BUCKINGHAM & CARNATIC CO., LTD. v. OFFICIAL ASSIGNEE, MADRAS.

wages vary according to the number of days they work and the amount of work they do. A collier so employed has never been regarded as a casual labourer in our experience. We are quite unable to distinguish this case from that case which in our view, having regard to the other cases referred to and the tests laid down, was correctly decided.

Applying that case to this, we allow the appeal and give the appellants their costs throughout.

Solicitors for appellants: *King and Partridge.*

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Cornish.

1936, April 1.

R. T. KESAVULOO (SECOND RESPONDENT—SECOND JUDGMENT-DEBTOR), APPELLANT,

v.

THE OFFICIAL RECEIVER, WEST TANJORE AT TANJORE, AND ANOTHER (PETITIONER AND FIRST RESPONDENT —FIRST JUDGMENT-DEBTOR), RESPONDENTS.*

Indian Limitation Act (IX of 1908), art. 182 (5) as amended by Act IX of 1927—"Final order"—Meaning of—Order returning execution petition for amendment—"Final order", if.

The expression "final order" in clause 5 of article 182 of the Indian Limitation Act of 1908 as amended by Act IX of 1927 does not mean "the last order in point of time". The words "final order" imply that the proceeding has terminated so far as the Court passing it is concerned.

---

* Appeal Against Order No. 488 of 1934.

An order returning an execution petition for amendment does not deal judicially with the matter of the petition and cannot therefore be regarded as final within the meaning of clause 5 of article 182 as amended. Such an order contemplates a final order to be passed at a subsequent stage, when the defects are remedied and the petition is re-presented.

Civil Miscellaneous Second Appeal No. 173 of 1932, (1936 M.W.N., 547) disapproved.

Batuk Nath v. *Munni Dei*, (1914) I.L.R. 36 All. 284 (P.C.), *Abdul Majid* v. *Jawahir Lal*, (1914) I.L.R. 36 All. 350 (P.C.), *Husain Abdulla Asghar Ali* v. *Ramditta Mal*, (1932) I.L.R. 60 Cal. 662 (P.C.), *Abdul Kadir* v. *Samipandia Tevar*, (1920) I.L.R. 43 Mad. 835, and *Kadiresan* v. *Maung San Ya*, A.I.R. 1933 Rang. 87, relied upon.

APPEAL against the order of the Court of the Subordinate Judge of Nilgiris, Ootacamund, dated 13th October 1934 and made in Execution Petition Register No. 132 of 1934 in Original Suit No. 170 of 1921.

M. Appa Rao for appellant.

K. S. Desikan for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by VENKATASUBBA RAO J.—This is an appeal from an order allowing execution. The execution petition with which we are concerned was filed on 15th January 1934. The question is whether or not it was barred by limitation. The judgment-debtor attacks the view of the lower Court that it was filed in time.

VENKATASUBBA RAO J.

The decree was passed on 24th January 1922 and nine execution petitions preceded the present petition. The petitions and the orders made thereon are given below :

i. Execution petition filed on 1st February 1922.	Order dated 23rd February 1922. "Batta not paid. Dismissed."

KESAVULOO v. OFFICIAL RECEIVER, WEST TANJORE.

VENKATASUBBA RAO J.

ii. Execution petition filed on 3rd March 1922 praying for the transfer of the decree to the Madras Small Cause Court.	Order dated 11th March 1922. "Transfer."
iii. Execution petition dated 29th April 1924.	Order dated 30th April 1924. "Returned" (for satisfying certain conditions).
iv. Execution petition filed on 24th October 1924.	Order dated 30th October 1924. "Returned" (for satisfying certain conditions).
v. Execution petition filed on 8th April 1926.	Order dated 12th April 1926. "Returned" (for satisfying certain conditions).
vi. Execution petition filed on 3rd September 1926.	Order dated 7th September 1926. "Returned" (for satisfying certain conditions).
vii. Execution petition filed on 25th March 1927.	Order dated 8th April 1927. "Returned" (for satisfying certain conditions).
viii. Execution petition filed on 27th July 1929.	Order dated 9th August 1929. "Returned" (for satisfying certain conditions).
ix. Execution petition filed on 6th March 1931.	Order dated 27th June 1931. "Returned" (for satisfying certain conditions).

The present application (the tenth) was, as already stated, filed on 15th January 1934.

