APPELLATE CIVIL.

Before Dalip Singh and Sale JJ.

1934

July 11.

BANK OF UPPER INDIA (IN LIQUIDATION) (DECREE-HOLDER) Appellant

versus

SRI KRISHAN DAS (DECEASED) AND OTHERS (JUDGMENT-DEBTORS) Respondents.

Civil Appeal No. 1226 of 1929.

Execution of Decree—Application for execution—Limitation—Indian Limitation Act, IX of 1908, Article 182 (2)—Terminus a quo—*Appeal dismissed in default—Civil Procedure Code, Act V of 1908, Order XLI, rule 17.*

Held, that an order of dismissal of an appeal in default, under Order XLI, rule 17 of the Code of Civil Procedure, passed by an appellate Court is a judicial order, and a final order of the appellate Court within the meaning of Article 182 (2) of the Indian Limitation Act and is the *terminus a quo* for an application to execute the decree of the trial Court.

Nagendra Nath Dey v. *Suresh Chandra Dey* (1), relied upon.

Girwal Raut v. *Bigu Raut* (2), followed.

Other case law, discussed.

Miscellaneous First Appeal from the order of Mr. L. Middleton, District Judge, Delhi, dated 29th April, 1929, dismissing the application for execution.

M. C. MAHAJAN, for Appellant.

KISHAN DAYAL, for Respondents.

SALE J.

SALE J.—On the 27th April, 1916, the Bank of Upper India obtained a mortgage decree in the Court of the District Judge, Delhi, for Rs.4,64,021 against the property of *Rai Bahadur* Sri Kishen Das, insolvent, in the hands of the Official Receiver, Bombay. The judgment-debtor appealed to this Court and on

(1) (1933) I. L. R. 60 Cal. 1 (P.C.). (2) 1930 A. I. R. (Pat.) 146.

the 7th December, 1925, the appeal was dismissed by the following order:—

"There is no appearance by or on behalf of the appellant and accordingly we dismiss the appeal in default with costs."

On the 18th September, 1928, the decree-holder applied in the Court of the District Judge, Delhi, for execution of this decree. Amongst other objections raised by the judgment-debtor to the execution of this decree, two only were pressed at the time of arguments: (1) that the application for execution is barred under Article 182 of the first schedule to the Limitation Act of 1908 and (2) that the execution is barred by section 48 of the Civil Procedure Code. The learned District Judge did not decide the second objection but dismissed the application on the first objection holding that the order of this Court, dated the 7th December, 1925, is not such an order as can operate to extend the period for execution of the decree under Article 182 of the Limitation Act.

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The remaining point for our decision is the question whether under Article 182, clause (2) of the Limitation Act, the *terminus a quo* should be the date of the decree (27th April, 1916) or the date of the order of the appellate Court which dismissed the appeal against this decree in default, *viz.* the 7th December, 1925. Since the application for execution was made on the 18th September, 1928, it is clear that so far as Article 182 is concerned the application will be time-barred unless limitation is extended by the period under which the case was under appeal in this Court.

1934

BANK OF UPPER INDIA (IN LIQUIDATION) v. SRI KRISHAN DAS.

SALE J.

It is necessary to note at the outset that the appeal against the decree was properly presented, that all necessary conditions for the hearing of the appeal had been observed by the appellant but that on the date of the hearing the appellant, though present in another case, stated that there was no appearance by or on his behalf in that particular appeal with the result that acting under Order 41, rule 17, Civil Procedure Code, the Court dismissed the appeal in default with costs.

The question for our determination is whether under these circumstances the order of this Court, dated the 7th December, 1925, is a final order within the meaning of clause 2 in the third column of Article 182.

Counsel for the appellant contends that on the plain meaning of Article 182, together with certain interpretations of this article by their Lordships of the Privy Council and other authorities, the order of dismissal for default was clearly one which operates to extend limitation under Article 182. Mr. Kishan Dayal, however, contends that the order in question is not an order within the meaning of Article 182 because it is not a judicial order confirming the decision of the lower Court.

