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On the whole their Lordships are of opinion that the appellants have not made out a sufficient case for disturbing the judgment of the Judicial Commissioner, and their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed with costs.

*Appeal dismissed.*

Solicitors for the appellants: *Sanderson, Adkin, Lee & Eddis.*

Solicitors for the respondent: *T. L. Wilson & Co.*

J. V. W.

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## CIVIL RULE.

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*Before Justice Sir Cecil Brett and Mr. Justice Carmichael.*

NEPAL CHANDRA ROY CHOWDHURY

*v.*

NIRODA SUNDARI GHOSE.\*

1912  
 Feb. 5.

*Ex parte decree—Application for setting aside ex parte decree—Limitation—Limitation Act (XV of 1877), Sch. II, Art. 164—Limitation Act (IX of 1908), Sch. I, Art. 164—General Clauses Act (X of 1897), s. 6.*

Where the right of the judgment-debtor to make an application for setting aside an *ex parte* decree was lost under the provisions of Article 164, Schedule II of the Limitation Act of 1877, long before Act IX of 1908 was passed, the provisions of the new Limitation Act of 1908 cannot revive the right to apply for setting aside the decree.

CIVIL RULE obtained by the plaintiffs, Nepal Chandra Roy Chowdhury and another.

The petitioners brought a suit for recovery of the amount due on an instalment-bond executed by Behari Lal Ghosh, the husband of the defendant, who is the opposite party in this Rule, for rent and *salami* of the

\* Civil Rule, No. 5565 of 1911, against the order of Chandra Bhusan Banerjee, Additional Subordinate Judge of Khulna, dated September 1911.

land in which the defendant resided with her husband and children. The suit was decreed *ex parte* on the 28th March 1906. The plaintiffs alleged due service of summons of the case on the defendant. The defendant denied it. On the 19th February, 1907, the plaintiffs applied for execution of the said decree, and in execution thereof duly attached the price of land and the huts standing thereon and belonging to the defendant. The property was sold on the 27th May, 1907, and purchased by the plaintiffs, who were the decree-holders. The plaintiffs duly took delivery of possession of the land through the Court, and in 1910 erected a house on the land. On the 27th June, 1911, the defendant filed an application under Order IX, rule 13 of the Code of Civil Procedure for setting aside the *ex parte* decree of the 28th March, 1906, on the ground of non-service of summons on her. The decree was set aside on the 7th September, 1911, the Subordinate Judge finding that there was no service of summons and holding that the provisions of the new Limitation Act of 1908 were applicable. On the 17th September, 1911, the plaintiffs applied under section 114 and Order XLVII, rule 1 of the Code of Civil Procedure, for a reconsideration of the order of the 7th September 1911, on the ground that the application under Order IX, rule 13, was time-barred under Article 164 of the Second Schedule of the Limitation Act of 1877. This application was rejected on the 19th September 1911. The plaintiffs thereupon applied to the High Court under section 15 of the Provincial Small Cause Court and section 115 of the Code of Civil Procedure for setting aside the orders of the 7th and 19th September 1911.

1912  
 ———  
 NEPAL  
 CHANDRA  
 ROY  
 CHOWDHURY  
 v.  
 NIBODA  
 SUNDARI  
 GHOSE.

*Babu Charu Chandra Biswas*, for the petitioners.  
 The lower Court was clearly wrong in applying Act

1912  
 ———  
 NEPAL  
 CHANDRA  
 ROY  
 CHOWDHURY  
 v.  
 NIRODA  
 SUNDARI  
 GHOSE.

IX of 1908. The right to set aside the *ex parte* decree accrued while the Limitation Act of 1877 was in force, as soon as any process was taken to enforce the decree. The right became barred on the expiry of thirty days from the date of accrual, under Article 164 of the old Limitation Act. That was long before the Act of 1908 came into force. It was not as if no steps had been taken in execution, and the right to set aside consequently continued unaffected by the bar of limitation when the new Limitation Act came into operation, so that it might be said with some plausibility that the application would be governed by the provisions of the new Act. Here the right had been clearly barred under the Limitation Act in force at the time. And a right barred under Act XV of 1877 could not be revived by Act IX of 1908, simply because the application was made after the latter Act came into force. See also section 2 of Act XV of 1877 and *Mohesh Narain Munshi v. Taruck Nath Moitra* (1). The absence of any express saving clause like that in the present Act has not in any way changed the law, in view of the clear provisions of the General Clauses Act X of 1897, section 6(a) and (c) and section 8. The terms of section 6(a) are wide enough to cover a case like this.

