

a one-third share in the property, so that even if the sale was void in respect of the share of one of them it would not be barred in respect of the shares of others whose shares were entirely separate.

In the result I see no reason to interfere with the decision of the learned Subordinate Judge and I would dismiss this appeal.

Ross, J.—I agree.

Appeal dismissed.

REVISIONAL CIVIL.

Before Coultts and Ross, JJ.

AJODHYA MAHTON

v.

MUSSAMMAT PHUL KUER.*

1922

January, 10

Code of Civil Procedure, 1908 (Act V of 1908), section 151, Order IX, rule 13—Ex parte final decree—whether may be set aside on the ground that the application on which it was passed was time-barred—Inherent powers not to be exercised to extend definite periods of limitation—no inherent power to set aside ex parte decree.

An *ex parte* decree cannot be set aside in exercise of the court's inherent powers under section 151 of the Code of Civil Procedure, 1908.

Neelaveni v. Narayan Reddi (1), followed.

Where a definite period of limitation has been provided by law within which action must be taken a court is not entitled to extend such period by purporting to act under section 151.

An *ex parte* final decree cannot be set aside under Order IX, rule 13, on the ground that the application for the final decree was barred by time.

The facts of the case material to this report were as follows:—

The petitioner obtained a preliminary decree on a mortgage executed by Ramlochan Mahton and others

* Civil Revision No. 366 of 1921 against an order of J. A. Sweeney, Esq., District Judge of Gaya, dated the 4th July, 1921, reversing an order of the Subordinate Judge of Gaya, dated the 4th December, 1920.

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on the 3rd January, 1913, and the decree was signed and sealed on the 18th January. A period of six months' grace, expiring on the 18th July, was allowed for payment of the decretal amount. The amount not having been paid within that time the petitioners applied for a final decree on the 18th November. This application was dismissed for default on the 7th February, 1914, on the ground that Ram Lochan had died and that notices had not been properly served on Mussammat Phul Kuer, his widow, and two other judgment-debtors. On the 22nd December, 1916, the petitioner applied for substitution of Mussammat Phul Kuer and the other members of the opposite-party in place of the deceased Ram Lochan and on the 4th January, 1917, he made a fresh application for a final decree. He obtained a final decree on the 13th February, 1917. On the 8th August, 1920, Mussammat Phul Kuer made an application purporting to be under Order IX, rule 13, of the Code of Civil Procedure, 1908, praying that the final decree should be set aside on the grounds that notice of the application for the final decree had not been served on her and that the application for the final decree was time-barred at the time it was made. The First Court held that notice had been served and rejected the application. The applicant appealed to the District Judge under Order XLIII, rule 1(d). The finding as to service of notice was affirmed. The question of limitation was dealt with as follows:—

“As to the question of limitation this would not come within the scope of Order IX, rule 13, under which the application was made but it is suggested that this rule is not exhaustive of the grounds on which a court can restore a suit as a general discretion is vested in the court by section 151. The period of grace expired on the 18th July, 1913, and if Article 131, Limitation Act, applies, the last day for making the application under Order XXXIV, rule 5 (2), would be the 18th July, 1916. The application was not made till the 16th January, 1917. It has been held that an application of this kind does in fact come under Article 131. [*Ras Behari Singh v. Juman Lal*, (1) and *Beni Singh v. Berhamdeo Singh*, (2)]. The application was therefore time-barred and I have been unable to ascertain why the lower court refused on this ground to set aside the *ex parte* decree of the 13th February, 1917.

(1) (1914) 4 Pat. L. J. 523.

(2) (1914—15) 19 Cal. W. N. 473.

The appeal is allowed and the decree absolute of the 13th February, 1917, will be set aside."

The decree-holders petitioned the High Court.

Atul Krishna Roy, for the petitioner :—The application to set aside the *ex parte* decree was an application under Order IX, rule 13, only and under that rule an *ex parte* decree cannot be set aside on the ground that the application for the final decree was time-barred. Further, a period of 30 days has been provided for an application under rule 13 and this period cannot be extended by purporting to act under section 151. [*Neelaveni v. Narayana Reddi* (1)].

Kulwant Sahay and Bimola Charan Sinha, for the opposite-party :—The lower appellate court has acted under section 151 and the order passed in the exercise of its discretionary powers should not be interfered with by this court.

(Ross, J.—Do you say that there was an application under section 151 before the first court ?)

One of the grounds taken to that court was that the application for the final decree was time-barred and as such a ground does not fall within rule 13 it must be taken that the application to set aside the decree was also an application under section 151 and the court had power to exercise its discretionary powers under section 151.

(Ross, J.—Then it was for the trial court to exercise its discretion and if that court refused to exercise it there was no appeal to the District Judge from the decision on that point.)

The trial court only dealt with the question of non-service of notice. The appellate court was therefore entitled to deal with the other ground raised in the application.

Atul Krishna Roy, replied.

Ross, J.—This is an application for revision of an order passed by the learned District Judge of Gaya allowing an appeal from an order passed by the

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Subordinate Judge, by which he rejected an application under Order IX, rule 13, to set aside an *ex parte* final decree in a mortgage suit. It appears that in this application which was made long after the time limited by Article 164 and which was expressed to be an application under Order IX, rule 13, two grounds were taken : (1) that no notice had been served on the applicant and (2) that the application for the final decree was barred by time. The latter ground is not appropriate to an application under Order IX, rule 13, and would not provide a reason for the court to exercise its power under that rule. Apparently for this reason there is no reference to that part of the application in the decision of the Subordinate Judge. He deals only with the question of the service of notice and finding that this service was proved he dismissed the application on the merits. The District Judge, while agreeing with the finding of the Subordinate Judge as to the service of notice, acted under section 151 of the Code and set aside the *ex parte* decree on the ground that when it was passed it was barred by time.

Now, if it is taken that there was an application before the Subordinate Judge under section 151 of the Code then his judgment must be read as having refused that application and against that refusal no appeal lay to the District Judge. But there is authority for the view that section 151 of the Code cannot be used in this way. [*Neelaveni v. Narayana Reddi* (1)].

Moreover a definite period of limitation has been prescribed by Article 164 of Schedule I to the Limitation Act for an application to set aside an *ex parte* decree and the court would not be entitled, by purporting to act under section 151, in effect to extend that period. I would therefore allow this application with costs, set aside the order of the District Judge and restore the order of the Subordinate Judge.

COURTS, J.—I agree.

Application allowed.