APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., *Chief Justice, and Mr. Justice Bardswell.*

BAIJNATH KARNANI (PLAINTIFF), APPELLANT,

v.

VALLABHADAS DAMANI (DEFENDANT), RESPONDENT.*

1933, March 15.

Indian Limitation Act (IX of 1908), art. 117—Foreign judgment—Final judgment of Court of First Instance of foreign Court—Appeal therefrom in foreign Court—Confirming judgment of appellate Court—Suit on the foreign judgment in British Indian Court—Starting point of limitation for—'Judgment' in art. 117—Meaning of.

On 9th July 1924 a judgment and decree were passed by the Court of first instance in Bikanir, a foreign State, where all the provisions of the Code of Civil Procedure are applied and the decisions of the Indian High Courts followed. On 24th March 1925 the said judgment and decree were confirmed on appeal by the High Court of Bikanir. On 12th March 1931 a suit was filed upon this foreign judgment in Madras.

Held that the starting point of limitation is the date of the decree of the appellate Court of Bikanir and not the date of the decree of the original Court of Bikanir and that, inasmuch as the suit in Madras was filed within six years from the said date, the suit was not barred.

Held further that "judgment" in article 117 of the Indian Limitation Act means "decree".

APPEAL from the judgment and decree of STONE J., dated the 17th day of November 1931, in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 136 of 1931.

T. R. Venkatarama Sastri and *V. Varadaraja Mudaliyar* for appellant.

S. Doraiswami Ayyar for respondent.

Cur. adv. vult.

* Original Side Appeal No. 15 of 1932.

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JUDGMENT.

BEASLEY C.J.—This is an appeal from a judgment of STONE J. and the point to be decided is: Where in a foreign State there is a suit and in that suit a judgment is given and from that judgment appeal is made, which appeal is dismissed, is the "judgment in that suit" the judgment of the Court of first instance or is it the judgment of the appellate Court for the purposes of the Limitation Act?

The suit under appeal is brought to enforce a judgment given in the State of Bikanir. The first Court's decree there was appealed from and the appeal was dismissed by the appellate Court. If the appellant here, the plaintiff in the suit, is to take as the date for his cause of action the date of the decree in the Court of first instance, then his suit is barred by limitation. If he is to take the date as that of the appellate Court's decree then his suit is not barred by limitation.

This is a very interesting point and, as STONE J. remarks, it is strange that there are no direct decisions upon this point although it must have arisen in India many times before. STONE J. has rightly, in my opinion, held that in article 117 of the Limitation Act "judgment" means "decree". He has taken the view that the starting point of limitation was the decree in the first Court and accordingly dismissed the suit as being barred by limitation. It is contended here that he was wrong. In this case we are dealing with a judgment given in the State of Bikanir where it is conceded that all the provisions of the Code of Civil Procedure are applied and the decisions of the Indian High Courts followed; and, in my view, the difficult question before us is made more simple on that account. It is conceded that a foreign judgment and a municipal judgment are upon an entirely different basis. A foreign judgment

cannot be executed and it is merely a cause of action and the judgment is regarded as creating a debt between the parties to it and it is said that the debt so created is a simple contract debt, the liability of the defendant arising on an implied contract to pay the amount of the foreign judgment. There is no merger of the original cause of action and it is therefore open to the plaintiff to sue either on the foreign judgment or on the original cause of action on which it is based; and it is argued on behalf of the respondent that, as a foreign judgment is a mere cause of action or a right gained by the plaintiff by reason of his decree, the starting point of limitation is the date upon which he obtains that right, and that this cannot be affected by reason of the pendency either of an appeal or the supervention of a decree of an appellate Court confirming the lower Court's decree; and in aid of this argument, amongst other things, it is pointed out that, when a decree has been obtained, steps to execute the decree may be taken and execution of it had during the pendency of an appeal, unless those steps are stayed. In my opinion the latter test, although there is a great deal to be said for the argument which adopts it, is not the real test. What has got to be found is, what is the final decree which has been obtained by the plaintiff in the suit; and it is quite clear that in order to enforce the judgment of a foreign Court that judgment must be a final one; and indeed that is conceded by the learned Counsel for the appellant and the respondent. In *Nouvion* v. *Freeman*(1) which was an action brought upon a foreign judgment for the recovery of a debt it was held that, if the judgment does not finally and conclusively (subject to an appeal to a higher Court)

(1) (1889) 15 App. Cas. 1.

