exercise of their duties. For these reasons I accept this reference and I set aside the order of acquittal of the Magistrate and I direct that the accused shall be retried by a Magistrate having jurisdiction. The record will be sent to the District Magistrate for directions for retrial.

REVISIONAL CIVIL.

Before Mr. Justice Pullan.

RAGHUNANDAN CHAUBE (DEFENDANT) *v.* BHUWAL TEWARI (PLAINTIFF).*

1931 *December* 8.

Civil Procedure Code, order IX, rule 13—Ex parte *decree—Decree dealt with by appellate court—Application for setting aside the* ex parte *decree—Whether trial court can entertain it—Limitation Act (IX of* 1908), *section* 14(2)—*Exclusion of time during which application for similar relief was being prosecuted in another court—Civil Procedure Code, order XLI, rule* 21.

Where a decree specified the liability of each of the defendants and was *ex parte* as against one of them, and an appeal by the other defendants, relating to their own specific liability, was dismissed, and the absentee defendant was impleaded in the appeal but was not served with notice, it was *held* that there was still a subsisting decree against him in the trial court and his application for setting aside the *ex parte* decree lay rightly to that court and not the appellate court.

Held, also, that section 14 of the Limitation Act applied in express terms to applications, and the time during which the defendant had been prosecuting the application in the lower court for setting aside the *ex parte* decree should be excluded in computing the limitation for an application by him to the appellate court to rehear the appeal decided by it *ex parte* from that decree.

Messrs. *N. P. Asthana, B. N. Sahai* and *Shankar Sahai Verma*, for the applicant.

Mr. *A. P. Pandey*, for the opposite parties.

* Civil Revision No. 328 of 1931.

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PULLAN, J. :—The circumstances which give rise to this appeal and this application in revision are as follows. On the 25th of April, 1927, the Munsif of Deoria passed a decree against certain persons in a suit for contribution based on a mortgage. In the decree the liability of each defendant was specified. The decree as against Raghunandan Chaube was *ex parte*. The other defendants appealed against the decision, and their appeal was dismissed by the Additional Subordinate Judge on the 5th of January, 1928. In that appeal Raghunandan Chaube was made a party, but it has been found definitely by the court below that he was not served with any notice. The plaintiff applied for a final decree on the 6th of June 1928, and Raghunandan Chaube applied on the 26th of October, 1928, in the court of the Munsif of Deoria to get the *ex parte* decree of the Munsif's court set aside. The Munsif dismissed the application on the ground that no such application could be entertained by him. His decision is dated the 5th of March, 1929. On the 8th of April, 1929, Raghunandan Chaube appealed against this decision to the Additional Subordinate Judge, and on the same day he put in an application in the Subordinate Judge's court for rehearing the appeal against the original decision of the Munsif. The learned Additional Subordinate Judge dismissed the application on the ground that it was made too late, and he dismissed the appeal on the ground that the decision of the Munsif was correct. The position is, therefore, that this Raghunandan Chaube has never obtained any decision as to whether he had notice of the suit which was decreed against him *ex parte*. Both courts have dismissed his claim to be heard, on a technical ground.

I shall deal first with the application in revision. The view taken by both the courts below is that, as there had been an appeal against the *ex parte* decree, the only court which could take action in the matter was the appellate court. For this general proposition

there is authority both of this High Court and of the other High Courts. But all the cases which are directly in point are those in which there has been a joint decree and where an appeal by one of those persons against whom the decree has been passed is in substance an appeal for all. In making this application in the court of the Munsif Raghunandan Chaube relied upon a decision of the Calcutta High Court in the case of *Brij Lal Singh* v. *Chowdhry Mahadeo Prasad* (1). In that case a suit was brought on a mortgage and a decree was passed *ex parte* against some of the mortgagors. In the decree only the share of the absent defendants was ordered to be sold, but the contesting defendants were made personally liable for the unsatisfied balance of the mortgage debt. Against this part of the decision the plaintiff appealed, and the contesting defendants made cross-objections. In the appeal the absent defendants were impleaded, yet the Calcutta High Court held that as no relief was claimed in the appeal against the absent defendants, there was still a subsisting *ex parte* decree against them over which the Subordinate Judge who was the trial court had control, and he had jurisdiction to entertain an application by the absent defendants to set aside the decree. It has not been shown to me that this ruling has ever been dissented from by the Allahabad High Court. It was considered by a Bench of this Court in *Gajraj Mati Tiwarin* v. *Swami Nath Rai* (2) and it was followed in so far as was necessary for the purpose of that case, namely to decide that persons who are not made parties to an appeal are not precluded from applying for setting aside the *ex parte* decree against them. It appears to me that the present case more nearly resembles the case of *Brij Lal Singh* v. *Chowdhry Mahadeo Prasad* (1) than any of the other cases which have been cited. The appeal

(1) (1911) 17 C.W.N., 133. (2) (1916) I.L.R., 39 All., 13.

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preferred by the contesting defendants related only to their own specific liability and had nothing to do with the liability imposed by the trial court on the absent defendant. Moreover, it is difficult to distinguish between persons who are not parties to an appeal and persons who have been impleaded in the appeal but have never received any notice and are ignorant of the fact that any appeal has been preferred. As their Lordships of the Calcutta High Court observed, "In cases of this description we must look rather to the substance than to the form of the proceeding." In my opinion, the appellate court never considered the case of this person at all and was never asked to consider his case; nor had he any opportunity of putting his case before that court. I find, therefore, that there was still a subsisting decree against this Raghunandan Chaube in the court of the Munsif, and he was acting rightly when he applied to that court rather than the appellate court to have the decree against him set aside.

On this view of the case, it follows almost inevitably that the order of the Judge dismissing the application for rehearing of the appeal in his own court is erroneous. The appellant can clearly take advantage of section 14 of the Indian Limitation Act. Until the very day on which the application was made he was contesting a *bona fide* application in the court of the Munsif for having his case reheard. I have been referred to a single Judge decision of this Court in the case of *Gadre* v. *Brij Nandan Saran* (1), in which the learned Judge observed: "The only section which deals with the exclusion of the period during which such a case is pending in another court is section 14 of the Limitation Act, but that section does not apply to applications." I cannot accept this observation as being a correct view of the law, as section 14, clause

(1) (1923) 21 A.L.J., 205.

(2) of the Limitation Act applies in set terms to applications. Possibly some error has crept into the report. This was the case in the only other ruling on which the learned counsel relied, which was a decision in Execution Second Appeal No. 1833 of 1925. The report in the All India Law Reporter showed that the learned Judge in that case also held that section 14 of the Limitation Act did not apply to applications, but the judgment was subsequently corrected.

An attempt has been made to support the Additional Subordinate Judge on the ground that the relief claimed in the Munsif's court was not the same as the relief claimed in the appellate court. I cannot, however, see that there is any difference between the reliefs claimed in the two courts. The applicant merely wished to have his case heard on the merits, and this is the prayer which he made to both courts. In my opinion, therefore, section 14 of the Indian Limitation Act applies to this case, and the Additional Subordinate Judge should not have dismissed the application on the ground that it was made too late.

In the view which I have taken on the application, it is clearly unnecessary for me to take any action in the appeal except to express my opinion that the view taken by the lower court was wrong. It is useless to send the case back to the lower appellate court, as the only order it would be able to pass would be one which I can myself pass on the application.

I allow the application in revision and direct the learned Munsif of Deoria to rehear the application for setting aside the *ex parte* decree passed by him on the 25th of April, 1927, on its merits. Costs both in the appeal and in the application in revision will abide the result.