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MAHARAJA PRATAP UDAI NATH SAHI DEO v. MAHABIR SAHU.

KULWANT SAHAY, J.

created by him. This decision of the Calcutta High Court has been expressly dissented from by a Full Bench of this Court in *Sheoraji Kuer* v. *Dhani Mian* (1).

As regards the finding of the learned Judicial Commissioner that the evidence on the record showed that there was no abandonment by the original tenant, that is a finding on a question of fact which is not open to us to interfere with in second appeal. But as I have said this question does not properly arise in view of the interpretation placed on section 10(*b*) of the Chota Nagpur Tenancy Act of 1879 and upon that interpretation the plaintiffs are not entitled to a decree.

The result is that the appeal will be allowed and the suit dismissed with costs.

Ross, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Das and Ross, J.J.

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June, 2.

HIA LAL KUMAR

v.

GENU MAHTO.*

Limitation Act, 1908 (*Act IX of* 1908), *Schedule I, Article* 182(2), *applicability of—Appeal, abatement of—application for execution—Limitation*—terminus a quo.

Where an appeal against one of the respondents had abated and a consent decree was passed in favour of the remaining respondents and the legal representatives of the deceased respondent applied for the execution of the decree within three years from the appellate Court's decree,

held, that the fact that the appellants allowed their appeal to abate against the deceased respondent could not

* Appeal from Original Order no. 249 of 1924, from an order of M. Wali Muhammad, Subordinate Judge of Bhagalpur, dated the 25th August, 1924.

(1) (1924) I. L. R. 3 Pat. 1.

prevent the latter's legal representatives from taking the benefit of the appellate Court decree, and limitation ran under Article 182(2) from the date of the decree of the Court of appeal.

Shivram Dhondu Pujara v. *Sakharam Krishna Kulkarni* (1), followed. *Tikait Krishna Prasad Singh* v. *Raja Wazir Narain Singh* (2), *Abdul Majid* v. *Jawahir Lal* (3) and *Batuk Nath* v. *Muni* (4), distinguished.

held, further, that there is no distinction in principle and there ought to be no difference in the result, for the purpose of Article 182(2), when the appellant instead of withdrawing from the appeal allows it to abate.

Raghu Prasad Singh v. *Jadunandan Prasad Singh* (5), applied.

Appeal by the decree-holders.

On the 10th of September, 1919, a decree was passed in a suit instituted by Nasib Kumar and his sons and grandsons Hia Lal Kumar, Thakur Prasad Kumar and Thitar Kumar and by Kare Prasad Kumar against the defendants nos. 1 to 7 and 8 who were represented by the respondents to this appeal. That decree ordered that the plaintiffs do get Rs. 3,735-8-6 and proportionate costs from defendants nos. 1 to 7 and Rs. 1,678-12-0 and proportionate costs from defendant no. 8, the amount of the decree to carry interest at six *per cent. per annum* from the date of the decree until realization. The defendants appealed on the 5th of January, 1920, to the High Court against that decree. During the pendency of the appeal, on the 22nd of February, 1921, Kare Prasad Kumar died No substitution of his legal representatives was made and the appeal against him abated. The decree was a decree in favour of the plaintiffs jointly. When the appeal came to be heard a sworn petition was filed in the High Court by the appellants stating that they had settled out of Court

(1) (1909) I. L. R. 33 Bom. 39. (3) (1914) I. L. R. 36 All. 350, P. C.
(2) (1920) 5 Pat. L. J. 731. (4) (1914) I. L. R. 36 All. 284, P. C.
(5) (1921) 6 Pat. L. J. 27.

