APPELLATE CIVIL

Before Kapur, J.

SHRI HARKISHEN DASS,—*Appellant.*

versus

SHRI KIRPAL SHAH,—*Respondent.*

Execution First Appeal No. 15-D of 1954

1955

February, 15th

Indian Limitation Act (IX of 1908) Article 182(2)—Appeal—Meaning of—Whether should necessarily be against the decree sought to be executed—Whether must be on merits.

In two cross suits disputes between parties referred to arbitration on 10th October, 1945. Award was made in favour of H.D. Objections to the award were dismissed on 19th November, 1946 and a decree for Rs. 7,000 was passed in accordance with the award on 30th November, 1946. Appeal filed against the order refusing to set aside the award was dismissed in default on 6th February 1948. H.D. applied for execution of the decree on 14th August 1950. Judgment-Debtor pleaded bar of limitation. The trial Court held the application barred by time. On appeal to the High Court by H.D.

Held (1), that the appeal which was brought against the order refusing to set aside the award which was dismissed on the 6th February, 1948 by the Lahore High Court in default the time will begin to run from that day and the execution application was within time.

(2) that the decision of the appeal need not necessarily be on merits and even if it is dismissed in default, Article 182(2) will be applicable.

Nagendra Nath Dey v. *Suresh Chandra Dey* (1), explained; *Nanduri Sriramchandra Rao* v. *Chintamanibhatla Venkateswara Rao* (2), *Firm Dedhraj Lachminarayan* v. *Bhagwan Das* (3), *Nagappa Bandappa* v. *Gurushantappa Shankrappa* (4), *Kayakutti* v. *Veerankutti* (5), *Narmadabai Narayanshet* v. *Hidayatalli Saheballi* (6), *Bhawanipore Banking Corporation, Limited* v. *Gouri Shankar Sharma* (7), relied upon; *Hussain Asghar Ali* v. *Ramditta Mal and others* (8), *Thandavarova Gramani* v. *Arumugha Mudali* (9), *Ram Kumar* v. *Chaube Rudra Dutt* (10), *Bank of Upper India, Limited* v. *Sri Kishan Das and others* (11), followed; *Haris Chandra Chowdhury* v. *Dines Chandra Chowdhury* (12), *Kanwar Bahadur Singh* v. *Sheo Shankar* (13), *Rameshwar Prasad Sahu* v. *Parmeshwar Prasad Sahu* (14) *Mulkh Raj* v. *Gurditta Shah Hari Chand* (15), *Secretary of State* v.

(1) 59 I.A. 283
(2) I.L.R. 1939 Mad. 252
(3) I.L.R. 16 Pat. 306
(4) I.L.R. 57 Bom. 388
(5) (1927) 1 M.L.J. 407
(6) A.I.R. 1949 Bom. 115
(7) A.I.R. 1950 S.C. 6
(8) 60 I.A. 83
(9) A.I.R. 1945 Mad 261
(10) A.I.R. 1951 All. 493
(11) A.I.R. 1935 Lah. 771
(12) A.I.R. 1946 Cal 375
(13) A.I.R. 1950 All. 327
(14) A.I.R. 1951 Pat 1
(15) A.I.R. 1929 Lah. 283

Mst. Reshmo (1), not followed; *Batuk Nath* v. *Munni Dei* (2), and *Abdul Majid* v. *Jawahir Lal* (3), distinguished.

Execution First Appeal under Section 96 of Act V of 1908, Code of Civil Procedure, against the order of Shri S. S. Kalha, Sub-Judge, 1st Class, Delhi, dated the 2nd February, 1954, dismissing the execution application as barred by time.

R. S. NARULA, for Appellant.

A. R. WHIG, for Respondent.

JUDGMENT

Kapur, J.

KAPUR, J. This is a decree-holder's appeal against an order passed by the executing Court dated the 2nd February, 1954, dismissing the application of the decree-holder for execution on the ground that it is barred by time.