The only authority cited before us on all fours with the present case is a Division Bench decision of the Patna High Court, cited as *Girwal Raut* v. *Bigu Raut* (1), in which it was held that an order dismissing an appeal for default was an order from which the three years' limitation provided by Article 182 begins to run. This decision is, in my view sound, but before endorsing it, it is necessary to deal with an apparent conflict of authority regarding the nature of

(1) 1930 A. I. R. (Pat.) 146.

the order contemplated by clause 2 in the third column of Article 182. In urging that a dismissal of an appeal in default, is not such an order as is contemplated in this clause. Mr. Kishan Dayal mainly relies on certain observations of their Lordships of the Privy Council in *Abdul Majid* v. *Jawahir Lal* (1) and *Sachindra Nath Roy* v. *Maharaj Bahadur Singh* (2).

There appears to be no conflict regarding the proposition laid down in the Full Bench ruling of the Madras High Court cited as *Peria Kovil Ramanaja* v. *Lakhshmi Das* (3) and approved in *Gohur Bepari* v. *Ram Krishna Saha* (4), *Raghu Prasad* v. *Jadunandan Prasad Singh* (5) (a Division Bench case of the Patna High Court) and in two Privy Council rulings, *Nagindra Nath Dey* v. *Suresh Chandra Dey* (6) and *Abdulla Asghar Ali* v. *Ganesh Das Vig* (7), to the effect that when an appellate Court makes an order which has the effect of finally disposing of an appeal, time runs from the date of that order and not from the date of the decree against which the appeal was preferred.

Some conflict appears however to have arisen, over the nature of the order, necessary to attract the provisions of clause 2 in column 3 of Article 182. Obviously in every appeal which, as in this case, was properly presented, there must be an order finally disposing of the appeal, but it was laid down by their Lordships of the Privy Council in *Abdulla Asghar Ali* v. *Ganesh Das Vig* (7), that the order in question must be a judicial order; and Mr. Kishan Dayal asks us to hold on the authority of certain observations made by

(1) (1914) I.L.R. 36 All. 350 (P.C.). (4) (1928) 32 Cal. W. N. 387.
(2) (1922) I.L.R. 49 Cal. 203 (P.C.). (5) (1921) 59 I. C. 896.
(3) (1907) I.L.R. 30 Mad. 1 (F.B.). (6) (1933) I.L.R. 60 Cal. 1 (P.C.).
(7) (1933) I. L. R. 60 Cal. 662 (P.C.).

1934

BANK OF UPPER INDIA (IN LIQUIDATION) v. SRI KRISHAN DAS.

SALE J.

Lord Moulton in the Privy Council ruling, *Abdul Majid* v. *Jawahir Lal* (1), that to justify an extension of time under Article 182 the order disposing of the appeal must be an order " dealing judicially with the matter of the suit."

In the case with which Lord Moulton was dealing in *Abdul Majid* v. *Jawahir Lal* (1), an appeal to their Lordships of the Privy Council had been dismissed for want of prosecution. Lord Moulton repelled the contention that this dismissal was a decree of His Majesty in Council, on the ground that 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. In *Sachindra Nath Roy* v. *Maharaj Bahadur Singh* (2), their Lordships of the Privy Council quoted this authority with approval in holding that " it is not the law " as was urged in that case that where an appeal from a decree is dismissed for want of prosecution limitation runs " not from the date of the decision of the decree appealed against but from that of dismissal."

I consider, however, that it was not the intention of their Lordships of the Privy Council to lay down the proposition that where an appeal is dismissed in default under Order 41, rule 17, Civil Procedure Code, limitation runs from the date of the decree appealed against, and not from the date of the dismissal by the appellate Court in default. There can be no doubt, and the fact is not contested before us, that an order under Order 41, rule 17, is a judicial order. It may not be a judicial order dealing with the merits of the appeal but it is certainly a judicial

(1) (1914) I. L. R. 36 All. 350 (P.C.).

(2) (1922) I. L. R. 49 Cal. 208, 213 (P.C.).

order dealing with the matter before the appellate Court. It will be observed that in *Abdulla Asghar Ali* v. *Ganesh Das Vig* (1), their Lordships, in quoting with approval the observations of Lord Moulton in *Abdul Majid* v. *Jawahir Lal* (2), do not insist that the order dealing " judicially with the matter of the suit " should be an order on the merits of the appeal before the Court. In this authority their Lordships held that an order declaring that an appeal had abated was a judicial order finally disposing of an appeal and as such was a final order which gives a new starting point for limitation under Article 182 (2). It is clear that in the case then under their Lordships' consideration the lower appellate Court (Judicial Commissioner, Baluchistan) had not considered the merits of the appeal before the Court. All the lower appellate Court did was to consider the judgment-debtor's contention that his appeal had not abated and held that it had abated.

