APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair.

BYYA REDDI (DECREE-HOLDER, PLAINTIFF, PETITIONER), APPELLANT,

1933, December 5.

v.

T. S. GOPAL RAO (JUDGMENT-DEBTOR, SECOND DEFENDANT, SECOND RESPONDENT), RESPONDENT.*

Indian Limitation Act (IX of 1908), art. 182 (2)—Appeal—Memorandum of appeal rejected as being out of time—Limitation for execution of decree in case of—Starting point of—O. XLI, r. 1 (3), Code of Civil Procedure (Act V of 1908).

It cannot be said that "there has been an appeal" within the meaning of article 182 (2) of the Indian Limitation Act (IX of 1908) when the appellate Court has refused to receive the appeal memorandum on its file.

Where an appeal memorandum presented to the High Court was rejected as being out of time,

Held accordingly that there was no appeal and that the decree-holder was not entitled to take advantage of the provision contained in article 182 (2).

Akshoy Kumar Nundi v. *Chunder Mohan Chathati*, (1888) I.L.R. 16 Calc. 250, dissented from.

Krishnaswami Panikondar v. *Ramaswami Chettiar*, (1917) I.L.R. 41 Mad. 412 (P.C.), distinguished.

APPEAL against the appellate order of the Court of the Subordinate Judge of Salem, dated the 27th day of January 1930, and made in Appeal Suit No. 108 of 1929, preferred against the order of the Court of the District Munsif of Krishnagiri, dated the 8th day of February 1929, and made in

* Appeal against Appellate Order No. 153 of 1930.

BYYA REDDI v. GOPAL RAO.

Renewal Execution Petition No. 524 of 1928 in Original Suit No. 533 of 1921.

B. Somayya for appellant.

S. S. Ramachandra Ayyar for respondent.

Cur. adv. vult.

JUDGMENT.

This civil miscellaneous second appeal arises out of an application for execution made by the appellant. He obtained a decree in Original Suit No. 533 of 1921 on the file of the Court of the District Munsif of Krishnagiri on 5th September 1922. This decree was confirmed on appeal by the District Judge of Salem in Appeal Suit No. 275 of 1922 on the 20th April 1925. The judgment-debtor preferred an appeal against the appellate decree to the High Court. This appeal was filed four days out of time. The High Court in Civil Miscellaneous Petition No. 3943 of 1925 refused to excuse the delay in presenting the second appeal. In consequence, the civil miscellaneous petition and the Stamp Reference (the second appeal sought to be preferred to the High Court) were dismissed on the 5th March 1926. The decree now sought to be executed is the decree passed on first appeal on 20th April 1925. The present application to execute that decree was filed on 6th September 1928, that is after the lapse of more than three years. The respondent, the judgment-debtor, contended that the application is barred by limitation. The decree-holder contended that the application is not barred inasmuch as it was filed within three years from 5th March 1926, the date when the High Court rejected the second appeal. The question in this civil miscellaneous second appeal is which view is right. Both the

lower Courts held that the execution application is barred by limitation.

The appellant-decree-holder relies on article 182, clause 2, of the Limitation Act which says that the period of limitation for the execution of a decree is three years to be computed "where there has been an appeal" from "the date of the final decree or order of the appellate Court, or the withdrawal of the appeal". It is argued on behalf of the appellant that inasmuch as "there has been an appeal" to the High Court, the date of the final order of the High Court, that is 5th March 1926, should be taken to be the starting point for computing the period of limitation and that it should therefore be held that his application is not barred by limitation. The respondent on the other hand contends that, as the appeal to the High Court was not *admitted* as having been filed out of time, it should not be held that there has been an appeal against the decree of the appellate Court as contemplated by clause 2 of article 182 of the Limitation Act. The appellant's contention is supported by the decision in *Akshoy Kumar Nundi* v. *Chunder Mohan Chathati*(1), where the precise point we are now considering arose for decision. In that case it was held that in the execution of a decree against which an appeal has been presented but rejected on the ground that it was after time, limitation begins to run from the date of the final decree or order of the appellate Court. The learned Judges pointed out that the words "where there has been an appeal" in article 179, clause 2, of Schedule II of the Limitation Act of 1877, corresponding to

(1) (1888) I.L.R. 16 Calc. 250.

BYYA REDDI v. GOPAL RAO.

the present article 182, clause 2, mean where a memorandum of appeal has been presented in Court. They rejected the contention that the words "where there has been an appeal" mean "where there has been an appeal presented and admitted". This decision no doubt supports the appellant very strongly. The appellant also relies on the decision of the Privy Council in *Nagendra Nath Dey* v. *Suresh Chandra Dey*(1) which contains observations which are *prima facie* in his favour. I shall refer to these observations presently.

It seems to me that the decision in *Akshoy Kumar Nundi* v. *Chunder Mohan Chathati*(2) should not be applied in deciding the present case having regard to the new sub-section 3 added in this Presidency to rule 1 of Order XLI of the Code of Civil Procedure. According to the procedure which prevailed in Madras prior to the decision of the Privy Council in *Krishnaswami Panikondar* v. *Ramaswami Chettiar*(3), the question whether the delay in filing the appeal should be excused or not was decided only after admitting the appeal memorandum. This practice is now altered by the new sub-section 3 added to rule 1 of Order XLI, which says that

> "when an appeal is presented after the period of limitation prescribed therefor, it shall be accompanied by a petition supported by an affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period, and the Court shall not proceed to deal with the appeal in any way (otherwise than by dismissing it either under rule 11 of this Order or on the ground that it is not satisfied as to the sufficiency of the

(1) (1932) 63 M.L.J. 329 (P.C.). (2) (1888) I.L.R. 16 Calc. 250.
(3) (1917) I.L.R. 41 Mad. 412 (P.C.).

reasons for extending the period of limitation) until notice has been given to the respondent and his objections, if any, to the Court acting under the provisions of section 5 of Act IX of 1908 have been heard."

