PRIVY COUNCIL.

P. C.*
1932

Nov. 21;
Dec. 19.

HUSAIN ASGHAR ALI
v.
RAMDITTA MAL.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER IN BALUCHISTAN.]

Limitation—Execution of decree—Appeal—Order declaring appeal abated—"Final order"—Indian Limitation Act (IX of 1908), Sch. I, Art. 182(2).

Where an appeallate court, dealing judicially with matters before it, finally disposes of an appeal on the ground that it has abated, the order is a "final order" and, under the Indian Limitation Act, 1908, Schedule I, Article 182(2), gives a new starting point for the period of three years prescribed for an application to execute the decree.

Gohur Bepari v. *Ram Krishna Shaha* (1) approved.

Batuk Nath v. *Munni Dei* (2) and *Abdul Majid* v. *Jawahir Lal* (3) distinguished.

Decree affirmed.

Appeal (No. 47 of 1931) from a decree of the Court of the Judicial Commissioner in Baluchistan (March 11, 1929) affirming a decree of the Assistant Political Agent, Quetta-Pishin (November 23, 1928).

The appellants were the legal representatives of one Abdulla Asghar Ali, the judgment-debtor under a money decree dated November 20, 1917, in a suit instituted in the Court of the Assistant Political Agent, Quetta. The respondents were the legal representatives of Ganesh Das, *viz.*, the judgment-creditor, who died on July 30, 1923. The main question in the present appeal was whether an application made by the respondents on October 27, 1926, to execute the decree was barred under the Indian Limitation Act, 1908, Schedule I, Article 182, having regard to the circumstance that, on

* *Present*: Lord Wright, Sir George Lowndes and Sir Dinshah Mulla.

(1) (1927) 32 C. W. N. 387.

(2) (1914) I. L. R. 36 All. 284; L. R. 41 I. A. 104.

(3) (1914) I. L. R. 36 All. 350.

October 18, 1924, the appellate court had made an order that cross-appeals against the decree had both abated. The order was made upon an application by the present respondents and was resisted by the judgment-debtor.

The facts appear from the judgment of Judicial Committee.

Both courts in India held that the order was a final order within the meaning of Article 182 (*2*) and that, accordingly, the application was within time.

Wallach for the appellants. The application was time-barred under the Indian Limitation Act, 1908, Schedule I, Article 182, as it was not made within three years of the date of the decree. The order of October 18, 1924, was not a final decree or order so as to extend the time under Article 182 (*2*). There have been conflicting decisions in India upon the question: *Fazal Husen* v. *Raj Bahadur* (1), *Muhammad Razi* v. *Karbalai Bibi* (2), *Raghu Prasad Singh* v. *Jadunandan Prasad Singh* (3), *Gohur Bepari* v. *Ram Krishna Shaha* (4), where the cases are discussed. The appeal abated by force of Order XXII of the Code of Civil Procedure, 1908, not by force of the order of the appellate court, which was, therefore, not a final decree or order in the appeal. The decisions of the Board in *Batuk Nath* v. *Munni Dei* (5) and *Abdul Majid* v. *Jawahir Lal* (6) show that that is the right view. Further, the original application to execute the decree was not in accordance with Order XXI, rule 11, and the court had no power to allow the amendments. Under Order XXI, rule 17, the court had power to allow defects to be amended only "on "receiving" the application, but in this case the amendments were allowed about a year later.

Pringle for the respondents. The order was an adjudication of the appellate court upon a contested application and finally disposed of the appeals; it was,

(1) (1897) I. L. R. 20 All. 124.
(2) (1909) I. L. R. 32 All 136.
(3) (1920) 6 Pat. L. J. 27.
(4) (1927) 32 C. W. N. 387.
(5) (1914) I. L. R. 36 All. 284; L. R. 41 I. A. 104.
(6) (1914) I. L. R. 36 All. 350.

