(1871) 06 CAL CK 0007

Calcutta High Court

Case No: Miscellaneous Regular Appeal No. 299 of 1870

Ram Charan Bysak and Another		APPELLANT
	Vs	
Lakhi Kant Bannik and Others		RESPONDENT

Date of Decision: June 12, 1871

Judgement

Norman, Offg. C.J.

1. In this case two questions been raised for the consideration of a Full Bench by a Division Bench, consisting of Mr. Justice E. Jackson and Mr. Justice Mookerjee:--

(reads)

As to the first point we observe that, in the case before us, the decree which was affirmed on appeal by the High Court was one which came before the Court on regular appeal. By section 189, of Act VIII of 1859, the decree in the first Court is to contain the number of the suit, the names and descriptions of the parties and particulars of the claim," and is to specify clearly the relief granted or other determination of the suit. By section 350, the judgment of the Appellate Court may be for confirming or reversing or modifying the decree of the lower Court." By section 360, the decree of the Appellate Court is to contain the number of the suit, the names and descriptions of the parties, &c., and shall specify clearly the relief granted or other determination of the appeal. It shall also state the amount of costs incurred in the appeal, and by what parties and in what proportion such costs and the costs in the original suit are to be paid." It is clear that the decree in the Appellate Court is to have the same relation to the suit as the decree in the first Court has in cases where there is no appeal. It is to be the final determination of the suit and of all matters in dispute therein. The Appellate Court is not merely at liberty, but is required, to dispose by its decree of the costs in the lower Court, a matter which, in cases where the decree is affirmed, is merely a part of the affirmance. Suppose, the lower Court made a decree in favor of the plaintiff for twenty parcels of land. If, on an appeal from the whole

decree, the Appellate Court were to uphold the decision of the first Court, except as to one parcel, as to which it might adjudge that the suit should be dismissed, could it be said that on this adjudication there would or could be two decrees, the decree so far as it dismissed the suit as to one parcel of land being a decree of the Appellate Court, and as to the rest a decree of the first Court? There can be no doubt but that in such case it would be the duty of the Appellate Court to make one single and complete decree in the suit. Nor would the duty be the less if the Court were to uphold the decision of the lower Court on all points. The Appellate Court would in that case be bound by section 350 to confirm the decision of the lower Court. In all cases in which the decree on appeal is regularly drawn up in due form, as it ordinarily is, it disposes of all the matters dealt with by the decree of the lower Court, and the decision of the lower Court becomes merged in and superseded by the decree of the superior tribunal. I entirely concur in the view taken by Mr. Justice Mookerjee that, whether the decree of the lower Court is reversed or modified or affirmed, the decree passed by the Appellate Court becomes the final decree in the suit. In the case before the Court, the decree is not drawn up in accordance with the terms of section 360. It simply dismisses the appeal with costs. But this is mere matter of form, and we think that the decree of the High Court must be treated as containing by implication an affirmance of the decree of the lower Court.

2. The next question is whether a decree of the High Court on its appellate side, affirming the decision of a District Court, is governed by the provisions of section 20 of Act XIV of 1859.

3. By section 36 L of the Code of Civil Procedure," a copy of the decree of the Appellate Court is to be transmitted to the Court which passed the first decree in the suit appealed from, and shall be filed with the original proceedings in the suit, and an entry of the judgment of the Appellate Court shall be made in the original register of the suit." It is to be transmitted not merely for the purpose of execution, but for the purpose of becoming the final decree in the suit, and of being entered as such in the register. It is however still treated as the decree of the Appellate Court (see section 362). It is to be executed according to the rules hereinbefore" (that is, in the Code of Civil Procedure)" contained for the execution of original decrees." Now, amongst the rules for the execution of original decrees is section 288 which provides that, when application is made to any Court to execute the decree of any other Court transmitted to it for execution, the Court to which the application shall be made shall execute it according to its own rules in the like cases." If, therefore, a time is limited within which the decrees of the lower Court must be executed, the same limitation will apply to the decrees of the Appellate Court transmitted to it. If the decree of the Appellate Court is one for which a special period of limitation has been expressly provided, such provision would constitute an exception to the general rule. The 19th section of Act XIV of 1859, with respect to judgments, decrees, or orders of any Court established by Royal Charter," allows twelve years after a right to enforce the same shall have accrued, & c.

