1923.

MAHARAJ KUMAR JAGAT MOHAN NATH SAH DEO v. JAIPAL SINGH.

DAS, J.

Tenancy Act there is no provision requiring the Court to assess the value of the property sought to be sold. It is quite true that there are no rules in the Chota Nagpur Tenancy Act which require the parties to assess the value of the property sought to be sold; but the value was undoubtedly given by the decree-holder with the result that the property, which was of very great value, has been sold for an insignificant sum of money.

In these circumstances I am of opinion that the order of the learned Judicial Commissioner should be affirmed

I would accordingly dismiss these appeals with one set of costs.

ROSS, J.—I agree.

Appeals dismissed.

APPELLATE CIVIL.

Before Jwala Prasad and Kulwant Sahay, J.J.

SOMAR SINGH

v.

MUSSAMMAT PREMDEI.*

1924.

January 4.

Limitation Act (Act IX of 1908), Article 182(2)—Execution of decree—decree against several defendants—appeal by some defendants—decree set aside—appeal to Privy Council by plaintiffs—decree restored—Civil Procedure Code, Order XLI, rule 33.

In a contribution suit a decree was passed against three different sets of defendants making them liable for different sums of money, and only one set appealed to the High Court while the others did not appeal. The High Court decided the case after the period of limitation for execution of the decree had expired, allowed the appeal and dismissed the entire suit of the plaintiffs. The plaintiffs appealed to His Majesty in Council and obtained an order restoring the original decree. In an application for execution of the order of His

*Appeals from Original Orders Nos. 68 and 74 of 1923 from an order of Maulavi Ghalib Husnain, Subordinate Judge, 2nd Court, Patna, dated the 10th March, 1923.

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Majesty-in-Council against all the defendants it was objected by those defendants who had not appealed to the High Court that execution of the decree as against them was barred by limitation. *Held*, that the period of limitation for execution of the decree should be computed from the date of the Order-in-Council and not from the date of the original decree and that the application was therefore within time.

Held, also, that no court can go behind an order, whether right or wrong, passed by His Majesty-in-Council, and the only duty of the courts in India is to give effect to the order in question and to carry the same into execution.

Premlall Mullick v. *Sumbhonath Roy*(1), approved.

Gopal Chunder Manna v. *Gogain Das Kalay*(2) *and Kristnama Chariar* v. *Mangammal*(3), followed.

Raghunath Pershad v. *Abdul Hye*(4), *Christiana Sens Law* v. *Benarashi Proshad Chowdhury*(5), *Badunnissa* v. *Shamsuddin*(6), *Mashiatunnissa* v. *Rani*(7), *and Ganga Kuar* v. *Kesar Kuar*(8), referred to.

Miscellaneous Appeal No. 68 was by defendants Nos. 2 and 5 to 8; and Miscellaneous Appeal No. 74 was by defendants Nos. 4, 9 to 11. The defendants 1 and 3 were not parties to these appeals.

The respondents obtained a decree against the eleven defendants in a suit for contribution. The decree was passed on the 6th May, 1910, for Rs. 10,672-2-0 on account of principal and Rs. 1,104-12-0 on account of interest, making a total of Rs. 11,776-14-0. The liabilities of the defendants were split up and incorporated in the decree by an order amending the decree, dated the 30th July, 1910. The defendants 1 and 3 were made liable for Rs. 3,925-10-4; defendants 2 and 5 to 8 for Rs. 3,925-10-4 and defendants 4 and 9 to 11 for Rs. 3,925-10-4.

Against this decree the defendants 1 and 3 appealed to the High Court of Calcutta on the 19th

(1) (1895) I. L. R. 22 Cal. 960(971-72).
(2) (1898) I. L. R. 25 Cal. 594, F.B.
(3) (1903) I. L. R. 26 Mad. 91.
(4) (1887) I. L. R. 14 Cal. 26.
(5) (1914-15) 19 Cal. W. N. 287.
(6) (1895) I. L. R. 17 All. 103.
(7) (1891) I. L. R. 13 All. 1, F.B.
(8) (1904) 1 All. L. J. 109.

December, 1910. The plaintiff and the remaining defendants, who were appellants in the present appeal, were impleaded as respondents in that appeal. The plaintiffs preferred a cross-objection against a part of the decree whereby their claim was reduced. They had claimed Rs. 15,960-6-9 on account of principal and interest; their claim was reduced by about Rs. 5,000. The High Court of Calcutta by its judgment, dated the 19th January, 1915, dismissed the entire claim of the plaintiff; their cross-appeal also failed.

The parties to the litigation, both the plaintiff and the defendants, were members of a joint *Mitakshara* family, and the claim of the plaintiff was based upon an *ekrarnamah*, dated the 13th August, 1907, whereby the rights of the plaintiff and the defendants, or their respective predecessors, as between themselves were settled. The High Court held that the claim of the plaintiffs to contribution was barred and that the plaintiffs had failed to show that the monies borrowed from one Ganga Prasad, which formed the subject-matter of the litigation, were used to pay off the joint debts.

