APPELLATE CIVIL.

Before James and Rowland, JJ.

1939.

February, 10, 13.

MUSAMMAT DULHIN

v.

MAHANTH HARIHAR GIR.*

Code of Civil Procedure, 1908 (Act V of 1908), section 48—"decree sought to be executed", meaning of—Limitation Act, 1908 (Act IX of 1908), article 182(4)—section 48 of the Code, whether affected by article 182(4)—amendment of decree—period of twelve years under section 48, whether is to be calculated from the date of amended decree.

Section 48, Code of Civil Procedure, 1908, is not controlled by the provisions of Article 182(4) of the Limitation Act, 1908, and, therefore, the amendment of a decree does not afford a new starting point for limitation so as to extend the period of twelve years fixed by section 48.

Faqir Chand v. *Kundan Singh*(1), *Ganesh Das* v. *Vishan Das*(2), *Narsingrao Konher Inamdar* v. *Bando Krishna Kulkarni*(3), *Narendra Bahadur Singh* v. *Oudh Commercial Bank, Ltd.*(4) and *Khulna Loan Co.* v. *Jnanendra Nath Bose*(5), followed.

Baldeo Shukul v. *Syed Yusuf*(6), not followed.

Ram Ranbijaya Prasad Singh v. *Kesho Prasad Singh*(7) and *Muhammad Suleman Khan* v. *Muhammad Yar Khan*(8), distinguished.

Appeal by the decree-holders.

The facts of the case material to this report are set out in the judgment of Rowland, J.

* Appeal from Original Order no. 302 of 1937, from an order of Babu Jugal Kishore Narayan, Subordinate Judge of Gaya, dated the 16th August, 1937.

(1) (1932) I. L. R. 54 All. 622.
(2) (1935) A. I. R. (Lah.) 292.
(3) (1918) I. L. R. 42 Bom. 309.
(4) (1934) I. L. R. 10 Luck. 208.
(5) (1917) 22 Cal. W. N. 145, P. C.
(6) (1921) 60 Ind. Cas. 318.
(7) (1938) 19 Pat. L. T. 424.
(8) (1894) I. L. R. 17 All. 39.

1939.

MUSAMMAT DULHIN v. MAHANTH HARIHAR GIR.

Sir Sultan Ahmed and *Syed Hasan*, for the appellant.

Sir M. N. Mukherji (with him *P. C. Manuk*, *Sarjoo Prasad*, *Rai G. S. Prasad*, *Rai Paras Nath*, *R. J. Bahadur*, *G. C. Das* and *N. K. Prasad II*), for the respondents.

ROWLAND, J.—The only point for decision is whether as held by the Subordinate Judge the application presented to him for execution of a mortgage decree by sale of the mortgaged properties was barred by time. The Subordinate Judge was of opinion that section 48 of the Code of Civil Procedure was a bar. The plaintiff (now decree-holder) had sued on three mortgage bonds and obtained a preliminary decree dated 23rd June, 1922, for approximately Rs. 42,000. The decree mentioned as usual a period of grace which having expired the decree-holder applied for and obtained a decree absolute for sale dated the 19th December, 1923. He applied to execute this decree on 16th August, 1926, and was met by an objection on behalf of some of the judgment-debtors that the decree in the form in which it had been drawn was not executable because the debts due on the three mortgage bonds were separate debts secured on different items of property and the amounts for which the several properties were liable must be specified in the decree before it could be executed. The Subordinate Judge disallowed this objection, but on appeal this Court on 3rd August, 1928, reversed that decision and said, referring to the judgment in the original suit, that the decree as it stood could not be executed and the Subordinate Judge must proceed to execute the decree substantially as three decrees. That being so, the order of the lower Court directing execution to proceed was set aside and the case remanded for disposal according to law. Thereafter on 15th September, 1928, the decree-holder suffered the execution to be dismissed for default. He next applied in 1930 for amendment of the decree which

1939.