4. The 20th section is as follows:--"No process of execution shall issue from any Court not established by Royal Charter, "to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such "judgment, decree, or order, or to keep the same in force within three years next preceding the application for such execution." At the time of the passing of this Act, and down to the time of the Charter of 1862, the period within which execution of the decrees of the late Sudder Court could be had was governed by the 20th section, and the period of limitation, during which such decrees could have been executed, was three years. It would be a strange and probably wholly unforeseen result of the establishment of the High Court as a Court of Appeal if the effect of Her Majesty"s Charter for that purpose had been to alter the law for the limitation of suits on so important a point. But let us see how the matter stands. I may observe that no general enactment appears to have been passed as regards the appellate side of the High Court, declaring that provisions or Regulations and Acts relating to the late Sudder Court at the time of its abolition should be deemed to apply to the High Court on its appellate side. The 11th section of the 24 & 25 Vict., c. 104, refers only to provisions relating to the Supreme Court. The 8th section of 24 & 25 Vict., c. 104, provides that, on the establishment of the High Court at Fort William in Bengal, the Sudder Dewanny Adawlut at Calcutta shall be abolished." By the 9th section it was enacted that "each of the High Courts to be established under that Act shall have all such jurisdiction, original and appellate, as Her Majesty may by Letters Patent direct, &c., and subject and without prejudice to the Legislative powers in relation to the matters aforesaid of the Governor-General in Council, the High Court shall have and exercise all jurisdiction and every power and authority vested in any of the Courts of the same Presidency abolished under this Act at the time of the abolition of the said last mentioned Courts." Now, if the High Court on its appellate side could now execute or cause to be executed its decrees within the limit allowed by section 19, it would exercise a power which the Sudder Court never possessed. The preamble of the Charter recites the provision to which I have just referred. The 21st clause ordains that, with respect to the law to be applied by the High Court of Judicature to cases coming before it in the exercise of its appellate jurisdiction, such law shall be the law which the Court, in which the proceedings were originally instituted, ought to have applied to such case." By the 37th clause of the Charter of 1862, it is declared that the proceedings in civil suits of every description, between party and party, brought in the High Court, shall be regulated by the CPC prescribed by Act VIII of 1859, and by such further or other enactments of the Governor-General in Council in relation to civil procedure as are now in force." If this 37th clause had been repeated in the Charter of 1865, it would assist my argument. Such is not the case. But I may add that I cannot think that the omission of this clause in the Charter of 1865 was intended to alter the Law of Limitation. The enactment relating to the execution of decrees on appeal at the time of the publication of the Charter of 1862, was section 20 of Act XIV of 1859, and I am of opinion that law became, on the promulgation of the Charter of 1862, instantly applicable as fixing the period of the limitation for the execution of decrees of the High Court on its appellate side. The 19th section of Act XIV of 1859 was intended to apply to the late Supreme Court, a Court established by Royal

Charter of a very different kind from the Appellate Court established by the Charter of 1862, a Court having a very extensive jurisdiction over Europeans resident in India, and dealing with a population to some extent migratory, engaged largely in foreign trade and in adventures in distant countries. The fact that an Appellate Court was established under circumstances which caused it to fall within the terms used in Act XIV of 1859, for the purpose of defining Courts, like the late Supreme Court, was a mere accident. I am of opinion that the 19th section was never intended to apply, and does not apply, to decrees of the High Court on its appellate side; that the High Court on its appellate side is not such a Court established by Royal Charter, as is contemplated by section 19 of Act XIV of 1859; and if so, unless section 20 applies, Act XIV of 1859 does not give any period of limitation within which decrees of the High Court on its appellate side must be executed.

5. On a careful consideration of the Acts and Charters, I am of opinion that when, u/s 361, a decree of the High Court on its appellate side is transmitted to the Court which passed the first decree in the suit for execution, it will have the effect of a decree of such Court, and must be executed within the period limited by section 20, Act XIV of 1859. This opinion is on both points in accordance with a judgment of the High Court at Madras in the case of Arunachella Thudayan v. Veludayan 5 Mad. H.C. Rep., 315.

Loch, J.

