

PRIVY COUNCIL

Nagendra Nath Dey

Vs.

Suresh Chandra Dey

P.C.A.No.84 of 1928

(Lords Blanesburgh, CJ. Tomlin and Russell of Killowen, J. Sir George Lowndes and Sir Dinshah Mulla JJ.)

21.04.1932

JUDGMENT

SIR DINSHAH MULLA.J.

1. This appeal raises a question as to the construction of Article 182, Schedule 1, Lim. Act, 1908. In a suit brought many years ago for partition of certain properties held jointly by the parties to this appeal and their predecessors, a receiver was appointed with power to raise a loan on the security of a mortgage of the properties. The receiver borrowed Rs. 18,000 from some of the cosharers, and on 10th July 1894, he executed a mortgage of the properties in their favor. Amongst the mortgagees were Nagendra Nath Dey and Pulin Behari Dey, who are the appellants before this Board, and Madan Mohan and his son, who are respondents 24 and 27 respectively. The position at that date was that some of the cosharers were mortgagees and all the cosharers were mortgagors.

2. In 1907, after the shares of the several cosharers in the partition suit had been allotted to them and the receiver discharged, Madan Mohan and his son instituted the suit out of which the present appeal arises in the Court of the Subordinate Judge of Hooghly to enforce the mortgage. In this suit Mad an Mohan claimed that the appellants (defendants 11 and 12) had assigned their 'interest in the mortgage to him. The Subordinate Judge upheld his claim, and after taking accounts between the parties, passed a preliminary mortgage decree declaring inter alia the liability of the appellants to pay a sum of Rs. 4,467 which they accordingly brought into Court, On appeal to the Sigh Court at Calcutta a compromise was effected between the parties, and on 10th June 1913 a preliminary decree in supersession 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 against the appellants was disregarded, and the appellants were shown as mortgage-creditors for Rs. 14,615.15-3. The appellants thereupon applied to the Subordinate Judge for the withdrawal of the Rs. 4,467. Madan Mohan opposed their application, re-asserting his former claim, but his contention was overruled, and the appellants were allowed to withdraw their deposit. Madan Mohan appealed to the High Court, but his appeal was dismissed.

3. In the preliminary decree as passed by the High Court the cosharers were ranged into two groups, one of decree-holders consisting of six sets of cosharers and the other of judgment debtors consisting of eight sets of cosharers. After the date of the decree two out of the eight judgment-debtors paid the amount due from them under the decree. The rest did not pay, and on 4th June 1916, Madan Mohan applied to the Subordinate Judge for a final mortgage decree. In his application he again claimed that the appellants had assigned their Interest in the mortgage to him, and prayed that an order should be made to that effect. On 24th June 1920 the Subordinate Judge delivered his judgment, disallowing Madan Mohan's claim, and a final decree was passed for the sale of the mortgaged properties that had come to the share of the remaining six judgment-debtors. The decree was drawn up on 2nd August 1920, but properly dated as of 24th June. It contained a declaration, in conformity with the judgment, that the appellants were entitled to payment of the above mentioned sum of Rs. 14,615-15-3 out of the proceeds of the sale of the properties.

4. On 27th August 1920, Madan Mohan presented an application to the High Court purporting to be an appeal from the "order" of the Subordinate Judge of 24th June 1920, and alleging, what was clearly untrue, that no decree had been drawn up. His objection was only to the decision against him in respect of the assignment, and he joined as parties to the appeal only the other decree-holders and not the judgment-debtors. The appeal though irregular in form as not being an appeal against the decree of the Subordinate Judge, and being insufficiently stamped for this purpose, was admitted and heard in due course by Woodroffe and Suhrawardy, JJ. Objection was taken to the form of the appeal; Madan Mohan asked to amend but this was refused. In the result the appeal was dismissed both on the ground of irregularity and upon the merits, and the dismissal was embodied in a decree of the High Court dated 24th August 1922, It is upon the effect of this appeal that the decision of the question under Article 182, Lim. Act, now before the Board depends. On 3rd October 1923 the appellants presented an application to the Subordinate Judge for execution by sale of

the mortgaged properties. It was opposed by some of the judgment-debtors, the present respondents 1 to 4, on the ground that it was barred by Article 189. The material portion of that article is in these terms :

Description of application.	Period of Time from which period begins to limitation run
For the execution of a decree or order of any civil Court not provided for by Article 183 or by Section 48; Civil Procedure Code, 1908.	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.

5. If the three years are to be calculated, as the respondents contend, from the date of the decree of the Subordinate Judge, viz., the 24th June 1920, the application was manifestly out of time; it was within time if the critical date is that of the decree of the High Court of 24th August 1922, and the decision of this question depends on whether Madan Mohan's appeal which was dismissed on the latter date was an appeal within the meaning of Clause 2 in Col. 3 of the article cited above. The Subordinate Judge held that it was, and that the application was in time; the judgment-debtor-respondents appealed, and the High Court took the opposite view, and dismissed the application of the appellants.

6. The dismissal is supported upon three grounds, namely, (1) that Madan Mohan's application of 27th August 1920 (hereinafter for convenience referred to as the 1920 appeal), was by reason of its irregularity not an appeal at all, but merely an abortive attempt to appeal; (2) that an appeal in order to save limitation under Clause 2 of the article must be one to which the persons affected, i. e., in the present case the judgment-debtors, were parties; and (3) that it must also be one in which the whole decree was imperilled. In their Lordships' opinion there is no force in the first of these contentions. There is no definition of appeal in the Civil Procedure Code, but their Lordships have no doubt that any 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 the term, and that it is no less an appeal because it is irregular or incompetent. The 1920 appeal was admitted and was heard in due course, and a decree was made upon it.

7. The second and third contentions have been the subject of much difference of opinion in India. In *Mashiattunnissa v. Rani* three of the Judges in the Full -Court took one view, and two the other. In *Gopal Chunder Manna v. Gosain Das Kalay a*

Calcutta Full Bench followed the Allahabad minority, though drawing a distinction between oases of joint and of several decrees. Subsequently further differences of opinion manifested themselves even in the Calcutta Court : see *Christiana Benshown v. Benarashi Proshad* AIR 1914 Calcutta 583 =22 IC 685 (upon which the judgment of the High Court in the present case was based); and *Satish Chandra Chaudhuri v. Girish Chandra Chakravarty* and *Dewan Abdul Alim v. Abdul Hafiz* in both of which cases the opposite view seems to have prevailed. In the Courts of Madras, Bombay and Patna, the view which was taken by the minority in the Allahabad case, and which favors the present appellants, has ultimately prevailed.

8. Their Lordships think that nothing would be gained by discussing these varying authorities in detail. 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 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 re. suit 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, and that there having been in the present case an appeal from the mortgage decree of 24th June 1920, time only ran against the appellants from 24th August 1922, the date of the appellate Court's decree. They are therefore in agreement upon this point with the Subordinate Judge, and they think that the order passed by him on 4th August 1924 was right.

9. Their Lordships will accordingly humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court dated 16th February 1926, should be set aside, and the order of the Subordinate Judge dated 4th August 1924, restored. Respondents 1 to 4 must pay the cost of the appellants in the High Court and before this Board.

Appeal allowed.

Cases Referred.

[1890] 13 All 1=(1890) Awn 207 (FB)

[1898] 25 Cal 594=2 CWN 556 (FB)

[1920] 47 Cal 813=60 IC 915

AIR 1927 Calcutta 89 =97 IC 338=53 Cal 901