No one appeared to show case for the opposite party.

BRETT AND CARNDUFF JJ. This Rule was issued to show cause why an order passed by the Subordinate Judge setting aside an *ex parte* decree should not be reversed on the ground that the application on which it was made was barred by limitation. The present applicant brought a suit to recover the amount due on an instalment bond, and obtained an *ex parte* decree

(1) (1892) I. L. R. 20. Calc. 487 ; L. R. 20. I. A. 30.

on the 28th March 1906. Execution was applied for on the 19th February 1907, and the property of the judgment-debtor was sold and purchased by the decree-holder on the 27th May 1907. The present application by the opposite party to set aside the *ex parte* decree was made on the 27th June 1911, that is to say, more than four years after the conclusion of the previous proceedings. Before the lower Court it was contended on behalf of the present applicant that the application was barred on the ground that the application to set aside the *ex parte* decree obtained by the applicant could only have been made when the provisions of the Limitation Act of 1877 were in force, and that, as under Article 164 of the Second Schedule of that Act, the application ought to have been made within thirty days from the date of executing the process for enforcing the judgment, the application was barred by limitation long before it was made on the 27th June 1911, and the right of the opposite party to make the application was lost long before the passing of Act IX of 1908, the present Limitation Act. The learned Subordinate Judge was, however, of opinion that the limitation provided in Article 164 of the First Schedule of Act IX of 1908 was applicable, and that the application was in time, as it was within thirty days of the time when the applicant had knowledge of the decree. The Rule was issued to set aside the order of the Subordinate Judge, and no one has appeared to contest it. In our opinion, the view taken by the learned Subordinate Judge cannot be accepted. The right of the opposite party to make the application was lost under the provisions of Article 164, Schedule II of the Limitation Act of 1877, long before Act IX of 1908 was passed, and section 6 of the General Clauses Act distinctly provides that

1912  
 ———  
 NEPAL  
 CHANDRA  
 ROY  
 CHOWDHURY  
 v.  
 NIRODA  
 SENIARI  
 GHOSE.

1912  
 NEPAL  
 CHANDRA  
 ROY  
 CHOWDHURY  
 v.  
 NIRODA  
 SUNDARI  
 GHOSE.

the repeal of the old Act would not have the effect of reviving any right not in force or existing at the time the repeal was made. We think, therefore, that on this ground the Rule must be made absolute, and the order of the Subordinate Judge set aside. The applicant is entitled to his costs of this hearing.

S. M.

*Rule absolute.*

## APPELLATE CIVIL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and  
 Mr. Justice N. R. Chatterjea.*

1912  
 Feb. 6.

EASTERN MORTGAGE AND AGENCY Co., LD.,

v.

PURNA CHANDRA SARBAGNA.\*

*Privy Council—Application for leave to appeal—Limitation—Admissibility of appeal filed after six months of the judgment—Time for taking copy of judgment and decree—Limitation Act (IX of 1908) s. 12 ; Sch. I, Art. 179.*

Clause (2) of section 12 of the Limitation Act, 1908, applies to an application for a certificate under Order XLV of the Code of Civil Procedure.

APPLICATION for leave to appeal to the Privy Council.

The judgment appealed against in this matter was passed by the High Court on the 3rd June 1910. The appellants to His Majesty in Council applied, on the 12th June 1910, for copies of the judgment and decree. Copies were ready on the 30th August, and the petitioners actually got them on the 31st August 1910. The petition for leave was filed on the 5th December 1910, the six months from the judgment appealed against expiring on the 3rd December.

\* Application for leave to appeal to His Majesty in Council, No. 102 of 1910.