Cross-suits were pending in the Court of a Subordinate Judge in Gujranwala. On the 10th of October, 1945, they were referred to arbitration and an award was made in favour of Harikishan Das, the date of which is not quite clear. Objections against the award were dismissed on the 19th November 1946 and a decree was passed in accordance with the award on the 30th November 1946, the amount being Rs. 7,000. On the 14th January 1947 an appeal was filed in the Lahore High Court against the order refusing to set aside the award and this appeal was dismissed for default on the 6th February 1948 on the ground that the parties were not present and that notices in accordance with the rules of the High Court had been issued to the parties.

The decree-holder made an application for execution on the 14th August 1950 in a Court at Delhi. The judgment-debtor pleaded that the application was barred by time, and there were other pleas also which are not necessary for the purposes of this appeal. The learned Judge held that the application was barred by time. In appeal reliance was placed on Article 182 (2) of the

(1) A.I.R. 1936 Lah. 479
(2) 41 I.A. 104
(3) I.L.R. 36 All. 350

Indian Limitation Act and it was submitted that as an appeal had been brought the date from which the time for execution begins to run is the 6th February 1948. The relevant portion of this Article when quoted runs as under—

"182. For the execution of decree or order* * *	Three years	1. The date of the decree or order, or 2. (where there has been an appeal) the date of the final decree or order of the Appellate Court, or the withdrawal or the appeal or * * * * * * *".

The contention raised is that the time runs from the date of the final decree or order irrespective of whether the appeal is from the decree which is sought to be executed. As I read the words of this Article the period of three years for the execution of the decree or order starts from the date of the decree or order which is sought to be executed. Sub-clause (2) of the third column shows that the time begins to run from the date of the final decree or order and the question to be decided is what is the meaning of the words 'where there has been an appeal'. Must the appeal necessarily be against the decree which is to be executed or the word 'appeal' would include such an appeal against proceedings which may imperil the decree wholly or partly or not at all.

The appellants rely on *Nagendra Nath Dey* v. *Suresh Chandra Dey* (1), where it was held that any application by a party to an appellate Court to set aside or revise a decree or order of a Court

(1) 59 I.A. 283

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subordinate thereto is an appeal within the meaning of Article 182 (2) of the Limitation Act even though (a) it is irregular or incompetent, (b) the persons affected by the application to execute were not parties, or (c) it did not imperil the whole decree or order. In this Privy Council case in a suit for partition a Receiver was appointed with a power to raise a loan on the security of a mortgage of the properties. He borrowed Rs. 18,000 from co-sharers on July the 10th, 1895. The appellants before the Board were amongst the mortgagees. Thus the position on that date was that some of the co-sharers were mortgagees and all the co-sharers were mortgagors. In 1907 after the shares had been allotted to several co-sharers and the Receiver discharged, one of the mortgagees Madan Mohan and his son instituted a suit to enforce the mortgage. After taking accounts the Subordinate Judge passed a preliminary mortgage decree and on appeal being taken to the High Court a compromise was effected on the 10th of June 1913, and a preliminary decree in suppression of the decree of the Subordinate Judge was passed by the High Court in terms of the compromise. Under this decree Madan Mohan's claim was disregarded and the appellants were shown as mortgage creditors for Rs. 14,600. The appellants thereupon applied for withdrawal of the money which they had deposited into the trial Court as a result of the preliminary decree which was opposed by Madan Mohan, but his contention was overruled and the money was allowed to be withdrawn and Madan Mohan appealed to the High Court which appeal was dismissed. This appeal was really an application which purported to be an appeal and the objection to the decision against him was only in respect of an assignment and he had made party to his appeal only the decree-holders. This appeal

was admitted and he was asked to amend the form of his appeal, but he refused. The appeal was then dismissed both on the ground of irregularity and upon the merits and the dismissal was embodied in a decree of the High Court dated August 24th, 1922. It was on the effect of this appeal that the decision on the question of Article 182 of the Limitation Act depended. The application for execution was presented on the 3rd October 1923, and if the time was to run from the decree of the Subordinate Judge, i.e., 24th June 1920, it was manifestly out of time, but it would be within time if the time was to run from the decree of the High Court which was dated the 24th August 1922, and this again depended upon whether Madan Mohan's appeal which was dismissed was "an appeal" within the meaning of second clause of the third column of Article 182. The Subordinate Judge held that it was and the High Court on appeal took the opposite view.