The plaintiffs appealed to His Majesty in Council, and the decision of the High Court was set aside by the Order of His Majesty in Council, dated the 21st December, 1920. The operating portion of that Order was as follows:

> (1) that this appeal ought to be allowed, the decree of the High Court of Judicature at Fort William in Bengal dated the 19th day of January 1915 set aside without costs and the decree of the Court of the Subordinate Judge of Patna dated the 6th day of May 1910 restored and (2) that there ought to be no costs of this appeal."

On the 27th April, 1921, the High Court directed the decree of His Majesty in Council to be sent down to the lower Court for execution. Thereupon the decree-holder, on the 3rd August, 1922, presented an application in the Court of the Subordinate Judge of Patna for executing the decree of His Majesty in Council against all the defendants.

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There were three sets of objections filed against the execution of the decree by the three sets of judgment-debtors, respectively. These objections were over-ruled by the Subordinate Judge by his order, dated the 10th March, 1923. The defendants 1 and 3 did not challenge the order of the Subordinate Judge. The other sets of defendants appealed to the High Court. Their petition in the Court below raised various objections; but in the present appeal the only objection pressed was that the execution of the decree was barred by limitation. This objection was common to both the appeals.

Hasan Imam (with him *Atul Krishna Roy*), for the appellants: As I did not appeal to the High Court, the suit was not set aside at my instance. The decree against me ought to have been executed within three years of its date. The Privy Council restored only that much of the original decree which was not dead, as it could not revive a dead decree, inasmuch as the original decree was divisible. I rely on *Raghunath Pershad* v. *Abdul Hye* (1), *Christiana Sens Law* v. *Benarashi Proshad Chowdhury* (2) and *Dhirendra Nath Sarkar* v. *Nischintapore Company* (3).

K. P. Jayaswal, for the respondent: The appellant's contention is that the decree of the Subordinate Judge is barred by limitation. But it is the decree of the Privy Council that is sought to be executed. The appellants were parties in the Privy Council, so they are bound by the decree. I submit that no Court can go behind the decree of the Privy Council which I am really executing. In the cross-appeal they were all parties, and so even if they withdrew the appeal, I had a substantive right to go on with my cross-appeal. Article 182 (2) should be considered with Order XLI, rule 33. There are two Full Bench cases which say that Article 182 (2) cannot be narrowed down and that it will save limitation with respect to the whole of the decree. The

(1) (1887) I. L. R. 14 Cal. 26. (2) (1914-15) 19 Cal. W. N. 287.
(3) (1917-18) 22 Cal. W. N. 192.

Full Bench cases are *Kristnama Chariar* v. *Mangammal* (1) and *Gopal Chunder Manna* v. *Gosain Das Kalay*(2). Article 182(2) must be read to coincide with Order XLI, rule 33. Since the decision of these Full Bench cases the new Civil Procedure Code (Order XLI, rule 33) came in force which fact makes the argument all the more strong. In *Gopal Chunder Manna* v. *Gosain Das Kalay* (3) their Lordships observe ".....and this to my mind is a clear indication that the legislature intended that time should run from the date of the final decree of the Appellate Court where there has been an appeal irrespective of the question whether the appeal related to the whole decree or not." There is no such distinction as "separate" or "joint" decree in Order XLI. rule 33. I also rely on *Abdul Rahiman* v. *Maidin Saiba* (4) and *Jagat Mohan Dasi* v. *Mohamad Ibrahim Hussain Khan* (5). *Raghunath Prasad* v. *Abdul Hye* (6), cited by Mr. *Hasan Imam*, is overruled.

Atul Krishna Roy, in reply: *Gopal Chunder Manna* v. *Gosain Das Kalay* (3) is distinguishable. There the decree was joint, so there is the distinction of "separate" and "joint" decree. *Kristnama Chariar* v. *Mangammal* (1) also relates to joint decrees.

I rely on *Christiana Sens Law* v. *Benarashi Proshad Chowdhury* (7) and *Ganga Kuar* v. *Kesar Kuar* (8). *Raghunath Prasad* v. *Abdul Hye* (6) is only distinguished and not overruled by *Christiana Sens Law* v. *Benarashi Proshad Chowdhury* (7).

S. A. K.

JWALA PRASAD, J. (after stating the facts, set out above, proceeded as follows) :—

The objection is common to both the appeals, and consequently one judgment will be sufficient to dispose of both of them.

