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in the view taken in *Vyankaji* v. *Sarjarao*, and hold that the Pensions Act applies to religious endowments as well as to personal grants.

We accordingly reverse the decrees of the lower Courts, and direct that the First Class Subordinate Judge do accept the plaint, and allow the plaintiff a reasonable time to obtain a certificate as to the cash allowances under section 4 of the Pensions Act, as we presume that there will be no objection on the part of the Collector to grant it, but should the certificate not be granted, the Subordinate Judge will proceed with the hearing of the rest of the claim. Costs of this application to be costs in the suit.

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

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ABDUL RAHIMAN AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 4), APPELLANTS, v. MAIDIN SAIBA AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Limitation—Limitation Act (XV of 1877), Sch. II, Art. 179—Decree—Appeal against part of decree only—Appeal dismissed—Execution—Application for execution of original decree—Time runs from date of appellate decree.

On the 26th June, 1891, in a suit against seven persons who were members of a Mahomedan family, the plaintiff obtained a decree on a mortgage. The decree directed the sale of $\frac{65}{72}$ of the mortgaged property, but it exonerated from liability the share of a female member (defendant No. 2) of the family, which was $\frac{7}{72}$ of the whole estate. The plaintiff appealed as to the $\frac{1}{72}$ share only. He made all the defendants respondents to the appeal, but the name of the first defendant was afterwards struck out, as he could not be served with notice. His interests, however, were identical with those of defendants Nos. 3 to 7. On the 30th July, 1892, the plaintiff's appeal was dismissed. On the 3rd July, 1895, the plaintiff applied for execution of the original decree. The defendants contended that as the appeal related only to that part of the decree which related to the $\frac{7}{72}$ share of the second defendant, the rest of the decree was unaffected by the appeal, and that consequently the plaintiff's application for execution of that

* Second Appeal, No. 452 of 1896.

decree was barred under article 179 of the Limitation Act (XV of 1877), not having been made within three years from the 26th June, 1891.

Held, that the application was not barred. The date of the appellate decree and not that of the original decree was the date from which limitation began to run.

Per PARSONS, J.:—The word "appeal" in article 179 does not mean only an appeal against the whole decree and by which the whole decree is imperilled: it means any appeal by any party.

Per RANADE, J.:—Except in the case where a nominally single decree awards separate reliefs against separate defendants, the words of article 179 must be construed in their natural sense as permitting an extension of limitation where an appeal is preferred and is not withdrawn.

SECOND appeal from the decision of E. H. Moscardi, District Judge of Kánara, confirming an order passed by Ráo Sáheb N. B. Muzamdar, Subordinate Judge of Honávar, in an execution proceeding.

On the 26th June, 1891, one Maidin Saiba bin Hasan Saiba obtained a decree on a mortgage against seven persons who were members of a Mahomedan family. The decree directed the plaintiff Maidin Saiba to recover his mortgage-debt and costs by selling $\frac{65}{72}$ share of the mortgaged property,—the share of $\frac{7}{72}$, belonging to defendant No. 2, who was a female member of the defendants' family, being held not liable to the debt.

The plaintiff appealed with respect to this $\frac{7}{72}$ share. The first defendant was originally a party respondent to the appeal, but his name was afterwards struck out, as he could not be served with notice. His interests, however, were identical with those of defendants Nos. 3 to 7. The plaintiff's appeal was dismissed on the 30th July, 1892.

On the 3rd July, 1895, the plaintiff having died, his heirs applied for the execution of the original decree. The first defendant contended (*inter alia*) that this application was barred by limitation, as it was not made within three years from the 26th June, 1891, the date of the original decree.

The Subordinate Judge found that under article 179, Schedule II of the Limitation Act (XV of 1877), time began to run from the date of the appellate decree, and as the application for execution was presented within three years from the date of that

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decree, it was not barred. He, therefore, granted the application.

On appeal by defendants Nos. 1 and 4, the Judge confirmed the order. They, therefore, preferred a second appeal.

Scott with *S. R. Bakhle* for the appellants (defendants Nos. 1 and 4): —The first defendant was not a party to the appeal, and the appellate decree which was passed in his absence cannot affect him. Further, the plaintiff's appeal related only to a part of the decree, *viz.*, the liability of the second defendant's share ($\frac{7}{72}$) of the mortgaged property. The whole decree was, therefore, not imperilled by the appeal. The part of the decree which dealt with $\frac{65}{72}$ share was not appealed against and was not judicially before the appellate Court. So far, therefore as the first defendant is concerned, the decree which can be executed against him is the original decree, and the present application being made after the expiration of three years from the date of that decree, is time-barred.

