

FULL BENCH.

1910
August 15.

*Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Banerji and
Mr. Justice Champier,*

ABDUL MAJID AND OTHERS (JUDGEMENT-DEBTORS) v. JAWAHIR LAL
(DECREE-HOLDER).*

*Act No. XV of 1877 (Indian Limitation Act), schedule II, article 180—
Execution of decree—Limitation—Terminus a quo—Order of His Majesty in
Council dismissing an appeal for want of prosecution an affirmation of the decree
appealed from.*

An order of His Majesty in the Privy Council dismissing an appeal for whatever cause is in effect an affirmation of the court below and is the only order in the litigation capable of enforcement.

Where, therefore, an appeal to His Majesty in Council from a decree passed by the High Court for sale on a mortgage was dismissed for want of prosecution, it was held that limitation in respect of an application by the decree-holder for an order absolute for sale was governed by article 180 of the second schedule to the Indian Limitation Act, 1877, time running from the date of the order of His Majesty in Council.

Pitts v. LaFontaine (1), *Luchmun Persad Singh v. Kishun Persad Singh* (2), *Beni Rai v. Ram Lakhan Rai* (3), *Tassardug Rasul Khan v. Kashi Ram* (4) and *Oudh Behari Lal v. Nageshar Lal* (5) referred to. *Bipro Doss Gossain v. Chunder Seekur Bhuttacharjee* (6) distinguished.

THE facts of this case were as follows:—

One Thakur Prasad brought a suit for sale upon a mortgage against Chaudhri Abdul Majid and others. The court passed a decree on 8th May, 1890, against Abdul Majid, ordering him to pay the money within three months, on failure of which the property mortgaged was to be sold. Abdul Majid appealed against the decree to the High Court and the appeal was dismissed on 8th April, 1893. He appealed to His Majesty in Council, and the Judicial Committee dismissed the appeal for failure of prosecution on 13th May, 1901. The decree-holder made the first application for an order absolute for sale on the 14th May, 1904, but the application was rejected by the court on 1st April, 1905, on the ground that the procedure prescribed by section 610 of Act XIV of 1882 had not been followed. The decree-holder obtained the necessary

* First Appeal No. 333 of 1909, from a decree of Srish Chandra Basu, Subordinate Judge of Allahabad, dated the 6th of October, 1909.

(1) (1881) L. R., 6 A. C., 492. (4) (1902) L. R., 25 All., 109.
(2) (1892) L. R., 8 Cal., 213. (5) (1900) L. R., 13 All., 278.
(3) (1898) L. R., 20 All., 337. (6) (1937) 7 W. R., C. R., 62 L.

order from the High Court on 14th June, 1906, and then made a fresh application on 11th June, 1909. On this application the judgement-debtor raised the plea of limitation. The plea was rejected by the lower court on two grounds, that the application was one falling within article 180 of the Limitation Act of 1877, and that the decree sought to be executed was a Privy Council decree and article 183 of the present Limitation Act applied. The judgement-debtor appealed.

Babu *Jogindro Nath Chaudhri* (with him Dr. *Satish Chandra Banerji* and Babu *Lalit Mohan Banerji*), for the appellant:—

An application to obtain a decree under order XXXIV, rule 5 of the Code of Civil Procedure, was not one to execute a decree. It did not fall within article 182 of the Limitation Act (IX of 1908), but under article 181.

[BANERJI, J., referred to the case of *Oudh Behari Lal v. Nageshar Lal* (1).]

That was a case in which the question of payment of court fee had arisen. Under article 182, the decree must be capable of enforcement, but an order under section 88 of Act No. IV of 1882, (Order XXXIV, rule 4, Act No. V of 1908), only declared the liability of the mortgagor and gave him time to comply with directions of the court, subject to the condition that on his failure to do so the property was to be put up for sale. Another order had yet to be obtained under section 89 of that Act. (Order XXXIV, rule 5, Act No. V of 1908). He cited *Ali Ahmad v. Naziran Bibi* (2).