6. I concur in the view taken by the Chief Justice. I have had to re-consider the subject, for, on a former occasion, I held that the provisions of section 19, Act XIV of 1859, applied to decrees of the appellate side of the High Court, but it is clear that the High Court in its appellate capacity is only in the position of the late Sudder Court, in regard to the disposal of appeals from the District Courts; and if a decree of the late Sudder Court made on appeal from the judgment of the Court below, required to be executed under the provisions of section 20 of Act XIV of 1859, the decree of the High Court on its appellate side, with regard to the same class of appeals, can have no higher position. Section 19 was enacted for the execution of decrees of the late Supreme Court, and was not applicable to decrees passed by the Sudder Court, and the mere accident that the two Courts have been subsequently amalgamated and become one High Court, does not alter the law as regards the execution of decrees made by the High Court on its appellate side. I concur in the answer proposed to be given by the Chief Justice.

Bayley, J.

7. The conclusion at which the Chief Justice has arrived appears to me to be the correct and proper one.

8. In every case this Court, on its appellate side, by its decrees, orders and decrees either that the appeal be dismissed and the decree of the lower Appellate Court affirmed, or merely that the appeal be dismissed, which involves the consequence that the decree of the first Court be affirmed; or this Court orders and decrees that the decree of the lower

Appellate Court be modified or reversed as the case may be. I do not think it can be said that any of such decrees of the High Court are only decrees of the lower Appellate Court. There was apparently an omission to provide for the particular point when the late Sudder Dewanny and Nizamut Adawlut were amalgamated into the High Court, but the result could never have been contemplated, and in fact it is a legal result that a decree-holder, appealing to the High Court for execution from a Zilla Court decree, should merely by such action obtain twelve years to execute his decree, while in the Zilla Court he would only have three.

9. I would answer the questions in the view taken by the Hon''ble Chief Justice.

Macpherson, J.

10. I am of the same opinion. I think the question is well-disposed of by Sir Colley Scotland in his judgment in the case of Arunachella Thudayan v. Veludayan 5 Mad. H.C. Rep., 217 referred to by the learned Chief Justice.

Mitter, J.

10. I am of the same opinion. The first question referred to us does not admit of any difficulty whatever. Whether the decree of the Appellate Court is for reversing or for affirming the decree against which the appeal is preferred, it is, in either case, the final decree in the cause, and as such the only decree which is capable of being enforced by execution, after it is once pronounced. If the decree of the lower Court is reversed by the Appellate Court, it is absolutely dead and gone. If, on the other hand, it is affirmed by the Appellate Court, it is equally dead and gone, though in a different way, namely, by being merged in the decree of the superior Court, which takes its place for all intents and purposes. Both the decrees cannot exist simultaneously; for in that case the decree-holder would be entitled to demand execution in respect of both of them, and such a double execution in one and the same suit would be manifestly improper. Suppose, the law were that Appellate Courts should execute their own decrees. There is nothing in this supposition to interfere with the fairness of the present discussion, for such a law might at any time be passed by the Legislature, without affecting the principle upon which that discussion depends. Could it have been contended for on(c) moment that the lower Courts would have been justified in executing the original decrees, whilst the Appellate Courts were executing their own? If, notwithstanding the confirmation of the decree of the lower Court by the Appellate Court, we hold that decree to be still in existence, what is to become of the decree of confirmation passed by the latter Court? Surely, it is not to be treated as a nullity. And if not treated as a nullity, it must be treated as a decree capable of being enforced by execution, and therefore of superseding the decree in affirmance of which it was passed.

11. The second question, however, is one of considerable difficulty. But after giving to it my best and most earnest consideration, the conclusion I have arrived at is that a decree

of the High Court in its appellate jurisdiction, whether it is for affirming or for reversing a decree passed by a subordinate Court in the mofussil, is subject, like the latter decree, to the three years" rule of limitation prescribed by the 20th section of Act XIV of 1859.