It may be mentioned in this connection that this authority definitely overruled *Fazal Husen* v. *Raj Bahadur* (3), on which the District Judge appears to have relied, which held that the abatement of an appeal was not a final order extending limitation within the meaning of clause 2 of the corresponding Article 179 in the old Limitation Act of 1877.

The effect of Lord Moulton's observations in *Abdul Majid* v. *Jawahir Lal* (2), has been carefully considered by a Division Bench of the Patna High Court in *Ragho Prashad Singh* v. *Jadunandan* (4). The following paragraph may be quoted :—

" What happened there was that there had been granted by the High Court leave to appeal from a

(1) (1933) I.L.R. 60 Cal. 662, 668 (P.C.). (3) (1898) I.L.R. 20 All. 124.
(2) (1914) I.L.R. 36 All. 350 (P.C.). (4) (1921) 59 I. C. 896, 897.

1934

BANK OF UPPER INDIA (IN LIQUIDATION) v. SRI KRISHAN DAS.

SALE J.

decree of the High Court to the Privy Council. On the 13th May, 1901, the appeal before the Privy Council had been dismissed automatically because of the failure on the part of the appellant to prosecute his appeal and the question for determination there was, whether that automatic dismissal of the appeal for want of prosecution was an order of His Majesty in Council within the meaning of Article 180 of the previous Act. Their Lordships came to the conclusion that it was not, and that therefore there was no order of the Privy Council which could be enforced at all. It was a mere automatic dismissal of the appeal to His Majesty in Council and was not such an order in Council as could be enforced under Article 180 of the former Act. Therefore that Article did not apply and the limitation period was not twelve years as therein provided but was three years from the date of the only decree that they could execute and that was the decree of the High Court made considerably more than three years before the application for execution. But when we turn to the Article upon the interpretation of which the present appeal depends, (*viz.* Article 182, as in the present case) it seems to me that it is quite clear that, where there has been an appeal and where that appeal has been properly presented and is within time, any order of the High Court dismissing the appeal or putting an end to the appeal in any way is either a decree or order within the meaning of the present Article 182, clause (2)."

It will thus be observed that in the case of both *Abdul Majid* v. *Jawahir Lal* (1), as well as in *Batuk Nath* v. *Munni Dei* (2), the appeals to their Lordships of the Privy Council stood automatically dismissed owing to the failure of the appellant to prosecute them

(1) (1914) I.L.R. 36 All. 350 (P.C.). (2) (1914) I.L.R. 36 All. 284 (P.C.).

according to the rules of the Board, and these rulings cannot in my view be held to decide that an order under Order 41, rule 17, Civil Procedure Code, dismissing an appeal in default, is not a final order within the meaning of clause (2) in the 3rd column of Article 182 of the Limitation Act. *Gohur Bepari* v. *Ram Krishna Saha* (1), is another authority for holding that an order declaring that an appeal has abated comes within clause (2) of Article 182 of the Limitation Act. This judgment deals exhaustively with the two Privy Council decisions, to which I have already referred, *Batuk Nath* v. *Munni Dei* (2) and *Abdul Majid* v. *Jawahir Lal* (3), and also cites with approval the decision, already quoted, of a Division Bench of the Patna High Court in *Raghu Prasad* v. *Jadunandan Prasad Singh* (4). In *Gohur Bepari* v. *Ram Krishna Saha* (1), it is pointed out, that there is no distinction in principle and there ought to be no distinction in the result, for the purposes of clause (2) of Article 182, between withdrawing from an appeal and allowing it to abate. It may be that want of prosecution of an appeal before their Lordships of the Privy Council would not come within the purview of clause (2) of Article 182, because there would be no order by their Lordships dismissing the appeal, the dismissal being automatic; but so far as the procedure before the Indian Courts is concerned I would say that, just as was held in *Gohur Bepari* v. *Ram Krishna Saha* (1), that there is no difference in principle between withdrawing from an appeal and allowing it to abate, so also for the purpose of clause (2) of Article 182 there should be no difference in principle between an order

(1) (1928) 32 Cal. W.N. 387, 390. (3) (1914) I. L. R. 36 All. 350 (P.C.).
(2) (1914) I. L. R. 36 All. 284, (4) (1921) 59 I.C. 896: 6 Pat. L.J. 27 (P.C.).

1934

BANK OF UPPER INDIA (IN LIQUIDATION) v. SRI KRISHAN DAS.