In order that article 182 of Act No. IX of 1908 should apply the order must be capable of execution in accordance with law, *Chhedi v. Lahu* (3), *Udit Narain v. Jugan Nath* (4), *Baldeo Prasad v. Ibn Haidar* (5), *Kedar Nath v. Lalji Sahai* (6) and *Oudh Behari Lal v. Nageshar Lal* (7). The last two cases showed that the stage of execution began after a decree had been passed, not that an application for foreclosure was one to execute a decree. At one time no limitation applied to such applications; *Rambir*

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(1) (1890) I. L. R., 13 All., 278.

(4) (1904), A. L. J., 15.

(2) (1902) I. L. R., 24 All., 542.

(5) (1905) I. L. R., 27 All., 625.

(3) (1902) I. L. R., 24 All., 300.

(6) (1889) I. L. R., 12 All., 61.

(7) (1890) I. L. R., 13 All., 278.

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Singh v. Drigpal (1). Dismissal of an appeal for default could not stand on the same footing as the affirmance of a decree. It did not constitute a decree of the appellate court; *Bipro Doss Gossain v. Chunder Seekur Bhattacharjee* (2). It was not a decree of the Privy Council to which 12 years limitation could apply. Article 183 of the present Limitation Act would apply only to orders which could be enforced; the order in the present case had no elements in it capable of execution. It is questionable whether, when an appeal is dismissed for default, the order of dismissal amounts to an affirmance of the lower court's decree; *Mansab Ali v. Nihal Chand* (3).

The Hon'ble Pandit *Sundar Lal* (with him Maulvi *Rahmatullah*), for the respondent:—

An order under section 89 of the Transfer of Property Act was an order in a suit. Article 181 of the new Limitation Act applied only if no other article applied. Article 183 was clearly applicable here. A decree *nisi* was given granting three months' time to the judgement-debtor and that time expired on 12th August, 1890. The decree of the final court was the only decree which could be executed; *Kristo Kinkur Roy v. Burrodacant Roy* (4), *Muhammad Sulaiman Khan v. Muhammad Yar Khan* (5). The dismissal of the appeal was an affirmance of the decree below. The reason of that dismissal was perfectly immaterial; *Luchman Persad Singh v. Kishun Persad Singh* (6). The result is always the same. That is the effect of order XLV, rule 15, (section 610 of Act No. XIV of 1882.)

Dr. *Satish Chandra Banerji*, in reply:—

It was held in the case in 7 W. R., 521, that time ran from the date of original decree in cases of dismissal for default. That case was approved of by the Privy Council in *Kristo Kinkur Roy v. Burrodacant Roy* (4). There was no decree of the appellate court to be executed, as the order of dismissal did not amount to a decree.

STANLEY, C. J.—The facts of this case, so far as it is necessary to state them for the purposes of this appeal are these:—A decree for sale was passed under section 88 of the Transfer of Property

(1) (1893) I. L. R., 16 All., 23.

(4) (1872) 14 Moo. I. A., 465.

(2) (1867) 7 W. R., C. R., 521.

(5) (1886) I. L. R., 11 All., 267.

(3) (1893) I. L. R., 15 All., 359.

(6) (1882) I. L. R., 8 Calc., 218.

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Act against several sets of defendants on the 12th of May, 1890, by the Court of the Subordinate Judge of Allahabad. According to that decree a sum of Rs. 11,751-15-9 was directed to be paid by the appellant Abdul Majid, one of the judgement-debtors. He appealed from this decree to this Court and his appeal was dismissed on the 8th April, 1893. He applied for and obtained leave to appeal to Her late Majesty in Council. No steps however were taken to prosecute the appeal, and it was dismissed for default of prosecution by the Privy Council on the 13th of May, 1901. The order of dismissal runs in these terms:—

“Their Lordships of the Committee in obedience to the said order in Council have proceeded to take into consideration the appeal of Chaudhri Abdul Majid, appellant, and Thakur Prasad, Kanhaiya Lal and Jawahir Lal respondents from a decree of the High Court of Judicature for the North-Western Provinces, and having called on the appellant to show cause why the said appeal should not be dismissed for non-prosecution, no effectual steps having been taken to set down the same for hearing, their Lordships do this day humbly agree to recommend to Your Majesty the dismissal of this appeal for non-prosecution.” An order was subsequently passed in these terms:—“His Majesty having taken the said report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order, as it is hereby ordered, that the said appeal be, and the same is hereby, dismissed for non-prosecution, whereof the Judges of the High Court of Judicature for the North-Western Provinces at Allahabad for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.”