12. According to the true theory of appeals, the duty of an Appellate Court is to pass the decree which ought to have been passed by the Court, from whose decision the appeal is preferred. The High Court, as a Court of Appeal from the Courts in the mofussil, is no exception to this rule, as may be clearly seen from the 21st section of the Letters Patent, which will be more specifically referred to hereafter. It would therefore be wrong in principle if we gave to the decree of the Appellate Court any legal effect or operation, which that decree, if passed by the Court of original jurisdiction, would not have possessed. An Appellate Court is nothing more than a Court of Error, and its decrees ought, therefore, to be subject to the same rules and limitations as the decrees whose errors they profess to correct. The necessity for the existence of Appellate Courts arises entirely from an assumed want of confidence in the judgments of the Courts of original jurisdiction. But neither this necessity, nor the cause from which it arises, ought to make any difference whatever in the rights of the parties, or in the mode in which those rights are to be enforced.

Section 21 of the Letters Patent of 1865 runs as follows:--

And it is hereby ordained that, with respect to the law or equity and rule of good conscience to be applied by the said High Court of Judicature at Fort William in Bengal to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience which the Court, in which the proceedings in such case were originally instituted, ought to have applied to such case.

13. Suppose, therefore, that the law had required the appellate branch of the High Court to execute its own decrees. The cases arising out of such executions would have been undoubtedly entitled to take their rank in the category of cases coming before the High Court in the exercise of its appellate jurisdiction." What law of limitation then would the High Court have been obliged to apply to such cases? Surely, the same law which the Courts in which the proceedings were originally instituted" would have applied to "such cases,"--that is to say, to cases arising out of the execution of their own decrees. It has been held over and over again, that proceedings taken in execution of a decree are nothing but continuations of the suit in Which that decree was passed; so that there is no ground whatever for raising any verbal objections to the above conclusion in consequence of the use of the word case in the section under our consideration. So far as the spirit of that section is concerned, its applicability to the cases supposed above is too manifest to require any lengthy discussion. If "the law, equity, and rule of good conscience," applicable to the execution of decrees passed by Courts of original jurisdiction, be not the law, equity, and rule of good conscience which the High Court would have been bound to follow in those cases, there is no other law, equity, and rule of good conscience," by which it could have guided itself; and the word law" clearly includes

the Law of Limitation. The High Court, in the exercise of its appellate jurisdiction, is bound to pass its decrees according to the law, equity, and rule of good conscience" prevailing in the Courts from whose decisions the appeals are preferred; and I do not see the slightest reason for holding that the framers of section 21 intended to make the execution of those very decrees subject to a different law or equity and rule of good conscience."

14. It is true that decrees passed by the appellate branch of the High Court are required to be executed by the Courts which passed the original decrees. But this circumstance can, in no way, affect the validity of my conclusion. On the contrary it affords an additional ground in support of it I take it to be a general principle of law that all matters of procedure are subject to the lex fori. Section 362 of Act VIII of 1859, the very section which requires the decree of the Appellate Court to be executed by the Court of first instance, recognises this principle as far as it goes; for it says distinctly that all such decrees shall be executed in the manner and according to the rules hereinbefore contained for the execution of original decrees." It is true that the rules referred to in this section are those-which are laid down in the Code of Civil Procedure, and that they do not, therefore, include the Law of Limitation which forms no part of that Code. But a Law of Limitation, like the one prescribed in Act XIV of 1859, for the execution of decrees, is a part of the law of Procedure in the most extensive signification of that expression; for it merely affects the remedy of the decree-holder, and not the right given to him by the decree, at least not directly. It is upon this ground that it has been held that causes of action arising in foreign territories are governed by the Law of Limitation prevailing in the Court in which they are sought to be enforced, and the same principle is also applicable to the decrees of our Civil Courts when they are sought to be executed out of the jurisdiction of the Courts by which they are passed. Section 287 of the CPC says distinctly that, when decrees of one Court are transmitted for execution to another Court of a different jurisdiction, they shall have the same effect" as the decrees of the Court to which they are so transmitted; and Section 288 enacts that they shall be executed by such Court according to its own rules in the like cases." Why, then, are we to hold that the Courts which have to execute the decrees passed by the High Court, in the exercise of its appellate jurisdiction, are to execute those decrees according to a rule of limitation different from that which is applicable to their own decrees, when the principle involved is precisely the same, and when we find that that principle has been recognized in every other respect by the express provisions of the 362nd section of Act VIII of 1859?