Before the Privy Council the dismissal was supported upon three grounds—(1) that Madan Mohan's application which was treated as appeal was by reason of its irregularity not an appeal but merely an abortive attempt to appeal, (2) that the appeal, in order to save limitation, must be one to which the persons affected, i.e., the judgment-debtors, were parties and (3) that it must be one in which the whole decree was imperilled. Their Lordships were of the opinion that an application by a party to an appellate Court asking it to set aside or revise a decision of a subordinate Court is an appeal within the ordinary acceptation of that term and it still remained an appeal whether it was irregular or incompetent.

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Dealing with the other two points their Lordships interpreted the words "where there has been an appeal" and it was observed by Sir Dinshaw Mulla at page 288—

> '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 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."

This judgment shows that the words "where there has been an appeal" would apply where an appeal has been taken—whether it is competent or otherwise and whether the whole of the decree was imperilled or not—and the time in that case was held to run from the date of the appellate decree which was dated the 24th August 1922.

Counsel then relied on *Nanduri Sriram-Chandra Rao* v. *Chintamanibhatla Venkateswara Rao* (1), where an application to set aside an *ex parte* decree was appealed from, but as a result

(1) I.L.R. 1939 Mad. 252

of the order made in appeal the *ex parte* decree stood confirmed as from the 20th October 1932—the date of the judgment of the High Court—and an application for execution was filed on 15th August 1935 and was held to be within time. Appeal in column 3 of Article 182 of the Limitation Act was held to mean "an appeal in the suit which is likely to affect the decree sought to be executed and not merely an appeal against the actual decree or order sought to be executed," and *Nagendra Nath Dey's case*, (1), was relied upon. Referring to the judgment of their Lordships King, J., said—

> "Now, it is true that their Lordships were not dealing with an actual appeal against an order refusing to set aside an *ex parte* decree, as we are here, but with an appeal against the decree itself which was sought to be executed, and the immediate result of their decision was to hold that, even if such an appeal were irregular in form and one to which the judgment-debtors were not parties, it was none-the-less an appeal within the meaning of Article 182. But the principles contained in the passages quoted are, we think, wide enough to cover the present case and other cases of a similar nature."

and the learned Judge agreed with the judgment of the Patna High Court in *Firm Dedhraj Lachminarayan* v. *Bhagwan Das* (2), where the definition given to the word "appeal" by the Privy Council was held to be applicable to an appeal against an order refusing to set aside an *ex parte* decree.

(1) 59 I.A. 283
(2) I.L.R. 16 Pat. 306

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The principles of the Privy Council judgment have been applied to two other situations in *Nagappa Bhandappa* v. *Gurushantappa Shankrappa* (1), which was an order granting a review of the original decree, and *Kayakutti* v. *Veerankutti* (2), which was a case of an appeal against a preliminary decree in a mortgage suit which is not itself executable.

In *Narmadabai Narayanshet* v. *Hidayatalli Saheballi* (3), the word "appeal" was held to include an appeal preferred by the defendant against an order dismissing his application to set aside an *ex parte* decree.

The respondent's counsel relied on *Bhawanipore Banking Corporation Limited* v. *Gouri Shankar Sharma* (4). There a judgment-debtor made an application under section 36 of the Bengal Money Lenders Act for reopening the preliminary mortgage decree which was dismissed in default and a final decree was passed. Subsequently, the petitioner applied under Order IX rule 9 for restoration of proceedings under the Bengal Money Lenders Act, but this was dismissed as also the appeal against this order and this was held not to be a review of the final decree and if it was a review at all it was of the order dismissing for default the petitioner's application under the Bengal Money Lenders Act and therefore the execution could not be saved by clause 3 of Article 182, nor did the matter fall under clause 2 of Article 182, as the word "appeal" did not cover an "appeal" from an order passed in a collateral proceeding or having no direct or immediate connection with the decree under execution.

