

The 24th April 1872.

*Present :*

The Hon'ble F. B. Kemp and F. A. Glover,  
*Judges.*

Execution—Sale of Attached Property—  
Limitation.

Case No. 47 of 1872.

*Miscellaneous Appeal from an order passed by the Additional Judge of Hooghly, dated the 16th September 1871, affirming an order of the Moon-siff of that district, dated the 14th July 1871.*

•Modhoo Soodun Mookerjee (Decree-holder),  
*Appellant,*

*versus*

Kirtee Chunder Ghose and another (Judgment-debtors), *Respondents.*

*Baboo Sham Lall Mitter* for Appellant.

*Baboo Chunder Nath Bose* for Respondents.

Where a decree-holder did not deposit the travelling allowance of the officer deputed to hold a sale of the attached property, and the case was struck off, the attachment was held to subsist up to the date of the striking off, and an application made within three years from that date was held to be within time.

*Kemp, J.*—THE decree-holder is the special appellant. The decree is dated the 24th of March 1863. An application for the sale of the attached property was made and was granted on the 1st of Pous 1274, and the sale day was fixed by proclamation for the 7th January 1868; but it appears that because the decree-holder did not deposit the travelling allowance of the officer deputed to hold the sale, the case was struck off on the 11th of January 1868, and up to that date the attachment subsisted. We think, therefore, that the present application was made within three years of the 7th of January 1868, the day fixed for the sale, as also from the 11th of January 1868, when the case was struck off; the attachment, as already observed, subsisting up to that date. We therefore think that the application was within time, and there is a decision of the Privy Council in Volume XIV., Weekly Reporter, page 22, which supports this view.

We reverse the decision of the Judge, and decree the appeal with costs.

The 24th April 1872.

*Present :*

The Hon'ble F. B. Kemp and F. A. Glover,  
*Judges.*

Limitation—Execution—Decree of Appellate  
Court—Inactive Decree-holder.

Case No. 38 of 1872.

*Miscellaneous Appeal from an order passed by the Judicial Commissioner of Chota Nagpore, dated the 4th October 1871, affirming an order of the Deputy Commissioner of that district, dated the 21st July 1871.*

Bukronath Chuckerbutty and others (Decree-holders), *Appellants,*

*versus*

Rajah Nilmonee Singh Deo (Judgment-debtor), *Respondent.*

*Baboo Anund Chunder Ghossal* for  
*Appellants.*

*Baboos Oopendro Chunder Bose and Bhowanee Churn Roy* for Respondent.

A party who fails to take out execution of a decree and takes no steps to appear in the Appellate Court to prevent that decree from being set aside or modified, is not entitled to a fresh starting point from the date of the decree of the Appellate Court.

*Kemp, J.*—THE decree-holder is the appellant in this case. Both Courts have found that his application to execute his decree, dated the 6th of September 1866, is barred. It appears that the present application to execute the decree was made on the 1st of September 1870. The decree holder accounted for the delay by stating that the judgment-debtor had appealed his case and that the appeals were disposed of respectively on the 29th of May 1867 and 16th of April 1869.

In special appeal, it is contended that the Full Bench Ruling cited by the Judicial Commissioner does not affect the present case, as that precedent simply ruled that the act of the decree-holder in appearing in the Appellate Court to oppose an appeal is sufficient to keep the decree alive, but did not rule that where no such appearance is made, the decree-holder fails to keep the decree alive; and that by a recent Full Bench Ruling to be found in Volume XVI., Weekly Reporter, page 1, it has been held that where a decree is affirmed in appeal, the decree appealed from is merged in the decree of the Appellate Court, which

is to be considered as the decree in the case, and that therefore the petitioner was fully entitled to execute the final decree passed by the High Court within three years from the date thereof. Now, in this case it is admitted that the decree-holder did not appear in the Appellate Court. In a decision to be found, in Volume VII. of the Weekly Reporter, page 521, the Full Bench laid down that a mere application for review or a petition of appeal by the person against whom the judgment was given would not be an act done by the person in whose favor the judgment was given for the purpose of keeping the same in force. It would be an act done by the opposite party to destroy it, and not done by the person in whose favor it was given to keep it in force. But if, upon the application for review or the petition of appeal, the person in whose favor the original decree was given appears in person or by vakeel (whether voluntarily or upon service of notice) to oppose the application and files a *vakalatnamah* or does anything for the purpose of preventing the Appellate Court or the Court of Review from setting the judgment aside, we think that within the fair interpretation of the words such act being an act of the person in whose favor the judgment has been given for the purpose of preventing it from being set aside, is an act done for the purpose of keeping the judgment in force.

Now, in the present case, the decree-holder did nothing by appearance in the Appellate Court to oppose the appeal, or for the purpose of preventing the decision which he had obtained from being set aside. It is therefore clear that he did nothing in the appeal stage for the purpose of keeping his judgment in force, and that the converse of the proposition laid down by the Full Bench in the decision reported in Volume VII. applies to this case. The later case merely rules that the decree of a District Court affirmed in appeal is merged in the decree of the High Court, and that the three years' rule applies and not the twelve years' rule; but that decision does not lay down that, if a party fails to take out execution of his decree and takes no steps to appear in the Appellate Court to prevent that decree being set aside or modified, he is to have a fresh starting point from the date of the decree of the Appellate Court. There was nothing to prevent the decree-holder from taking out execution of his decree on the mere fact of an appeal having been lodged against it. Not having done so, and not having appeared in the Appellate

Court, we think that the ruling in Volume VII. does apply, and that the decisions of the Courts below are correct.

We dismiss the special appeal with costs, payable by the appellant.

The 24th April 1872.

Present :

The Hon'ble Louis S. Jackson and  
W. Markby, *Judges.*

Arrears of Rent—Jurisdiction—Limitation  
—Act XIV. of 1859—Act X. of 1859, s. 32—  
Act VIII. of 1869 (B. C.), s. 29.

Case No. 236 of 1871.

*Regular Appeal from a decision passed by the Second Subordinate Judge of Twenty-four Pergunnahs, dated the 5th July 1871.*

Prosuano Coomar Pal Chowdhry and others  
(Defendants), *Appellants,*

*versus*

Ramdhun Chatterjee (Plaintiff), *Respondent.*

*Baboo Nil Mathub Bose and Jadub Chunder Seal for Appellants.*

*Baboo Mohinee Mohun Roy for Respondent.*

It having been decided in a former case that the zemindar's claim against the defendants for the rent of 1271, being a suit for arrears of rent recoverable upon a liability arising out of matters not within the cognizance of a Revenue Court, was not governed by the special limitation prescribed by s. 32, Act X. of 1859, but by the ordinary law of limitation, Act XIV. of 1859—HELD that the zemindar's present claim of a precisely similar nature against the same parties in respect of the year 1272, was not barred by the special limitation prescribed by s. 29, Act VIII. of 1869, B. C. (corresponding to s. 32, Act X. of 1859).

*Markby, J.*—In this appeal the general facts are that a certain talook, formerly in the district of Nuddea, but now in the 24-Pergunnahs, was put up to sale on account of arrears of rent due to the zemindar, and purchased, nominally, by a person of the name of Gopal Chunder Mokerjee, but it has now been ascertained beyond all doubt that the purchase was really made on behalf of Prosuano Coomar Pal Chowdhry, and his wife, who are the two principal defendants in the present suit.

After the sale, the zemindar being aware that persons other than Gopal Chunder were interested in the purchase, brought a suit in