Under this rule the question of delay is decided beforehand and the appeal is not admitted till that point has been decided in the appellant's favour. This was not the procedure before the amendment. Whether the decision in *Akshoy Kumar Nundi* v. *Chander Mohan Chathati*(1) can be distinguished on the ground I have pointed out or not, *it seems to me difficult to hold that there has been an appeal when the Court has refused to receive the memorandum on its file.* Ordinarily in cases where this question of delay in filing the appeal does not arise, the mere presentation of the memorandum of appeal would amount to acceptance or admission of the appeal on the Court's file. As pointed out by the learned Subordinate Judge, if the contention of the decree-holder were to prevail, any decree-holder who has allowed his decree to be barred by limitation may circumvent the rule by filing an appeal and getting it rejected for not satisfactorily explaining the delay. I can see no satisfactory answer to this objection. If possible, such an interpretation should be put on the words "where there has been an appeal" as would enable us to avoid the above conclusion. Mr. Somayya on behalf of the appellant has relied strongly on certain observations contained in the decisions in *Maharajadhiraj Kameshwar Singh Bahadur* v. *Beni Madho Singh*(2) and *Nagendra Nath Dey* v. *Suresh Chandra Dey*(3),

(1) (1888) I.L.R. 16 Calc. 250. (2) (1931) I.L.R. 11 Pat. 430.
(3) (1932) 63 M.L.J. 329 (P.C.).

BYYA REDDI v. GOPAL RAO.

which seem to support him very strongly ; but if properly understood I do not think they lend him much support. In *Maharajadhiraj Kameshwar Singh Bahadur* v. *Beni Madho Singh*(1), the appeal in question was admitted on the 4th November 1921 and was eventually dismissed on the 14th May 1923 on the ground that it was barred by limitation. The decree-holder contended that under clause 2 of article 182 of the Limitation Act the period of three years should be computed from the 14th May 1923. The judgment-debtor contended that in order that he, the decree-holder, may take advantage of article 182, clause 2, of the Limitation Act it must be shown that the appeal was a "competent appeal" and that the order disposing of the appeal was one which disposed of the appeal on the merits. The learned Judges overruled this contention observing

> "that the article speaks of the 'decree or order' and it does not say that that decree or order must be passed in an appeal which was a competent appeal."

It is this observation that has been relied on by Mr. Somayya, but I do not think it helps him at all. No one can say in that case that there has been no appeal. In the judgment it is expressly stated that the appeal was admitted and ultimately it was disposed of on the ground that it was barred by limitation. The question with which we are concerned did not arise in that case as the memorandum of appeal *was accepted on its file by the Court* and the appeal was admitted. Having regard to the point now urged it cannot be said that there has been no appeal in that case. In *Nagendra Nath Dey* v. *Suresh Chandra Dey*(2),

(1) (1931) I.L.R. 11 Pat. 430. (2) (1932) 63 M.L.J. 329 (P.C.).

which is a decision of the Privy Council, the appeal was "irregular in form" and was "insufficiently stamped" but it was admitted and heard in due course. It was argued that time should not be computed from the final order passed in appeal because "the appeal was by reason of its irregularity not an appeal at all but merely an abortive attempt to appeal." This contention was overruled by their Lordships. They state :

"There is no definition of appeal in the Code of Civil Procedure, but their Lordships have no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a Subordinate Court, is an appeal within the ordinary acceptation of the term, and that it is no less an appeal because it is irregular or incompetent. The 1920 appeal was admitted and was heard in due course, and a decree was made upon it."

Further on their Lordships again observe thus :

"They think that the question must be decided upon the plain words of the article: 'where there has been an appeal', time is to run from the date of the decree of the appellate Court. There is, in their Lordships' opinion, no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it; the words mean just what they say. The fixation of periods of limitation must always be to some extent arbitrary, and may frequently result in hardship. But in construing such provisions equitable considerations are out of place, and the strict grammatical meaning of the words is, their Lordships think, the only safe guide."

These observations may seem to support the appellant ; but having regard to the fact that the appeal with which they were concerned was admitted, which fact is stated in the judgment, the observations should not be made to apply to the question that I am called upon to consider. These observations must be understood with reference to the special arguments which were

BYYA REDDI v. GOPAL RAO.

addressed to their Lordships in connection with the meaning of the term "where there has been an appeal". The decision in *Khan Sahib Abdulla Ashgar Ali* v. *Ganesh Das Vig*(1), another Privy Council decision relied upon by the appellant, also does not help me in solving the present question. It was there held that

> "an order of the appellate Court holding that the appeal had abated and refusing to set aside the abatement is a 'final order' within the meaning of article 182 (2) of the Limitation Act since it deals judicially with the matters before the Court."

For the above reasons I hold that since the appeal memorandum presented to the High Court was rejected as being out of time there has been no appeal to the High Court and the appellant is not entitled to take advantage of the provision contained in article 182, clause 2, of the Limitation Act in support of his contention that the execution petition is not barred by limitation. If time is calculated from the date of the appellate decree it is not disputed that the execution application is time-barred. I would therefore confirm the order of the lower Courts and dismiss this civil miscellaneous second appeal with costs.

K.W.R.

(1) (1932) 64 M.L.J. 421 (P.C.).