APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

MUHOMED ABDUL KADIR MARAKAYAR, MINOR BY GUARDIAN MAHOMED KASIM MARAKAYAR AND NINE OTHERS (DEFENDANTS), APPELLANTS,*

1920, March 31 and April 8.

v.

SAMIPANDIA TEVAR AND TWENTY-TWO OTHERS (PLAINTIFFS), RESPONDENTS.

Limitation Act (IX of 1908), art. 182 (2)—Appeal filed in wrong Court—Order of Court returning appeal for presentation to proper Court—'Appellate Court' meaning of—Time for executing decree.

Where a court decides that an appeal has been wrongly presented to it and orders a return of it for presentation to the proper court, such an order is neither 'a final order' of the Appellate Court, nor a 'withdrawal of the appeal' within article 182 (2) of the Limitation Act.

'Appellate Court' in the article means an appellate court having jurisdiction to hear the appeal.

Per OLDFIELD, J. (SESHAGIRI AYYAR, J., doubting)—A mortgagor in whose favour a decree for redemption has been passed can execute the decree by sale of the mortgaged properties.

Govinda Targan v. *Veeran* (1913) I.L.R., 36 Mad., 32, followed.

APPEAL against the order of C. KRISHNASWAMI RAO, District Judge of Ramnad, in Appeal No. 346 of 1918, filed against the order of P. SUBBAYYA MUDALIYAR, Subordinate Judge of Ramnad, in Execution Petition No. 300 of 1916, in Original Suit No. 18 of 1900.

The facts are stated in the Judgment of SESHAGIRI AYYAR, J.

The judgment-debtors preferred this appeal.

C. V. Anantakrishna Ayyar for appellant.

The Hon'ble The Advocate-General (S. Srinivasa Ayyangar), K. P. Laxmana Rao, R. Kesava Ayyangar for respondent.

OLDFIELD, J.—The first question raised in this appeal is whether the plaintiffs, mortgagors, are entitled to execute their decree for redemption, by asking the Court to sell the mortgaged property. It is prima facie concluded in their favour by *Govinda Targan* v. *Veeran*(1), since we have been shown no case

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* Appeal against Appellate Order 10 of 1919.

(1) (1913) I.L.R., 36 Mad., 32.

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in which that decision has been doubted and in *Venkatachalam Pattar* v. *Ramayyar*(1) it has been followed, and since Mr. Ananthakrishna Ayyar for defendants has declined to argue against its correctness. He has relied only on the fact that the decree provides for a sale at the instance only of the mortgagee. But that appears to have been the case also in the decision referred to. This objection to the order under appeal must therefore be disallowed.

The more important contention before us is, however, that the plaintiffs' application for execution was made too late; and certainly it was so, unless time ran, as they contend, from the date 10th February 1915 on which an order was passed by this Court returning their memorandum of appeal against the decree for presentation to the District Court, as the proper Court to entertain it. Was the High Court in these circumstances 'the Appellate Court' and was this its 'final order' within the meaning of article 182, Schedule 1, Limitation Act?

This Court's order in no degree decided the appeal; and its final character has been supported mainly by comparison of its effect with that of the withdrawal of the appeal, reference to which as a starting point was introduced into the article by its amendment in 1908. But this argument is unsustainable, if, as in *Peria Kovil Ramanuja Peria Jeeyangar* v. *Lakshmi Doss*(2) and *Fazl-ur-Rahman* v. *Shah Muhamad Khan*(3), which were reproduced in the amendment, there is besides the withdrawal an order dismissing the appeal as withdrawn. Further there is an order of the Appellate Court, such as the article contemplates directly. And it may be doubted whether there can be cases of withdrawal without such an order. For the procedure for withdrawal of a suit with leave to sue again under Order XXIII corresponds with nothing in the specification of the powers of the Appellate Court in section 107, Civil Procedure Code. But, it is useless to consider further the applicability of the reference in the article to withdrawal or the analogy between it and the order in question at present, when in my opinion plaintiffs must fail, because this Court was not 'the Appellate Court', inasmuch as the proceedings before it were not within its jurisdiction.

