Before the Hon'ble Mr. R. F. Rampini, Acting Chief Justice, and Mr. Justice Sharfuddin.

1907
June 10.

MAHOMED MEHDI BELLA
v.
MOHINI KANTA SAHA CHOWDHRY.*

Limitation—Execution of decree—Civil Procedure Code (Act XIV of 1882) s. 230—Decree on appeal, modifying the first decree.

A decree for payment of money was modified on appeal:—

Held, that the decree to be executed being the decree made on appeal, the twelve years mentioned in section 230 of the Code of Civil Procedure would run from the date of the appellate decree.

SECOND APPEAL by the judgment-debtor, Moulvie Mahomed Mehdi Bella.

The respondent, Mohini Kanta Saha Chowdhry, had brought a suit for contribution against the appellant and three other persons. The Court of first instance made a decree in favour of the respondent on the 23rd of August 1892 making the appellant, who was the fourth defendant in the suit, separately liable for Rs. 480. The first and the second defendants preferred an appeal to which the present appellant was not a party, and the Appellate Court made its decree on the 29th of March 1893 making the appellant and the third defendant jointly liable for Rs. 959-15-3. After certain previous applications for execution, the respondent made the present application on a date which was more than 12 years from the date of the original decree but within 12 years from the appellate decree. The judgment-debtor objected, *inter alia*, that the application was barred under section 230 of the Code of Civil Procedure. This objection was overruled by both Courts on the authority of *Gopal Chunder Manna* v. *Gosain Das Kalay*(1).

*Appeal from Order, No. 428 of 1906, against the order passed by H. Walmsley, District Judge of Dacca, dated June 9, 1906, affirming the order of Tarak Chunder Das, Offg. Subordinate Judge of Dacca, dated April 21, 1906.

(1) (1898) I. L. R. 25 Calc. 594.

The judgment-debtor appealed to the High Court.

Babu Joy Gopal Ghose, for the appellant. The case relied on by the Courts below was decided on a construction of Art. 179 clauses (4) and (2) of the Second Schedule of the Limitation Act, and has no bearing on the question now raised which depends on the meaning of section 230 of the Code of Civil Procedure. The twelve years mentioned there runs from the first decree, and it is expressly provided that the period is to run from the decree on appeal only where the appellate decree affirms the first decree. Here, the Appellate Court modified the decree of the first Court, so that the time would run from the first decree.

No one appeared for the respondent.

RAMPINI, A.C.J. This is an appeal by judgment-debtor No. 4. He contends that the decree which it is sought to execute against him is barred by limitation under section 230, Civil Procedure Code. The facts are that a decree was given against him for Rs. 480 on the 23rd August 1892. An appeal was preferred and a decree for Rs. 960 was on the 29th March 1893, passed jointly against him and the defendant No. 3. It is contended that as more than 12 years had elapsed between the 23rd August 1892 and the date of presentation of the present application for execution, execution of the decree is barred. The appellant's pleader relies on the words of section 230, in which it is said that execution is barred by the lapse of 12 years from the date of the decree sought to be enforced, or the date of the decree on appeal "affirming the same."

The pleader's contention is that limitation cannot be held to run from the date of the decree in appeal in this case, because it did not affirm the decree of the lower Court. The answer to this would seem to be that it is the decree passed on appeal in this case it is sought to enforce and not the decree of the first Court. Hence limitation runs from the 29th March 1893, and the present application for execution is in time.

The decree in appeal appears to have been rightly passed against the defendants 3 and 4, and cannot now be impugned.

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MAHOMED MEHDI BELLA v. MOHINI KANTA SAHA CHOWDHRY.

We dismiss this appeal with costs.

SHARFUDDIN J. The whole contention on behalf of the judgment-debtor appellant, rests on the question as to whether the decree-holder, who is the respondent in the present appeal, can execute his decree against the appellant within 12 years from the date of the appellate decree in this case.

The original decree is dated the 23rd August 1892, and the appellate decree is dated the 29th March 1893. The application for execution was admittedly made within 12 years after the appellate decree and more than 12 years after the original decree.

The original suit was against four defendants, and the appellant was defendant No. 4 in that suit. This defendant No. 4 was made separately liable for a sum of Rs. 480. The first and second defendants of that suit preferred an appeal against the decree. But the present appellant was not made a party in that appeal. The appellate Court modified the decree by making the present appellant and the third defendant of the original suit jointly liable for the sum of Rs. 959, and this modified decree is dated the 29th March 1893.

It is urged on behalf of the present appellant that the period of limitation should be computed from the date of the original decree which is the 23rd August 1892, and that the application for execution having been made more than twelve years after this date, is barred.

The Subordinate Judge has held otherwise, and I think rightly so, relying on the authority, *viz.*, *Gopal Chunder Manna* v. *Gosain Das Kalay* (1).

It has been urged on behalf of the appellant that although under section 230, cl. (*a*), Civil Procedure Code, the 12 years limitation is to be counted from the appellate decree but that clause provides that the period can be so counted when the decree has been affirmed on appeal, and that in the present case the appellate decree has modified the original decree and hence the period of limitation should be counted from the original decree.

The rule of law is that it is only the last decree that can be executed and that limitation, therefore, would begin to run from

(1) (1898) I. L. R. 25 Cal. 594.

the date of the appellate decree and not from that of the original decree.

In cases where the original decree has either been set aside or modified, that decree ceases to exist and hence for the purposes of limitation the date of the appellate decree should be taken into consideration, not the date of the decree that has ceased to exist.

In cases where the Court of appeal affirms the original decree, that Court allows the original decree to exist. And hence, I think, the Legislature thought it necessary to provide that even in cases where the Court of Appeal affirms the original decree the general rule is to be followed, and that the date of the appellate decree affirming the original one is the date from which the period of limitation is counted.

For the above reasons and for the reasons set forth in the judgment of my learned brother, I also consider that the present appeal should be dismissed.

Appeal dismissed.

S. CH. B.