(1) (1903) I. L. R. 26 Mad. 91, F.B.
(2) (1898) I. L. R. 25 Cal. 594, F.B.
(3) (1898) I. L. R. 25 Cal. 594(599), F.B
(4) (1898) I. L. R. 22 Bom. 500.
(5) (1917) 37 Ind. Cas. 883.
(6) (1887) I. L. R. 14 Cal. 26.
(7) (1914-15) 19 Cal. W. N. 287.
(8) (1904) 1 All. L. J. 409.

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The objection is a short one. It is said that the decree of the Subordinate Judge was passed on the 6th May, 1910, declaring separate liabilities of these appellants in the two cases, *viz.*, Rs. 3,925-10-4 to be paid to the plaintiff by each set of defendants; that these sets of defendants had not preferred any appeal to the High Court and the separate decrees against them embodied in one decree of the Court below became final; that the execution of the portions of the decree against these sets of defendants should have been levied within three years of the 6th of May, 1910, the date of the decree, and that no execution was levied nor was any step taken to advance execution of the decree against these appellants. Hence it is urged that the decree against them became barred by lapse of time long before the 19th July, 1915, when the High Court dismissed the plaintiff's claim, and that the Order of His Majesty in Council simply restores the decree of the Subordinate Judge and the execution is virtually in respect of the decree passed by the Subordinate Judge and the effect of the Order of His Majesty in Council is to revive the decree which, as stated above, was long before barred. Now, it has not been disputed in this Court that the respondents are executing only the Order of His Majesty in Council and that that order fastens the liability of the claim of the plaintiff on all the defendants, including the appellants before us; but it is said that it could not have been contemplated nor could it be the result of the Order of His Majesty in Council to revive the decree of the Subordinate Judge which was barred as against these defendants, the appellants before us. It appears to me that we are not competent, nor was the Subordinate Judge competent, who was executing the decree in question, to go behind the order passed by His Majesty in Council. That order may be right or wrong; but we have to take it as it is, and the only duty of the Courts in India is to give effect to the order in question and, as stated in the concluding portion of the order, to punctually observe, obey and carry the same into execution. The grievance of the appellants, if any,

could be rectified by His Majesty in Council alone, and the remedy as recommended in the case of *Premlall Mullick* v. *Sumbhoonath Roy* (1) was to approach His Majesty in Council and to get the mistake, if any, rectified. This course has not been so far adopted, and the Order of His Majesty in Council remains unimpeachable. The appellants were impleaded as respondents in the appeal before His Majesty in Council and it was their duty to urge before His Majesty in Council to absolve them from the liability of the decree of the Subordinate Judge upon the ground that it was barred by limitation. That decree was challenged in appeal by defendants Nos. 1 and 3; in that appeal the present appellants were also impleaded as parties and were made respondents. The plaintiff preferred cross-objection to the decree and prayed that the entire claim should have been decreed against all the defendants and that the Subordinate Judge was wrong in modifying the claim and reducing the same. In this way the whole suit of the plaintiff was involved in the appeal. The plaintiffs did not accept the decree of the Subordinate Judge as a final decree and therefore were not bound to enforce it. They wanted their whole claim and until that was determined in the appeal in the High Court of Calcutta they were not at all required to execute the decree in question.

I have already briefly set out the scope of the suit and the point involved in the appeal in the High Court. The entire suit was based upon an *ekrarnamah* or certain dealings which the plaintiffs alleged were binding upon all the defendants as members of a joint *Mitakshara* family. The foundation of the liability might have been different, and in the appeal the foundation of the plaintiff's claim was involved. That was the scope of the appeal, and the result confirms the view, for upon the hearing of the appeal their Lordships of the Calcutta High Court did not confine themselves to the decree passed against defendants Nos. 1

(1) (1895) I. L. R. 22 Cal. 960 (971, 972).

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and 3, but dismissed the entire claim of the plaintiff. This, to my mind, arose upon the particular facts of the case and upon the appeal and the cross-appeal before the High Court and upon the fact that all the contending parties were before the Court either as appellants or as respondents. Therefore, as a matter of fact, the whole decree was before the Court and the finality of it was not determined until the appeal was disposed of. Apart from this, the High Court had full seizin of the appeal, and under Order XLI, rule 33, of the Civil Procedure Code, it had full power to pass such decree, in favour of all or any of the respondents or parties whether they were actually before the Court or not, as the justice of the case required. This provision in the Code is new, but it has given effect to the principles from time to time enunciated by learned Judges in dealing with cases that came before them where they found that it was their incumbent duty as a Court of Appeal to do full justice to the case and to the parties involved in the case—whether all of them were before the Court or not. Therefore the plaintiffs were not required to execute the decree before it became final: in other words, before the appeal in the High Court was determined. After the High Court of Calcutta dismissed the appeal, the plaintiffs had no decree in their favour to execute until His Majesty in Council upheld their claim.