(1) C.M.A. 99 of 1915 (unreported).

(2) (1907) I L.R., 30 Mad., 1 (F.B.). (3) (1908) I L.R., 30 All., 385.

In *Akshoy Kumar Nundi* v. *Chunder Mohun Chothati*(1), it was held that the appeal was presented to the proper Court, and in the present case, in which this Court returned the appeal memorandum for want of jurisdiction there was no legally constituted appeal and no final order by the Appellate Court. It is suggested that the order of return was final, so far as this Court was concerned, and that it was the order of the Appellate Court, because this Court has appellate powers, a distinction being attempted between failures of jurisdiction on territorial grounds and on the pecuniary grounds referred to in this Court's order. I was unable to follow that distinction and it was supported by no authority. The remainder of the argument is inconsistent with the reference to "the" not "an" Appellate Court in the article and its best support was the reference to *Krishnasami* v. *Kanakasabai*(2) and the cases therein cited. But the principle for which plaintiffs contend, was referred to only *obiter* in this Court's decision and was applied in *Matra Mondal* v. *Hari Mohun Mullick*(3) and *Nidhi Lal* v. *Mazhar Husain*(4) to proceedings actually completed in the wrong Court, through mistake and without objection, and was authorized by the reference in the various Civil Courts Acts concerned to the jurisdiction in question as concurrent. Here we are concerned with the more general principle that no party shall be allowed to obtain a longer period of limitation on the ground of his own mistake, and no attempt has been, or indeed could fairly be made, to invoke section 14 or any other provision of the Limitation Act by which exceptions to it are recognized, as authorizing plaintiffs' contention. As there was no final order of the Appellate Court, time cannot be calculated from one; and the application was therefore out of time and should have been dismissed.

The appeal is allowed, the lower Appellate Court's order being set aside and that of the Subordinate Judge being restored with costs throughout.

SESHAGIRI AYYAR, J.—The decree under execution is one for redemption and was passed on 19th March 1898. The time fixed for payment expired before the new Civil Procedure Code

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(1) (1889) I.L.R., 16 Calc., 250.
(2) (1891) I.L.R., 14 Mad., 183.
(3) (1890) I.L.R., 17 Calc., 155.
(4) (1885) I.L.R., 7 All., 436.

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came into force. An appeal was preferred to the High Court within the time limited by law. It was returned on 10th February 1915 for presentation to the proper Court, as the High Court was of opinion that the appeal lay to the District Court and not to itself. The present application for execution was made on 21st September 1916 for sale of the mortgaged property.

Two objections were taken to it. The first was that under the decree, the mortgagor is not entitled to apply for sale. The second that the application was barred by limitation. The District Judge overruled both these objections.

The first point is covered by *Govinda Targan* v. *Veeran*(1). In that case, the learned Judges were of opinion that although express power was given by section 93 of the Transfer of Property Act only to the mortgagee to apply for sale, the mortgagor has also an inherent right to apply for a similar order. This decision was followed in *Venkatachelam Pattar* v. *Ramayyar*(2), to which my learned brother was a party. Speaking for myself, I would have required more argument to convince me of the correctness of the view taken in these two decisions, and would have suggested a reference to the Full Bench if our decision depended upon the first point alone. Notwithstanding the argument addressed to us by the learned Advocate-General regarding the procedure adopted in England, by which power is reserved to the mortgagor to apply for sale where a decree for redemption is passed, I am not convinced that we should read into section 93 of the Transfer of Property Act, or into Order XXXIV, rules 7 and 8, Civil Procedure Code, such a power. However, as the conclusion which I have come to is not dependent upon the view I take on the first point, and as Mr. Anantakrishna Ayyar, who appeared for the appellant, did not ask us to dissent from the view in *Govinda Targan* v. *Veeran*(1) but only attempted to distinguish that case from the present, I do not propose to say anything more about it.