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settle the existence of the debt so as to become *res judicata* between the parties, such an action cannot be brought. In that case their Lordships had before them what was described as a "remate" judgment of a Spanish Court and in accordance with the laws of Spain this "remate" judgment when it was "executive" or summary, as it was, could not be regarded as *res judicata* and their Lordships accordingly held that, since such a judgment as that does not finally and conclusively establish the debt, no suit upon it could be brought in England. Lord HERSCHELL in dealing with the finality and conclusive nature of the judgment upon which an action may be maintained in the English Courts when such judgment is pronounced by a foreign Court at page 9 says:

"My Lords, I think that in order to establish that such a judgment has been pronounced it must be shewn that in the Court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties."

Lord WATSON on page 13 says:

"In order to its receiving effect here, a foreign decree need not be final in the sense that it cannot be made the subject of appeal to a higher Court; but it must be final and unalterable in the Court which pronounced it; and if appealable the English Court will only enforce it, subject to conditions which will save the interests of those who have the right of appeal."

This case, it is urged on the respondent's behalf, shows that when once a decree has been obtained even though that decree may be the subject of an appeal, a suit may be brought upon it in a foreign Court to enforce it. For the appellant, however, it is argued that it does not necessarily follow that, where an appeal has been presented which results in a decree of the appellate Court dismissing the appeal, a fresh starting point of limitation is not given thereby, it being conceded that

the foreign judgment sued upon must be final and conclusive. Since this question, in my view, has got to be decided upon a consideration of the cases which lay down the law as to the finality of a decree in this country, I propose to refer to some of those quoted in the course of the arguments; and I will first of all deal with those decisions which consider the effect of the passing of an appellate decree. The first of these is *Luchmun Persad Singh* v. *Kishun Persad Singh*(1), a Full Bench decision. There it was held that, although an order of the Privy Council may confirm a decree of the Court below, that order is the paramount decision in the suit; and that any application to enforce it is, in point of law, an application to execute the order and not the decree which it confirmed. The next case is *Noor Ali Chowdhuri* v. *Koni Meah*(2) where it was held that the only decree of which execution could be taken was the appellate decree and not the original decree. In the judgment in that case a Madras decision is referred to, namely, *Arunachellathudayan* v. *Veludayan*(3), in which SCOTLAND C.J. said:

"Whether that decree be in affirmance or reversal or modification of the decree appealed from, it becomes the final decree in the suit, and therefore the decree enforceable by execution."

In *Kailash Chandra Bose* v. *Girija Sundari Debi*(4) it was held that the appellate decree supersedes the original decree. At page 929 JENKINS C.J. says:

"The decree in that suit was in the Court of first instance against the widow, and it may be that this decree, had there been no appeal, would have been binding as against the reversioner, even though the mortgage was created by the lady herself. That is a point on which I express no opinion at this stage, because I do not think it is necessary, and I reserve my opinion until occasion arises for its decision. But whatever may have been the effect of that decree, had it stood by itself, it

(1) (1882) I.L.R. 8 Calc. 218 (F.B.).
(2) (1886) I L.R. 13 Calc. 13.
(3) (1870) 5 M.H.C.R. 215.
(4) (1912) I.L.R. 39 Calc. 925.

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was superseded by the decree passed on appeal. The decree of the Court of first instance could not in the circumstances be pleaded as *res judicata* . . . "

BEASLEY C.J.

