

ALLAHABAD HIGH COURT

Abdul Majid

Vs

Jawahir Lal

(John Stanley, C.J. Banerji and Channel, JJ.)

05.08.1910

JUDGMENT

John Stanley, C.J.

1. The facts of this case, so far as it is necessary to state them for the purposes of this appeal, are these:-- A decree for sale was passed under Section 88 of the Transfer of Property Act against several sets of defendants on the 12th of May, 1890, by the Court of the Subordinate Judge of Allahabad. According to that decree a sum of Rs. 11,751-15-9 was directed to be paid by the appellant Abdul Majid, one of the judgment-debtors. He appealed from this decree to this Court and his appeal was dismissed on the 8th of April, 1893. He applied for and obtained leave to appeal to Her Late Majesty in Council. No steps, however, were taken to prosecute the appeal and it was dismissed for default of prosecution by the Privy Council on the 13th of May, 1901. The order of dismissal runs in these terms:--Their Lordships of the Committee in obedience to the said order in Council have proceeded to take into consideration the appeal of Chaudhri Abdul Majid, appellant, and Thakur Prasad, Kanhaiya Lal and Jawahir Lal respondents from a decree of the High Court of Judicature for the North-Western Provinces and having called on the appellant to show cause why the said appeal should not be dismissed for non-prosecution, no effectual steps having been taken to set down the same for hearing, their Lordships do this day humbly agree to recommend to Your Majesty the dismissal of this appeal for non-prosecution." An order was subsequently passed in these terms: "His Majesty having taken the said report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that, the said appeal be and the same is hereby dismissed for non-prosecution, whereof the Judges of the High Court of Judicature for the North-Western Provinces at Allahabad for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly." On the 14th of November, 1904, an application was made to the High Court by the decree-holder, Jawahir Lal, an order absolute against Abdul Majid. An objection was taken to this application by the judgment-debtor on the ground that it was barred by limitation and on the further ground that the procedure enjoined by Section 610 of the Code of Civil Procedure of 1882, had not been followed. On the latter ground the objection was allowed.

The decree-holder then on the 11th of June, 1900, applied to this Court under Section 510, and an order was passed to this effect: "Let the order be sent down to the Court below for necessary execution according to law," The decree-holder then applied for a decree absolute under Order XXXIV Rule 5 of Act V of 1908. This application was met by the objection on behalf of the judgment-debtor that the application was barred by limitation; that the only decree which was capable of execution was the decree of the High Court passed on the 8th of April, 1893; that the order of their Lordships of the Privy Council did not affirm that decree but merely dismissed the appeal for want of prosecution; and that there was no order or decree of the Privy Council which was capable of execution.

2. If this contention be correct, then the application for execution is barred by Article 178 or 179 of the second Schedule to Act XV of 1877, corresponding to Article 181 or 182 of Act IX of 1908. If, on the other hand, the order of the Privy Council is an order which can be executed, the application of the decree-holder is governed by Article 180 of Act XV of 1877, corresponding to Article 183 of Act IX of 1908. This last mentioned article provides a period of 12 years within which an order of His Majesty in Council may be enforced. If the order of His Majesty of the 13th of May, 1901, is treated as an affirmance of the decree of this Court, it seems to me that it is the decree or order of the final Court of Appeal and is an order which can be executed, and as 12 years have not elapsed since the date of that order, the application of the creditor is not barred by limitation. The question is not without authority. In *Pitts v. La Fontaine*¹ it was held by their Lordships of the Privy Council that when a decision of the judicial Committee has been reported and sanctioned and embodied in an order of Council, it becomes the decree or order of the final Court of Appeal, and it is the duty of every subordinate tribunal to whom the order is addressed to carry it into execution.

