Courts, and it has been held by the Madras High Court in *Assan Mohamed Sahib* v. *Rahim Sahib*,[1] by the Allahabad High Court in *Moti Lal Ramchandar* v. *Durga Prasad*,[2] and by the Calcutta High Court in *Jeun Muchi* v. *Budhiram Muchi*,[3] that, so long as the deposit of the decretal amount or the giving of security is done within the time limit, the application is good. This is of course a fiction to avoid injustice. The Courts assumed that the applicants had done what would have been beneficial for them to do, that is that they had asked for leave to withdraw their applications and to file fresh applications within the time of limitation. This is the principle which was embodied in the old section 101 of the Transfer of Property Act, and is reasonable and equitable: so I agree that we are entitled to follow the authority of the other High Courts and hold that the application under consideration was good.

I, therefore, agree with the order proposed by his Lordship the Chief Justice.

Rule made absolute.

J. G. R.

[1] (1920) 43 Mad. 579. [2] [1930] A. I. R. (All.) 830.
[3] (1904) 32 Cal. 339.

APPELLATE CIVIL.

Before Mr. Justice Patkar and Mr. Justice Murphy.

BAI MANGU WIDOW OF BALABHAI KEVALDAS AND OTHERS (ORIGINAL PLAINTIFFS-APPELLANTS), APPLICANTS *v.* THE BHARATKHAND COTTON MILLS CO., LTD. (ORIGINAL DEFENDANTS-RESPONDENTS), OPPONENTS.*

1931 *July* 13.

Civil Procedure Code (Act V of 1908), section 109, clause (a)—Leave to appeal to Privy Council—Final decree passed by the High Court in pursuance of directions of Privy Council not a decree passed on appeal—Letters Patent clause 39—Two categories of cases—Remedy of the aggrieved party.

When the High Court passes a final decree in pursuance of the directions of the Privy Council no leave to appeal to the Privy Council against such decree can be granted either under section 109 (*a*) of the Civil Procedure Code or under clause 39 of the Letters Patent it not being a decree passed on appeal.

*Civil Application No. 1038 of 1930.

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Secretary of State for India in Council v. *British India Steam Navigation Company*,[1] *Chappan* v. *Moidin Kutti*[2] and *Attorney General (The)* v. *Sillem and Others*,[3] followed.

Clause 39 of the Letters Patent deals only with two categories of cases first, judgment, decree or order made on appeal and, secondly, made in exercise of original jurisdiction whether by individual judges or by a Division Court from which no appeal lies under clause 15 of the Letters Patent.

An Attorney, In re,[4] referred to.

The only remedy of the aggrieved party is to apply for special leave to appeal to the Privy Council.

APPLICATION for leave to appeal to the Privy Council.

One Kevaldas and his family filed certain suits in the Ahmedabad Court against the Bharatkhand Cotton Mills Company, Ltd., for specific performance of a contract on the part of the company to award preference shares in satisfaction of their debt due under certain deposit receipts of the company. The trial Court decreed the claim but on appeal the High Court held *inter alia* that there was no debt due from the company under the deposit receipts and dismissed the suits. The Privy Council held that the alleged contract with reference to preference shares was mainly to satisfy a just claim of Kevaldas and his family but that as the balance was in favour of the company the suits failed.

Before the Privy Council all the parties agreed to the convenient procedure of expressing in one decree the financial result of the relation between the parties including the decrees standing against each of the parties and although Kevaldas had substantially failed the decree of the High Court was varied and the High Court was directed to take an account between the parties on certain lines. This was done and the High Court accordingly passed a final decree in pursuance of the directions given by the Privy Council. Against this decree the heirs of Kevaldas (who had died in the

(1) (1911) 13 Cal. L. J. 90 at pp. 93, 97.
(2) (1898) 22 Mad. 68 at p. 80.
(3) (1864) 10 H. L. C. 704 at p. 724.
(4) (1914) 41 Cal. 734.

meanwhile) applied for leave to appeal to the Privy Council.

B. J. Desai, with *B. G. Rao*, for the applicants.

G. N. Thakor, with *R. J. Thakor*, for the opponents.

The arguments of counsel are set out in the judgment of Patkar J.

PATKAR, J. :—This is an application for leave to appeal to the Privy Council from the decision of the High Court after taking accounts in pursuance of the directions given by their Lordships of the Privy Council.