He relied on *Noor Ali Chowdhuri* v. *Koni Meah*(1) as showing that, where there is a decree on appeal which confirms the decree against which the appeal is made, it is the appellate decree to which regard must be had and that the appellate decree superseded the original decree. He further points out that, where an appellate Court dismisses an appeal under the provisions of the Code, the proper course is, as is provided by the Code, to confirm, vary or reverse the decree against which the appeal is made and not merely to dismiss the appeal. In Dicey's Conflict of Laws, fourth edition, page 454, it is stated that the test of finality is the treatment of the judgment by the foreign tribunal as a *res judicata*. In India and in Bikanir a decree of the first Court which is taken on appeal to an appellate Court is not *res judicata*. In *Sheosagar Singh* v. *Sitaram Singh*(2), a decision of the Privy Council, Lord MACNAGHTEN states :

"To support a plea of *res judicata* it is not enough that the parties are the same and that the same matter is in issue. The matter must have been 'heard and finally decided'. If there had been no appeal in the first suit the decision of the Subordinate Judge would no doubt have given rise to the plea. But the appeal destroyed the finality of the decision. The judgment of the lower Court was superseded by the judgment of the Court of appeal."

This decision, in my view, affords the strongest support to the appellant's contention before us. The first Court's decision was superseded by the judgment of the appellate Court and its finality destroyed by the appeal. It seems to me that the judgment sued upon cannot be the judgment the finality of which has been

(1) (1883) I.L.R. 13 Calc. 13.
(2) (1897) I.L.R. 24 Calc. 616, 626 (P.C.).

destroyed by the appeal and which has been superseded by the judgment of an appellate Court and that it is only the latter judgment which is sued upon. [See also *Abdullah Asghar Ali Khan* v. *Ganesh Dass*(1), another decision of the Privy Council.] In *Chengalvala Gurraju* v. *Madapathy Venkateswara Row*(2) it was held that a judgment pending appeal or for which the appeal time has not expired is only a provisional judgment and does not operate as *res judicata*. *Balkishan* v. *Kishan Lal*(3) is to the same effect. Another decision of the Privy Council is *Annamalai Chetty* v. *Thornhill*(4) where it was held that a decree from which an appeal lies and has in fact been taken is not final between the parties so as to form *res judicata*. The judgment of COZENS-HARDY L.J. in *Huntley* (*Marchioness of*) v. *Gaskell* (5) is relied upon by the respondent. At page 667 he says :

"It is urged that the judgment of the Scotch Court of Session is not a final judgment ; but when the word 'final' is used, as I think it is in some authorities with reference to judgments, that does not mean, I apprehend, a judgment which is not open to appeal but merely 'final' as opposed to 'interlocutory'. A judgment is, in my opinion, not the less an *estoppel* between the parties to the action because it may be reversed on appeal to the House of Lords."

I have already expressed the view that this question falls to be decided not by the English decisions upon this question but by the decisions of the Indian Courts and of the Privy Council and no case in this Court or the Privy Council has been referred to by Mr. Doraiswami Ayyar in the course of his able argument on behalf of the respondent which, in my opinion, supports his argument. *Juscurn Boid* v. *Pirthichand*

(1) (1917) I.L.R. 45 Calc. 442 (P.C.).
(2) (1916) 30 M.L.J. 379.
(3) (1883) I.L.R. 11 All. 148.
(4) (1931) 61 M.L.J. 420 (P.C.).
(5) [1905] 2 Ch. 656.

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Lal Choudhury(1), a decision of the Privy Council, relied upon by him is clearly distinguishable from the cases on the other side by reason of the fact that the article of the Limitation Act there in question was article 97 "for money paid upon an existing consideration which afterwards fails". A period of three years is given from the date of the failure. The lower Court held that there had been a failure of consideration. This order was confirmed on appeal and nevertheless it was held that time commenced to run from the date of the lower Court's decree because it was upon that date that consideration failed. This case is of no force when article 117 comes to be considered. In my view, applying the test of *res judicata* and the decisions referred to in support of the appellant's argument, STONE J.'s judgment was erroneous and it follows that the decree must be set aside and the appeal allowed with costs, both here and in the trial Court.

BARDSWELL J.