3. In *Lachmun Persad Singh v. Kishen Persad Singh*² it was held by a Full Bench of the Calcutta High Court, on a reference by Mitter and Maclean, JJ., that although an order of Her late Majesty in Council only confirms a decree of the Court below, that order is the paramount decision in the suit and any application to enforce it is in point of law an application to execute the order and not the decree which it confirmed. The question before the Court in that case was whether Article 179 or Article 180 of Schedule II of Act XV of 1877 governed an application to enforce an order of Her Majesty in Council, affirming a decree of the High Court on its appellate side. Garth, C.J., who delivered the judgment of the Court observed: "Although an order of Her Majesty in Council may confirm the decree of the Court below that order is undoubtedly the paramount decision in the suit and any application to enforce it is in point of law an application to execute the order and not the decree which it confirmed." Then he observes that before the decree-holder can obtain execution he must apply to the High Court under Section 610 of the Code to transmit the order of Her Majesty to the Court whose duty it is to issue execution and it is clear from the language of that section that the Court to which the order is transmitted has to execute not its own decree but the order itself, if this were not so, there would seem no necessity for applying to the High Court at all."

4. In that case, it will be observed, the order of the Privy Council affirmed the decree of the High Court and it may be said that there was no such affirmance of the decree of the High Court in the present case. This I think is not so. The dismissal of the judgment-debtor's appeal for want of prosecution must, I think, be treated as an affirmance of the decree of the High Court.

5. The question whether the dismissal of an appeal for want of prosecution was a decree affirming the decision of the Court immediately below, within the meaning of Section 596 of the former Code of Civil Procedure was considered in the case of *Beni Rai v. Ram Lakhan*³ That section falls within Chapter XLV which treats of appeals to His Majesty in Council, and it prescribes the requirements for such an appeal, and, amongst others, enjoins that where the decree appealed from affirms the decision of the Court immediately below the Court passing such decree, the appeal must involve some substantial question of law. My brothers Knox and Banerji, held that a decree dismissing an appeal for want of prosecution was a decree affirming the decision of the Court' immediately below, within the meaning of Section 596.

6. The decision of the Privy Council in *Tassaduk Rasul Khan v. Kashi Ram*⁴ lends support to the view taken in the last mentioned case. In that case a preliminary objection was taken on behalf of the respondents to the hearing of an appeal before their lordships on the ground that the order giving leave to appeal was not in accordance with the Code of Civil Procedure. The suit in that case was for specific performance of an agreement and the Court below had decreed specific performance. On appeal the only order of the appellate Court was in these terms: "It is ordered and decreed that this appeal be dismissed and the respondents' costs of this appeal are to be paid by appellant." It was held that in order to "affirm the decision of the Court below" within the meaning of Section 596, it is sufficient for the appellate Court to affirm the decree. It need not also affirm the grounds of fact on which the judgment was passed, and that where the decree of the appellate Court was that the appeal be dismissed, but the reasons given were not the same as those of the lower Court in respect of some matters of fact, the appellate Court by the dismissal affirmed the decision of the lower Court within the meaning of the section. This decision appears to me to lend strong support to the argument addressed to us on behalf of the respondent, that the dismissal of an appeal operates as an affirmance of the decree of the Court from which the appeal is preferred, and it is immaterial on what grounds it is dismissed. It seems to me, therefore, that we ought to treat the order of His Majesty in Council as the final order in the litigation and the order which alone is capable of enforcement.

7. I would, therefore, dismiss the appeal.

Banerji, J.

8. The question to be determined in this appeal is whether the application of the respondent for an order absolute for sale under Section 89 of the Transfer of Property Act is barred by

limitation, as contended by the appellant.

9. This decree under Section 83 of the Act was passed by the Court of first instance on the 12th of May, 1890, and was affirmed by this Court on the 8th of April, 1893. The appellant preferred an appeal to His Majesty in Council, allowed it to remain pending till the 13th of May, 1901, when it was dismissed for "non-prosecution" no effectual steps having been taken by the appellant for its hearing. After the disposal of the appeal to the Privy Council the respondent applied for an order absolute for sale on the 14th of November, 1904, but it was dismissed on the objection of the appellant on the ground that the provisions of Section 610 of Act XIV of 1882, had not been complied with. On the 11th of June, 1909, the application which has given rise to this appeal was presented. It is urged that the application is time-barred under Article 178 of Schedule II to Act XV of 1877.