The appeal to the Privy Council arose in connection with certain suits brought by one Kevaldas and his family and subsequently one Tulsidas to enforce certain deposit receipts given by the company on October 31, 1911. Kevaldas alleged that he agreed with the company to have preference shares allotted to him to the extent of the face value of the debts owing by the company to him and his nominees represented by the amount of the deposit receipts, with accrued interest and some addition to the current account which was incurred between October 31, 1911, and the actual date of his resignation. The company contended that there was no binding agreement in that behalf and that in any event there was due to the company a sum exceeding the amount of the receipts and that no money was due to him on the cross claim of the company.

The Subordinate Judge found in favour of Kevaldas that there was a binding agreement to allot preference shares in satisfaction of the debt substantially represented by the deposit receipts and decreed specific performance accordingly. The High Court found against Kevaldas on both the points. The Privy Council held that at most the alleged contract with reference to the preference shares was mainly to satisfy

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a just claim, and if Kevaldas by reason of the cross claim had really nothing due to him, he was not entitled to the issue of preference shares, and inasmuch as the balance was in favour of the company, the suit failed.

The Privy Council after confirming the finding of the High Court that the company was entitled to recover repayment of the sum paid to Tulsidas, viz., Rs. 86,000, the parties were given an opportunity of agreeing to the figures if possible on the footing of the view expressed. All the parties agreed to the convenient procedure of expressing in one decree the financial result of the relations between the parties including the decrees standing against each party, and though the appellant substantially failed, the decree of the High Court was varied and the High Court was directed to take an account to ascertain how much should be credited to Kevaldas in respect of the amount of the deposit receipts with interest and in respect of the dividends claimed to be deducted by the respondents in the execution schedule, the dividends to be credited as they fell due with interest, if any interest was payable under the articles. On the other hand, the company were entitled to be credited with the payment to Tulsidas and to the decree of Rs. 1,46,453, with interest less the sums realised in execution. Marten C. J. and Murphy J. thereupon, on April 1, 1930, gave certain directions to the Commissioner as to the manner in which the account should be taken, and on April 14 confirmed the Commissioner's report and directed the plaintiff to pay to the defendant company the sum of Rs. 1,33,723-6-10 with interest at six per cent. from March 31, 1930. The final decree passed by the High Court was, therefore, in pursuance of the directions given by the Privy Council to take an account between the parties.

It is urged on behalf of the opponents that the application for leave to appeal to the Privy Council does not fall under section 109, clause (*a*), of the Civil Procedure Code, as it is not a judgment, decree or order passed on appeal by the High Court, nor does it fall under clause 39 of the Letters Patent on the ground that it is not a final judgment, decree or order of the High Court made on appeal. It is contended on behalf of the applicants that though the decision of the High Court is not a judgment, decree or order passed on appeal within the meaning of section 109, clause (*a*), or the first part of clause 39 of the Letters Patent, it is a final judgment, decree or order of a Division Court from which an appeal shall not lie to the said High Court under the provisions contained in the 15th clause of the Letters Patent, and therefore, an appeal would lie to the Privy Council on the ground that it is a final decree or order passed in appeal, though not strictly on appeal, by the High Court.

The decree passed by the High Court is in pursuance of the directions of the Privy Council and is not passed on appeal by the High Court. If the High Court had sent down the case to the Subordinate Judge for disposal, and an appeal had been filed by any of the parties against the decision of the Subordinate Judge, the judgment or decree passed by the High Court would have been a judgment or decree passed on appeal. A judgment, decree or order passed by the High Court in its appellate jurisdiction is not necessarily a judgment, decree or order passed on appeal.

The question is discussed in the case of *Secretary of State for India in Council* v. *British India Steam Navigation Company*.[1] The relationship of a superior and inferior Court and the power on the part of the former

[1] (1911) 13 Cal. L. J. 90 at pp. 93, 97.

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to review the decisions of the latter must be present in order to constitute jurisdiction on appeal: see *Chappan* v. *Moidin Kutti*.[1] We are not concerned here with the precise point decided in these cases to the effect that an order passed by the High Court in the exercise of the revisional jurisdiction was an order made on appeal within the meaning of clause 39 of the Letters Patent.