The second question is practically bare of authority. The point for determination is that where an appeal is presented to a Court to which appeals do not ordinarily lie and that Court ultimately passes an order returning the appeal for presentation

(1) (1913) I.L.R., 36 Mad., 32.
(2) C.M.A. No. 99 of 1915 (unreported).

to the proper Court, whether such an order is within article 182 of the third column of the first schedule of the Indian Limitation Act. That clause runs thus :

"Where there has been an appeal the date of the final decree or order of the Appellate Court, or the withdrawal of the appeal."

The words "or the withdrawal of the appeal" were inserted by the Amending Act of 1905. Is the order of the High Court, returning the plaint for presentation to the proper Court, an order of the Appellate Court, or can it be regarded as a withdrawal of the appeal ?

Under the Civil Courts Act (III of 1873), section 13, the legislature has prescribed which shall be the Appellate Court, and the circumstances under which appeals from one Court can be taken to another.

In conformity with that Act, in the present case, the view of the High Court was that the subject-matter of the original suit was above Rs. 2,500 and below Rs. 5,000 in value, and that consequently an appeal lay to the District Court and not to the High Court. The language of the second clause of article 182 which I have quoted refers to 'the Appellate Court'. In my opinion, that language means that the Appellate Court should be the proper Appellate Court, not any Appellate Court, which a party, bona fide or otherwise has chosen to file an appeal in. The learned Advocate-General who appeared for the respondent, contended that the High Court has a general power of hearing appeals from the subordinate courts. It is true that by virtue of section 24 of the Code of Civil Procedure, the High Court can withdraw any appeal pending in any of the subordinate courts and hear it itself; but the disposal of an appeal in the exercise of the powers given by section 24 would not constitute the High Court 'the Appellate Court', as contemplated by clause (2) of article 182 of the Limitation Act.

It was also contended before us that all appellate authorities must be regarded as possessing fundamental jurisdiction to hear appeals. The argument was, as was held in *Krishnasami* v. *Kanakasabai*(1) that as there is a general power in a Subordinate Judge or in a District Judge to hear suits which ordinarily District Munsifs alone can try, similarly there is a general

(1) (1891) I.L.R., 14 Mad., 183.

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power in the High Court to hear appeals although, ordinarily, such appeals would be heard only by a District Judge or a Subordinate Judge.

SESHAGIRI AYYAR, J.

The language of section 24, which contemplates an order of transfer, does not indicate the existence of such a general power. The right of appeal is the creature of the statute, and the right to resort to particular grades of tribunals is equally a statutory right, and not a common law right. It is because of the powers of supervision which are vested in the High Court under the Charter Act, and by the Letters Patent, that the legislature has enacted under section 24 of the Code of Civil Procedure that the High Court can withdraw to its own file appeals pending in the lower courts. Moreover, section 15 of the Code of Civil Procedure provides that every suit shall be instituted in the Court of the lowest grade competent to try it. In my opinion, this provision is applicable to appeals also.

Section 96 of the Code provides that an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decision of such a Court. I take it that the authorization herein referred to is what is contained in the Civil Courts Act of each of the Presidencies. Apart from authority, therefore, on the construction of the above sections and on general principles of jurisprudence, I am of opinion that clause 2 of article 182 should be interpreted as referring to the Appellate Court which ordinarily is empowered to hear appeals from the subordinate courts. If we make a departure from this rule, there is nothing to prevent a suitor from claiming that the time during which an appeal has been pending in a Revenue Court, in which he has wrongly filed an appeal, should be deducted in computing the period of limitation.

