Judgment of the Lords of the Judicial Committee of the Privy Council on the two consolidated Appeals of Haji Ashfaq Husain and others v. *Lala Gauri Sahai, from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered the 1st February* 1911.

PRESENT AT THE HEARING:

LORD MACNAGHTEN.
LORD MERSEY.
LORD ROBSON.
SIR ARTHUR WILSON.
MR. AMEER ALI.

[DELIVERED BY LORD MERSEY.]

The substantial question in this case is whether an application for the execution of a decree absolute obtained by the Respondent for the sale of some property which had been mortgaged to him by the Appellants is barred by Section 4 of the Indian Limitation Act, 1877. There is also a further question, namely, whether a similar application had not already been made to the Court and dismissed on the 27th November 1905, so as to make the present application *res judicata*.

The litigation which has led up to this dispute has been very long, and it has been somewhat complicated, but the story can be told, for present purposes, in a few sentences.

The Respondent was the holder of a mortgage of the interest of the Appellants and of a lady

named Musammat Sakina in certain lands. The mortgage debt was a joint debt, and the mortgaged property was joint property. Default was made in payment of the debt, and thereupon the Respondent instituted proceedings for the recovery of the money. He also asked for a decree that if payment were not made the property should be sold.

The present Appellants put in defences, but the lady failed to appear. The case was tried, and the defences were found to be untrue, whereupon a decree was pronounced against all the Defendants, the judgment against the lady going by default of appearance. This decree was dated the 25th August 1900, and it was made absolute on the 21st December 1901.

If nothing more had happened there should have been no difficulty about obtaining an order for execution of the decree. But before the decree absolute was made, namely, on the 19th September 1900, the lady Musammat Sakina had bestirred herself and had applied for a review of the judgment of the 25th August 1900 on the ground that she had never been served with process. The lady's application was refused by the Subordinate Judge before whom it came. This was on the 13th May 1901. The learned Judge did not believe her statement that she had had no notice of the proceedings and he was of opinion that she had been put forward by the principal Defendant in the suit, the present Appellant Ashfaq Husain, in order to delay the execution. Musammat Sakina then appealed; and her appeal was allowed, the Court directing "that "the decree passed *ex parte* be set aside so far as "the Appellant, Musammat Sakina is concerned," and that the case should be reheard upon the merits as against her. This was on the 11th March 1902. The case was accordingly set down for rehearing, and Musammat Sakina then

pleaded that the Plaintiff had received certain sums of money from her deceased husband on account of the mortgage debt for which he had not given credit. This defence of payment had not been put forward by any of the other Defendants, and at the hearing Musammat Sakina was unable to support it by satisfactory evidence. Accordingly judgment was given against her on the 15th August 1902. She then again appealed but the High Court, agreeing with the Subordinate Judge that her witnesses were unworthy of credit dismissed her appeal. This was on the 16th November 1904. Nothing was paid and on the 15th February 1905 the Plaintiff filed an application against all the Defendants in the action asking that the decree of the 15th August 1902 might be made absolute, and for an order for the sale of the property. To this the Appellants filed an objection alleging that the decree of the 15th August 1902 was passed against Musammat Sakina alone, and that the original decree of the 25th August 1900, passed against the Appellants, "had become extinct" by operation of the Statute of Limitation. The objection was heard on the 27th November 1905, when the Subordinate Judge held that the decree of the 15th August 1902 concerned Musammat Sakina only, and that therefore no order absolute could be made against the objectors on the basis of that decree. He also found that the Plaintiff had already, namely, on the 21st December 1901, obtained a decree absolute against the objectors so that there were two binding decrees (namely, the decree against the objectors and the decree against Musammat Sakina) in respect of the same mortgage. The learned Judge therefore came to the conclusion that he could not help but disallow the Plaintiff's application; and the application was accordingly dismissed. The

learned Judge, however, made a decree absolute (dated the 27th November 1905) against Sakina. Later on, namely, on the 21st December 1905, the Plaintiff filed an application against all the Defendants for execution by way of sale of the property. This application was based on the decrees of the 25th August 1900, the 15th August 1902, the 16th November 1904, the 21st December 1901, and the 27th November 1905, before-mentioned. The present Appellants filed an objection to this application on the 7th February 1906, alleging that they were no parties to the decrees of the 15th August 1902 and the 27th November 1905, and that as to the decrees of 25th August 1900 and 21st December 1901 they were time barred. These are the facts, and the first question is whether the remedy against the present Defendants is statute barred. The limitation applicable to the case is to be found in the fourth section of the Indian Limitation Act, 1877, which provides that every application made after the period of limitation prescribed therefor by the second schedule annexed to the Act shall be dismissed, although limitation has not been set up as a defence. The second schedule (No. 179) provides that the time for an application for the execution of a decree shall be three years from the date of the decree, or (where there has been an appeal) from the date of the final decree or order of the Appellate Court. The answer to the question, therefore, depends upon the date of the decree on which the application for execution is based. If the date of the decree is more than three years before the date of the application, then the Respondent's remedy is statute barred, but otherwise not. Now the Respondent originally claimed a decree against all the Defendants jointly in respect of a joint mortgage debt, and he obtained on the 25th August 1900 what purported to be a

judgment in accordance with his claim. But it subsequently appeared that by reason of non-service of process on one of the Defendants, the judgment ought not to have been given, and accordingly the Court reopened the matter by setting aside the judgment so far as it affected the one Defendant who had not been served, and directed another enquiry to ascertain whether that Defendant had any defence. It might have been more in accordance with strict procedure if the Court had set aside the whole judgment and had proceeded to re-try the case as against all the Defendants. But it was apparently considered that such a course would involve unnecessary delay and expense, and no one objected to the procedure adopted by the Court.

Thus the original judgment of the 25th August 1900 was treated by the Court and by the parties as a mere step in the granting of the relief for which the Plaintiff was asking and to which, as it ultimately turned out, he was entitled, namely, a decree against all the Defendants jointly. The irregularity (if any) in the procedure has, in their Lordships' opinion, worked no wrong and is of no real consequence. Subsequently and after many delays, for which the Respondent was in no way responsible, it was ascertained that the Defendant who alleged that she had not been served had no defence, and a decree was made against her. This decree which was dated the 16th November 1904 was the second step in granting to the Plaintiff the relief to which he was entitled. It supplemented and completed the decree granted on the 25th August 1900, and for the first time gave to the Plaintiff that which would alone justify him in applying for the joint execution to which he was entitled. It is from the date of this last judgment (the 16th November 1904), or rather from the date when it was made absolute (the 27th November 1905), that the time

under the statute began to run. It was then for the first time that the Court granted a complete decree to the Respondent. It follows therefore that the Plaintiff's remedy is not statute barred. This seems to have been the view taken by the High Court in the judgment from which this appeal is brought, and in their Lordships' opinion it is right.

As to the second point taken on behalf of the Appellants, namely, that the Plaintiff is estopped in the present proceedings by the judgment given against him on the 27th November 1905 upon his application of the 15th February 1905, it is sufficient to say that the present application is different from the application then before the Court. The application of the 15th February 1905 was based on the decree of the 15th August 1902, and on that alone, whereas the present application is based upon the joint effect of the two orders absolute of the 21st December 1901 and the 27th November 1905, made against the Appellants and Sakina respectively, and which two orders are in effect one decree of the later date.

Their Lordships will humbly advise His Majesty that the Appeals should be dismissed. The Appellants will pay the costs.

In the Privy Council.

HAJI ASHFAQ HUSAIN AND OTHERS

v.

LALA GAURI SAHAI.

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