In Wharton's Law Lexicon, 13th Edition, "appeal" is defined as the judicial examination of the decision by a higher Court of the decision of an inferior Court. According to Stroud's Judicial Dictionary, Volume 1, page 98 "an appeal is the right of entering a superior Court and invoking its aid and interposition to redress the error of the Court below." See *The Attorney General* v. *Sillem and Others*.[2]

In the present case the order passed by the High Court was in pursuance of the directions given by the Privy Council and was not passed in any proceedings taken by the parties in order to review or modify the decision of an inferior Court. In *Rajah Enaet Hossein* v. *Ranee Rowshun Jahan*,[3] a distinction is made between a final judgment, decree or order made in the exercise of the appellate jurisdiction and one made on appeal, and it was held that an order made by a High Court in an application to review its judgment in a case of appeal to the Privy Council previously heard was not an order made on appeal within the meaning of clause 39 of the Charter, so as to enable the Court to admit an appeal against such order to Her Majesty in Council. A similar view was taken in *Sunder Koer* v. *Chandishwar Prosad Singh*.[4]

I think, therefore, that the judgment, decree or order from which the application for leave to appeal is made

(1) (1898) 22 Mad. 68 at p. 80.
(2) (1864) 10 H. L. C. 704 at p. 724.
(3) (1868) 10 Cal. W. R. 1 (F.B.).
(4) (1903) 30 Cal. 679.

in the present case is not one made on appeal though it was made in its appellate jurisdiction in pursuance of the directions given by the Privy Council presumably with the consent of both the parties. The application does not, therefore, fall under section 109, clause (*a*), of the Civil Procedure Code or the first part of clause 39 of the Letters Patent.

This position is not seriously contested on behalf of the applicants, but it is contended on their behalf that the judgment, decree or order of the High Court in the present case was a final judgment, decree or order of a Division Court from which an appeal does not lie to the said High Court under the provisions contained in the 15th clause. I think that clause 39 of the Letters Patent first refers to a final judgment, decree or order made on appeal, i.e., made on appeal on the Original Side or under the Civil Procedure Code on appeals from the mofussil, and the latter part of clause 39 refers to a final judgment, decree or order of the said High Court in the exercise of its original jurisdiction made by individual Judges of the High Court or by a Division Bench from which an appeal does not lie to the said High Court under clause 15 of the Letters Patent. It is contended on behalf of the applicants that clause 39 deals with three categories of cases, first, a judgment, decree or order made on appeal; secondly, made in exercise of its original jurisdiction, and thirdly, by a Division Court from which no appeal lies under clause 15 of the Letters Patent, and it is, therefore, contended that though the present judgment, decree or order is not passed on appeal, it is a judgment, decree or order of a Division Court from which no appeal lies under clause 15 of the Letters Patent. I think that clause 39 deals only with two categories of cases, first judgment, decree or order made on appeal, and secondly,

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made in exercise of original jurisdiction whether by individual Judges or by a Division Court from which no appeal lies under clause 15 of the Letters Patent. This view is consistent with the decision in *An Attorney, In re*[1] where it was held that clause 39 of the Letters Patent empowers the High Court to declare the fitness of an appeal to the Privy Council in any matter not being of criminal jurisdiction, if it is a final judgment, decree or order of the Court made on appeal or in exercise of original jurisdiction.

I think, therefore, that the present application does not fall either under clause (*a*) of section 109 of the Civil Procedure Code or clause 39 of the Letters Patent. The only remedy, in my opinion, for the applicants is to apply for special leave to appeal to the Privy Council.

For these reasons I would discharge the rule with costs.

MURPHY, J. :—The first question in this application is whether under the provisions regulating appeals to His Majesty's Privy Council we have power to grant leave to the petitioners.

These proceedings are the last tangle of a web of litigation in which one Kevaldas, formerly the agent of the Bharatkhand Cotton Mills at Ahmedabad, has involved himself and the Mill. The many disputes have been going on since 1909. They culminated in three appeals to His Majesty in Council which were consolidated into Privy Council appeal No. 118 of 1927, and were disposed of by their Lordships on November 1, 1929, the result being a variation of this Court's decrees, by deleting paragraphs 2 and 5 of the final one. As their Lordships were unable to obtain the precise figures to

[1] (1914) 41 Cal. 734.

find place in the final decree, they were pleased to direct that this was a task which must devolve on the Courts in India and the matter so came before a Division Bench of this Court of which I was a member, judgment being delivered by the Honourable the Chief Justice (Sir Amberson Marten) on April 1, 1930, and April 14, 1930—the second judgment being on the report of the Commissioner for taking accounts. The main points arising for decision then were, whether a sum of Rs. 47,672 recovered in execution in March 1920 should be paid towards principal, or go to reduction of interest, the decision being in favour of the second alternative; whether interest should be allowed on dividends, a question decided in the negative; and, lastly, whether interest on the deposit receipts should be simple or compound, the answer given being that it should be simple.

