1891.

FAKIRÁPA v. RUDRÁPA.

given for such one or more of the plaintiffs as may be found to be entitled to any relief, for such relief as he or they may be entitled to, without any amendment. Irápa, the deceased husband of plaintiff No. 1, is admitted by the defendants to have been a coparcener in the land in suit. The question is whether he was separate from defendant No. 1. If he was separate, then the attachment and sale must be set aside. Both the plaintiffs are jointly interested in disproving the alleged title of defendant No. 1, and in proving Irápa's exclusive title. As they both assert the adoption, their interests are in no way antagonistic, and the suit is not bad because both their names appear on the record, as is shown by the cases of *Dhurm Das Pándey* v. *Mussumat Shama Soondri Dibiah*[1] and *Paravartani* v. *Ambalavana Pillai*[2].

We reverse the order of remand and direct the lower appellate Court to hear the appeal on the merits. Costs to abide the result.

Order of remand reversed.

(1) 3 M. I. A., 229. (2) 1 M. H. C. R., 197.

APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

JIVA'JI (ORIGINAL DECREE-HOLDER), APPELLANT, *v.* RA'MCHANDRA (ORIGINAL JUDGMENT-DEBTOR), RESPONDENT.*

1891. *April* 14.

Execution—Decree—Ex parte decree—Application to set decree aside—Appeal from order rejecting application—Subsequent application for execution of decree more than three years after date of decree—Limitation Act (XV of 1877), Article 179, clause 2, Schedule II.

The plaintiff obtained an *ex parte* decree against the defendant on the 10th March 1886. The defendant applied to have the decree set aside. His application was finally rejected by the appellate Court on 5th March 1887. The decree-holder presented a *darkhást* for execution of the decree on 24th September 1889.

Held that the *darkhást* was time-barred under article 179, clause 2, of the Limitation Act (XV of 1877). The appeal referred to in that clause is clearly an appeal from the decree or order sought to be executed, and not an appeal from an order of the Court refusing to set it aside. The unsuccessful attempts made by the defendants to set aside the *ex parte* decree could not have the effect of extending the period prescribed by law for execution of the decree.

* Second Appeal, No. 74 of 1891.

1891.

JIVÁJI v. RÁMCHANDRA.

SECOND appeal from the decision of Ráo Bahádur K. B. Maráthe, Subordinate Judge, A. P., at Dhárwár, in Appeal No. 3 of 1890.

On the 10th March, 1886, the plaintiff obtained a decree *ex parte* against the defendant.

The defendant applied to have the *ex parte* decree set aside. His application was dismissed on 23rd December, 1886.

The defendant appealed against this order of dismissal. His appeal was rejected on 5th March, 1887.

The decree-holder presented a *darkhást* for execution of the decree on 24th September, 1889.

The Subordinate Judge of Gadag rejected this *darkhást* as barred by limitation, having been made more than three years after the date of the decree.

This order was confirmed on appeal by the First Class Subordinate Judge of Dhárwár.

The decree-holder appealed to the High Court.

Mahádev V. Bhat for appellant.—The lower Courts erred in holding that the application for execution was barred by limitation. The ruling of the Calcutta High Court in *Lutful Huq* v. *Sumbhudin*[1] is in point. Refers to *Narsingh Sewak Singh* v. *Mádho Dás*[2], *Sheo Prasád* v. *Anrudh Singh*[3], *Umesh Chunder Dutta* v. *Soonder Nárâian Deo*[4].

There was no appearance for the respondent.

BIRDWOOD, J.:—The plaintiff having obtained an *ex parte* decree against the defendant on the 10th March, 1886, did not present an application for its execution till the 24th September, 1889. He contended, however, in the Courts below that as the defendant had applied on the 23rd December, 1886, to set aside the *ex parte* decree, and as his application was not finally disposed of till the 5th March, 1887, when his appeal against the order rejecting his application was dismissed, three years' time can now be allowed from that date for the execution of the decree under clause 2 of article 179 of Schedule II of the Limitation Act of 1877. But the appeal referred to in that clause is clearly,

(1) I. L. R., 8 Calc., 248.
(2) I. L. R., 4 All., 274.
(3) I. L. R., 2 All., 273.
(4) L. L. R., 16 Calc., 747.

as appears from the context, an appeal from the decree or order sought to be executed—*Sheo Prasád* v. *Anrudh Singh*[1]. The appeal made by the defendant in the present case was an appeal not from the decree but from the order of the Court refusing to set it aside.

Again it was argued that the decree was kept open by the defendant's application and appeal, and did not become final until the order of the appellate Court was passed thereon; but we cannot accept that view, as both the application and the appeal were dismissed. We do not concur in the ruling in *Lutful Huq* v. *Sumbhudin*[2]. The infructuous efforts of the defendant to set aside the plaintiff's decree cannot have the effect of extending the period within which the plaintiff was allowed by law to execute it. We, therefore, confirm the decree in execution of the lower appellate Court.

Decree confirmed.

(1) I. L. R., 2 All., 273. (2) I. L. R., 8 Calc., 248.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

NA'RO VINA'YAK PATVARDHAN (ORIGINAL PLAINTIFF), APPELLANT, *v.* NARHARI BIN RAGHUNA'TH AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Evidence—Evidence Act (I of 1872, Sec. 11.)—Fact making probable a fact in issue—Admission by one defendant relevant against other defendants.

In a suit brought by the plaintiff against several defendants to prevent encroachments by the defendants in a lane which was the common property of himself and the defendants.

Held, that the admission of one of the defendants in a previous suit to which the other defendants were not parties as to the common character of the portion of the lane between his house and the plaintiff's, and also a similar statement in a deed put in by another of the defendants to prove his title to his own house, were admissible in evidence to establish the common character of the entire lane as alleged by the plaintiff. The fact of common ownership of other parts of the lane should be treated as relevant to the issue as to the common character of the entire lane on the principle laid down in section 11 of the Indian Evidence Act.

* Second Appeal, No. 274 of 1890.