APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Krishnan Pandalai.

PEER AMMAL AND ANOTHER (DEFENDANTS NOS. 1 AND 4), APPELLANTS,

1930, November 19

v.

N. S. NALLUSWAMI PILLAI AND SEVEN OTHERS (PLAINTIFF AND DEFENDANTS NOS. 2, 3 AND 6 TO 10), RESPONDENTS.*

Indian Limitation Act (IX of 1908), art. 156—Ex parte decree —Appeal from—Limitation—Starting point—Ex parte decree set aside by trial Court within appealable period, but subsequently restored by High Court in revision.

When an *ex parte* decree has been set aside by the Court which passed it within the appealable period, and therefore no appeal against it is thereafter competent to the defendant, but the order setting aside the *ex parte* decree is subsequently set aside in revision and the original *ex parte* decree restored, the period of 90 days allowed by article 156 of the Indian Limitation Act of 1908 for an appeal from the original *ex parte* decree runs, not from the date of the said decree, but from the date when it is restored in revision.

STAMP REGISTER No. 711 of 1930 since registered as Appeal No. 532 of 1930 sought to be preferred against the decree of the Court of the Subordinate Judge of Madura, dated 8th August 1928, in Original Suit No. 128 of 1926.

K. Bhashyam Ayyangar (with *T. R. Srinivasan*) for appellants.

K. S. Jayarama Ayyar (with *K. Swaminatha Ayyar*) for first respondent.

* Stamp Register No. 711 of 1930 since registered as Appeal No. 532 of 1930.

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The JUDGMENT of the Court was delivered by KRISHNAN PANDALAI J.—The question is whether this appeal was presented in time. The material dates are as follows :—

The appeal is from a preliminary decree on a mortgage passed *ex parte* by the Subordinate Judge of Madura in Original Suit No. 128 of 1926 first on 8th August 1928. The appellants (defendants 1 and 4) applied under Order IX, rule 13 of the Code of Civil Procedure on 9th August 1928 to set aside the *ex parte* decree, and the Court set it aside on 12th October 1928. Meanwhile the appellants had also on 9th August 1928 applied for copies of the judgment and decree, and they were ready for delivery on 27th September 1928 so that, had the appellants wanted to appeal, they had out of the 90 days available about $1\frac{1}{2}$ months more after 12th October 1928. As the decree was set aside by the Subordinate Judge himself, no appeal was preferred. But the plaintiff (respondent) applied in Civil Revision Petition No. 116 of 1929 to this Court to revise the order of the Subordinate Judge setting aside the *ex parte* decree, and this Court on 22nd November 1929 set aside that order thus restoring the preliminary decree to effect. This appeal was presented on 6th January 1930.

The provision of the Limitation Act applicable is article 156 which prescribes a period of 90 days from the date of the decree or order appealed from. The appellants contend that the date of this decree for the purpose of appeal must be taken as 22nd November 1929 when this Court by its order in Civil Revision Petition No. 116 of 1929 restored force and effect, including appealability, to the original decree which it had lost by its being set aside. The respondent contends that the date of the decree is 8th August 1928, the date when it was originally passed, and that its subsequent

vicissitudes have no effect on the period of appealability and that the only course open to the appellants is to induce this Court to excuse the delay under section 5 of the Limitation Act. No application under section 5 being now before us, we have to decide between the two above contentions as to the starting point of limitation.

No decision exactly in point has been brought to our notice. But we entertain little doubt that the appellants' contention must be accepted. It is not only in consonance with the principle underlying the law of limitation that suits, appeals and other legal proceedings are possible only when there is some cause of action, or ground of appeal or other grievance on which the plaintiff, appellant or applicant has a right to come to Court and ask for relief, but the opposite view would lead to the absurd result that an appellant's right to appeal and the decree-holder's right to execute the decree are both barred before the decree to be appealed from or to be executed came into legal being.