15. Much stress has been laid upon the words established by Royal Charter" used in the 19th section of Act XIV of 1859. It has been argued that, as the High Court is a Court established by Royal Charter," all the decrees passed by it, whether in the exercise of its original jurisdiction or otherwise, must be subject to the twelve years" rule of limitation prescribed by that section. It is clear, however, that that rule was intended by the framers of Act XIV of 1859, for the decrees of the late Supreme Court, whose place is now occupied by the High Court in its original jurisdiction, and there is nothing either in the Act of Parliament, or in the Letters Patent, by which the High Court was established, or in any

other Act or Regulation passed since the promulgation of Act XIV of 1859, to show that the original operation of that rule has been extended to the decrees of the High Court in its appellate jurisdiction. On the contrary, it has been already shown, from the provisions of the 21st section of the Letters Patent, that the reverse is the case. Why, then, are we to adopt an anomalous construction, the effect of which would be to render the decrees of an Appellate Court subject to a Law of Limitation different from that prescribed for the decrees of the Court of first instance, when that construction has not only nothing either in reason or in justice to recommend it, but when it is not even sanctioned by the intention of the Legislature? It may be said that, if section 19 was not intended for the decrees of the appellate branch of the High Court, section 20 also was not intended for those decrees. But the answer to this objection is four-fold. In the first place it is beyond all contention that section 20 was intended for the decrees of the late Sudder Court; and as the appellate branch of the High Court occupies the place of that Court in every respect, all its decrees must be subject to the Law of Limitation prescribed for the decrees of the Sudder Court, in the absence of any specific Legislative provision to the contrary. In the second place, even if it is admitted that section 20 would not be directly applicable to the decrees passed by the High Court in the exercise of its appellate jurisdiction, those decrees would still be subject, according to the true theory of appeals, to the Law of Limitation prescribed by that section, inasmuch as it is the law applicable to the decrees of the Courts in which the proceedings were originally instituted. The legitimate function of an Appellate Court being to do nothing more than what ought to have been done by the Court from whose decision the appeal is preferred, the decrees of the Appellate Court would, upon general principles, be subject to the same laws as those prescribed for the decrees of the Court of first instance, even if there were no express Legislative provision on the subject. In the present case, however, it has been shown, from the 21st section of the Letters Patent, that this was clearly the intention of the Legislature. In the third place, the decrees passed by the High Court on its appellate side being required by law to be executed by the Courts of original jurisdiction, the latter Courts are bound, according to the general principle above referred to, to execute them according to the Law of Limitation applicable to their own decrees. In the last place, if we hold that the decrees passed by the High Court in the exercise of its appellate jurisdiction are subject neither to the provisions of section 20, nor to those of section 19, there is no other section of the Limitation Act which can possibly apply to them; and the consequence would be that those decrees would have no Law of Limitation at all to govern their execution. Such a construction, however, would be not only unjust to the parties against whom those decrees are passed, but it would be also opposed to the intentions of the Legislature, so far as we can gather those intentions from the nature of the functions entrusted to the appellate branch of the High Court, and the laws which have been enacted to regulate the exercise of those functions. It has been said that the opposite view is strongly supported by the principle of the Full Bench case Anandmayi Dasi v. Purno Chandra Roy, Case No. 569 of 1865; 24th August 1866 in which it was held that the decrees of the Privy Council are not subject to any Law of Limitation. I do not wish to express any opinion as to the correctness or otherwise of that decision. But without pledging myself to the soundness of

all the reasonings employed by the learned Judges by whom it was passed, it is sufficient, for the purposes of the present argument, to say that that case is clearly distinguishable from the one now before us. A decree of the Privy Council is not in the nature of a decree passed by an ordinary Court of Justice. It is, in fact, a command of Her Majesty the Queen, and the chief reason upon which the case referred to was decided was that no Act or Regulation passed by the Indian Legislature could interfere with Her Majesty''s prerogative to have that command executed, without reference to any conditions of time not expressly included in it.

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Before Mr. Justice Kemp and Mr. Justice Glover.

The 6th March 1869.

Tafuzzal Hossein Khan (Decree-Holder) v. Bahadur Sing and Others (Judgment-Debtors).