BARDSWELL J.—The suit under appeal was brought by the plaintiff for a decree for the enforcement of a foreign judgment in his favour against the defendant for the sum of Rs. 7,858–10–3 with interest and costs. The foreign judgment was that of the State of Bikanir. A judgment and decree in favour of the plaintiff for Rs. 7,284–14–3 were passed by the High Court of Bikanir in exercise of its original jurisdiction on 9th July 1924 and confirmed by an appellate Bench of the same High Court on 24th March 1925. The suit under appeal was filed in this Court on 12th March 1931, the principal amount sued for being made up of the amount for which the High Court of Bikanir had given the decree and Rs. 573–12–0 which had been allowed for costs. One objection taken before STONE J. who tried

(1) (1918) I.L.R. 46 Calc. 670 (P.C.).

the suit was that the High Court of Bikanir had no jurisdiction, but this objection, which is said to have been only faintly argued, was over-ruled, and that decision has not been challenged. The defendant, however, has succeeded on another point that was taken on his behalf and that is that the suit claim was barred by limitation except for the sum of Rs. 573-12-0 allowed for costs, the claim to which was admitted.

STONE J. has held that the word "judgment" in the expression "foreign judgment" in section 2 (6) of the Civil Procedure Code means the "decree" of the foreign Court and this view, which is in accordance with common sense and with what is the English law on the subject, has not been contested. It is, therefore, article 117 of the Indian Limitation Act that has to be considered. Under that article the time allowed for bringing a suit upon a foreign judgment is six years from the date of the judgment. What has been held is that by "date of the judgment" is meant the date of the original judgment and that, as the date of the original judgment at Bikanir was more than six years before the filing of the suit in this Court, the suit was barred by limitation. For the plaintiff, who is now the appellant, it is argued that time has to run from the date of the appellate judgment. If that view is correct the suit will have been brought in time.

To enable a foreign judgment to be enforced it must be one that is final and conclusive between the parties and it may be final and conclusive though it is subject to an appeal and though an appeal against it is actually pending in the foreign country where it was given. The law on the subject is thus set out in Rule 114 of Dicey's Conflict of Laws on which Mr. Doraiswami Iyer lays stress in his arguments on behalf of the respondent. But the same learned author in his

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commentary on this rule gives as the test of finality the treatment of the judgment by the foreign tribunal as *res judicata*. He quotes from the judgment of Lord HERSCHELL in *Nouvion* v. *Freeman*(1):

"In order to establish that a (final and conclusive) judgment has been pronounced it must be shown that in the Court by which it was pronounced, it conclusively, finally and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties."

The same extract is also given in Smith's Leading Cases as the test of what is a conclusive judgment. In the case of some foreign Courts the decision of the Court of first instance may act as *res judicata*. Such a state of things is contemplated in *Nouvion* v. *Freeman*(1) at page 13, and, when it exists, the first Court's judgment, as stated in that decision, will only be enforced subject to conditions which will save the interests of those who have the right of appeal. But what we have to consider is what is the position as regards *res judicata* of a decree passed by a Court of first instance in accordance with the provisions of the Code of Civil Procedure of British India when that decree has been appealed against, even if the result of the appeal is for it to be confirmed. It is common ground that the law of the Bikanir State is on all relevant matters the same as that of British India.

By Order XLI, rule 32, of the Civil Procedure Code the appellate judgment may be for confirming, varying or reversing the decree from which the appeal is preferred, and in *Kailash Chandra Bose* v. *Girija Sundari Debi*(2) JENKINS C.J. has called special attention to this rule (then section 577) and has held that, where there is a decree on appeal which confirms the decree against

(1) (1889) 15 App. Cas. 1.

(2) (1912) I.L.R. 39 Calc. 925.

which the appeal is made, the appellate decree supersedes the original decree. In *Sheosagar Singh* v. *Sitaram Singh*(1) the Privy Council have held:

"To support a plea of *res judicata* it is not enough that the parties are the same and that the same matter is in issue. The matter must have been 'heard and finally decided'. If there had been no appeal in the first suit the decision of the Subordinate Judge would no doubt have given rise to the plea. But the appeal destroyed the finality of the decision. The judgment of the lower Court was superseded by the judgment of the Court of Appeal."

This decision has been followed by a later Privy Council decision in *Abdullah Ashgar Ali Khan* v. *Ganesh Dass*(2) while in *Annamalai Chetty* v. *Thornhill*(3) their Lordships have held that

"where an appeal lies the finality of the decree, on such appeal being taken, is qualified by the appeal and the decree is not final in the sense that it will form *res judicata* as between the same parties."

