execute the decree for Rs. 1,207; this being the first application made for that purpose. The defendant met the application with the objection that the decree was barred by lapse of time, and his objection has been sustained in both the lower Courts. This application has, under these circumstances, been brought in the High Court, and the only point argued before us and calling for our decision is whether clause (2) of Article 179 of the Limitation Act applies. That clause provides that for an application for the execution of a decree the period of limitation is three years, which shall begin to run (where there has been an appeal) from the date of the final decree or order of the Appellate Court. Read literally the language of the clause clearly covers the present case; but it has been argued before us, on the part of the respondents, that the literal interpretation of the clause has been modified by a series of judicial decisions which are said to lay down the rule, that where part only of a decree is under appeal, clause (2) of Article 179 does not apply to the rest, unless the whole decree is imperilled by the appeal. Then starting from that proposition, it is contended that clause (2) has no application to the present case, inasmuch as the original decree, so far as it awarded to the plaintiff Rs. 1,207, was never brought into peril by the appeal preferred. The case is one of importance, and to arrive at a satisfactory solution it will be necessary to refer shortly to the more relevant of the authorities which have been cited on behalf of the respondent. The first case

1896

HARKANT SEN v. BIRAJ MOHAN ROY.

is *Hur Proshaud Roy* v. *Enayet Hossein* (1), in which a decree for possession of certain property was obtained against three defendants collectively. Some of them appealed, but their appeal was dismissed on the 23rd May 1869. Muzhur, one of the unsuccessful appellants, brought a special appeal, so far as he was affected by the dismissal; and it was held that, as against the other defendants, the special appeal did not suspend the operation of Article 179. "It is obvious," said the learned Judges, "that though the decree was drawn up in the form of a single order, it did in fact incorporate in that order separate decrees against Muzhur and the others, and that it did not relate to property in which the defendants had such a common interest and a common defence that the appeal by any one imperilled the whole decree."

In *Raghunath Pershad* v. *Abdul Hye* (2), it seems that, on the 16th August 1880, the plaintiff obtained a decree for Rs. 15,260-5-6 against one defendant, for Rs. 20,099-2-6 against the same defendant and another jointly, while as to two other defendants, sued as sureties, his suit was dismissed.

The plaintiff appealed against the dismissal, without, however, *joining as respondents those defendants against* whom he had obtained a decree; but his appeal was dismissed on the 1st May 1882. On the 27th of April 1885, the plaintiff applied for execution of his decree against the two first-mentioned defendants; but it was held that he was barred by lapse of time. The key to the decision is to be found in the concluding paragraph of the judgment, where it is said: "We think, therefore, that there were separate decrees against each set of the defendants; that there was no appeal as against the decree affecting the respondents in this appeal; and that the Judge was right in holding that the application was barred by limitation."

In *Muthu* v. *Chellappa* (3), it appears by the head-note that in a suit for land against several defendants, the plaintiff obtained, on 14th June 1884, a decree against the shares of the defendants Nos. 3 and 4, the shares of defendants Nos. 5 and 9 being exonerated. The plaintiff appealed against so much of the decree as exonerated the shares of defendants Nos. 3 and 4; but on the 20th

(1) 2 C. L. R., 471. (2) I. L. R., 14 Calc., 26.
(3) I. L. R., 12 Mad., 479.

1896

HARKANT SEN v. BIRAJ MOHAN ROY.

October 1884 his appeal was dismissed. On the 20th October 1887, plaintiff applied for execution of his decree against defendants Nos. 3 and 4 ; but his application was, on appeal to the High Court, refused, on the ground that it was barred by the Limitation Act. The learned Judges in that case found that the decree against defendants Nos. 3 and 4 was in no way imperilled by the appeal preferred against the other defendants, so that the decrees against the several sets of defendants must have been separate. From this it necessarily followed that the case was on all fours with those of *Hur Proshaud Roy* v. *Enayet Hossein* (1) and *Raghunath Pershad* v. *Abdul Hye* (2) and in fact the judgment is based on the authority of those cases. On the part of the present respondents we were pressed with certain remarks which fell from the Judges in illustration of their views ; but as to them it will suffice to point out that they were *obiter dicta* and in no way necessary for the decision of the case. Then there was cited the case of *Nundun Lall* v. *Rai Joykishen* (3), where a plaintiff obtained, on the 14th September 1881, a decree against two defendants, the decree against one defendant being for partition, and against the other for costs. The first of these defendants alone appealed ; but his appeal was dismissed on the 18th of January 1884. In December 1886, the plaintiff applied for execution against the other defendant, and the Court granted the application on the ground that limitation only ran from the 18th of January 1884. Obviously the actual result attained in that case is of no aid to the respondent in this case ; he, however, relies on the remarks which are to be found in the course of the judgment ; but it does not appear to us that, viewed in the light of the actual facts calling for decision, they govern the present case. The Court there was distinguishing the cases which have been cited to us, and to that end it pointed out that, although in the case then in hand there were decrees against two defendants, still they could not be treated as separate decrees, as the appeal which had been preferred in regard to the one might have affected or imperilled the other ; consequently the Court held that the cited cases did not apply.