(1) I.L.R. 57 Bom. 388
(2) (1937) 1 M.L.J. 407
(3) A.I.R. 1949 Bom. 115
(4) A.I.R. 1950 S.C. 6

The respondent's counsel submitted that unless there is an appeal against the decree sought to be executed, there is no extension of time as a result of the appeal and the words "where the decree or order appealed from", according to the submission of Mr. Anant Ram Whig, meant "the decree which was sought to be executed," and in support he relied on *Haris Chandra Chowdhury* v. *Dines Chandra Chowdhury* (3), where it was held that an appeal from an order rejecting an application to set aside an *ex parte* decree does not extend the period of limitation for execution of the decree under Article 182 (2). The learned Judges explained the Privy Council case, *Nagendra Nath Dey* v. *Suresh Chandra Dey* (2), and referring to this judgment Mukherjea, J., said that the decision was no authority for the proposition that the appeal need not be directed against the decree which is the subject-matter of execution or a portion of it.

Counsel next relied on *Kanwar Bahadur Singh* v. *Sheo Shankar* (3), where the rule laid down was the same as the one laid down by the Calcutta High Court which I have referred to above.

Reliance was next placed on *Rameshwar Prasad Sahu* v. *Parmeshwar Prasad Sahu* (4), where also it was held that the word "appeal" in column 3 does not include an appeal preferred against an order refusing to set aside an *ex parte* preliminary decree for partition and that it signified an appeal only from the decree or order sought to be executed. The Court noticed the conflict of opinion, but preferred to follow the Calcutta view.

(1) A.I.R. 1946 Cal. 375
(2) 59 I.A. 283
(3) A.I.R. 1950 All. 327
(4) A.I.R. 1951 Pat. 1

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Reliance was also placed on *Mulkh Raj* v. *Gurditta Shah Hari Chand* (1), which is a judgment of Bhide, J., and it was held that the word "appeal" means an appeal from the decree sought to be executed and not from an order rejecting an application to set aside the *ex parte* decree. As this was before the Privy Council judgment, it really does not help in the proper appreciation of the present case.

Reading the judgment of Sir Dinshaw Mulla in the Privy Council case and of Fazl Ali. J., in the Supreme Court case, *Bhawanipore Banking Corporation Limited* v. *Gouri Shankar Sharma* (2), I am of the opinion that the interpretation which has been put by the Madras and Bombay High Courts should be followed. Fazl Ali, J., pointed out that the word "appeal" could not cover an appeal which had no direct or immediate connection with the decree under execution. The proceeding in the present case was an appeal against an order refusing to set aside an award. Under the Arbitration Act no appeal lies against the decree which follows the judgment passed on the basis of an award, but the order refusing to set aside an award is appealable. After an award is set aside the decree would automatically go and therefore it cannot be said that it has not a direct or immediate connection with the decree which was sought to be executed in the present case. The language used by Sir Dinshaw Mulla in *Nagendra Nath Dey's case* (3), is also similar. His Lordship said that so long as there was any question *sub judice* between any of the parties those affected should not be compelled to pursue what was described as thorny path of execution "which, if the final result is against them, may lead to no

(1) A.I.R. 1929 Lah. 283
(2) A.I.R. 1950 S.C. 6
(3) 59 I.A. 283

advantage." These observations are directly applicable to the facts of the present case and I am therefore of the opinion that the time for execution of the decree must run from the date of the final order dismissing the appeal of the judgment-debtor in default on the 6th February 1948.