MUSAMMAT DULHIN v. MAHANTH HARIHAR GIR.

ROWLAND, J.

was duly ordered to be done on 16th July, 1930. Subsequently he found that some further amendment was necessary and obtained orders to that effect on 27th August, 1932, and 24th September, 1932. On 8th July, 1933, he made his second application to execute the decree and this application was dismissed on 20th June, 1934, for default in prosecution. The third application to execute the decree was presented on 2nd January, 1937, and is the application against which the objection under section 48 of the Code of Civil Procedure has been allowed by the Subordinate Judge. The Subordinate Judge was of opinion that the period of twelve years began to run from the 19th December, 1923, the date of the decree absolute and expired in December, 1935.

For the appellants reference is made to the words in section 48—

"twelve years from the date of the decree sought to be executed"

and it is said that when there was no executable decree in existence before the 16th July, 1930, the decree sought to be executed must be considered to be of that date and twelve years will run from that date and it has further been suggested that the 24th September, 1932, again gives a starting point available to the decree-holder for computing the period of twelve years laid down in section 48. In support of this contention reference is made to *Baldeo Shukul* v. *Syed Yusuf*(1) where a single Judge of this Court took the view that the words "decree sought to be executed" must include the amended decree. The learned Judge did not quote authority for his view, but he referred to what was generally understood to be the law under the old Limitation Act when Article 179 had to be construed. It may be that the learned Judge was referring to such decision as that in *Muhammad Suleman Khan* v. *Muhammad Yar Khan*(2) in which, although Article 179 as it then

(1) (1921) 60 Ind. Cas. 318.
(2) (1894) I. L. R. 17 All. 39.

1939.

MUSAMMAT DULHIN v. MAHANTH HARIHAR GIR.

ROWLAND, J.

stood contained no reference to the date of the amended decree as distinct from the date of the decree itself, the date of decree had been held for the purposes of that Article to mean or at least to include the date of the amended decree where there had been an amendment. It may be noticed here that subsequent to that decision both the Limitation Act of that time and the Code of Civil Procedure have been repealed and their place taken by new enactments. Article 182 which takes the place of Article 179 in the Limitation Act has been amplified and now makes specific provisions for a period of three years' limitation to run from the date of an amended decree where there has been an amendment. In section 48 on the other hand the words are—

"date of decree sought to be executed"

without any qualifying reference to possible amendments subsequent to the date of the original decree. It has, therefore, been argued for the respondents that in construing section 48 we ought to limit ourselves to examination of the provisions of the Code itself and not import the provisions of other enactments, more particularly Article 182 of the Limitation Act which by its own terms applies only to the period for execution of a decree or order not provided for by section 48 of the Code of Civil Procedure. In support of this view we have been referred to decisions of the High Courts in Bombay, Allahabad, Calcutta, Lahore and the Chief Court of Lucknow. In Bombay the matter came under consideration in *Narsingrao Konher Inamdar* v. *Bando Krishna*(1). In this case the decree had been passed under the old Code and the Court considered the words in section 205—

"the decree shall bear date the day on which the judgment was pronounced".

It was said that this language was imperative and was designed' to meet precisely a case of this sort

(1) (1918) I. L. R. 42 Bom. 309.

where owing to certain oversights or irregularities a delay has intervened between the delivery of the judgment and the formal drawing of a correct decree. This was said notwithstanding that the decree which was at first drawn was incapable of execution until it was amended. I may in passing mention that this case was not apparently brought to the notice of the learned Judge of this Court who decided *Baldeo Shukul* v. *Syed Yusuf*(1). Both those decisions were examined in *Fagir Chand* v. *Kundan Singh*(2) where the learned Judges drew special attention to the wording of the first column of Article 182 and held that the amendment of a decree does not give a new date for starting a period of limitation if the application for execution is beyond the period of twelve years allowed by section 48. That is, the period of twelve years under section 48 is final and cannot be extended by any amendment of the decree. The view of the Lahore High Court is expressed in *Ganesh Das* v. *Vishan Das*(3) in which the above Bombay and Allahabad decisions were considered and approved; and the Allahabad decision was also followed by the Chief Court of Oudh in *Narendra Bahadur Singh* v. *Oudh Commercial Bank, Ltd.*(4). In Calcutta a similar view was taken in a decision apparently unreported but which was taken on appeal to His Majesty in Council and the judgment of the Judicial Committee is reported in *Khulna Loan Co.* v. *Jnanendra Nath Bose*(5). The report shows that the Subordinate Judge had proceeded on the view that the period of twelve years provided in the case of a decree does not certainly begin to run until the decree becomes operative and capable of execution; but the High Court took the opposite view observing " The terms of section 48 seem to us to be perfectly

