

Their Lordships agree with the judgement of the Court of the Judicial Commissioner of Oudh, and will humbly advise His Majesty to dismiss the appeal with costs.

*Appeal dismissed.*

Solicitor for the appellant : *Douglas Grant.*

Solicitors for the respondents : *Watkins and Hunter.*

J. V. W.

1914

AMIR BEGAM  
v.  
BADE UD-DIN  
HUSAIN.

P. C.\*  
1904  
April 1, 7.

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

[On appeal from the High Court of Judicature at Allahabad].

*Privy Council, Practice of—Dismissal of appeal for want of prosecution—No judicial decision of suit—Act No. XV of 1877 (Indian Limitation Act), schedule II, articles 179, 180—Application for order absolute for sale under Act No. IV of 1882 (Transfer of Property Act), section 89—Final decree or order of appellate Court.*

An order of His Majesty in Council dismissing an appeal for want of prosecution does not deal judicially with the matter of the suit, and can in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognizes authoritatively that the appellant has not complied with the conditions under which the appeal was open to him, and that therefore he is in the same position as if he had not appealed at all.

Where, therefore, in a suit to enforce a mortgage a preliminary decree for sale was made by the Subordinate Judge on the 12th of May, 1890, which was confirmed by the High Court on the 8th of April, 1893, and an appeal to the Privy Council was admitted, but was dismissed for want of prosecution on the 13th of May, 1901. *Held* (reversing the decisions of the Courts in India) that the period of limitation for an application under section 89 of the Transfer of Property Act (IV of 1882) to make absolute the decree for sale was not 12 years under article 180 of schedule II of the Limitation Act, 1877, but three years under article 179, and limitation ran, not from the dismissal of the appeal for want of prosecution, but from the order of the High Court confirming the decree, which was the "the final order of the Appellate Court," and did not become merged in the order of the Privy Council (1).

The right to enforce the decree had therefore been barred before the passing of the Civil Procedure Code, 1908, (under which the present application purported to be made), and no provision of that Act operated to revive it.

APPEAL No. 27 of 1913 from a judgement and decree (5th August, 1910) of the High Court at Allahabad, which affirmed the judgement and decree (6th October, 1909) of the Court of the Subordinate Judge of Allahabad.

\* Present :—Lord MOULTON, Sir JOHN EDGE and Mr. AMBER ALI.

(1) See *Batuk Nath v. Munni Dei*, I. L. R., 36 All., 284.

The facts of this case are sufficiently stated in the report of the appeal to the High Court which was heard by Sir JOHN STANLEY, C. J. and BANERJI and CHAMIER, JJ., and will be found in I. L. R., 33 All., 154.

On this appeal—

*G. R. Lowndes*, for the appellant, contended that the courts below were wrong in treating the application of the 11th of June, 1909, as one to enforce the order of the Privy Council, dated the 13th of May, 1901. That order did not purport to be, and ought not to be treated as, a decree in the suit deciding the rights of the parties under the mortgage, and was not capable of being enforced in execution as the decree-holder (the first respondent) sought to do. It was not "the final order of the Appellate Court" within the meaning of article 179, clause 2, of schedule II to the Limitation Act, 1877 (which corresponded with article 182, clause 2, of schedule I, to the Limitation Act, 1908). The period of limitation was three years and it must be reckoned from the 8th of April, 1893, when the High Court confirmed the decree of the Subordinate Judge, and when the right to make the present application accrued. If the present application was an application for a decree under order XXXIV, rule 5, of the Code of Civil Procedure, 1908, that is, if the Limitation Act, 1908, was applicable, the application was equally barred by article 181, schedule I, of the last named Act. The question was whether the application was one to obtain a decree or one for execution of a decree, but in any view it was barred by limitation.

*De Gruyther, K.C.*, and *B. Dube*, for the first respondent, contended that the Code of Civil Procedure, 1908, was not applicable; see section 158 of that Code at page 487 of the commentaries on the Code by Woodroffe and Ameer Ali. Such an application in the case of non-mortgaged property would be under section 284 of the Code of Civil Procedure, 1882. It was one to enforce a decree from which a further application can count for the purpose of the Limitation Act. In this case the date from which limitation was to be reckoned was the date of the final order or decree of the appellate court, which was the date of the order of the Privy Council dismissing the appeal for want of prosecution, that was the 13th of May, 1901. [*Lowndes* referred to *Stirling* on Limitation

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(5th edition, 1911), page 509, where it is said that where an appeal is not prosecuted, owing to its being struck off, or withdrawn *without being heard*, the date of the decree for the purpose of limitation was the date of the decree from which the appeal was brought]. If a decree after the dismissal of an appeal for any reason needs amendment, the application to amend it must be made to the Appellate Court, the decree of the Appellate Court being the final order. Reference was made to *Gobardhan Das v. Gopal Ram* (1); *Kisto Kinkur Roy v. Burrodacaunt Roy* (2); *Naurang Rai v. Latif Chaudhri* (3); *Shivlal Kalidas v. Jumaklal Nathji Desai* (4); *Nauchand v. Vithu* (5); *Beni Rai v. Ram Laxhan Rai* (6) which was the case of a decree of the High Court dismissing an appeal for non-prosecution, *Lachman Persad Singh v. Kishun Persad Singh* (7), the decision of a Full Bench; and *Tasaddug Rasul Khan v. Manik Chand* (8) which shows the decree of "appeal dismissed" is an affirmation of the decree appealed from, although precisely the same reasons may not be given. No express period of limitation was prescribed by the Limitation Act for an application for a decree absolute for sale under section 89 of the Transfer of Property Act (IV of 1882). To this case the article of schedule II of the Limitation Act, 1877, applicable was article 180 which allows a period of twelve years limitation, and limitation ran from the 13th of May, 1901. It was submitted therefore that the decisions of the courts below were right, and the application was not barred by limitation.