It was then submitted that in order to attract the applicability of the word "appeal" as used in column 3 of Article 182 (2) the appeal should be decided on merits and a dismissal for default is ineffectual. In the present case it is true that the appeal was dismissed in default, but that was a decision in accordance with the rules made by the High Court of Lahore, but an order of abatement has also been held to give extension of time,—*vide Hussain Asghar Ali* v. *Ramditta Mal and others* (1), where it was held that where an appellate Court dealing judicially with matters before it finally disposes of an appeal on the ground that it has abated, the order is a final order under Article 182 (2) and gives a new starting point to execute a decree, and the observations made at page 89 are in my opinion most relevant and they read—

> "Their Lordships think that when an order is judicially made by an Appellate Court which has the effect of finally disposing of an appeal, such an order gives a new starting point for the period of limitation prescribed by Article 182 (2) of the Act of 1908."

In *Thandavaroya Gramani* v. *Arumugha Mudali* (2), an appeal was taken against an application refusing to set aside an *ex parte* decree, but that was dismissed on the ground that no appeal lay, it was held that under Article 182 (2) the

(1) 60 I.A. 83
(2) A.I.R. 1945 Mad. 261

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only essentials were that there must be an appeal and an order of the appellate Court, and even if the appeal was incompetent on the ground that no appeal lay, the order passed in the appeal would give a starting point of limitation.

In *Ram Kumar* v. *Chaube Rudra Dutt* (1), an order dismissing an appeal for want of prosecution in India was held to be a judicial order disposing of an appeal and this was a final order within the meaning of Article 182 (2) of the Limitation Act.

Two judgments which appear to support a contrary view were quoted before me. They are *Batuk Nath* v. *Munni Dei* (2), and *Abdul Majid* v. *Jawahir Lal* (3). In the former it was held that Article 179 of the Act of 1877 would be inapplicable where an appeal to His Majesty-in-Council was dismissed for want of prosecution as the appeal under the rules of the Privy Council stood dismissed without any further order and it was not necessary for any order being passed.

In the latter case it was held that an order of His Majesty-in-Council dismissing an appeal for want of prosecution does not deal judicially with the matter of the suit and therefore the appellant is not in the same position as if he had not appealed at all. These two judgments are based on the peculiar rules of the Privy Council and are inapplicable to the present case.

Counsel for the respondent relied on *Secretary of State* v. *Mst. Reshmo* (4), where it was held by Bhide, J., following the Privy Council Judgment

(1) A.I.R. 1951 All. 493
(2) 41 I.A. 104
(3) I.L.R. 36 All. 350
(4) A.I.R. 1936 Lah. 479

on the point, that a dismissal for want of prosecution does not constitute a final decree or an order within the meaning of Article 182 (2) of the Limitation Act. With very great respect I am unable to agree with the opinion of the learned Judge because under the rules of this Court a judicial order has to be passed in order to dismiss an appeal for want of prosecution and it is so provided in the rules of the Court.

In a previous judgment of the Lahore High Court in *Bank of Upper India Limited* v. *Sri Kishan Das and others* (1), it was held that where 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.

It was next submitted by the respondent that the decree sought to be executed is not a decree which was passed before the 15th day of August 1947, and therefore it could not be executed in India under section 7 of Act XXV of 1949, the Displaced Persons (Legal Proceedings) Act. The decree which is sought to be executed is not a decree which was passed after the 15th day of August 1947. The decree was passed on the 30th November 1946, although the period of limitation begins to run from the date that the final order was passed in the proceedings which was the 6th February 1948, and in my opinion this objection is not available to the respondent.

I am therefore of the opinion that—

(1) because of the appeal which was brought against the order refusing to

(1) A.I.R. 1935 Lah. 771

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set aside the award which was dismissed on the 6th February 1948 by the Lahore High Court in default the time will begin to run from that date and that the Privy Council judgment and the decision of the Supreme Court would apply to such cases; and

(2) the decision of the appeal need not necessarily be on merits, but even if it is dismissed in default, Article 182 (2) will be applicable.

I would therefore allow this appeal, set aside the order of the executing Court and order that the execution application should be proceeded with in accordance with law.

The parties will bear their own costs.

The parties have been directed to appear in the Executing Court on the 28th February 1955.