Before Mr. Justice Prinsep and Mr. Justice Field.

1881 *July* 14.

GOPAL SAHU DEO (JUDGMENT-DEBTOR) *v.* JOYRAM TEWARY AND OTHERS (DECREE-HOLDERS).*

Execution of Decree—Limitation—Appellate Court—Privy Council—Limitation Act (IX of 1871), sched. ii, arts. 167, 169—Act VI of 1874, s. 21—Limitation Act (XV of 1877), sched. ii, arts. 177, 179, and 180—Interest, Rate of.

The term 'appeal' in art. 167 of sched. ii of the Limitation Act (IX of 1871) includes an appeal to the Privy Council, and the term 'Appellate Court' in the same article includes the Judicial Committee of the Privy Council sitting for the purpose of hearing appeals from orders passed by British Courts in India.

Where an appeal had been preferred to Her Majesty in Council from a decree of the High Court reversing the decree of the Court of first instance, and the High Court's decree was affirmed by an order of Her Majesty in Council, dated the 15th February 1873, and an application for execution of the High Court's decree was made on the 17th November 1875, more than three years after the date of the decree, but within that period of the order of Her Majesty in Council,—

Held, that, under art. 167 of sched. ii, Act IX of 1871, the limitation of such application must be computed from the date of the order of Her Majesty in Council, and consequently that the application for execution was not barred.

Where, in the course of executing a decree, accounts, in which interest was entered and charged, had, from time to time, been filed in Court, and no objection had been taken thereto by the judgment-debtor from 1870 up to 1880,—

Held, that it was too late to object to interest being allowed, and that the High Court would not interfere to alter the rate where it appeared that the District Judge had found that the rate ruling in the District was 12 per cent., and had allowed that rate accordingly.

IN this case it appeared that the judgment-creditors, the respondents, had lost the original suit, out of which these execution-proceedings arose, in the Court of first instance, and that their adversary had thereupon taken out execution, although an appeal had been preferred and was then pending in the High Court. When the appeal came on to be heard, the decree of the lower

*Appeal from Original Order, No. 327 of 1880, against the order of A. W. B. Power, Esq., Deputy Commissioner of Lohardugga, dated the 14th September 1880.

Court was reversed, and subsequently the order of the High Court was confirmed, on appeal, by the Privy Council. This present appeal arose from an attempt made by the judgment-creditors to recover the mesne profits for the time during which they had been dispossessed in consequence of the execution of the decree of the first Court previous to its being set aside by the High Court. It appeared that the first application in the present proceedings had been made on the 17th November 1875, and it was contended by the judgment-debtor, the appellant, that limitation applied, inasmuch as it had been made more than three years after the final decree or order of the Appellate Court, and that though the case was not finally decided by the Privy Council till the 15th February 1873, the Limitation Act (IX of 1871) did not apply to orders of the Privy Council. The Deputy Commissioner, however, decided this point against the judgment-debtor, and also allowed interest at 12 per cent., to which the appellant objected.

He accordingly now appealed to the High Court on both these points.

Baboo *Trailokyanath Mitra* and Baboo *Jogesh Chunder Day* for the appellant.

Mr. *M. L. Sandel* for the respondents.

The judgments of the Court (PRINSEP and FIELD, JJ.) were as follow:—

PRINSEP, J.—In this case it is first objected by the appellant's pleader that execution is barred, inasmuch as the previous application, made on the 17th of November 1875, was not made within three years from the date on which the notice was served on the debtor,—that is, on the 29th October 1872. It appears that the judgment-creditors now before us lost the original suit in the first Court. Execution was then taken out by their adversary while an appeal was pending in the High Court. The High Court set aside that order, and in 1873, the Privy Council affirmed the order of the High Court.

The present matter relates to restitution on account of mesne profits for the period during which the judgment-creditors now

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before us were out of possession in consequence of the execution of the decree of the Court of first instance, which was ultimately reversed. In answer to the objection as regards limitation it is pointed out that, inasmuch as the case was not finally decided by the Privy Council until 1873, the application of the 17th of November 1875 is within time, calculating from that date. The appellant's pleader, however, contends, that the terms of art. 167 of the second schedule of Act IX of 1871 do not apply to the present case, inasmuch as the second clause, which gives the term of three years from the date of the final decree or order of the Appellate Court, does not apply to orders of the Privy Council; and he bases this argument upon the consideration that Act IX of 1871 nowhere refers to orders passed by the Privy Council in the same way as the present Law of Limitation (Act XV of 1877) does. I observe that Act VI of 1874, s. 21, which was passed before the application which we are now considering, added to art. 169 the words which are now reproduced in art. 180 of Act XV of 1877, and so provided a period of limitation for the enforcement of any order of Her Majesty in Council. But it cannot be rightly contended that the terms of s. 177 do not apply to any order passed by the Privy Council on appeal from a decree of the High Court, because, if it were so, the consequence would be that, in order to preserve his rights, a successful party in this country would have to run the risk of executing a decree which might be set aside by the Privy Council, and that is a result which could never have been contemplated by the Legislature. It appears to me rather, that although perhaps not strictly accurate, the term 'Appellate Court' in art. 167 includes the Privy Council sitting for the hearing of appeals from orders passed by Courts of British India. So far then as limitation is concerned, it appears to me that the application of the 17th of November 1875 is not barred, because limitation did not begin to run until 1873, when the final order in the case was passed by the Privy Council.