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the dispute with the heirs of Kare Prasad Kumar whose share in the decree had already been paid by means of a registered bond, dated the 18th of January, 1922. In the judgment of the High Court it was stated that two questions arose in the case: first, whether the abatement of the appeal as against the respondent no. 4 (that is, Kare Prasad Kumar) had caused the abatement of the entire appeal by reason of the decree being a joint one; and, secondly, what was the effect of the payment out of Court of a portion of the decree said to represent the share of Kare Prasad Kumar which had not been certified in the Court below. Their Lordships held that, assuming that these two points were decided against the appellants, the respondents nos. 1 to 3 would be entitled to execute the entire decree which amounted to Rs. 6,433 against both sets of appellants and complications would certainly arise in the course of execution as to the effect of the payment made to one of the joint decree-holders. In order to avoid these complications the parties had settled their difference and a consent decree was passed to the effect that the decree of the Court below be reduced to Rs. 3,550 payable by the appellants to the respondents nos. 1 to 3 for principal and costs out of which appellants nos. 1 to 9 would be liable for Rs. 2,415 and the appellant no. 10 for Rs. 1,135. These sums were to carry interest at the rate of six *per cent. per annum*. This decree was dated the 3rd of January, 1923. On the 3rd of January, 1924, an application was made by Hia Lal Kumar, Thakur Prasad Kumar and Thitar Kumar and by the sons of Kare Prasad Kumar for execution. The application stated the date of the decree passed by the Court of first instance to be the 10th of September, 1919, and the 3rd of January, 1923, the date of the decree of the appellate Court. The amount claimed was Rs. 8,584-5-0. The account stated in the application contained first an item of Rs. 3,735-8-6 with costs and interest amounting in all to Rs. 5,305-0-9. From this was deducted Rs. 2,415 as payable to the

plaintiffs nos. 3, 4 and 5. On the balance interest was calculated from the date of the High Court decree giving a total of Rs. 3,063-6-3 as the share of the sons of Kare Prasad Kumar. The share of the representatives of Nasib Kumar was stated as in the High Court decree to be Rs. 2,415 and on this sum interest was calculated. These were the amounts due by the defendants nos. 1 to 9. The amounts due by the defendant no. 10 to the sons of Kare Prasad Kumar and to the representatives of Nasib Kumar were similarly calculated and the total already stated was arrived at.

Two objections were taken by the judgment-debtors to this application for execution: first, that the application was not maintainable in its present form; and, secondly, that as regards the representatives of Kare Prasad Kumar, it was barred by time. The Subordinate Judge gave effect to both of these objections and dismissed the petition. The decree-holders appealed and on behalf of the respondents the same points were urged.

S. N. Palit and *S. M. Mullick*, for the appellants.

K. B. Dutt (with him *S. P. Sinha*) for the respondents.

Ross, J. (after stating the facts set out above, proceeded as follows): With regard to the maintainability of the application it seems to me that if the contention of the appellants on the question of limitation is sound, there can be no objection to the form of the application. If time runs against the representatives of Kare Prasad Kumar from the date of the appellate decree then, as the appeal had abated against them, the only decree which they can execute is the decree of the original Court, while it is evident that the representatives of Nasib Kumar are bound by the consent order passed by the High Court and the only decree that they can execute is the decree of the High Court. It should be stated that the

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settlement out of Court which was alleged at the hearing of the appeal in the High Court was untrue and has been disbelieved by the Subordinate Judge. If that misrepresentation had not been made, it is quite clear that the appeal to the High Court must have been dismissed because the decree was a joint decree and as the appeal had abated against one of the decree-holders it had abated against all. It was in view of that misrepresentation, which was accepted as a true statement of fact, that the High Court passed the decree by consent. The rights of the parties having been adjusted in that way, it seems to me that the account stated in the application for execution has been stated in the only possible way and the application is maintainable.

The principal question in the appeal, however, is the question of limitation. The learned Advocate for the appellants relies on the language of Article 182 of the first schedule to the Limitation Act which lays down the period of limitation as three years, where there has been an appeal " from the date of the final decree or order of the appellate Court, or the withdrawal of the appeal ". The contention is simply that the present case falls within these words because there has been a final decree of the appellate Court, and that the present application, though beyond three years from the date of the decree of the original Court, is within three years from the date of the final decree of the appellate Court. So far as the representatives of Nasib Kumar, who were parties to the appeal, are concerned, there can be no question of limitation as against them; and the only question is as to the representatives of Kare Prasad Kumar who seek to execute the decree of the original Court, but claim the benefit of the date of the decree of the Court of appeal. The contention on behalf of the respondents is that as the appeal had abated so far as Kare Prasad Kumar was concerned, there was no final decree or order of the appellate Court and therefore the decree of the appellate Court is not