On the 14th of November, 1904, an application was made to the High Court by the decree-holder, Jawahir Lal, for an order absolute against Abdul Majid. An objection was taken to this application by the judgement-debtor on the ground that it was barred by limitation and on the further ground that the procedure enjoined by section 610 of the Code of Civil Procedure of 1882, had not been followed. On the latter ground the objection was allowed. The decree-holder then on the 11th of June, 1906, applied to this Court under section 610, and an order was passed to this effect:—“Let the order be sent down to the court below

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for necessary execution according to law." The decree-holder then applied for a decree absolute under order 34, rule V of Act No. V of 1908. This application was met by the objection on behalf of the judgement-debtor that the application was barred by limitation; that the only decree which was capable of execution was the decree of the High Court passed on the 8th of April, 1893; that the order of their Lordships of the Privy Council did not affirm that decree, but merely dismissed the appeal for want of prosecution; and that there was no order or decree of the Privy Council which was capable of execution.

If this contention be correct, then the application for execution is barred by article 178 or 179 of the second schedule to Act XV of 1877, corresponding to article 181 or 182 of Act No. IX of 1908. If, on the other hand, the order of the Privy Council is an order which can be executed, the application of the decree-holder is governed by article 180 of Act No. XV of 1877, corresponding to article 183 of Act No. IX of 1908. This last mentioned article provides a period of 12 years within which an order of His Majesty in Council may be enforced. If the order of His Majesty of the 13th of May, 1901, is treated as an affirmance of the decree of this Court, it seems to me that it is the decree or order of the final Court of Appeal and is an order which can be executed, and as 12 years have not elapsed since the date of that order, the application of the creditor is not barred by limitation.

The question is not without authority. In *Pitts v. LaFontaine* (1), it was held by their Lordships of the Privy Council that when a decision of the Judicial Committee has been reported and sanctioned and embodied in an order of Council, it becomes the decree or order of the final Court of Appeal, and it is the duty of every subordinate tribunal to whom the order is addressed to carry it into execution.

In *Luchmun Persad Singh v. Kushun Persad Singh* (2), it was held by a Full Bench of the Calcutta High Court, on a reference by MITTER and MALLEAN, JJ., that although an order of Her late Majesty in Council only confirms a decree of the court below, that order is the paramount decision in the suit and any application to enforce it is in point of law an application to

(1) (1881) L. R., 6 A. C. 482. (2) (1882) I. L. R., 8 Cal., 218.

execute the order and not the decree which it confirmed. The question before the Court in that case was whether article 179 or article 180 of schedule II of Act No. XV of 1877 governed an application to enforce an order of Her Majesty in Council, affirming a decree of the High Court on its appellate side. GARTH, C. J., who delivered the judgement of the Court observed:—

“Although an order of Her Majesty in Council may confirm the decree of the court below, that order is undoubtedly the paramount decision in the suit and any application to enforce it is in point of law an application to execute the order and not the decree which it confirmed.” Then he observes that “before the decree-holder can obtain execution he must apply to the High Court under section 610 of the Code to transmit the order of Her Majesty to the Court whose duty it is to issue execution, and it is clear from the language of that section that the court to which the order is transmitted has to execute not its own decree but the order itself. If this were not so, there would seem no necessity for applying to the High Court at all.”

In that case, it will be observed, the order of the Privy Council affirmed the decree of the High Court, and it may be said that there was no such affirmance of the decree of the High Court in the present case. This I think is not so. The dismissal of the judgement-debtor's appeal for want of prosecution must, I think, be treated as an affirmance of the decree of the High Court.

