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copies of the documents relied upon by him, the originals of which had been inspected by the court of first instance. Both parties will be at liberty to adduce any further evidence which may be relevant to the matters in issue. The plaintiff will pay the costs of the appeal to this Court and of the abortive appeal to the District Judge. All other costs will follow the event.

Appeal decreed—cause remanded.

PRIVY COUNCIL.

P. C.
1910
November 10, 11.
1911
February, 1.

ASHFAQ HUSAIN AND OTHERS (JUDGEMENT-DEBTORS) *v.* GAURI SAHAI (DECREE-HOLDER).

Two appeals consolidated.

[On appeal from the High Court of Judicature at Allahabad.]

Limitation—Execution of joint decree—Decree set aside as against one of several joint judgement-debtors, against whom it has been ex parte*—Decree passed subsequently against the exempted party—Civil Procedure Code (1882), section* 108*—Order on a former application whether* res judicata.

A decree for sale on a mortgage was passed against several defendants jointly on the 25th August, 1900, and made absolute on the 21st December, 1901. As against one defendant, however, the decree was *ex parte*, and it was set aside as against her on appeal on the 11th March, 1902. Subsequently, a decree was passed on the merits against this defendant on the 15th August, 1902, and her appeal was dismissed by the High Court on the 16th November, 1904, and as against her that decree was made absolute on the 27th November, 1905. An application for execution was made against all the defendants on the 21st December, 1905, based on the decrees of the 25th August, 1900, the 15th August, 1902, the 16th November, 1904, the 21st December, 1901, and the 27th November, 1905. The defendants filed an objection to the application on the 7th February, 1906, alleging that they were no parties to the decrees of the 15th August, 1902, and the 27th November, 1905, and that, as to the decrees of the 25th August, 1900, and the 21st December, 1901, they were time barred.

Held (affirming the decision of the High Court) that the decrees of the 25th August, 1900, and the 16th November, 1904, were steps in granting the plaintiff the relief to which he was entitled. The latter decree supplemented and completed the former, and for the first time justified the plaintiff in applying for the joint execution of the decree. Time under the Limitation Act (XV of 1877) began to run from the date of the latter decree, or rather from the date it was made absolute—the 27th November, 1905, and consequently the application was not barred.

Held, also, that the plaintiff was not estopped, in the present proceedings, by the order of the 27th November, 1905, dismissing his former application for

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execution of the 15th February, 1905, which was based on the decree of the 15th August, 1902, alone; whereas the present application was based on the joint effect of the two orders absolute of the 21st December, 1901, and the 27th November, 1905, which were in effect one decree of the later date. The applications therefore were different and the former did not operate as a *res judicata*.

Two consolidated appeals 50 and 51 of 1909 from two decrees (27th June, 1907) of the High Court at Allahabad, which reversed orders (17th April, 1906, and 5th May, 1906) of the Subordinate Judge of Moradabad.

The only question in the appeal was whether or not the execution of a mortgage decree in favour of the respondent was barred by limitation.

The facts are stated in the judgement of their Lordships and also in the report of the hearing before the High Court (RICHARDS and GRIFFIN, JJ.), which will be found in I. L. R., 29 All., 623.

On those facts the Subordinate Judge in his judgement on 17th April, 1906, said:—

"The decree-holder contends that he can count time from the decree of the appellate Court of the 16th November, 1904. It has been noticed that the *ex parte* decree was set aside so far as Sakina was concerned. The case was reheard on the merits as between the plaintiff and her only, and the decree of the 15th August, 1902, was passed as between the plaintiff and her only. She appealed from this decree, and the High Court decree was confined between her and the plaintiff only. The defendants (objectors) were not parties to the decree of the first court of the 15th August, 1902, nor to that of the High Court of the 16th November, 1904. The cases referred to by the decree-holder, *Nur-ul-Hasan* v. *Muhammad Hasan* (1), *Basant Lal* v. *Najm-un-nissa Bibi* (2) and *Ram Lal* v. *Jagannath* (3), are distinguishable, in that in each of them the decree itself was under question before the appellate court, though all the persons who were parties before the first court were not before the appellate Court. Here neither the decree of the 25th August, 1900, nor that by which it was made absolute, that is, the decree of the 21st December, 1901, was subject of the appeal. It may be added that while Sakina's appeal against the order refusing her application of section 108 was before the court, and again when the case was being tried on the merits so far as she was concerned, and again when the decree passed on the merits was the subject of appeal to the High Court which ended in the decree of the 16th November, 1904, there was nothing that could prevent the decree-holder from putting the decree of the 21st December, 1901, in execution against the defendants, and to have such interest in the property as was in the hands of these defendants sold. Nor, having

(1) (1886) I. L. R., 8 All., 572. (2) (1889) Weekly Notes, 179.
(3) (1884) Weekly Notes, 182.