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therefore, a "final order" within Article 182 (*2*). The decisions of the Board relied on are distinguishable, as there had been no judicial adjudication; the appeals had abated under the Privy Council Rules. Even if Order XXII of the Code applied in this case, the balance of judicial decision in India strongly supports the respondents. But Order XXII did not apply. The case did not arise in British Baluchistan, but in the agency territories directly administered. Under the Regulations and notifications applicable, the Indian Limitation Act and parts of the Code of Civil Procedure applied, but not Order XXII: British Baluchistan Jurisdiction Regulation IX of 1896, as amended by Regulation II of 1913; Notification, Foreign Department, 1603-1B, July 28, 1911 (British Enactments in Force in Indian States, 1913, Vol. 1, p. 7). The order was made under the inherent power of the court and section 89 of the Regulation of 1896, which directs that the rule of justice, equity and good conscience shall apply.

[Reference was made also to *Brij Indar Singh* v. *Kanshi Ram* (1).]

Wallach replied.

The judgment of their Lordships was delivered by

SIR GEORGE LOWNDES. The principal question in this appeal is whether an application for the execution of a decree is time-barred under the provisions of Article 182 of the First Schedule to the Indian Limitation Act, 1908. The Article allows a period of three years only for such an application from the date of the decree, "or where there has been an appeal, the "date of the final decree or order of the appellate "court." It is not disputed that if, in the present case, the period is to be reckoned from the date of the decree, the application was out of time, nor, *per contra*, if the respondents can take advantage of a certain order of the appellate court, that it was within time.

(1) (1917) I. L. R. 45 Cal. 94 (108); L. R. 44 I. A. 218 (226).

The suit, out of which the appeal arises, was launched as long ago as 1912. Some four years later, it came up in appeal to this Board*, but was sent back for trial in the Baluchistan courts, where the proceedings dragged on for another 12 years.

On the 17th November, 1920, the decree, of which execution is sought, was passed in favour of the plaintiff, Ganeshdas Vig, by the Assistant Political Agent, Quetta. Against this decree, both parties appealed to the court of the Judicial Commissioner in Baluchistan. Two years or more were wasted in an abortive reference to arbitration, the arbitrator selected by the parties being the son of the judgment-debtor, and now, as his representative, the principal appellant before the Board. On the 30th July, 1923, the judgment-creditor died. His widow was brought on the record in his appeal but not in that of the judgment-debtor. On the 12th May, 1924, the widow died, and no further substitution was made in either appeal, nor was anything done by the arbitrator.

On the 6th August, 1924, an application was made to the appellate court by the present respondents, as the representatives of the judgment-creditor, for an order holding that the judgment-debtor's appeal had abated. Notice was served upon the judgment-debtor, and he put in a petition in reply denying that his appeal had abated, and asking for an order that the arbitration should proceed, with an alternative prayer that in case the court should hold that the appeal had abated, an order should be made setting aside the abatement.

Upon these counter applications, both appeals were set down before the Judicial Commissioner, who, by an order of the 18th October, 1924, held that both appeals had abated. He said it would be useless to send the matter back to arbitration, and he refused the application of the judgment-debtor to set aside the abatement in the case of his appeal.

It is upon this order of the 18th October, 1924, that the respondents rely to save limitation, and the

* (1917) I. L. R. 45 Calc. 442 ; L. R. 44 I.A. 213.

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only question is whether it was a final order of the appellate court within Article 182 (*2*). Both the courts in India have held that it was.

The respondents made their application for execution on the 27th October, 1926. The present appellants, the representatives of the judgment-debtor, who was then dead, took various objections to the application, and, after the lapse of another two years, a considerable portion of which was occupied in a search by the court officials for the file of the case, the matter came on before the Assistant Political Agent. Objection to his jurisdiction and to the title of the respondents were disposed of in their favour. They have not been urged before the Board. On the question of limitation, the learned Judge held, following a ruling of the Calcutta Court [*Gohur Bepari* v. *Ram Krishna Shaha* (1)], that the period of limitation should be calculated from the 18th October, 1924, the date of the Judicial Commissioner's order above referred to, and that the application was, therefore, in time. Having regard, however, to the omission of certain particulars from the application for execution, he returned it to the respondents for amendment. The necessary amendments were made and the application was re-submitted, but apparently before it was considered by the Judge, the representatives of the judgment-debtor lodged an appeal to the Judicial Commissioner.

The appeal was argued before him at great length, but was dismissed on the 11th March, 1929, by an order of that date. The learned Judicial Commissioner, though noting that there had been some conflict in the Indian courts as to what should be considered a final order of an appellate court, agreed with the conclusion to which the Assistant Political Agent had come on the question of limitation.