The question whether the dismissal of an appeal for want of prosecution is a decree affirming the decision of the court immediately below, within the meaning of section 596 of the former Code of Civil Procedure was considered in the case of *Beni Rai v. Ram Lakhnan Rai* (1). That section falls within chapter XLV which treats of appeals to His Majesty in Council, and it prescribes the requirements for such an appeal, and, amongst others enjoins that where the decree appealed from affirms the decision of the Court immediately below the court passing such decree, the appeal must involve some substantial question of law. My brothers KNOX and BANERJI, held that a decree dismissing an appeal for want of prosecution was a decree affirming the decision of the court immediately below, within the meaning of section 596.

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The decision of the Privy Council in *Tassaduq Rasul Khan v. Kashi Ram* (1), lends support to the view taken in the last mentioned case. In that case a preliminary objection was taken on behalf of the respondents to the hearing of an appeal before their Lordships on the ground that the order giving leave to appeal was not in accordance with the Code of Civil Procedure. The suit in that case was for specific performance of an agreement and the court below had decreed specific performance. On appeal the only order of the appellate court was in these terms:—"It is ordered and decreed that this appeal be dismissed and the respondents' costs of this appeal are to be paid by appellant." It was held that in order to "affirm the decision of the court below" within the meaning of section 596, it is sufficient for the appellate court to affirm the decree. It need not also affirm the grounds of fact on which the judgement was passed, and that where the decree of the appellate court was that the appeal be dismissed, but the reasons given were not the same as those of the lower court in respect of some matters of fact, the appellate court by the dismissal affirmed the decision of the lower court within the meaning of the section. This decision appears to me to lend strong support to the argument addressed to us on behalf of the respondent, that the dismissal of an appeal operates as an affirmance of the decree of the court from which the appeal is preferred, and it is immaterial on what grounds it is dismissed. It seems to me therefore that we ought to treat the order of His Majesty in Council as the final order in the litigation and the order which alone is capable of enforcement.

I would therefore dismiss the appeal.

BANERJI, J.—The question to be determined in this appeal is whether the application of the respondent for an order absolute for sale under section 89 of the Transfer of Property Act is barred by limitation, as contended by the appellant.

The decree under section 88 of the Act was passed by the court of first instance on the 12th of May, 1890, and was affirmed by this Court on the 8th of April, 1893. The appellant preferred an appeal to His Majesty in Council, but allowed it to remain pending till the 13th of May, 1901, when it was dismissed for

“non-prosecution,” no effectual steps having been taken by the appellant for its hearing. After the disposal of the appeal to the Privy Council the respondent applied for an order absolute for sale on the 14th of November, 1904, but it was dismissed on the objection of the appellant on the ground that the provisions of section 610 of Act No. XIV of 1882, had not been complied with. On the 11th of June, 1909, the application which has given rise to this appeal was presented. It is urged that the application is time-barred under article 178 of schedule II to Act No. XV of 1877.

It was held by a Full Bench of this Court in *Oudh Behari Lal v. Nageshar Lal* (1) that an application for an order absolute for sale under section 89 of the Transfer of Property Act is an application in execution. This will apparently not be so under Act No. V of 1908 (the present Code of Civil Procedure), as order XXXIV, rule 5, declares that what was an order absolute for sale under section 89 of the Transfer of Property Act is the final decree in the suit. However, as order XXXIX does not apply to this case, we must, in accordance with the ruling of the Full Bench, hold the present application to be an application in execution, and we must consider what article of schedule II of the Limitation Act applies to it.