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regard to the judgement of the High Court setting aside the *ex parte* decree, can it be said that the whole *ex parte* decree was set aside.

"I cannot help but hold that the application for execution as against the defendants (objectors) is beyond time from the decree of the 21st December, 1901. This is a case in which there were two decrees: one against the defendants (objectors), the other against Sakina. The latter decree may be executed in respect of the whole sum against the interest of Sakina, but the decree of the 21st December, 1901, is barred. I accept the objection with costs, allowing execution against Sakina and her interest only."

On the same day (17th April 1906) the Subordinate Judge made an order directing the appellants to specify the amount of the share of Sakina in the mortgaged property and postponed the further hearing of the application for execution to the 27th April, 1906.

On that date the respondent filed a petition stating that his decree was a joint decree, and the mortgage was also joint, and the Subordinate Judge thereupon, on the 5th May, 1906, ordered the execution case to be struck off on the ground that, as Sakina's share was not specified, it could not be sold.

From these two orders (17th April and 5th May 1906) the respondent appealed to the High Court. The appeal from the former order is reported as above stated. On appeal from the latter order the High Court said:—

"Having regard to our judgement in the connected appeal, it is perhaps unnecessary to give any further judgement in this case. However, inasmuch as the court below dismissed the application for execution against Sakina Bibi, we set it aside so far as it is inconsistent with our judgement just delivered in the connected appeal. As Sakina Bibi did not appear in the court below and does not appear now, we make no order as to costs."

Both orders having been reversed by the High Court, the present appeals 50 and 51 were brought from the respective orders of reversal. On these appeals :—

De Gruyther, K. C. and *Ross*, for the appellants, contended that the application for execution dated the 21st December, 1905, was made more than three years after the decree of the 25th August, 1900, was made absolute against the appellants on the 21st December, 1901, and was therefore barred by lapse of time; and that the decree of the 16th November, 1904, was not the decree in the suit capable of being executed against the appellants. Reference was made to the Transfer of Property Act (IV of 1882), sections 88, 89; Limitation Act (XV of 1877),

schedule II, article 179: Civil Procedure Code (XIV of 1882), sections 108, 540, 545: *Sheo Prasad* v. *Anrudh Singh* (1), *Jivaji* v. *Ramchandra* (2) and *Baikanta Nath Mittra* v. *Aughore Nath Bose* (3). It was also contended that the decree of the Subordinate Judge, dated the 27th November, 1905, became final as between the appellants and respondent, not having been appealed from, and the High Court had no jurisdiction to question its validity; and the cases of *Ram Kirpal* v. *Rup Kuari* (4) and *Beni Ram* v. *Nanhu Mal* (5) were referred to. It was further contended that the same decree had the effect of a *res judicata* between the parties, and prevented the making of a further application substantially the same, reference being made to the case of *Krishna Behari Roy* v. *Bunwari Lall Roy* (6).

E. U. Eddis, for the respondent, contended that under article 179 of schedule II of the Limitation Act, 1877, limitation did not begin to run until the date of the decree of the High Court of the 16th November, 1904, and consequently the application for execution of the 21st December, 1905, was not barred. In all these proceedings the Subordinate Judge had treated the original decree against all the judgement-debtors, and the subsequent decree against Sakina as being totally distinct and independent decrees which must be executed separately; but the correct way of dealing with them, it was submitted, was to take them together, and so treated they formed only one decree against all the judgement-debtors jointly, and the whole decree should be executed at one time and in one proceeding. Reference was made to *Gopal Chunder Manna* v. *Gosain Das Kalay* (7) and *Kristnama Chariar* v. *Mangammal* (8). The reasons given by the High Court were right, and the judgement should be upheld.

De Gruyther, K. C. in reply referred to and distinguished the case of *Sham Sundar* v. *Muhammad Ihtisham Ali* (9), which

(1) (1879) I. L. R., 2 All., 273.

(2) (1891) I. L. R., 16 Bom., 123.

(3) (1893) I. L. R., 21 Calc., 387.

(4) (1883) I. L. R., 6 All., 269: L. R. 11 I. A., 37.

(5) (1884) I. L. R., 7 All., 102: L. R., 11 I. A., 181.

(6) (1875) I. L. R., 1 Calc., 144 (146): L. R., 2 I. A., 283 (286).

(7) (1898) I. L. R., 25 Calc., 594 (599—600 and 601—602).

(8) (1902) I. L. R., 26 Mad., 91 (92).

(9) (1905) I. L. R., 27 All., 501.

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was referred to by the High Court as being applicable in principle to the present case.