The learned Counsel on behalf of the appellants has cited a number of authorities in support of the provision that the Subordinate Judge's decree against the present appellants could be executed inasmuch as their liabilities under the decree were specified: *Ganga Kuar* v. *Kesar Kuar* (1), *Mashiat-un-nissa* v. *Rani* (2), *Raghunath Pershad* v. *Abdul Hye* (3), *Christiana Sens Law* v. *Benarashi Proshad Chowdhury* (4) and *Dhirendra Nath Sarkar* v. *Nischintapore Company* (5).

(1) (1904) 1 All. L. J. 409.
(2) (1889) I. L. R. 13 All. 1, F.B.
(3) (1886) I. L. R. 14 Cal. 26.
(4) (1914-15) 19 Cal. W. N. 287.
(5) (1916-17) 22 Cal. W. N. 192

The earliest case of Allahabad was *Mashiat-un-nissa* v. *Rani* (1) in which two learned Judges (Broadhurst and Mahmood, J.J.) took a different view. The other case, *Ganga Kuar* v. *Kesar Kuar* (2), was a decision by Knox, J., who, while he felt that there was a sharp difference of opinion upon the question, thought that he was bound by the decision in *Mashiat-un-nissa* v. *Rani* (1). He does not give any reason of his own to support his view. On the other hand, a Division Bench of the same Court in *Badi-un-nissa* v. *Shamsuddin* (3) distinguished those cases upon the ground that all the parties were not impleaded in the appeal in those cases. Sir John Edge, C.J., referring to those cases says, " but in these cases all the parties to the suit were not parties to the various appeals from the decree in the suit." In the case decided by Sir John Edge, C.J., the decrees passed in favour of the plaintiff in respect of the pre-emption with respect to two of the villages were no longer involved in the subsequent appeals up to the High Court by the plaintiff with respect to two other villages, yet it was held that the execution to enforce the decree with respect to the first two villages was not barred, inasmuch as the decree did not become final until the appellate decree of the High Court was passed. This case is indistinguishable from the present one and the learned Counsel for the appellants concedes that. The case of *Raghunath Pershad* v. *Abdul Hye* (4) was distinguished, if not overruled, in the Full Bench case of *Gopal Chunder Manna* v. *Gosain Das Kalay* (5). The case of *Christiana Sens Law* v. *Benarashi Proshad Chowdhury* (6) was similarly distinguished in *Satish Chandra Chaudhuri* v. *Girish Chandra Chakravarty* (7).

The case of *Kristnama Chariar* v. *Mangammal* (8) dealt with all the cases, and upon a review of them and of the law on the subject distinctly came to the conclusion that a decree is not barred even with respect

(1) (1889) I. L. R. 13 All. 1.
(2) (1904) 1 All. L. J. 409.
(3) (1895) I. L. R. 17 All. 103.
(4) (1886) I. L. R. 14 Cal. 26.
(5) (1898) I. L. R. 25 Cal. 594, F.B.
(6) (1914-15) 19 Cal. W. N. 287.
(7) (1920) I. L. R. 47 Cal. 813.
(8) (1902) I. L. R. 26 Mad. 91, F.B.

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to the portion against which no appeal had been preferred until the appeal against the other portion of the decree is finally determined.

The Full Bench cases of *Gopal Chunder Manna* v. *Gosain Das Kalay* (1) and *Kristnama Chariar* v. *Mangammal* (2) were based upon Article 179 of the old Limitation Act but shortly before the present Limitation Act was passed in 1908, and most of the reasonings advanced there would seem to anticipate the law as at present stands embodied in the new Code of Civil Procedure and the Limitation Act, both of which were passed in the year 1908. Rule 33 of Order XLI of the new Code, as observed above, enables the appellate Court to deal with the entire decree although the appeal may be as to a part of the decree, and also to give direction in favour of parties who have actually not filed any appeal or objection. In this way under the present Code of Civil Procedure in an appeal from a part of the decree by some of the parties the entire decree becomes the subject-matter of the appeal. Article 182, clause (*2*). "the date of the final decree or order of the Appellate Court, or the withdrawal of the appeal" would seem to apply where there has been an appeal from a part or whole of the decree, or only when some of the parties to the suit have brought the appeal. It does not in any way qualify or restrict the final decree or order as is sought for by the appellants. The case of *Ranjit Prasad Tewari* v. *Ramjatan Pandey* (3) will to some extent also support the view.

It would thus appear that the plaintiff's right to execute the decree is not at all barred.

The view taken by the learned Subordinate Judge is therefore correct, and we dismiss the appeal with costs.

KULWANT SAHAY, J.—I agree.

Appeal dismissed.

(1) (1898) I. L. R. 25 Cal. 594, F.B.

(2) (1902) I. L. R. 26 Mad. 91, F.B.

(3) (1917) 37 Ind. Cas. 835; 1 Pat. L. W. 389.