In *Muthu Korakkai Chetty* v. *Madar Ammal*(1), a Bench of five Judges dealt with the question whether, for an application for delivery of properties sold in Court auction, limitation ran from the date of an *ex parte* confirmation of the sale (26th April 1913) or from the termination of proceedings taken by the opposite party to set aside that confirmation (25th June 1915). It was held by four of the learned Judges that the latter date was the *terminus a quo*, although the result of the proceedings in respect of the properties subsequently sought to be recovered was that the order of 26th April 1913 was confirmed by that of 25th June 1915. The other learned Judge contented himself with answering the question put in the negative as it was put in the

(1) (1919) I.L.R. 43 Mad. 185 (F.B.).

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form whether the cause of action for the application was suspended during the pendency of the proceedings. The decisions of the Judicial Committee bearing on this question, an apparent conflict between which was the cause of the reference to a Full Bench, were so fully gone into in that case, that it is needless to refer at length to them again. To understand the ground of decision of the Court, it is sufficient to refer to the citations from the Privy Council decisions in *Baijnath Sahai* v. *Ramgut Singh*(1) and *Bassu Kuar* v. *Dhum Singh*(2). In the former case, which was one of a revenue sale by the Collector in 1882 confirmed by the Commissioner in 1884 and set aside by the Board of Revenue in 1884 and confirmed by the Board in review in 1886, their Lordships said that for the purpose of limitation there was no final or definitive confirmation of the sale till the final order on review by the Revenue Board in 1886. In *Bassu Kuar* v. *Dhum Singh*(2), it was held that money due on an account stated, which would, as such, have been barred in three years from the statement, became for purposes of limitation a debt of a new character when, it having been retained by the debtor as part of the consideration for a proposed sale of land, that arrangement failed, the sale not being specifically enforceable and so declared by decree between the parties. Their Lordships said, as to the defence that the suit for the money should have been brought while the arrangement for setting it off against the purchase-money was still in force :—

"It would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not. And it would be a lamentable state of the law if it were found that a debtor, who for years had been insisting that his creditor

(1) (1896) I.L.R. 23 Calc. 775 (P.C.). (2) (1888) I.L.R. 11 All. 47 (P.C.).

shall take payment in a particular mode, can, when it is decided that he cannot enforce that mode, turn round and say that the lapse of time had relieved him from paying at all."

Reading the judgments pronounced in *Muthu Korakkai Chetty* v. *Madar Ammal*(1), it becomes clear that, while on the one hand no "suspension", in the proper sense, of a period of limitation which has begun to run is permissible except as provided in sections 14, etc., of the Limitation Act, the Courts will place a liberal or, in the language of OLDFIELD J., an accurate construction on the somewhat loosely expressed words in column 3 of the first schedule which prescribe the starting point of the period of limitation by not requiring parties to start legal proceedings in circumstances when it would be futile for them to do so. As SESHAGIRI AYYAR J. put it :—

> "Subject to the exemptions, exclusion, mode of computation and the excusing of delay, etc., which are provided in the Limitation Act, the language of the third column of the first schedule should be so interpreted as to carry out the true intention of the legislature, that is to say, by dating the cause of action from a date when the remedy is available to the party"—page 213.

The respondent's Advocate relied on *Ammathayi Ammal* v. *Sivarama Pillai*(2) and the Privy Council decision referred to in it, *Mani Singh Mandhata* v. *Nawab Bahadur of Murshidabad*(3). In that case, the plaintiff had obtained a preliminary decree on a hypothecation under which the time for payment of the mortgage money was fixed for 6th March 1917. Meanwhile the mortgagor's (defendant's) husband brought a suit in 1916 against the mortgagor and mortgagee for a declaration that the mortgaged property belonged to himself and that the mortgage was therefore not binding on the property. That suit was decreed in the first

(1) (1919) I.L.R. 43 Mad. 185 (F.B.). (2) (1924) 48 M.L.J. 74.
(3) (1918) I.L.R. 46 Calc. 694 (P.C.).