The next objection raised is, that interest should not have been charged on the mesne profits of the year 1924 Sumbut (1867-68). The order passed by the Deputy Commissioner is certainly not clear in its terms, but, as I understand it, the

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Deputy Commissioner divided it into two parts, dealing with the mesne profits of 1924 (1867-68) according to an adjustment between the parties, and fixing the amount which was payable as regards the three months' mesne profits of 1925 (1868-69), on which he declared that interest at the usual rate should be paid. Now, although there was no express order regarding payment of the mesne profits of 1924 (1867-68), it appears that the amount agreed on, namely, 9,895 rupees, has been paid through the Court; and that, from time to time, in the course of execution of their decree, the decree-holders have attached to their application for execution an account showing that they claimed interest on that sum. No objection from 1870 up to the present time has been made to this account; payments have been made, and I find myself unable to believe that such payments having been made, the items of the account were not known to the judgment-debtor and accepted by him. I therefore consider that interest was payable by the judgment-debtor on the mesne profits of 1924.

As regards the rate at which such interest was payable, not only on the mesne profits of 1924 (1867-68), but also on the mesne profits for the broken period of 1925 (1868-69), I think that 12 per cent. should be the rate allowed.

That is the rate which has been considered by the Courts to be the usual rate where no mention of any specific rate has been made, and that is the rate which has been given by the lower Court as the rate current in the District.

The appeal is, therefore, dismissed with costs.

FIELD, J.—With reference to the rate of interest, I think it may reasonably be assumed that the lower Court, in allowing 12 per cent, considered this to be the rate of interest usually allowed by the Courts in that part of the country, and I think we ought not to interfere with the rate so allowed.

Then as to the interest on Rs. 9,895, the mesne profits of the year 1924 (1867-68) up to the two dates, the 20th of December 1869, when 7,274 rupees were paid, and the 5th of April 1870, when the balance, namely, 2,621 rupees, was paid, I agree with my learned colleague that it is too late now to take this objection, seeing that accounts were, on previous occasions,

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filed in Court, in which accounts this interest was entered and no objection taken thereto.

Then as to the third point concerning limitation, the contention is, that this decree was barred when the application of the 17th of November 1875 was made, and that the principle "once barred for ever barred" must be applied. Now it is admitted that this contention cannot be successful, if we are to yield to the argument advanced on the other side, namely, that the decree-holders are entitled to three years from the 5th of February 1873, being the date on which the original decree of the Court in India was confirmed in appeal by the Judicial Committee of the Privy Council. In order to dispose of the question thus raised we have to determine whether the word 'appeal' in the third column, opposite art. 167 of the second schedule of the Limitation Act (IX of 1871), is to be interpreted so as to include an appeal to the Privy Council, and the words 'Appellate Court' in the same column, so as to include the Judicial Committee of the Privy Council.

An argument, based upon the reasoning in the case of *Narsingh Das* v. *Narain Das* (1), has been addressed to us to this effect, that, although in the corresponding column and article of the Limitation Act of 1877, the term 'appeal' may be well taken to include an appeal to the Privy Council, and the term 'Appellate Court' to include the Judicial Committee, a similar construction cannot be put upon these terms in the Act of 1871 for the following reason. The later Act contains specific provisions (in arts. 177 and 180 of the second schedule) which govern appeals to, and orders of, Her Majesty in Council; but the earlier Act of 1871 contains no such provision, and therefore could not have contemplated appeals to Her Majesty in Council, or the exercise of the appellate jurisdiction of the Judicial Committee.

So far as regards the case now before us (in which the order of the Judicial Committee was made on the 15th February 1873), that argument may be effectually disposed of by a reference to s. 21 of Act VI of 1874, which amended art. 169 of the second schedule of the Act of 1871, by the addition of the

(1) I. L. R., 2 All., 763.

words "or any order of Her Majesty in Council." The Act of 1874 operated to make the Limitation Act of 1871 contemplate the Judicial Committee of the Privy Council, before the decree had become barred.

But it appears to me, that the fact of the Act of 1877 containing two additional articles (177 and 180), which expressly mention appeals to, and orders of, Her Majesty in Council, or the absence of such provisions from the Act of 1871, does not really affect the question which we have to decide. These two additional articles contain additional substantive provisions of limitation, but the presence or absence of these provisions does not, I think, affect the meaning of the terms 'appeal' and 'Appellate Court' in the other parts of the Act.