(1) (1921) 60 Ind. Cas. 316.
(2) (1932) I. L. R. 54 All. 622.
(3) (1935) A. I. R. (Lah.) 292.
(4) (1934) I. L. R. 10 Luck 208.
(5) (1917) 22 Cal. W. N. 145, P. C.

1939.

MUSAMMAT DULHIN v. MAHANTH HARIHAR GIR.

DOWLAND, J.

clear, and according to that section time runs from the date of the decree. The date of the decree is fixed by Order XX, rule 6, and we cannot understand how there can be any other date of the decree, from which limitation should run". Their Lordships in the Judicial Committee simply stated that they saw no reason to differ from the judgment of the High Court.

I think that we are bound to follow these authorities and cannot hold that time for the purposes of section 48 is to be calculated from a date prescribed elsewhere than in that section. I should, however, state that we have been referred to a recent decision of this Court in *Ram Ranbijaya Prasad Singh* v. *Kesho Prasad Singh*(1) which is said to favour a different view. The facts in that case are not quite on all fours with those before us, for the question there was whether the starting point for the period of twelve years under section 48 was the date of the decree of the original Court or the date of the final order of the appellate Court. The point decided was that time would run from the final order of the appellate Court, and in the course of the judgment reference is made to Article 182 in support of that proposition. The learned Judges did not say that the decree sought to be executed in section 48 was the decree of the appellate Court as has been sometimes held; if that had been their reading of the scope of section 48, then it would not have been necessary to invoke Article 182 in the determination of the starting point for limitation under section 48 in cases where there has been an appeal. But whether the observations in *Ram Ranbijaya Prasad Singh* v. *Kesho Prasad Singh*(1) are in their entirety correct or not with reference to Article 182(2), I do not think we are to treat those observations as applicable to cases falling within all the sub-clauses of article 182. Such a view would have a surprising result, if applied to

(1) (1938) 19 Pat. L. T. 424.

article 182(5), and one which I do not think can have been intended by the learned Judge. So I think we should not regard these observations as applying to sub-clause (4) or any other sub-clause than (2). And in dealing with the matter before us, I feel no doubt that we ought to follow the current of authority in Bombay, Allahabad, Lahore, Calcutta and Lucknow and to hold that the application presented on the 2nd January, 1937, to execute the decree dated 19th December, 1923, was barred by section 48 of the Code of Civil Procedure.

I would dismiss this appeal with costs to each set of contesting respondents.

JAMES, J.—I agree to the order proposed by my learned brother and I agree with his view that we must regard ourselves as bound by the current of authority on this question to accept as correct the view of the learned Subordinate Judge, although if the matter were *res integra* I should feel more difficulty. In *Muhammad Suleman Khan* v. *Muhammad Yar Khan*(1) the Allahabad High Court was dealing with Articles 178 and 179 of the Limitation Act of 1877. Sir Sultan Ahmad for the appellants suggests that section 230 of the former Code of Civil Procedure would also have applied to that case; but the application in execution with which the learned Judges were dealing had been made within twelve years of the original decree so that whether the provisions of section 230 applied or whether they did not, the Court in that particular case was not required to consider them. Sir Sultan Ahmad suggests that the remark with which the judgment ends, that with regard to any future application in execution paragraph 4 of the third column of Article 179 contains the limitation which will be applicable, implies that the learned Judges had considered the question of whether after twelve years from the date of the original decree

(1) (1894) I. L. R. 17 All. 39.