Miscellaneous Special Appeal No. 440 of 1868, from an order of the Judge of Patna, dated the 26th June 1868, reversing an order of the Moonsiff of that district, dried the 80th November 1867.

Messrs. R.E. Twiddle and C. Gregory for the appellant.

Baboo Mahini Mohan Roy for the respondents.

The facts of the case are fully stated in the judgment of the Court, which was delivered by

Glover, J.--This was an application for execution of a decree. The original decree was passed on the 18th December 1862, and awarded possession of certain lands to the plaintiff (mortgagor) in that suit on condition of his depositing in Court a sum of Rs. 2,600. The defendant appealed specially to the High Court, which, on the 8th of January 1864, dismissed his application with costs, and confirmed the order of the Court below.

The first application made to execute the mortgagor''s decree, appears to have been on the 21st November 1865. The Judge has considered that application not to have been made bond fide, because it was a condition precedent to execution that the judgment-creditor should have deposited the Rs. 2,600 which the order of the Court directed him to do; and that not having done so, his application could not be said to have been a bond fide application within the meaning of the Act. It followed, therefore, that the present application of the 6th of April 1867 was out of time.

The first point taken in appeal in this case is, that the decree sought to be executed is in fact a decree of the High Court, and that, therefore, according to various rulings of this Court, the judgment-creditor would have twelve years instead of three wherein to execute

his decree, On this we observe that the decree of the 8th of January 1864 merely rejected the appeal of the special appellant, and confirmed the order of the first Court, and the only way in which the position of the appellant was altered by that decree was that he had to pay the costs of the appeal.

It has been ruled in one or two cases by Division Benches of this Court, that where the High Court on appeal simply confirms the order of the Court below, the decree to be executed is substantially a decree of the Court from whence the appeal came, and that the only decree of the High Court is that part of the order which relates to coats. We think, therefore, that the twelve years'' limitation does not apply to this case except as to that part of the order which gave costs to the appellant, and that the three years'' limitation applies to the substantive decree. We then come to the question as to whether the application by the decree-holder to execute his decree on the 21st November 1865, was a bond fide application within the meaning of the Act. That application was for permission to deposit the Rs. 2,600 as ordered by the original decree, and to get possession of the property. In consequence of this application (on the 29th of November), the petitioner was ordered to deposit the money and to issue the usual notice on the judgment-debtor, and on the 30th of December it appears that the notice was served. The Judge has held these proceedings not to be bond fide, because the sum of Rs. 2,600 had not been paid; bat we find that whilst that application was pending on the 21st December 1865, the judgment-creditor brought a suit to recover wasilat from his judgment-debtor, on the ground that the Rs. 2,600 had already been paid by the usufruct of the land, and that there was a surplus of collections due to him, amounting to Rs. 518, and he obtained a decree on the 13th of June 1866. The judgment-creditor then sought to execute his former decree, on the ground that the Rs. 2,600 which he had been ordered by the decree of 1862 to pay before getting possession of the property had already been paid in the year 1865. It appears to us that this proceeding alone was sufficient to dispose of the Judge''s objection as to the bond fide nature of the execution proceedings in 1865, because this decision distinctly shows that the order contained in the decree of 1862 had been complied with, and that the money had been paid. It has been ruled in various cases that such a suit, brought whilst execution proceedings were pending, and in furtherance of the original decree, would be a proceeding to keep that decree alive. In the case of Shureefoonissa v. Rajkishen 4 W.R., Mis., 24, it was held that when litigation has been undertaken in furtherance of an original decree, that decree was fully kept alive thereby, and that consequently the decree-holder was not barred by the statute of limitation. In another case, Syud Akbar Gazee v. Mussamut Beebee Nufeezun 8 W.R., 99, it was held that even an unsuccessful suit by a decree-holder to establish his right to certain lands was a bond fide proceeding within the meaning of the Act; and, again, in the case of Mussamut Fuzeelutoonnissa v. Chuttur Dharee Sing 6 W.R., Mis., 43, it was held that an attempt at a settlement of accounts even, was sufficient to keep a decree alive. We think it quite clear, therefore, that in this case the decree had been kept alive by bond fide proceedings taken during the year 1865, and that the subsequent application in April 1867 was in time, and should have been allowed to proceed. We therefore reverse the

decision of the Court below with costs.