[PARSONS, J., referred to *Sakhalchand* v. *Velchand*[1].]

In that case, the liability of the parties against whom execution was sought, was in question both in the original suit and in appeal, while in the present case the shares of the parties were defined and the appeal related to one definite share, the other shares being excluded from it.

Branson with *Shamrav Vithal* and *Dattatraya A. Idgunji* for the respondents (plaintiffs): When a decree is appealed against, the whole decree is before the appellate Court and it can deal with it as a whole. It cannot be said that one portion of the decree is before the Court and the other not. Article 179, Schedule II of the Limitation Act is quite explicit on the point. It does not refer to portions of a decree. Our application for execution was made within three years from the date of the appellate decree and was, therefore, in time. There is a conflict of cases on the point, but the ruling of our High Court in *Sakhalchand* v. *Velchand*[1] supports our contention.

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

The following cases were cited during arguments:—*Muthu* v. *Chellappa*[1]; *Raghunath Pershad* v. *Abdul Hye*[2]; *Mashiatun-nissa* v. *Rani*[3]; *Sakhalchand* v. *Velchand*[4]; *Nur-ul-Hasan* v. *Muhammad*[5]; *Nundun Lall* v. *Rai Joykishen*[6], *Kristo Churn Dass* v. *Radha Churn Kur*[7].

PARSONS, J.:—The suit, in which the decree now sought to be executed was passed, was brought against the members of a Mahomedan family to recover a debt by the sale of the whole estate. The Court of first instance exonerated from liability the share of a female member, the second defendant, which amounted to $\frac{7}{72}$ of the whole estate, and ordered the sale of the remaining $\frac{65}{72}$. The plaintiffs appealed as to the $\frac{7}{72}$ share only. They made, however, all the defendants respondants in the appeal, and though the name of the first defendant was afterwards struck out, as he could not be served with notice, his interests and those of the defendants Nos. 3 to 7 were identical. The appellate Court confirmed the decree.

Within three years of the date of the appellate decree, but more than three years after the date of the decree of the Court of first instance, the plaintiffs have now applied for execution. The appellants (original defendants Nos. 1 and 4) contended that the application was time-barred.

The decision depends upon whether the date of the decree or the date of the appellate decree is to be taken as the starting point from which limitation begins to run as against them. Article 179 of the Limitation Act provides that an application for execution must be made within three years from the date of the decree, or (where there has been an appeal) the date of the final decree of the appellate Court. Here there has been a decree and there has been an appeal, so that if the clause is construed in its plain and natural sense the application would be in time. The decision in *Sakhalchand* v. *Velchand*[4] adopts this construction. The other High Courts in India have, however,

(1) I. L. R., 12 Mad., 479.
(2) I. L. R., 14 Cal., 26.
(3) I. L. R., 13 All., 1.
(4) I. L. R., 18 Bom., 203.
(5) I. L. R., 8 All., 573.
(6) I. L. R., 16 Cal., 598.
(7) I. L. R., 19 Cal., 750.

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placed a different construction on the clause. The Madras High Court considered that the appeal referred to in the clause must be one that imperils the whole decree, and it consequently held that where an appeal was presented only against that portion of a decree which exonerated the shares of defendants Nos. 5 to 9, the time for applying for execution against the shares of defendants No. 3 and 4 was not extended though they were actually parties to the appeal—*Muthu* v. *Chellappa* (1). The majority of the Judges of the Allahabad High Court considered that the appeal referred to in the clause could not be taken advantage of by persons who were in no way concerned with the appeal and whose rights under the decree could not be affected by the appeal to which they were not parties, or whose liabilities under the decree could neither be limited nor extended nor varied by the appeal to which they were not parties, unless such appeal came within the scope of section 544 of the Code of Civil Procedure. The other two Judges following *Nur-ul-Hasan* v. *Muhammad Hasan* (2) considered that the clause applied, without any exceptions, to decrees from which an appeal had been lodged by any of the parties to the original proceedings—*Mashiatunnissa* v. *Rani* (3). A Division Bench of the Calcutta High Court in *Nundun Lall* v. *Rai Joykishen* (4) laid down the following principle, namely, that as regards parties who were not parties to the appeal, where the appeal made by one of the parties to the suit did not and could not affect the decree as against others of the parties concerned in the case, the decision in the appeal would not alter the period of limitation in respect of the execution of the decree as between other parties to the suit. In order to alter the period the whole decree must be imperilled by the particular appeal which is preferred. In *Kristo Churn Dass* v. *Radha Churn Kur* (5), however, another Division Bench refused to go into the question whether or not the whole decree was or might have been or became imperilled in the Court of appeal, and applied the clause because all the defendants were parties to the appeal. There is, therefore, this difference between the Courts. The

