

evidence, their Lordships fully concur in the reasoning and the conclusion of the Court below.

Their Lordships will therefore humbly advise His Majesty that this appeal be dismissed. The appellants will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants :—*Walker & Rowe.*

Solicitors for the respondent :—*T. L. Wilson & Co.*

J. V. W.

APPELLATE CIVIL.

Before Mr. Justice Sir George Know and Mr. Justice Richards.

MADHUBAN DAS AND OTHERS (JUDGMENT-DEBTORS) v. NARAIN DAS AND ANOTHER (DECREE-HOLDERS).*

Civil Procedure Code, sections 368, 582 and 587—Act No. XV of 1877 (Indian Limitation Act), schedule II, article 175C.—Application to bring on to the record the heirs of a deceased respondent—Limitation.

Held that article 175C of the second schedule to the Indian Limitation Act applies as well to appeals from appellate decrees as to appeals from original decrees. *Susya Pillai v. Aiyakannu Pillai* (1) dissented from. *Vakkalagadda Narasimhan v. Valizulla Sahib* (2) followed.

IN this case an application for execution of a decree was dismissed by a Munsif. The decree-holders thereupon appealed to the Subordinate Judge, who allowed the appeal and remanded the case to the Munsif under section 562 of the Code of Civil Procedure. Against this order of remand the judgment-debtors appealed to the High Court. When the appeal came on for hearing a preliminary objection was taken by one of the respondents to the effect that the appeal abated, the contention being that Narain Das, one of the respondents, had died on the 30th of May 1906 (the appeal having been filed on the 6th of June 1906), and that no steps had been taken within limitation to bring his representatives upon the record.

Munshi *Haribans Sahai*, for the appellants.

Munshi *Ishwar Saran* (for whom Pandit *Brij Narain Gurtu*), for the respondents.

* First Appeal No. 59 of 1906, from an order of Munshi Achal Behari, Subordinate Judge of Gorakhpur, dated the 17th of February 1906.

(1) (1906) I. L. R., 29 Mad., 529. (2) (1905) I. L. R., 28 Mad., 498.

1907

HAB
SHANKAR
PARTAB
SINGH

v.
JAL
RAGHURAJ
SINGH

1907

March 20.

1907

MADRUBAN
DAS
v.
NARAIN
DAS.

KNOX and RICHARDS, JJ.—At the hearing of this appeal a preliminary objection was taken on behalf of Lachhman Das respondent to the effect that the appeal abated. It was contended from the papers on the record that Narain Das, one of the respondents to this appeal, had died on some date before the 30th of May 1906 and that the application to bring Lachhman Das and Ram Das on the record as representatives of Narain Das, deceased, had not been made within the six months prescribed. In answer to this the learned vakil for the appellants draws our attention to the Full Bench ruling of the Madras High Court—*Susya Pillai v. Aiyakannu Pillai* (1)—and argued that article 175C of the Indian Limitation Act did not apply to appeals from appellate decrees. The article which he wishes us to apply is article 178 of the Limitation Act. There is no doubt that the view taken by the Madras High Court supports the contention raised here, but, with all the respect due to the learned Judges who decided that case, we are not prepared to follow them. We prefer the reasoning which commended itself to a division bench of the same Court—*Vakkalagadda Narasimham v. Vahizulla Sahib* (2). The application made to bring the representative of the deceased respondent in an appeal, whether that appeal is an appeal from an original decree or an appeal from an appellate decree, is an application made under section 368 of the Code of Civil Procedure, the provisions of which have been extended in the one case by section 582 and in the other by section 587. Section 582 authorizes our reading section 368 as follows :—When the appellant fails to make such application within the period prescribed therefor, the appeal shall abate, unless he satisfies the Court that he had sufficient cause for not making the application within the period prescribed therefor. The provisions of section 368 as altered by section 582 are, by section 587, to apply as far as may be to appeals from appellate decrees, and, though the amendment to the Limitation Act contained in article 175C might have been framed with greater care and precision, we are prepared to hold that the words contained in article 175C may be read so as to cover appeals from appellate decrees. This reading is sanctioned by the

(1) (1906) I. L. R., 29 Mad., 529.

(2) (1906) I. L. R., 28 Mad., 498.

procedure followed by this Court ever since this amendment was introduced in the Limitation Act.

The learned vakil for the appellants asks us to grant him time to show that he was prevented by sufficient cause from making the application within the six months allowed. We think this application should be granted. Let the appeal stand over for three weeks.

1907

MADHUBAN
DAS
v.
NABAIN
DAS.

FULL BENCH.

1907
April 17.

*Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Aikman and
Mr. Justice Richards.*

DOST MUHAMMAD KHAN (DEFENDANT) v. MANI RAM (PLAINTIFF) AND
RAHMAT-ULLAH (DEFENDANT).*

Civil Procedure Code, section 411—Suit in formâ pauperis—Court fee—Property of defendant sold to realize court fee—Property sold subject to a mortgage—Rights of mortgagee.

Held that the sale, subject to a mortgage, of property belonging to the defendant in a suit brought *in formâ pauperis* for the purpose of realizing the court fee payable to Government by the plaintiff does not preclude the mortgagee from bringing to sale the same property in execution of a decree for sale on his mortgage. *The Collector of Moradabad v. Muhammad Daim Khan* (1) overruled. *Ganpat Futaya v. The Collector of Kanara* (2) distinguished.

THE facts of this case are as follows:—

One Rahmat-ullah executed a mortgage in favour of Ram Charan Das on the 15th of April 1895 purporting to hypothecate in it the whole of a certain house. The mortgagee subsequently instituted a suit to realise the amount of the mortgage, but, having ascertained that the mortgagor was only entitled to mortgage a $\frac{7}{16}$ share of the house, he confined his claim to that share and obtained a decree for sale on the 29th of June 1898. This decree was on the 7th of April 1899 transferred to the plaintiff Lala Mani Ram. Musammat Hafizan Bibi, a sister of the mortgagor, was entitled to a share in the house in question, and she on the 21st of January 1899 instituted a suit *in formâ pauperis* against her brother to have the mortgage set aside so far as regards

* Second Appeal No. 541 of 1904, from a decree of C. Rustomjee, Esq., District Judge of Allahabad, dated the 16th of March 1904, modifying a decree of Mr. H. David, Subordinate Judge of Allahabad, dated the 16th of December 1902.

(1) (1879) L. L. R., 2 All., 196. (2) (1875) L. L. R., 1 Bom., 7.