Under clause 5 of article 182 of the Limitation Act (Act IX of 1908) as amended by Act IX of 1927, the limitation runs from the date of the final order passed on an application made in accordance with law to the proper Court for execution, or to take some step in aid of execution, of the decree. The present clause 5 was substituted by Act IX of 1927 for clauses 5 and 6 of the Act of 1908. Under clause 5 as it stood, the

statute ran from the date of applying for execution, etc., but under the amended clause, the *terminus a quo* is the date of the final order. Clause 6 in the Act of 1908, which referred to cases where notice was issued to the judgment-debtor, has been altogether omitted. The question that is to be decided is, what is the meaning of the expression "final order" as it occurs in the amended clause?

We may state at the outset that of the nine petitions, excepting the first two, the rest were returned, as shown above, for some defect or other to be remedied, but none of them was re-presented to the Court. If the clause had not been amended, the date of any of those petitions might furnish the starting point, as it seems to be settled law that failure to re-present a petition does not affect the rule that the statute runs from the filing of the petition; *Narayanaswami Naidu* v. *Gantayya*(1), *Kamakshi Ammal* v. *Pitchu Aiyar*(2), *Seshayya* v. *Venkata Subbarayadu* (3), *Gopisetti Narayanaswami* v. *Muthyala Venkataratnam*(4) and *Thirupathi Ayyangar* v. *Yegnammal*(5). As the clause now stands, the question is, what is the final order in the case from which the time runs? For the decree holder, it is contended that the order on each petition returning it for amendment amounts to a final order. If that contention is right, the present petition would be in time, filed as it was on 15th January 1934, that is, within three years from 27th June 1931, the date of the order on the ninth petition; similarly,

(1) 1915 M.W.N. 865.
(2) (1916) 31 M.L.J. 561.
(3) (1915) 2 L.W. 540.
(4) (1915) 2 L.W. 1207.
(5) (1932) 38 L.W. 224.

KESAVULOO v. OFFICIAL RECEIVER, WEST TANJORE.

VENKATASUBBA RAO J.

petitions 4 to 9 would also be in time. The decree-holder has had to contend, to sustain this position, that the expression "the final order" means "the last order in point of time". We are not prepared to agree with this contention. The word "final" occurs not only in clause 5 but also in clauses 2 and 6. The meaning of the word "final" in clause 2 has had to be considered in several cases. In *Batuk Nath* v. *Munni Dei*(1) the question arose whether the dismissal for want of prosecution of the appeal to His Majesty in Council, was a final decree or order made in the appeal. The question was answered in the negative and the application for execution, having been made more than three years after the decree of the High Court, was held barred by lapse of time. To the same effect is the decision in *Abdul Majid* v. *Jawahir Lal*(2). There, Lord MOULTON observed :

> "The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or affirming the decision appealed from. It merely recognised authoritatively that the appellant had not complied with the conditions under which the appeal was open to him, and that therefore he was in the same position as if he had not appealed at all."

Applying this test, when an order is made returning a petition, it does not deal judicially with the matter of the petition and cannot therefore be regarded as final. See also *Sachindra Nath Roy* v. *Maharaj Bahadur Singh*(3).

In *Husain Asghar Ali* v. *Ramditta Mal*(4) the appellate Court made an order holding that the appeal had abated and refusing to set aside

(1) (1914) I.L.R. 36 All 284 (P.C.). (2) (1914) I.L.R. 36 All. 350 (P.C.).
(3) (1921) I.L.R. 49 Cal. 203, 213 (P.C.).
(4) (1932) I.L.R. 60 Cal. 662 (P.C.).

the abatement. The question arose whether that could be deemed a final order within the meaning of article 182 (2). Their Lordships observe that, as the order in question was judicially made and had the effect of finally disposing of the appeal, it amounted to a final order which gave a starting point. Applying the test here laid down, when an order is made returning a petition, it contemplates a final order to be passed at a subsequent stage, when the defects are remedied and the petition is re-presented.

Again, when an appeal had been wrongly presented and an order was made returning it for presentation to the proper Court, it was held that such an order was not a final order within the meaning of article 182(2) ; *Abdul Kadir* v. *Samipandia Tevar*(1)

In the course of their judgment in *Khalil-ur-Rahman Khan* v. *Collector of Etah*(2), the Judicial Committee, referring to the amendment in question, seem to regard the result of an application as being synonymous with the final order passed upon it (page 85). Surely, when an order is made returning a petition, that does not represent "the result of the application". The order returning a petition is a long way off from the ultimate result which alone can properly be described as a final order.

