

APPELLATE CIVIL.

1908
May 18.*Before Mr. Justice Aikman and Mr. Justice Griffin.*FAZL-UR-RAHMAN AND OTHERS (DECREE-HOLDERS) v. SHAH MUHAM-
MAD KHAN AND OTHERS (JUDGMENT-DEBTORS).**Act No. XV of 1877 (Indian Limitation Act), schedule II, article 179—
Execution of decrees—Limitation—Appeal—Appeal not pressed—Terminus a quo.*

Where there has been an appeal from a decree limitation does not the less begin to run from the date of the final decree in appeal because the appeal may have been dismissed upon the representation of the appellants' counsel that he was unable to support it. *Jeeyangar v. Lakshmi Dass* (1) followed. *Hingan Khan v. Ganga Parshud* (2) and *Fazal Husein v. Raj Bahadur* (3) distinguished.

THIS was an appeal arising out of an application to execute two decrees which were passed on the 8th of March 1901. Against these decrees appeals were preferred to the High Court. When the appeals were called on for hearing, counsel for the appellants informed the Court that he was unable to support the appeals, and they were accordingly dismissed, no costs being awarded to the respondents, as they were not represented. On this judgment decrees were passed by the High Court affirming the decrees of the Lower Court. The application was within time, reckoning from the date of the decrees of the High Court, but would be barred by limitation if time were computed to run from the date of the decrees of the Court of first instance. The Lower Court (Subordinate Judge of Aligarh) held that, as the appeals to the High Court were not supported, time must be held to run from the date of the decrees of the Court of first instance, and accordingly dismissed the application as barred by limitation. Against this order of the Lower Court the decree-holders appealed to the High Court, contending that limitation should be computed as from the date of the dismissal of the appeals by the High Court.

Maulvi *Ghulam Mujtaba* and Maulvi *Muhammad Ishaq*, for the appellants.

Mr. *W. Wallach*, for the respondents.

* First Appeal No. 218 of 1907 from a decree of Muhammad Shah, Subordinate Judge of Aligarh, dated the 15th of April 1907.

(1) (1907) 16 M. L. J., 393. (2) (1876) I. L. R., 1 All., 293.

(3) (1897) I. L. R., 20 All., 124.

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AIKMAN and GRIFFIN, JJ.—The sole question raised in this appeal is whether an application for execution presented by the appellants is or is not barred by limitation. The application was to execute two decrees which were passed on the 8th of March, 1901. Against these decrees appeals were preferred to this Court. When the appeals were called on for hearing the learned counsel for the appellants informed the Court that he was unable to support the appeals, and they were accordingly dismissed, no costs being awarded to the respondents, as they were not represented. On this judgment decrees were passed by this Court affirming the decrees of the lower Court. It is admitted that the appellants' present application is within time, if time is reckoned from the date of the decrees of this Court, but would be barred by limitation if time be computed to run from the date of the decrees of the Court of first instance. The lower Court has held that, as the appeals to this Court were not supported, time must be held to run from the date of the decrees of the Court of first instance, and has accordingly dismissed the application as barred by limitation. Against the order of the lower Court the present appeal has been preferred. In our judgment the appeal must succeed. It seems to us that the language of article 179 of schedule II of the Limitation Act is perfectly clear and is in favour of the appellants' contention. That article allows three years from the date of the decree or order, or, where there has been an appeal, from the date of the final decree or order of the appellate Court. There was undoubtedly an appeal in the case before us, and a final decree was passed by the appellate Court. The application is within three years from the date of the final decree. For the respondents reliance is placed upon two decisions of this Court in *Hingan Khan v. Ganga Parshad* (1) and *Fazal Husen v. Raj Bahadur* (2). In our opinion these cases are distinguishable from the present, as in the former the appeal was withdrawn, and the question which had to be dealt with was as to the time to be allowed for payment of pre-emption money. Moreover, the language of article 179 was not referred to. In the second of these, to which one of us was a party, the appeal abated. It

(1) (1876) I. L. R., 1 All., 293. (2) (1897) I. L. R., 20 All., 124.

appears that the decree-holder in that case appealed against one Hardayal, a judgment-debtor. Hardayal died, and the decree-holder failed to bring on the record his legal representatives. It was held that the only extant decree was the original decree of the Munsif. In the Full Bench case of *Jeeyangar v. Lakshmi Dass* (1), the Madras High Court held that when an appeal is entertained and an order made by the Court to which the appeal is preferred which has the effect of finally disposing of the appeal, time for execution runs from the date of the order of the appellate Court. The learned Judges in that case dissented from certain decisions of the Bombay High Court in which an opposite view had been taken. We agree with the opinion expressed by the Full Bench of the Madras High Court. If a judgment-debtor's appeal, as sometimes happens, is pending for upwards of three years, and if it were held that the appellant judgment-debtor, by withdrawing or declining to support his appeal, or by omitting to bring on the record the representatives of a deceased respondent, could, notwithstanding the fact that an appeal had been filed, cause time to run from the date of the original decree, it would in our opinion be going directly against the language of the Limitation Act and would open a door to fraud. We allow the appeal, and, setting aside the order of the lower Court, send back the case to that Court with instructions to re-admit the application under its original number in the register and dispose of it according to law. The appellants will have the costs of this appeal. Other costs will follow the event.

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Appeal decreed and Cause remanded.

(1) (1907) 16 M. L. J., 393.