We were also referred by the respondent to *Sangram Singh*

(1) 2 C. L. R., 471. (2) I. L. R., 14 Calc., 26.

(3) I. L. R., 16 Calc., 598.

1896

HARKANT SEN v. BIRAJ MOHAN ROY.

v. *Bujharat Singh* (1) and *Mashiat-un-nissa* v. *Rani* (2), and to other cases; but as they do not differ in any material respect from those with which we have already dealt, it will serve no useful purpose to discuss them in further detail.

Now it is obvious from an examination of these authorities that in none did the facts resemble those of the present case.

The essential points common to all the cited cases are that in each there were several defendants, or sets of defendants, and in each case the actual decision depended upon whether it could properly be said (having regard to that fact) that though in form there was but one decree, contained in one piece of paper, still, as a matter of substance, there were several separate decrees. This doctrine of separate decrees seems to have been first enunciated by Sir Richard Couch in *Wise* v. *Rajnarain Chuckerbutty* (3), where a similar question arose under the Limitation Act then in force, and had been submitted for the opinion of the Full Bench. In the course of his judgment the Chief Justice said:—"Although these persons were joined in the suit in this way, yet we must treat the decree as what it must have been by law, a decree against one person for the rent of one period, and a decree against the other person for the rent of another; and I think such a decree as this, though it is on one piece of paper, is in fact two decrees, a separate decree against each for the sum for which each is liable. When we come to apply to that the terms of section 20 of the law of limitation, there is really no difficulty; the decree is to be kept in force against each and to be treated as a separate decree against each in such a case as this as it would be in the case of persons sued for contribution, because it is a separate liability, and each is liable only for his own share. I think that although the decree is made in one suit, it is in reality and substance a separate decree against each for the portion for which each is declared liable." It will be noticed that nothing is here said by Sir Richard Couch as to the peril to the rest of the decree; and this bears out the view we hold that peril to the decree is not itself the true *ratio decidendi*, but merely furnishes a test as to whether it can properly be said that there are separate decrees against several defendants. We have already remarked that

(1) I. L. R., 4 All., 36. (2) I. L. R., 13 All., 1.

(3) 10 B. L. R., 258.

1896

HARKANT SEN v. BIRAJ MOHAN ROY.

the facts in the cited authorities do not resemble those of the present case. Here there is but one defendant, one cause of action, and one decree; for it cannot with reason be argued that in this case there was one decree, so far as the plaintiff's claim was allowed, and another and separate decree, so far as it failed. Consequently there is wanting here that which has been the ground of decision in the cited authorities where clause (2) has been held not to apply. Can it then be said that clause (2) of Article 179 has been so modified by judicial decision as to be inapplicable to the present case? Notwithstanding a *dictum* to the contrary, we should be inclined to doubt whether it could with propriety be said that the literal terms of the clause have been in any way modified. The more correct view appears to us to be that, when the question has from time to time arisen, the document containing the decree has been so construed as to bring it within, or exclude it from, the literal terms of clause (2). The result has been reached, not by modification of the words of the Statute, but by determining the substantial and practical effect of the document embodying in the form of a decree the decision of the Court.

Be that however as it may, it appears to us clear, that at any rate no such interpretation has been placed upon the clause by the authorities brought to our notice, as constrains us to exclude the present case from its provision; and in the absence of authority, we see no reason to depart from the plain terms of the clause which read literally are unquestionably wide enough to cover this case. The conclusion at which we have arrived accords with that of the Bombay High Court in *Sakhalchand Rikhawdas* v. *Velchand Gujar* (1), where, on facts practically identical with the present, it was decided that clause (2) applied. We, therefore, hold that the present application for execution comes within Article 179, clause (2) of the Limitation Act, with the result that it is not barred by lapse of time; and we accordingly set aside the order appealed from and allow the appellant's application.

The appeal will be decreed with costs here and in the Courts below.

S. C. G. *Appeal allowed.*

(1) I. L. R., 18 Bom., 203.