material in the case of his representatives. Reliance is placed on the decision of this Court in *Tikait Krishna Prasad Singh* v. *Raja Wazir Narain Singh*(1) where it was held that Article 182(2) does not apply where a decree has abated by operation of law. On the other hand, in *Shivram Dhonda Pujara* v. *Sakharam Krishna Kulkarni*(2) it was held that where some of the parties to a decree appealed against it, the decree in appeal is the final decree for the purpose of the execution with respect to all the parties. In that case it was argued for those who opposed the application for execution that the words of clause (2) in the third column of Article 182 should not be taken literally and that as the opponents did not appeal against the original decree although the other defendants did, the date of the final decree of the appellate Court which was passed within three years from the initiation of the proceedings was a date which did not concern the opponents as the original decree, which was final so far as they were concerned, was passed more than three years before. Their Lordships overruled this contention holding that they could not disregard the plain words of clause (2). "There was an appeal and the final decree of the appellate Court was passed less than three years before the plaintiffs' application, and that application was therefore within time." I do not myself see how the fact that the respondents allowed their appeal against Kare Prasad Kumar to abate can prevent the representatives of Kare Prasad Kumar from taking the benefit of the date of the appellate Court decree. The facts in *Tikait Krishna Prasad Singh* v. *Raja Wazir Narain Singh* (1) were very peculiar. Wazir Narain Singh who was seeking to execute the decree had been a party neither to the original nor to the appellate decree, and his position was therefore different from that of the representatives of Kare Prasad Kumar in the present case. It was held that Wazir Narain Singh could not execute

(1) (1920) 5 Pat. L. J. 731. (2) (1903) I. L. R. 33 Bom. 39.

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the original decree; and, as he had not been a party to the appellate decree, he could not execute that either. The observations of their Lordships on the effect of abatement must therefore be treated as unnecessary to the decision of the case; and, in view of the plain words of clause (2) of Article 182 and of the decision above referred to in *Shivram* v. *Sakharam*(1), I am of opinion that time runs against the representatives of Kare Prasad Kumar from the date of the decree of the Court of appeal and their application is therefore not barred by time. That the decisions of the Privy Council in *Abdul Majid* v. *Jawahir Lal*(2) and *Batuk Nath* v. *Muni*(3) have no application to the present question is clear from the discussion of these decisions in *Raghu Prasad Singh* v. *Jadunandan Prasad Singh*(4). The decision in the last-mentioned case does not apply precisely to the present question, because there the appeal had been dismissed for non-payment of printing costs and there had been an order of dismissal passed by the High Court; whereas in a case of abatement no order is made. But on principle the decision does apply where their Lordships observed: "It would be a strange thing if the period of limitation were to be revived where the appellant withdraws his appeal and yet it were not to be revived in cases where the appellant instead of withdrawing his appeal allowed the appeal to be dismissed by default." The same anomaly would arise if the period of limitation were not revived where the appellant instead of withdrawing the appeal allowed it to abate. There is no distinction in principle and there ought to be no difference in the result. In the present case the judgment-debtors got a consent decree in appeal against some of the decree-holders on the allegation of a settlement out of Court by the other decree-holders against whom the appeal

(1) (1903) I. L. R. 33 Bom. 89.
(2) (1914) I. L. R. 36 All. 350, P. C.
(3) (1914) I. L. R. 36 All. 284, P. C.
(4) (1921) 6 Pat. L. J. 27.

had abated. The whole case was essentially a single case and the consent decree rested on this allegation. It seems to me impossible to deprive the representatives of Kare Prasad Kumar of the benefit of the date of this decree in calculating the period of limitation as against them.

I would, therefore, allow this appeal with costs, set aside the order of the Subordinate Judge and direct that the execution do proceed.

ROSS, J.

DAS, J.—I agree.

Appeal allowed.