In *Chengalvala Gurraju* v. *Madapathy Venkateswara Row*(4) it has been held by a Bench of this Court that a judgment pending appeal or for which the appeal time has not expired is only a provisional judgment and does not operate as *res judicata*. It is unnecessary to discuss this decision here, in so far as it extends the principle to a judgment not yet appealed against while the time for appeal has not yet expired, as in the case under notice there has been an appeal and the decisions of the Privy Council are conclusive as to a case of that kind.

Great stress has been laid for the respondent on the Privy Council decision in *Juscurn Boid* v. *Pirthichand Lal Choudhury*(5). In that case it was held that failure of consideration dated from the first Court decree setting aside a sale for arrears of rent and not from the date of the appellate decree by which it was confirmed,

(1) (1897) I.L.R. 24 Calc. 616 (P.C.).
(2) (1917) I.L.R. 45 Calc. 442 (P.C.). (3) (1931) 61 M.L.J. 420 (P.C.).
(4) (1916) 30 M.L.J. 379. (5) (1918) I.L.R. 46 Calc. 670 (P.C.).

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and it was pointed out that under the Indian Law and Procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal. A subsequent suit that was brought for the recovery of money was, therefore, held to be time-barred under article 97 of the Limitation Act. This decision has been considered by a Bench of this Court in *Venkayya* v. *Sathiraju*(1) and it is pointed out there what was held was that consideration had failed when the sale was set aside in the first Court and that it did not fail afresh when the order setting aside the same was affirmed by the appellate Court. It was held in this Madras Case that the remarks of the Privy Council in *Juscurn Boid* v. *Pirthichand Lal Choudhury*(2) did not apply to questions arising under articles 181 and 182 of the Limitation Act and that, even though by article 182 the appellate decree is expressly made a fresh starting point for purposes of execution, whereas there is no corresponding provision to article 181, yet even an application under the latter article for a decree absolute could be made within three years from the passing of the preliminary decree by the appellate Court. And that this view as to article 181 is correct is shown by the Privy Council decision, *Jowad Hussain* v. *Gendan Singh*(3). Therein is cited with approval a remark of BANERJI J. in *Gajadhar Singh* v. *Kishan Jiwan Lal* (4) :

> " It seems to me that this rule",

the rule regulating applications for final decrees in mortgage actions,

> " contemplates the passing of only one final decree in a suit for sale upon a mortgage. The essential condition to the making of a final decree is the existence of a preliminary decree which has become conclusive between the parties.

(1) (1921) I.L.R. 44 Mad. 714.
(2) (1918) I.L.R. 46 Calc. 670 (P.C.).
(3) (1926) I.L.R. 6 Pat. 24 (P.C.).
(4) (1917) I.L.R. 39 All. 641 (F.B.).

Where an appeal has been preferred, it is the decree of the appellate Court which is the final decree in the cause." There appears to be no authority directly bearing on the question of from the date of which judgment or decree, in the case of there being an original decree and an appellate decree confirming it, time should run for the purposes of article 117, but it seems to me that the decision in *Jowad Hussain* v. *Gendan Singh*(1) is an authority that gives better guidance as to how that article should be interpreted than is *Juscurn Boid* v. *Pirthichand Lal Choudhury*(2). In the latter case what had to be looked to for the purposes of article 97 was not so much the decree itself as what had been decided by the decree. For the purposes of article 117 as for those of article 181, the existence of a decree is essential as the basis of the action and that decree has to be one that is final and conclusive between the parties so as to operate as *res judicata*.

Now in the present instance there was no final and conclusive decree between the parties such as could so operate till the decree of confirmation had been passed on the appeal. In these circumstances it is from the date of that decree and not from the date of the original decree that limitation began to run against the plaintiff as, when there had been an appeal, it was not till the appeal had been decided that the plaintiff had obtained a decree of the necessary finality and conclusiveness for him to take action upon it in British India. I would, therefore, allow this appeal and grant a decree for the full amount sued for with interest at six per cent per annum from date of suit to date of realisation and costs both on the appeal and on the first hearing.

Attorney for respondent: *N. T. Shamanna.*

G.R.

(1) (1926) I.L.R. 6 Pat. 24 (P.C.). (2) (1918) I.L.R. 46 Calc. 670 (P.C.).