"Final", when it occurs in a legal enactment, does not usually mean "last in point of time". Even a general dictionary like Webster's explains what "final" as a term used in law means. A decision or judgment is final when it ends the

(1) (1920) I.L.R. 43 Mad. 835.
(2) (1933) I.L.R. 55 All. 993 (P.C.).

KESAVULOO v. OFFICIAL RECEIVER, WEST TANJORE.

VENKATASUBBA RAO J.

action or proceeding in the Court that makes it, leaving nothing further to be determined or to be done by the Court except the administrative execution of the decision or the judgment as the case may be ; Webster's Dictionary (1927), 9th Edn., page 816. In *Kadiresan* v. *Maung San Ya*(1) it has been held that an order directing notice on a petition for execution would not be final, but an order made on a subsequent date closing the case would be final.

As already observed, the amendment in question altered the provision in two respects ; first, in clause 5 "the date of the final decree or order" has been substituted for "the date of applying", and secondly, the old clause 6 has been totally repealed. This has a bearing on the question of the meaning of the word "final". There was, under the Act of 1877, conflict of authority on the question whether the time ran when the Court ordered the notice to issue or when the notice was actually issued from the Court. In the Act of 1908 the wording was slightly altered and clause 6 was enacted. In spite of the change, the phraseology of the new clause was not clear enough to remove the doubt that prevailed ; Rustomji's Law of Limitation (1927), 4th Edn., page 1026. By reason of the Amending Act of 1927, which has made the final order the starting point, the provision in clause 6 as it stood, which gave rise to the conflict of opinion, became unnecessary and has accordingly been removed. *See* Mitra on Limitation (1932), 6th Edn., Vol. II, page 1982. If "final" means "last in point of time", the object of the amendment will clearly

(1) A.I.R. 1933 Rang. 87.

be frustrated as "the date of issue of notice" may happen to be the final order, in the sense that it is the order last made. This is clearly brought out by *Kadiresan* v. *Maung San Ya*(1) already cited. There, the question was whether "the date of notice" or the date of the order closing the case furnished the starting point. In no sense can an order directing notice be regarded as final ; in the very nature of things it is interlocutory. When a Court directs notice to issue, it has in contemplation the making of a final order in due course. The words "final order" imply that the proceeding has terminated so far as the Court passing it is concerned.

This view entails no hardship whatsoever upon a diligent creditor. If the execution proceeding has ended, the final order gives the starting point ; if, on the other hand, execution has been suspended by no default of the decree-holder, he can, treating the petition as a pending one, apply to have it revived, without being hindered by any rule of limitation ; see *Shaikh Kamar-ud-din Ahmad* v. *Jawahir Lal*(2). This case incidentally throws light on the question what constitutes a final order. When it was ordered that "in default of prosecution on the part of the decree-holder the record be not sent to the Collector's Court", the Judicial Committee proceeded upon the footing that there was no final order.

Lastly, a word remains to be said as regards the so-called policy of the Amending Act. It is urged that the object of the amendment was to enlarge the limitation period in the interests of

(1) A.I.R. 1933 Rang. 87.

(2) (1905) L.R. 32 I.A. 102.

KESAVULOO v. OFFICIAL RECEIVER, WEST TANJORE.

VENKATASUBBA RAO J.

the decree-holder. Granting that this is a relevant matter, one cannot help noting that the amendment was made in consequence of the recommendations of the Civil Justice Committee, which had for their object the speedy disposal of litigation. Take the case in hand. It shows how frivolous applications could have, under the law as it stood, kept alive a decree. In the case of seven successive petitions, the decree-holder, it is perfectly obvious, had not the slightest desire to prosecute them. Were it permissible to speculate, it would not be far-fetched to hold that the object of the amendment was to put an end to such frivolous petitions. In some cases undoubtedly the amendment benefits the decree-holder; for instance, where a prior petition is kept pending for a long time for no default of his, he unjustly suffers, if the time is to be reckoned from the date of the petition and not from the date of the final order. But, to say that the decree-holder gets some benefit from the amendment is one thing, and it is a wholly different thing to say that the object of the amendment is to benefit him.

The decision of PANDRANG ROW J. in Civil Miscellaneous Second Appeal No. 173 of 1932*, on which the respondent strongly relies, completely supports him. But, for the reasons already stated, we must, with great respect, dissent from the view expressed there.

We must, therefore, holding that the execution petition was barred by time, reverse the lower Court's order and allow the appeal with costs, to be paid by the Official Receiver out of the insolvent's estate.

A S V.

* 1936 M.W.N. 547.