Before Mr. Justice Stevens and Mr. Justice Pratt.

HARISH CHANDRA SHAHA AND ANOTHER (DECREE-HOLDERS) *v.* CHANDRA MOHAN DASS (JUDGMENT-DEBTOR).* 1900 *August* 30.

Limitation Act (XV of 1877), Sch. II, arts. 178, 179—Ex parte Decree—Application for refund of the amount of decree subsequently set aside—Time for making such application.

An application for refund of the amount levied in execution of an *ex parte* decree subsequently set aside is governed by art. 178, sch. II of the Limitation Act, and should be made within three years from the date of setting aside of that decree.

Kurupam Zamindar v. *Sadasiva* (1) followed.

THE judgment-debtor Chandra Mohan Dass brought a suit for arrears of rent and obtained an *ex parte* decree against the present decree-holders. That decree was subsequently set aside, and on the suit being tried in the presence of both the parties it was dismissed with costs. Meanwhile, however, the *ex parte* decree had been executed and satisfied.

On the 23rd of June 1899 an application was made by the decree-holders (*a*) to execute the decree for costs, and (*b*) for refund of the money paid in satisfaction of the *ex parte* decree which was subsequently set aside.

The decree for costs sought to be executed was passed on the 9th of June 1896.

The Court of First Instance allowed both the prayers in the aforesaid application dated 23rd June 1899.

The District Judge, on appeal, held that the application for the refund was barred by limitation under art. 178, sch. II of the Limitation Act, not having been made within three years from the date on which the right to make such an application accrued, *i. e.*, from the date when the *ex parte* decree was set aside. He further observed that there was nothing to shew on what date that took place, but the setting aside of the *ex parte* decree must

* Appeal from Order No. 112 of 1900, against the order of B. G. Geidt, Esq., District Judge of Tipperah, dated the 11th of December 1899, reversing the order of Babu Kali Kumar Sarkar, Munsif of Commillah, dated the 5th of September 1899.

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have taken place before the dismissal of the suit (in which costs were awarded) on the 9th of June 1896, and there must therefore have been a longer interval than three years between the date of setting aside the *ex parte* decree and the present application for the refund; and he accordingly reversed the order of the First Court so far as the refund was concerned.

The decree-holders appealed to the High Court.

Babu *Promotho Nath Sen* (for Babu *Gobinda Chandra Dass*), for the appellants.

Babu *Akhoy Coomar Banerjee*, for the respondent.

The judgment of the Court (STEVENS and PRATT, JJ.) was delivered by

STEVENS, J.—The facts out of which this appeal arises were as follows:—

An *ex parte* decree for rent was obtained against the present appellants and they succeeded in having that decree set aside. On the rehearing of the case the suit against them was dismissed with costs. They applied to the Court of First Instance by one application for execution of the final decree for costs and for restitution of the amount of the *ex parte* decree which had been satisfied by them before it was set aside.

The Lower Appellate Court has held that although the application was in time as regards costs, it was not in time as regards the refund, because the appellants were entitled to apply for the refund immediately on the setting aside of the *ex parte* decree. The date on which the *ex parte* decree was set aside has not been stated; but, as the Lower Appellate Court says, it must have been more than three years before the date on which the application in question was made. The learned Judge has accordingly held, applying art. 178 of the second schedule of the Limitation Act, that that application was barred so far as the refund was concerned.

The main contention before us, and in fact, the contention on which all the other arguments which have been addressed to us depend, is that the Lower Appellate Court was in error in holding that the right to apply accrued on the setting aside of the *ex parte* decree, and that it should have held that the right accrued on the

passing of the final decree dismissing the suit against the appellants, because, until the suit was finally dismissed, the appellants could not tell whether they might not ultimately be obliged to satisfy the decree. We think that there is nothing in this contention. The decree which had been satisfied was the *ex parte* decree. Since that decree was set aside, the appellants were entitled to a refund. They were in no way bound to allow the amount which they had already paid to remain in the decree-holder's hand in case the suit should eventually be decreed against them.

The question has been raised whether art. 178 or art. 179 of the second schedule of the Limitation Act properly applies to an application such as that in question. It has been pointed out that in the case of *Nand Ram* v. *Sita Ram* (1) where a refund was sought in execution of a decree of the Lower Appellate Court, modifying the decree of the Court of First Instance, the application was held to be an application made according to law in the proper Court in the sense of art. 179 of the Limitation Act.

On the other hand, the learned pleader for the respondent has referred to the case of *Kurupam Zamindar* v. *Sadasiva* (2) in which the learned Judges, who disposed of the case, were inclined to think that an application for refund after a decree passed in appeal was governed by art. 178, since it was not one for execution of a decree or order, but to enforce a benefit by way of restitution under a decree passed in appeal.

It does not appear that in the Allahabad case the question was considered whether art. 179 was the one most properly applicable to the case, and we are disposed to agree with the learned Judges of the Madras High Court in considering that art. 178 is that which applies. In either case the real question is as to the starting point from which limitation began to run, and, whether art. 178 or art. 179 be applied, the appellants would be out of time.

The appeal is accordingly dismissed with costs.

B. D. B. *Appeal dismissed.*

(1) (1886) I. L. R., 8 All., 545.
(2) (1886) I. L. R., 10 Mad., 66.