The term 'appeal,' standing alone and without words to qualify or restrict it, is wide enough to include any appeal, and therefore an appeal to Her Majesty in Council. So the term 'Appellate Court' standing alone and without words to qualify or restrict its meaning, is wide enough to include any tribunal exercising appellate jurisdiction. Do we thus find either in the Act itself or in the rest of the Statute-Book anything which qualifies or restricts the general meaning of these terms? The Act itself contains no definition of either term. Further, it gives no enumeration or description of Appellate Courts, of the tribunals to which an appeal lies. We must, in fact, travel outside the Act and search the rest of the Statute-Book in order to discover what tribunals exercise appellate jurisdiction. The term 'appeal' is used in the Act and the schedule of appeals under the Codes of Civil and Criminal Procedure and other Acts, and of appeals to different Courts. We cannot, therefore, merely from the use of the term in the Act, invent any definition of 'appeal,' which will apply in all places in which the word is used in the same Act,—*i. e.*, so far as concerns the procedure under which, or the tribunal to which, the appeal is made.

Then when we get outside the Act, there is no definition of either term in the General Clauses Act; and if we search the Indian Statute-Book, in order to find what tribunals exercise appellate jurisdiction in respect of cases tried and decided in India, we find no less than four enactments,—*viz.*, Reg.

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XVI of 1797, Reg. V of 1803, Act XXV of 1852, and Act II of 1863,—which were wholly or partially in force when the Limitation Act of 1871 was passed; and which provided for appeals to Her Majesty in Council. We find no express language cutting down the general meaning of the terms 'appeal' and 'Appellate Court,' and it is not easy to suppose, having regard to the existence of these four enactments in the Statute-Book, that the Legislature intended to restrict this general meaning, so as to exclude appeals to Her Majesty in Council and the Appellate tribunal mentioned in those enactments. Then with reference to a doubt which has been started as to whether Her Majesty in Council or the Judicial Committee of the Privy Council can be properly termed an 'Appellate Court.' It appears to me that there is nothing in this. It may be quite true that Her Majesty, exercising the appellate jurisdiction which she is pleased to exercise with the aid of the Judicial Committee of the Privy Council, does not use exactly the same forms and the same procedure which is used in her other Courts. For example, the so-called decrees of the Judicial Committee are really orders in Council made upon the recommendation of the Committee; see *Kristo Kinkur Roy* v. *Raja Burrodacaunt Roy* (1). But I take it that this does not affect the question. The essentials of a Court are (i) the *actor*, or plaintiff; (ii) the *reus*, or defendant; and (iii) the *judex*, or judicial power, which ascertains the facts, applies the law, and, if injury has been done, affords a remedy by its officers or otherwise. An examination of the Statutes which regulate the Judicial Committee of the Privy Council will show that this tribunal possesses all these essential elements of a Court; see more especially 2 and 3 Will. IV, c. 92; 3 and 4 Will. IV, c. 41, ss. 14, 15, 16, 19, and 28; and 6 and 7 Vict., c. 38, ss. 5 and 7. The Committee is a judicial committee. The law speaks of its jurisdiction to hear causes (17 and 18 Vict., c. 18, s. 34). The Statute 39 and 40 Viet., c. 59, s. 14, speaks of paid Judges of the Judicial Committee of the Privy Council. In *Tronsoy* v. *Dent* (2), the Lords of the Committee speak of "treating this Court as a

(1) 14 Moore's I. A., 465, cf. p. 493. (2) 8 Moore's P. C., 419, cf. p. 432.

Court of Error." According to the constitution of England the sovereign is the fountain of all justice. In ancient days, he sat in Court in *propria persona*, and is still supposed to do so, although he does not determine, and is not by law empowered to determine, any cause or motion otherwise than by the mouth of his judges, to whom he has committed his whole judicial authority. Part of the business now transacted by the Judicial Committee of the Privy Council used to be transacted by "The High Court of Delegates." The Judicial Committee of the Privy Council, like Her Majesty's High Court of Chancery (the 2 and 3 Will. IV, c. 92, speaks of the Queen's Majesty in Her Highness' Court of Chancery" or Her Majesty's High Court of Justice, 36 and 37 Viet., c. 66, 85) as one Chamber of the Aula Regia; and so far as concerns its jurisdiction to hear appeals, it is most undoubtedly an 'Appellate Court' in the proper sense of the term.

I am, therefore, of opinion that the term 'appeal,' in the column of the Limitation Act of 1871, includes an appeal to the Privy Council; and the term 'Appellate Court,' in the same column, includes the Judicial Committee of the Privy Council; and the effect of this construction is, that the execution of this decree is not barred by limitation.

Appeal dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Wilson.

LAWLESS *v.* THE CALCUTTA LANDING AND SHIPPING CO., LD. AND THE CALCUTTA LANDING AND SHIPPING CO., LD., *v.* LAWLESS.

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Limitation Act (XV of 1877), s. 17—Right of Employer to call on Manager for Account—Accrual of Right on Death of Manager against Representatives.

A manager is bound to account to his employer whenever he is called upon to do so under reasonable circumstances.

On the death of such manager a fresh right to an account accrues to the employer as against the manager's representatives.