(1) I. L. R., 12 Mad., 479.
(2) I. L. R., 8 All., 573.
(3) I. L. R., 13 All., 1.
(4) I. L. R., 16 Cal., 598.
(5) I. L. R., 19 Cal., 750.

Madras High Court construes the word "appeal" to mean an appeal by which the whole decree is imperilled. The Allahabad and Calcutta High Courts construe it to mean an appeal to which the parties seeking to profit by the clause must either be parties or come within the scope of section 544 of the Code of Civil Procedure. This High Court and a minority of the Judges of the Allahabad High Court give the word "appeal" its plain meaning, and hold that it means any appeal by any party. In our opinion, the latter is the correct construction. Even if it were otherwise, the clause ought, we think, to be applied in the present case, for all the defendants except the defendant No. 1 were parties to the appeal, and the interests of the defendants Nos. 1 and 3 to 7 were identical, so that it is impossible to say that the decree was not imperilled by the appeal presented by the plaintiffs, since the defendants could in it have taken any objection to the decree that they could have taken by way of appeal, and the appeal as regards the defendant No. 1 would come within the scope of section 544 of the code. We, therefore, confirm the order of the lower appellate Court with costs.

RANADE, J.:—In this case the respondent-plaintiffs obtained on 26th June, 1891, a decree on a mortgage bond, which directed that the mortgage-debt should be recovered by the sale of $\frac{65}{72}$ share of the mortgaged property; the remaining $\frac{7}{72}$ share belonging to defendant No. 2 being held not liable to satisfy the mortgage-debt. The plaintiffs appealed against the decree in respect of the rejected portion of the claim, but the decree was confirmed in appeal on 30th July, 1892. Defendant No. 1 was not a party to the appeal, and when the plaintiffs applied for execution on 3rd July, 1895, this defendant pleaded that as against him the execution was time-barred, counting the three years' period from 26th June, 1891, the date of the original decree. This objection was over-ruled by both the lower Courts. Mr. Scott on behalf of the appellants contended before us that the lower Courts were in error in over-ruling the objection, because the decree of the appellate Court could not be executed as against the appellant, original defendant No. 1, who was not a party to the appeal. Mr. Scott sought to distinguish the present case from *Sakhalchand*

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v. *Velchand* [1] on the ground that in that case the amount of money due was not fixed till the appellate Court confirmed the decree; whereas here the appeal was confined to the $\frac{7}{72}$ share, and did not imperil the claim as against the $\frac{65}{72}$ share.

The question we have thus to decide is, whether, under the circumstances of this case, the three years' limitation should be held to commence from the date of the original or the appellate decree, when the person against whom execution is sought, was not a party to the appeal. Clause 2 of article 179 of Limitation Act is general in its terms, and does not specify any details about parties or subject-matter. Admittedly where all the parties to the original suit are parties to the appeal, the original decree is merged in the appellate decree, whether the latter confirms, amends or reverses the original decree, and it is the appellate decree which can alone be executed—*Shohrat Singh* v. *Bridgman* [2]; *Muhammad Sulaiman* v. *Muhammad Yar Khan* [3]; *Sakhalchand* v. *Velchand* [4]; *Daulat* v. *Bhukandas* [4]; *Noor Ali* v. *Koni Meah* [5]; *Kistokinker Ghose* v. *Burrodacaunt Singh* [6]. Similarly, where an appeal is preferred, but subsequently withdrawn, it is the original decree which has to be executed, and the three years' term has to be computed from the date of that decree—*Mahant Ishwargar* v. *Chudasama Manabhai* [7]; *Patloji* v. *Ganu* [8]; *Chudasama Manabhai* v. *Mahant Ishwargar* [9]. While there is no dispute in regard to both these positions, there is some difference of opinion in regard to the intermediate classes of cases, where the whole of the subject-matter is or is not involved in peril by the appeal, or the parties to the appeal do not include all the parties to the original suit.