10. It was held by a Full Bench of this Court in *Oudh Behari Lal v. Nageshar Lal*⁵ that an application for an order absolute for sale under Section 89 of the Transfer of Property Act is an application in execution. This will apparently not be so under Act No. V of 1908 (the present Code of Civil Procedure) as Order XXXIV, Rule 5 declares that what was an order absolute for sale under Section 89 of the Transfer of Property Act is the final decree in the suit. However, as Order XXXIV does not apply to this case, we must, in accordance with the ruling of the Full Bench, hold the present application to be an application in execution, and we must consider what article of Schedule II of the Limitation Act applies to it.

11. Article 178 applies if there is no other article in the schedule which governs the application. It is urged on behalf of the respondent that Article 180 of Schedule II to Act XV of 1877, to which Article 183, Schedule I to Act IX of 1908 corresponds, is applicable. Article 180 provides a limitation of 12 years for an application to enforce, among other orders etc., "an order of Her Majesty in Council." We have to determine whether the order which the respondent seeks to enforce is an order of His Majesty in Council within the meaning and intention of the article. When a decision of their Lordships of the Privy Council "has been reported to His Majesty and has been sanctioned and embodied in an order of His Majesty in Council" it becomes the order of His Majesty and the final order in the case which a Court is to carry into effect. This order is not a decree but it is the order of His Majesty and as such has to be enforced. In this case their Lordships of the Privy Council made a report to His Majesty and recommended "the dismissal of the appeal for non-prosecution." This report was taken into consideration by His Majesty and was approved of and it was ordered that the "appeal be and the same is hereby dismissed for non-prosecution." This order of His Majesty is the final order in the cause and is the order which must be enforced. The necessary effect of an order dismissing an appeal from the decree of a subordinate Court is an affirmance of that decree. Therefore, when an appeal to His Majesty in Council is dismissed, the necessary result is that the decree of the Court below is affirmed, whatever the reason for the dismissal may be. It was held in *Beni Rai v. Ram Lakhan Rai* 20 A. 367. (*Supra*) that a decree of the High Court dismissing an appeal for want of prosecution was a

decree affirming the decision of the Court below. I was a party to this ruling and I see no reason to alter the opinion therein expressed. To the same effect is the decision of their Lordships of the Privy Council in *Tassaduq Rasul Khan v. Kashi Ram* 25 A. 109 : 5 Bom. L.R. 300 : 30 I.A. 35(*Supra*), referred to in the judgment of learned Chief Justice. In that case the decree of the appellate Court was, as the report of the case shows, "that the appeal should be dismissed with costs." It was held that the appellate Court affirmed the decision of the lower Court. The principle of these cases applies to the present case, and applying that principle, it cannot but be held that the order of His Majesty dismissing the appellant's appeal affirmed the decree of this Court. The learned Advocate for the appellant placed great reliance on certain observations made by Sir Barnes Peacock, C.J., in his judgment in *Bipro Doss Gossain v. Chunder Seekur Bhattacharjee*⁵ That case is, in my opinion, distinguishable. There the question was as to the meaning to be placed on the provision of Section 20 of Act XIV of 1859 and no question arose as to the effect of an order of His Majesty dismissing an appeal. For the above reasons, I agree with the learned Chief Justice in holding that the respondent's application is governed by Article 180 of Schedule II, Act XV of 1877, and is not time-barred. I also would dismiss the appeal.

Chamier, J.

12. I concur.

13. The order of the Court is that the appeal be dismissed with costs.

Cases Referred.

1(1881) L.R. 6 A.C. 482 : 50 L.J.P.C. 8 : 43 L.T. 519
28 C. 218 : 10 C.L.R. 425
320 A. 367
425 A. 109 : 5 Bom. L.R. 300 : 30 I.A. 35
57 W.R. 521 : B.L.R. Supp. Vol. 718 : 2 Ind. Jnr. (N.S.) 248