1939.

MUSAMMAT DULHIN v. MAHANTH HARIHAR GIR.

AMES, J.

execution would or would not be barred by the provisions of section 230. If it had been clear that section 230 did apply to that particular case, the decision would have been of considerable authority in support of Sir Sultan Ahmad's view, because any obiter dictum of Sir John Edge is to be treated with respect; but it is not clear that section 230 did apply in this case at all.

In 1908, when both of these Acts were repealed and re-enacted, a new section 48 of the Code of Civil Procedure took the place of old section 230; and Articles 181 and 182 took the place of Articles 178 and 179 of the schedule in the Limitation Act. Article 182 was amended in such a manner as to give statutory authority to the decision of Sir John Edge and Mr. Justice Banerji; but applications governed by section 48 of the Code of Civil Procedure were excluded from its operation; and section 48 merely said that limitation was to run from the date of the decree of which execution was sought. In favour of the appellants' view we have the decision of a single Judge of this Court in *Baldeo Shukul* v. *Syed Yusuf*(1); but the Allahabad High Court expressly dissented from that decision in *Faqir Chand* v. *Kundan Singh*(2) and the weight of authority in general appears to be against it. I find some difficulty in treating the decision of this Court in *Ram Ranbijay Prasad Singh* v. *Kesho Prasad Singh*(3) in the manner in which Sir Sultan Ahmad suggests, as authority for the view that in looking for the starting point for limitation under section 48 of the Code of Civil Procedure we must apply the conditions laid down in Article 182 of the schedule to the Limitation Act. In that case the learned Judges were dealing with paragraph 2 of the third column of the schedule and not with paragraph 4; but I find it difficult to act upon

(1) (1921) 60 Ind. Cas. 318.
(2) (1932) I. L. R. 54 All. 622.
(3) (1938) 19 Pat. L. T. 424.

the general proposition that the provisions of Article 182 should be held in any way to affect section 48 of the Code of Civil Procedure. The provisions of Article 182 cannot be read into Article 183, as is clear from the decision of the Judicial Committee of the Privy Council in *Abdul Majid* v. *Jawahir Lal*(1) wherein it was held that the decision of the appellate court could only afford a new starting base for limitation under Article 183 when there was a decree of the appellate court in which the original decree merged; and if Article 182 cannot be invoked to find the starting point for the twelve years' rule of limitation prescribed by Article 183, it appears to me difficult to hold that it can be invoked to find the starting point for the twelve years' rule under section 48 of the Code of Civil Procedure, since Article 182, prescribing the three years' rule for petitions of decree-holders in execution, is expressly excluded from application where the twelve years' rule may apply, under Article 183 of the schedule or section 48 of the Code of Civil Procedure. In *Khulna Loan, Co.*, v. *Jnanendra Nath Bose*(2) their Lordships of the Judicial Committee approved of the decision that the period of twelve years under section 48 ran, not from the date when the decree became operative and capable of execution, but from the date of the decree; and I consider that the decisions of the Allahabad High Court in *Fakir Chand* v. *Kundan Singh*(3), of the Bombay High Court in *Narsingrao Konher Inamdar* v. *Bando Krishna*(4) and of the High Court at Lahore in *Ganesh Das* v. *Vishan Das*(5) leave us no option but to hold that the view taken by the learned Subordinate Judge was right and to dismiss the appeal.

S. A. K.

Appeal dismissed.

(1) (1914) I. L. R. 36 All. 350, P. C.
(2) (1917) 22 Cal. W. N. 145, P. C.
(3) (1932) I. L. R. 54 All. 622.
(4) (1918) I. L. R. 42 Bom. 309.
(5) (1935) A. I. R. (Lah.) 292.