The appellants were not called upon to reply.

1914, April 7th:—The judgement of their Lordships was delivered by Lord MOULTON:—

In this case the relevant facts necessary and sufficient to determine their Lordships' decision on the appeal are very simple and are undisputed.

The appellants are in the position of mortgagor and the respondents of mortgagees under a mortgage, dated the 3rd of September,

(1) (1885) I. L. R., 7 All., 366.

(5) (1894) I. L. R., 19 Bom., 258.

(2) (1872) 14 Moo. I. A., 465 (488,

(6) (1898) I. L. R., 20 All., 367.

489): 10 B. L. R., 101 (112).

(3) (1891) I. L. R., 13 All., 394.

(7) (1882) I. L. R., 8 Calc., 218.

(4) (1893) I. L. R., 13 Bom., 542.

(8) (1902) I. L. R., 25 All., 109; I. L. R., 30 I. A., 85.

1868. In 1889 a suit was commenced before the Subordinate Judge of Allahabad to enforce that mortgage, and on the 12th of May, 1890, a decree was passed by him for the sale of the property unless payment was made on or before the 12th of August, 1890. An appeal was brought from that decree to the High Court, and, on the 8th of April, 1893, that appeal was dismissed and the decree of the Subordinate Judge confirmed. The mortgagor obtained leave to appeal to this Board, but did not prosecute his appeal, and on the 13th of May, 1901, the appeal was dismissed for want of prosecution.

The present appeal relates to an application to the Subordinate Judge, dated the 11th of June, 1909, for an order absolute to sell the mortgaged properties; in other words, for an order directing enforcement of the order *nisi* which had been confirmed by the decision of the High Court of the 8th of April, 1893. It is not necessary to go into the particulars of this application because their Lordships are of opinion that any such application was barred by the Statute of Limitation, article 179, at the expiry of three years from the date of the decree, and therefore before the passing of the Code of Civil Procedure of 1908 under which the present proceedings purported to be taken, and their Lordships have no doubt whatever that, inasmuch as the right to enforce the decree had once been barred, no provisions of the Code of Civil Procedure, 1908, operate to revive it.

The chief matter of argument before this Board was a contention that the decree which it is sought to enforce had been constructively turned into a decree of His Majesty in Council and assigned to the date of the 13th of May, 1901, by virtue of the dismissal of the appeal for want of prosecution on that date, and that therefore the period of limitation was twelve years from the 13th of May, 1901, by virtue of article 180 of the Indian Limitation Act. Their Lordships see no foundation for this contention, which appears to have been the basis of the decision of the Courts below. 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 confirming the decision appealed from. It merely recognized authoritatively that the appellant had not complied with the conditions under which the appeal was open

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to him, and that therefore he was in the same position as if he had not appealed at all. To put it shortly, the only decree for sale that exists is the decree, dated the 8th of April, 1893, and that is a decree of the High Court of Allahabad. The operation of this decree has never been stayed, and there is no decree of His Majesty in Council in which it has become merged. The period of limitation applying to the enforcement of it at all material times was therefore a period of three years. The respondents' right is therefore barred by limitation

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, and that the application of the 11th of June, 1909, should be dismissed and that the respondents should pay the costs of that application and of the appeal to the High Court as well as of this appeal.

*Appeal allowed.*

Solicitor for the appellant :—*Douglas Grant.*

Solicitors for the respondent Jawahir Lal :—*Barrow, Rogers and Nevill.*

J. V. W.

## REVISIONAL CIVIL.

1914

March, 31.

*Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.*

OHATARBHUI (PLAINTIFF) v. RAGHUBAR DAYAL (DEFENDANT).

*Arbitration—Jurisdiction—Power of court to supersede an arbitration proceeding under its orders before submission of award—Revision—Civil Procedure Code (1908), section 115 ; schedule II, paragraph 15.*

*Seemle* that the intention of the second schedule to the Code of Civil Procedure is that when once a reference to arbitration has been made under the orders of the court that reference should only be superseded for one of the reasons given in the schedule itself, and that allegations of corruption against the arbitrator should be dealt with under paragraph 15, after the award has been received.

Even if a civil court possesses inherent jurisdiction to supersede an arbitration proceeding under its orders, such jurisdiction should be cautiously and sparingly exercised, and an application invoking such jurisdiction should at least suggest grounds for supposing that the applicant will suffer some irreparable injury if prompt action is not taken. The High Court can interfere in revision when the inherent jurisdiction of a court is exercised wrongly and with material irregularity. *Atlas Assurance Company v. Ahmedbhoj Habibbhoj* (1) not followed.

\* Civil Revision No. 89 of 1913.

(1) (1901) I.L.R., 34 Bom., 1.