SALE J.

dismissing an appeal in default, and an order declaring that an appeal had abated.

The decision in *Gohur Bepari* v. *Ram Krishna Saha* (1), was expressly approved by their Lordships of the Privy Council in *Abdulla Asghar Ali* v. *Ganesh Das Vig* (2), and it would seem to follow that their Lordships do not intend that the Courts in India should, in interpreting Article 182 of the Limitation Act, confuse the procedure relating to the dismissal of appeals in default in India with the procedure relating to the dismissal of appeals to the Privy Council for want of prosecution.

This view obtains confirmation from another recent Privy Council decision cited as *Nagindra Nath Dey* v. *Suresh Chandra Dey* (3). In this case it was contended that a certain appeal was by reason of an irregularity not an appeal at all, but merely an abortive attempt to appeal and it was urged that the dismissal of such an appeal was not an order within the meaning of clause (2) of the third column of article 182. Their Lordships rejected this contention. They observed :—

" They think that the question must be decided upon the plain words of the Article; ' where there has been an appeal,' time is to run from the date of the decree of the appellate Court. There is, in their Lordships' opinion, no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it; the words mean just what they say. The fixation of periods of limitation must always be to some extent arbitrary, and may frequently result in hardship. But in construing such provisions, equitable considerations are

(1) (1928) 32 Cal. W. N. 387. (2) (1933) I. L. R. 60 Cal. 662 (P.C.).
(3) (1933) I. L. R. 60 Cal. 16 (P.C.).

out of place, and the strict grammatical meaning of the words is, their Lordships think, the only safe guide. It is at least an intelligible rule that, so long as there is any question *sub judice* between any of the parties, those affected shall not be compelled to pursue the so often thorny path of execution, which, if the final result is against them, may lead to no advantage. Nor, in such a case as this, is the judgment-debtor prejudiced. He may indeed obtain the boon of delay, which is so dear to debtors, and, if he is virtuously inclined, there is nothing to prevent his paying what he owes into Court. But whether there be or be not a theoretical justification for the provision in question, their Lordships think that the words of the article are plain.''.

Adopting the reasoning of their Lordships which applies closely to the facts of the present case, I am of opinion, that on the plain words of article 182 the *terminus a quo* in this case is the date of the final order of this Court dismissing the appeal in default on the 7th December, 1925. Accordingly, I would hold that the application for execution, presented as it was on the 18th September, 1928, is within time.

At the request of counsel for the appellant we refrain from deciding the second objection regarding the applicability of section 48 of the Civil Procedure Code, as we are informed that the facts necessary for the decision of this objection are not admitted, and must therefore first form the subject of a finding by the learned District Judge. Accordingly I would accept the appeal to the extent of holding that the application for execution in question is within time under clause (2) of the third column of article 182 of the Limitation Act and I would remand the case to the learned District Judge for decision on the other

1934

BANK OF UPPER INDIA (IN LIQUIDATION) v. SRI KRISHAN DAS.

SALE J.

objection which he left undecided. The appellant is entitled to the costs of this appeal.

DALIP SINGH J.—I agree.

P. S.

Appeal accepted; Case remanded.

APPELLATE CIVIL.

Before Tek Chand and Bhide JJ.

1934

July 12.

MADAN GOPAL AND OTHERS (DEFENDANTS) Appellants

versus

SHEWAL DAS (PLAINTIFF) Respondent.

Civil Appeal No. 1912 of 1932.

Indian Companies Act, VII of 1913, section 4 : Pooling contract between certain factories — whether constitutes a partnership — one of the partners to the pool being a firm consisting of more than twenty members—whether suit can be maintained against — Civil Procedure Code, Act V of 1908, Order VI, rule 17 : Amendment of plaint—when not admissible.

The proprietors of certain factories entered into a pooling contract by virtue of which they agreed to work the factories in a certain manner and to share the total profits in certain proportions. The partners were left to manage their own factories, and no partner had any right to interfere with the management of the factories of the other partners. No joint management was set up by the appointment of any managing committee or officers to act on behalf of all the partners. The agreement made no provision for sharing of losses. One of the partners, defendant No.2, however, was a firm consisting of *more* than twenty persons.

Held, that the parties to the pooling contract did not constitute any partnership or association and were not carrying on any business jointly within the meaning of section 4 of the Indian Companies Act and that section, therefore, was no bar to the maintenance of the suit by the plaintiff as against defendants 1 and 3.