In this connexion, I am not clear that, even if the High Court can be regarded as 'the Appellate Court' within the meaning of that expression in clause 2 of article 182, whether the order directing the return of the plaint for presentation to the proper Court is within the same clause. I attach no importance to the fact that the order itself was not complied with, as the appeal was never presented to the Subordinate Judge. As at present advised, I am of opinion that the order contemplated is one

which disposes of the appeal on the merits in some form, and not simply one which intimates to the party that the appeal should be filed elsewhere. I may here refer to the decision of the Judicial Committee in *Batuk Nath* v. *Munni Dei*(1), where it was held that an order of the Privy Council dismissing an appeal for default of prosecution is not an order in council, contemplated by article 182. The reason for that dictum is that there was no adjudication on the merits. I confess that the introduction of the clause by the amending Act, "or the withdrawal of the appeal" to some extent weakens this suggestion of mine; but in the case of a withdrawal—I take the withdrawal to be an unconditional one—there is an end to the litigation; but from the order returning the appeal for presentation of the appeal to a proper Court, the same result does not necessarily follow. It is not a strained construction upon the second clause of article 182 to say that the decree, order or withdrawal contemplated, must all have the effect of putting an end to the litigation. However that may be, as I am of opinion that the order in question was not passed by the Court contemplated in clause (2) the respondent is not entitled to claim that limitation starts against him only from 10th February 1915 and not earlier. When we remember that under the Indian Law, there is nothing to prevent a party entitled to a benefit under the decree from executing that decree, there is no necessity for reading into this article words which are not to be found there. *Wazir Mahton* v. *Lulit Singh*(2) contains observations which to some extent, support the respondent. The appeal in that case was certainly a competent one. I do not feel pressed by the *obiter dictum* contained in that judgment. *Akshoy Kumar Nundi* v. *Chunder Mohun Chathati*(3) is not entirely reconcilable with the observations in *Wazir Mahton* v. *Lulit Singh*(2) relied on by the District Judge. Very recently the Judicial Committee held that, where an application was presented bona fide to a Court which had no jurisdiction to execute a decree, the application was not one made to the proper Court in accordance with the law within the meaning of these words in clause 5 of article 182. The principle of

(1) (1914) I.L.R., 36 All., 284 (P.C.).
(2) (1883) I.L.R., 9 Calc., 100. (3) (1889) I.L.R., 16 Calc., 250.

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that decision applies equally to the present case; vide *Ramabhadra Raju Bahadur* v. *Maharajah of Jeypore*(1).

For all these reasons, I am of opinion that the decision of the District Judge must be reversed and the execution application should be dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Phillips.

KUPPUSWAMI AYYANGAR AND DEVANATHA AYYANGAR (PLAINTIFFS), APPELLANTS,

v.

1920, April, 21, 22.

KAMALAMMAL AND THREE OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act (*IX of* 1908), *Arts.* 44 *and* 144—*Alienation by mother as guardian of the sons—Decree against the sons represented by the mother as guardian* ad litem—*Sale in execution—Decree and sale, whether nullities—Suit by minors to recover possession—Limitation—Civil Procedure Code* (*V of* 1908), *O. XXXII, r.* 4 (1).

Where a mother acting as the guardian of her minor sons mortgaged their property and a decree on the mortgage was passed against the minors represented by the mother as guardian *ad litem* and the property sold in execution, and subsequently the sons sued to recover possession of the properties more than three years after the elder of them attained majority but within twelve years of the sale, alleging that their mother was not competent to represent them in the previous suit, as her interest was adverse to theirs,

Held, that the decree against the minors was not a nullity and had to be set aside, and that the suit was consequently barred by limitation.

SECOND APPEAL against the decree of R. ANNASWAMI AYYAR, Temporary Subordinate Judge of Cuddalore, in Appeal Suit No. 113 of 1917, preferred against the decree of K. L. VENKATA RAO, Additional District Munsif of Villupuram, in Original Suit No. 1 of 1916.

One Venkatasa Ayyangar executed a will, dated 27th December 1897, whereby he appointed Thiruvenkata Achariyar as guardian in respect of the joint family properties of his two minor sons, aged five years and one year, respectively. The mother of the minors, professing to act as their guardian alienated the property by way of mortgage to different persons; and two suits were

(1) (1919) I.L.R., 42 Mad., 813 (P.C.); L.R., 46 I.A., 151.

* Second Appeal No. 784 of 1919.