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Court in favour of the husband on 26th April 1917 and by the first appellate Court, but was dismissed in second appeal by the High Court on 29th April 1920. The plaintiff applied for a final decree on 10th September 1920, more than three years after the date fixed for payment but less than three years after the defendant's title to the mortgaged property was affirmed in second appeal. The argument put forward for the plaintiff in this Court was that he had lost the right to apply for a final decree by the decisions of the first Court and the first appellate Court in the husband's suit that the property belonged to him, and that it revived on the decision in the second appeal that it belonged to the mortgagor. The Court did not accept this on the ground that the Court when it sells property in execution of a mortgage decree does not guarantee the title of the judgment-debtor as against strangers, and that article 181, which prescribes the starting point of limitation for such an application as the time when the right to apply accrues, does not say (mean) that the right to apply accrues only when the mortgagor's title as against strangers is clear. Therefore it was held that the right to apply for a final decree accrued on the date fixed for payment, and that, as no ground of suspension of limitation could be urged under the Limitation Act and no other ground of suspension was available according to *Mani Singh Mandhata* v. *Nawab Bahadur of Murshidabad*(1), the application was barred.

This decision has, in our opinion, no application to this case. It merely decided that under article 181 the right to apply for a final decree in a mortgage suit accrues, not when the disputes between the decree-holder and strangers to the decree about the title to the mortgaged property terminate and the mortgagor's title as

(1) (1918) I.L.R. 46 Calc. 694 (P.C.).

against such strangers is established, but from the date fixed in the decree for payment of the debt. In this case, we have to deal with a different article, namely, 156, and the question is, what is the meaning to be given to the words "date of the decree or order appealed from", when the decree has been set aside by the Court which passed it within the appealable period, and therefore no appeal is thereafter competent to the defendant, and the decree is afterwards restored by a higher tribunal. In our opinion, the case clearly falls within the class of cases when a fresh starting point of limitation for appealing has necessarily to be found. The opposite view would lead to the absurd result that the defendant would be deprived of the right of appeal because he did not appeal against a decree which had ceased to exist and against which therefore he could not have appealed after it was set aside. But it was suggested that he ought to have appealed before the decree was set aside under Order IX, rule 13 of the Code of Civil Procedure. Assuming he had done so, as soon as the decree was set aside under Order IX, rule 13 of the Code of Civil Procedure, the appeal would become infructuous and would necessarily have to be dropped, and the position after the decree was restored in revision by the High Court would be the same as if he had not appealed at all. It is not to be supposed that the appeal should be kept pending in contemplation of the double uncertainty that the plaintiff might take the order setting aside the decree to the High Court in revision and that this Court might interfere in revision. If we look at the matter from the point of view of the decree-holder, it becomes still more absurd if we have to suppose that his right to execute the decree under article 182 is, in the circumstances of the present case, to begin from the date of the first decree which was

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subsequently set aside and later restored. If between the date of the original decree and the restoration in revision a period of more than three years has expired, it would follow that, as there is no allowance for the intervening period according to the Act or any of the clauses of article 182, his application for execution would be barred before he succeeded in getting his decree restored. A construction which leads to such results could not have been contemplated by the legislature. We think, therefore, that the date of the decree appealed from must be taken as the date when the decree was restored in revision by this Court. On this footing, we hold that the appeal was presented in time, and it will be admitted.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Cornish.

1930, February 4.

AMMANI AMMAL (RESPONDENT), APPELLANT,

v.

M. NARAYANASWAMI NAIDU (PETITIONER—APPLICANT), RESPONDENT.*

Original Side Rules, High Court, Madras, O. XXXIV, r. 57 (*Form No.* 124) *and r.* 62—*Application for calling in of letters of administration granted on footing of intestacy—Citation—Issue of—Appropriate rule.*

On an application for the calling in of a grant of letters of administration which has been made upon the footing of an intestacy, citation ought to be issued only under Order XXXIV, rule 57 (Form No. 124) of the Madras High Court Original Side Rules, and not under rule 62 of the said Order.

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* Original Side Appeal No. 87 of 1929.