Lastly, it was decided that the accounts on these lines should be taken by the Commissioner of this Court. Accounts were accordingly taken and the Court adopted the learned Commissioner's report, and made a decree for Rs. 1,33,723-6-10. These findings are the petitioner's grievance, expressed in a petition covering 51 paragraphs. Seth Kevaldas did not appear before the Commissioner, for reasons stated in the petition, and those proceedings were *ex parte*.

Mr. B. J. Desai for the petitioners has frankly admitted that owing to the nature of the proceeding in this Court, the question whether petitioners have a further right of appeal, or not, is not free from doubt; and we have not been able to find a precedent.

The provisions of sections 109 and 110 of the Civil Procedure Code cover orders passed "on appeal". The decree in question was made under the direction of their Lordships of the Privy Council in pursuance of that Court's decree, and did not come before this Court

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"on appeal", it having already dealt with the matter on appeal. Mr. Desai accordingly leans more towards making out his clients' right to be granted leave by clause 39 of the Letters Patent. *Prima facie*, the provisions of clause 39 apply to proceedings on the Original Side of this Court rather than to matters coming to it from the District and Subordinate Courts in the Presidency, as does this one—but this objection is probably not insuperable.

Sections 109 and 110 seem to me clearly not to apply. This Court's decree does not fall under clause (*b*) and cannot come within clause (*a*) for it was not passed "on appeal" unless we hold that it is really a continuation of the three original appeals, which, in view of the intervening decree of a higher Court, cannot be the case. In a sense, it may be said to be a final decree, a preliminary one only having been made by His Majesty's Privy Council; but here again it is not on appeal. I believe the case does not fall under clause (*c*) either.

The provisions of clause 39 of the Letters Patent are as follows, omitting now unnecessary expressions and phrases :—

"may appeal to Us . . . . in any matter . . . . from any final judgment, decree, or order of the said High Court . . . . *made on appeal*, and from any final judgment, decree, or order made in the exercise of original jurisdiction by Judges of the said High Court, or of any Division Court, from which an appeal shall not lie to the said High Court under the provisions contained in the fifteenth clause of these presents."

Mr. Desai's argument has been that there are three classes of cases contemplated :

(I) orders made on appeal.

(II) in exercise of original jurisdiction,

(III) in exercise of either original or appellate jurisdiction by a Division Court from which there is no appeal to the High Court.

He would bring this order within the last class, and so base the petition now in question.

I think that the clause cannot be read in this way—the plain intention of the clause is—I believe—to make provision for two classes of cases only, and the third class can only be extracted from it by reading in what is not there, for the expression "made in the exercise of original jurisdiction" appears to govern the following clause "or by any Division Court," which is not, I think, a 3rd term, importing orders not made on appeal or in the exercise of original jurisdiction, but all other orders, whether in the first, or second class made by a Division Court. Had this been the intention it would have been easy to express it clearly otherwise, and since it has not been done, I must conclude that it was not the object of the Letters Patent.

I agree, therefore, with the order propounded by my learned brother Patkar J.

Rule discharged.

B. G. R.

ORIGINAL CIVIL.

Before Mr. Justice Rangnekar.

In re ADARJI MANCHERJI DALAL.

1931
April 11.

Indian Succession Act (XXXIX of 1925), section 250—Letters of administration—Partnership property—Policy of insurance on lives of partners—Premia paid out of partnership property—Policies part of partnership property—Death of partner—Recovery of amount due on policies—Will by partner—Renunciation by executors—Grant of letters of administration limited to amount due on policies—Indian Trusts Act (II of 1882), section 88—Indian Court-fees Act (VII of 1870), section 19 D.

Where both the partners in a firm effect assurances on their lives for and on account of the partnership and the premia in respect of those insurance policies are paid out of the funds of the partnership, those policies form part of the partnership assets. In such a case the surviving partner is entitled under the provisions of section 250 of the Indian Succession