The appellants, with the no doubt laudable ambition of completing the tale of 20 years for the duration of this suit, have appealed to His Majesty in Council against the Judicial Commissioner's

(1) (1927) 32 C. W. N. 387.

decision. Their Lordships, for the reason to be stated, have no doubt that their appeal must fail, but the execution proceedings will still have to be worked out in the Political Agent's court, and there may still be opportunities to them to delay the satisfaction of what has been so laboriously decided to be a just debt.

In the argument before their Lordships, the appellants have relied mainly on two decisions of this Board, *Batuk Nath* v. *Munni Dei* (1) and *Abul Majid* v. *Jawahir Lal* (2), reported only in the Indian Law Reports. Neither of these cases is, in their Lordships' opinion, decisive of the present question. In the first, an appeal to His Majesty in Council had been dismissed for want of prosecution under rule V of the Order in Council of 13th June, 1853. The question before the Board in the reported case was whether under Article 179 of the second schedule to the Limitation Act of 1877, which corresponds with Article 182 of the Act of 1908, the assignee of the original deree-holder could claim three years from the date of the dismissal in this Board. It was held that he could not, the reason assigned being that there was no order. Sir John Edge, in delivering the judgment of the Board, says :—

> There was, however, no order of His Majesty in Council dismissing the appeal, nor was it necessary that any such order should be made in the appeal. Under rule V of the Order in Council of June 13, 1853, the appellant or his agent not having taken effectual steps for the prosecution of the appeal, the appeal stood dismissed without further order.

In the second case, the question was again as to the effect of the dismissal of an appeal in this Board for want of prosecution. No reference was made to *Batuk Nath's* case (1), which had been decided less than a month before, and it does not appear whether the dismissal had been under the Order in Council, but the effect of the decision was the same. Lord Moulton in delivering the judgment of the Board says :—

> The chief matter of argument before this Board was a contention that the decree which it is sought to enforce had been constructively turned

(1) (1914) I. L. R. 36 All. 384; L. R. 41 I. A. 104.

(2) (1914) I. L. R. 36 All. 350.

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into a decree of His Majesty in Council and assigned to the date of the 13th of May, 1001, by virtue of the dismissal of the appeal for want of prosecution on that date, and that therefore the period of limitation was 12 years from the 13th May, 1901, by virtue of Article 180* of the Indian Limitation Act, 1877. Their Lordships see no foundation for this contention, which appears to have been the basis of the decision of the courts below. The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit, and could in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognised authoritatively that the appellant had not complied with the conditions under which the appeal was open to him, and that therefore he was in the same position as if he had not appealed at all.

In the case now before their Lordships, it is manifest that there was an order of the appellate court, and that it did deal judicially with the matters before it. The Judicial Commissioner considered the judgment-debtor's contention that his appeal had not abated, and held that it had. He considered the prayer for revival of the arbitration and refused it. He rejected the application to set aside the abatement. Whether the order made was right or wrong is immaterial: there was no appeal against it, and it was, in the circumstances, clearly final. Their Lordships think that, when an order is judicially made by an appellate court which has the effect of finally disposing of an appeal, such an order gives a new starting point for the period of limitation prescribed by Article 182 (*2*) of the Act of 1908. They recognize that there has been some difference of opinion upon this question in Indian courts, but they think that the principle enunciated above is in accordance with the view taken in the majority of cases and is the effect of *Gohur Bepari's* case (1), on which both courts have relied in the present proceedings.

The only other question which has been argued on the appeal is as to the omissions in the application for execution, which led to its return to the respondents in the lower court for amendment. It is contended for the appellants that no amendment should have

*Under Article 180, 12 years was allowed for the execution of an Order of His Majesty in Council.

(1) (1927) 32 C. W. N. 387.

been allowed, and that the application should have been rejected. Under Order XXI, rule 17, of the Code of Civil Procedure the executing court clearly had a discretion to allow the amendments, and the appellate court thought that the discretion had been properly exercised. In these circumstances, it is idle to ask this Board to interfere.

In their Lordships' opinion this appeal fails and should be dismissed with costs. They will humbly advise His Majesty accordingly.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitors for respondents: *Ranken Ford & Chester.*

A. M. T.