It is true that in *Sangram Singh* v. *Bujharat Singh* [10] it was held that where there are more defendants than one, against whom the first decree is passed, and only one defendant appeals, it is the first Court's decree, and not the appellate decree which can be executed against the non-appealing defendant, where there

(1) I. L. R., 18 Bom., 203.
(2) I. L. R., 4 All., 376.
(3) I. L. R., 11 All., 267.
(4) I. L. R., 11 Bom., 172.
(5) I. L. R., 13 Cal., 13.
(6) 10 Ben. L. R., 101.
(7) I. L. R., 13 Bom., 106.
(8) I. L. R., 15 Bom., 370.
(9) I. L. R., 16 Bom., 243.
(10) I. L. R., 4 All., 36.

is no common ground or interest between the several defendants. Where there is such a common ground, as, for instance, where the decree is a joint decree; or is a joint and several decree, and only one defendant appeals, execution can only be taken out of the appellate decree, even as against the non-appealing defendant—*Mullick Ahmed* v. *Mahomed Syed* (1); *Gungamoyee Dassee* v. *Shib Sunkur* (2). Where the decree is for separate sums found to be due from separate defendants, and only one defendant appeals, execution as against the non-appealing defedant can only be of the original decree—*Muthu* v. *Chellappa* (3); *Hur Proshad* v. *Enayet Hossein* (4); *Wise* v. *Rajnarain Chuckerbutty* (5); *Raghunath Pershad* v. *Abdul Hye* (6); *Mashiatunnissa* v. *Rani* (7).

The principle underlying these cases is stated to be that the whole decree is not in peril, and plaintiff might execute his decree against the non-appealing defendants without waiting for the decision of the appeal—*Nundun Lall* v. *Rai Joykishen* (8); *Kristo Churn Dass* v. *Radha Churn Kur* (9); *Nur-ul-Hasan* v. *Muhammad Hasan* (10). Where, therefore, the whole claim is or may be in danger either on an appeal by the plaintiff or by the defendant, there the period for execution must be counted from the date of the appellate decree. The Judges who decided these last cited Calcutta cases, while holding themselves bound to follow the previous rulings as far as they went, have expressed themselves against introducing further refinements or limitations, not suggested by the general words of article 179, clause 2.

In the remarks made above, I have tried to reconcile as far as may be the apparent conflict of opinions between the several Courts. The words of the article contain no limitations or conditions such as those which have been laid down in these conflicting rulings. They appear, evidently, to have been intended to give the plaintiff a right to bring his claim, so far as it is disallowed, before a Court of appeal without requiring him to hasten

(1) I. L. R., 6 Cal., 194.
(2) 3 Cal. L. R., 430.
(3) I. L. R., 12 Mad., 479.
(4) 2 Cal. L. R., 471.
(5) 10 B. L. R., 258.
(6) I. L. R., 14 Cal., 26.
(7) I. L. R., 13 All., 1.
(8) I. L. R., 16 Cal., 598.
(9) I. L. R., 19 Cal., 750.
(10) I. L. R., 8 All., 573.

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the execution of the claim so far as it had been awarded. In many cases when plaintiffs appeal in respect of a portion of a claim not awarded, the other side puts in objections at the hearing of the appeal, under section 561, in regard to the claim awarded. So that by virtue of the appeal, the whole claim is brought before the appellate Court. Similarly where there is a common ground or interest amongst the plaintiffs or the defendants, an appeal by one is virtually an appeal by all under section 544 though they may not be parties to the record. Bearing the operations of these sections in mind, it appears to me that, except in the case where the nominally single decree awards separate reliefs against separate defendants, the words of the clause must be construed in their natural sense, as permitting an extension of limitation, where an appeal has been preferred, and is not withdrawn. In the present case the cause of action was single and joint as against all the defendants, being based on the mortgage-bond of the whole property. And though the appeal was necessarily confined to the portion disallowed, it did not follow that the plaintiff was bound to take out execution against the defendant not a party to the appeal, without waiting to see if he could not sell the whole property mortgaged. The case of *Sakhalchand* v. *Velchand* (1) is a clear authority on this point, and this High Court has generally interpreted the section as it stands without any conditions. The distinction sought to be made between money amounts and shares in landed property is more or less fanciful, as what plaintiffs sought here was to recover the money by the sale of the property. We, therefore, confirm the order of the lower Court and reject the appeal with costs.

Order confirmed.

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