1911, *February 1st.*—The judgement of their Lordships was delivered by LORD MERSEY:—

The substantial question in this case is whether an application for the execution of a decree absolute obtained by the respondent for the sale of some property which had been mortgaged to him by the appellants is barred by section 4 of the Indian Limitation Act, 1877. There is also a further question, namely, whether a similar application had not already been made to the court and dismissed on the 27th November, 1905, so as to make the present application *res judicata*.

The litigation which has led up to this dispute has been very long, and it has been somewhat complicated, but the story can be told for present purposes, in a few sentences.

The respondent was the holder of a mortgage of the interest of the appellants and of a lady named Musammat Sakina in certain lands. The mortgage debt was a joint debt, and the mortgaged property was joint property. Default was made in payment of the debt, and thereupon the respondent instituted proceedings for the recovery of the money. He also asked for a decree that if payment were not made the property should be sold.

The present appellants put in defences, but the lady failed to appear. The case was tried, and the defences were found to be untrue, whereupon a decree was pronounced against all the defendants, the judgement against the lady going by default of appearance. This decree was dated the 25th August, 1900, and it was made absolute on the 21st December, 1901.

If nothing more had happened there should have been no difficulty about obtaining an order for execution of the decree. But before the decree absolute was made, namely, on the 19th September, 1900, the lady Musammat Sakina had bestirred herself and had applied for a review of the judgement of the 25th August, 1900, on the ground that she had never been served with process. The lady's application was refused by the Subordinate Judge before whom it came. This was on the 13th May, 1901.

The learned Judge did not believe her statement that she had had no notice of the proceedings and he was of opinion that she had been put forward by the principal defendant in the suit, the present appellant Ashfaq Husain, in order to delay the execution. Musammat Sakina then appealed ; and her appeal was allowed, the court directing "that the decree passed *ex parte* be set aside so far as the appellant, Musammat Sakina is concerned," and that the case should be reheard upon the merits as against her. This was on the 11th March, 1902. The case was accordingly set down for rehearing, and Musammat Sakina then pleaded that the plaintiff had received certain sums of money from her deceased husband on account of the mortgage debt for which he had not given credit. This defence of payment had not been put forward by any of the other defendants, and at the hearing Musammat Sakina was unable to support it by satisfactory evidence. Accordingly judgement was given against her on the 15th August, 1902. She then again appealed, but the High Court, agreeing with the Subordinate Judge that her witnesses were unworthy of credit, dismissed her appeal. This was on the 16th November, 1904. Nothing was paid, and on the 15th February, 1905, the plaintiff filed an application against all the defendants in the action asking that the decree of the 15th August, 1902, might be made absolute, and for an order for the sale of the property. To this the appellants filed an objection alleging that the decree of the 15th August, 1902, was passed against Musammat Sakina alone, and that the original decree of the 25th August, 1900, passed against the appellants, "had become extinct" by operation of the Statute of Limitation. The objection was heard on the 27th November, 1905, when the Subordinate Judge held that the decree of the 15th August, 1902, concerned Musammat Sakina only, and that therefore no order absolute could be made against the objectors on the basis of that decree. He also found that the plaintiff had already, namely, on the 21st December, 1901, obtained a decree absolute against the objectors, so that there were two binding decrees (namely, the decree against the objectors and the decree against Musammat Sakina) in respect of the same mortgage. The learned Judge therefore came to the conclusion that he could not help but disallow the plaintiff's

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application; and the application was accordingly dismissed. The learned Judge, however, made a decree absolute (dated the 27th November, 1905), against Sakina. Later on, namely, on the 21st December, 1905, the plaintiff filed an application against all the defendants for execution by way of sale of the property. This application was based on the decrees of the 25th August, 1900, the 15th August, 1902, the 16th November, 1904, the 21st December, 1901, and the 27th November, 1905, before-mentioned. The present appellants filed an objection to this application on the 7th February, 1906, alleging that they were no parties to the decrees of the 15th August, 1902, and the 27th November, 1905, and that as to the decrees of 25th August, 1900, and 21st December, 1901, they were time barred.

These are the facts, and the first question is whether the remedy against the present defendants is statute barred. The limitation applicable to the case is to be found in the fourth section of the Indian Limitation Act, 1877, which provides that every application made after the period of limitation prescribed therefor by the second schedule annexed to the Act shall be dismissed, although limitation has not been set up as a defence. The second schedule (Art. 179) provides that the time for an application for the execution of a decree shall be three years from the date of the decree or (where there has been an appeal) from the date of the final decree or order of the appellate Court. The answer to the question, therefore, depends upon the date of the decree on which the application for execution is based. If the date of the decree is more than three years before the date of the application, then the respondent's remedy is statute barred, but otherwise not. Now the respondent originally claimed a decree against all the defendants jointly in respect of a joint mortgage debt, and he obtained on the 25th August, 1900, what purported to be a judgement in accordance with his claim. But it subsequently appeared that by reason of non-service of process on one of the defendants the judgement ought not to have been given, and accordingly the Court reopened the matter by setting aside the judgement so far as it affected the one defendant who had not been served, and directed another inquiry to ascertain whether that defendant had any defence. It might

have been more in accordance with strict procedure if the court had set aside the whole judgement and had proceeded to re-try the case as against all the defendants. But it was apparently considered that such a course would involve unnecessary delay and expense, and no one objected to the procedure adopted by the Court.