Article 178 applies if there is no other article in the schedule which governs the application. It is urged on behalf of the respondent that article 180 of schedule II to Act No. XV of 1877, to which article 183, schedule I to Act No. IX of 1908 corresponds, is applicable. Article 180 provides a limitation of 12 years for an application to enforce, among other orders, etc., “an order of Her Majesty in Council.” We have to determine whether the order which the respondent seeks to enforce is an order of His Majesty in Council within the meaning and intention of the article. When a decision of their Lordships of the Privy Council “has been reported to His Majesty and has been sanctioned and embodied in an order of His Majesty in Council” it becomes the order of His Majesty and the final order in the case which a court is to carry into effect. This order is not a decree, but it is the order of His Majesty and as such has to be enforced. In this case

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their Lordships of the Privy Council made a report to His Majesty and recommended "the dismissal of the appeal for non-prosecution." This report was taken into consideration by His Majesty and was approved of, and it was ordered that the "appeal be and the same is hereby dismissed for non-prosecution." This order of His Majesty is the final order in the cause and is the order which must be enforced. The necessary effect of an order dismissing an appeal from the decree of a subordinate court is an affirmance of that decree. Therefore when an appeal to His Majesty in Council is dismissed, the necessary result is that the decree of the court below is affirmed, whatever the reason for the dismissal may be. It was held in *Beni Rai v. Ram Lalhan Rai* (1) that a decree of the High Court dismissing an appeal for want of prosecution was a decree affirming the decision of the court below. I was a party to this ruling and I see no reason to alter the opinion therein expressed. To the same effect is the decision of their Lordships of the Privy Council in *Tassaduq Rasul Khan v. Kashi Ram*, referred to in the judgement of the learned Chief Justice. In that case the decree of the appellate court was, as the report of the case shows, "that the appeal should be dismissed with cost." It was held that the appellate court affirmed the decision of the lower court. The principle of these cases applies to the present case, and applying that principle, it cannot but be held that the order of His Majesty dismissing the appellant's appeal affirmed the decree of this Court. The learned advocate for the appellant placed great reliance on certain observations made by SIR BARNES PEACOCK, C. J., in his judgement in *Bipro Doss Gossain v. Chunder Seekur Bhattacharjee* (2). That case is in my opinion distinguishable. There the question was as to the meaning to be placed on the provision of section 20 of Act XIV of 1859 and no question arose as to the effect of an order of His Majesty dismissing an appeal. For the above reasons, I agree with the learned Chief Justice in holding that the respondent's application is governed by article 180 of schedule II, Act No. XV of 1877, and is not time-barred. I also would dismiss the appeal.

CHAMIER, J.—I concur.

(1) (1898) I. L. R., 20 All., 367. (2) (1867) 7 W. R., O. R., 521.

BY THE COURT :—The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

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REVISIONAL CRIMINAL.

Before Mr. Justice Griffin and Mr. Justice Chamier.

EMPEROR v. MATAN.*

Act No. XLV of 1860 (Indian Penal Code), section 182—Transfer—Unfounded allegations against the trying magistrate made by an accused person in an application for transfer of his case.

Held that an accused person, who in support of an application for the transfer of the case against him to some other Magistrate makes unfounded and defamatory allegations against the trying Magistrate, cannot be prosecuted in respect of such allegations under section 182 of the Indian Penal Code. *Queen v. Daria Khan (1)* and *Queen-Empress v. Subbayya (2)* referred to.

THE facts of this case were as follows :—

One Ramdoo lodged a complaint against Matan of an offence under section 323 of the Indian Penal Code in the court of the Sub-Divisional Magistrate. The case was made over to a Tahsildar Magistrate for trial. The case had not proceeded far when Matan presented a petition to the Sub-Divisional Magistrate praying him to transfer the case from the court of the Tahsildar Magistrate to some other court. In the course of the petition the applicant stated as one of the reasons for a transfer of the case that it had been instituted at the instance of the Tahsildar because the applicant had declined to accede to the Tahsildar's request that he should stand security for a man named Mangalia. The allegation was entirely without foundation. The Sub-Divisional Magistrate examined the applicant on oath in support of the application for transfer and the applicant then repeated his accusation against the Tahsildar. The Sub-Divisional Magistrate on this directed the applicant to be prosecuted in respect of these allegations under section 182 of the Indian Penal Code. Against this order the applicant applied in revision to the High Court.

* Criminal Revision No. 364 of 1910 against the order of Raghubar Dayal Misra, Magistrate, first class, of Hamirpur, dated the 5th of May, 1910.