Thus the original judgement of the 25th August, 1900, was treated by the Court and by the parties as a mere step in the granting of the relief for which the plaintiff was asking and to which, as it ultimately turned out, he was entitled, namely, a decree against all the defendants jointly. The irregularity (if any) in the procedure has, in their Lordships' opinion, worked no wrong and is of no real consequence. Subsequently, and after many delays, for which the respondent was is no way responsible, it was ascertained that the defendant who alleged that she had not been served had no defence, and a decree was made against her. This decree, which was dated the 16th November, 1904, was the second step in granting to the plaintiff the relief to which he was entitled. It supplemented and completed the decree granted on the 25th August, 1900, and for the first time gave to the plaintiff that which would alone justify him in applying for the joint execution to which he was entitled. It is from the date of this last judgement (the 16th November, 1904), or rather from the date when it was made absolute (the 27th November, 1905), that the time under the statute began to run. It was then for the first time that the Court granted a complete decree to the respondent. It follows therefore that the plaintiff's remedy is not statute barred. This seems to have been the view taken by the High Court in the judgement from which this appeal is brought, and in their Lordships' opinion it is right.

As to the second point taken on behalf of the appellants, namely, that the plaintiff is estopped in the present proceedings by the judgement given against him on the 27th November, 1905, upon his application of the 15th February, 1905, it is sufficient to say that the present application is different from the application then before the Court. The application of the 15th February, 1905, was based on the decree of the 15th August, 1902, and on that alone, whereas the present application is based upon the joint

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effect of the two orders absolute of the 21st December, 1901, and the 27th November, 1905, made against the appellants and Sakina respectively, and which two orders are in effect on decree of the later date.

Their Lordships will humbly advise His Majesty that the appeals should be dismissed. The appellants will pay the costs.

Appeals dismissed.

Solicitors for the appellants :—*Ranken Ford, Ford and Chester.*

Solicitors for the respondent :—*Sanderson, Adkin, Lee and Eddis.*

J. V. W.

P. C. 1910. *November* 11, 15. 1911. *February* 1.

KISHAN PRASAD AND OTHERS (PLAINTIFFS) *v.* HAR NARAIN SINGH AND OTHERS (DEFENDANTS).

[On appeal from the High Court of Judicature at Allahabad.]

Parties—Parties to suits—Joint Hindu family—Managing members—Suit to recover debt due to members of family in family business—Power of managers to sue alone—Act No. XV of 1877 (Indian Limitation Act), section 22—Parties added after expiry of period of limitation.

Where a joint family business has to be carried on in the interests of the joint family as a whole, the managing members may properly be entrusted with the power of making contracts, giving receipts, and compromising or discharging claims ordinarily incidental to the business; and where they are so entrusted and empowered they are entitled as the sole managers of the family business to make in their own names contracts in the course of that business, and to maintain suits brought to enforce those contracts without joining in the suit with them either as plaintiffs or defendants the other members of the family.

Arunachala Pillai v. *Vythialinga Mudaliyar* (1) approved. *K. P. Kanna Pisharody* v. *V. M. Narayanan Somayajipad* (2), *Ramsebuk* v. *Ramlall Koondoo* (3), *Imam-ud-din* v. *Liladhar* (4) and *Alagappa Chetti* v. *Vellian Chetti* (5) distinguished.

In this case the original plaintiffs were the managing members of a joint family business of money-lending, entrusted with and regularly exercising the power of doing everything necessary to carry on the business. In the course of such business they contracted in their own names with the defendants for a loan, and on the accounts a balance was struck between the parties on the 9th August, 1901. In a suit brought by the managing members on the 3rd June, 1904, and therefore within the period of limitation, to recover the amount due, the other members of the family were, on an objection by the defendants that the suit

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Present :—Lord MACNAGHTEN, Lord MORLEY, Lord ROBSON, Sir ARTHUR WILSON, and Mr. AMEER ALI.

(1) (1882) I. L. R., 6 Mad., 27.
(2) (1881) I. L. R., 3 Mad., 254.
(3) (1881) I. L. R., 6 Calc., 815
(4) (1892) I. L. R., 14 All., 524.
(5) (1894) I. L. R., 18 Mad., 33.