
(1932) 11 MAD CK 0004
In the Madras High Court

Jujisti Mahapatro

APPELLANT

Vs

Korada Magata Patro and Others

RESPONDENT

Date of Decision : 08-11-1932

Acts Referred:

Limitation Act, 1877 — Article 179

Citation : AIR 1933 Mad 442 : (1933) ILR (Mad) 520 : (1933) 37 LW 557 :
(1933) 64 MLJ 695

Hon'ble Judges : Madhavan Nair, J; Jackson, J

Bench : Full Bench

Judgement

Madhavan Nair, J.—I have had the advantage of reading the judgment which my learned brother is going to deliver and I agree with him. As

the question involved in the appeal is of some importance, I will briefly record my reasons in support of my conclusion.

2. This appeal arises out of an application filed by the transferee decree-holder for passing a final decree in a mortgage suit. The facts of this case

are not disputed. In O.S. No. 7 of 1918 on the file of the District Court of Ganjam, which was a suit on a mortgage, a preliminary decree for sale

was passed on 12th December, 1921, fixing six months, for the payment of the decree amount. An appeal against the decree was filed in the High

Court--Appeal No. 259 of 1923--by the 5th judgment-debtor. Notice was ordered in the appeal, and some of the respondents were served. At

this stage ""the appeal itself was withdrawn by the appellant and it was dismissed with the costs of those respondents that appeared. The order

passed by the High Court runs thus:

The appeal is withdrawn. It is dismissed with costs. The costs will be proportionate ...

3. This order was passed on 21st January, 1924. On 21st January, 1927, the transferee decree-holder presented I.A. No. 36 of 1927 in the

District Court for a final decree. The question that arises for decision is whether this petition is in time.

4. Under Article 181 of the Limitation Act which is applicable to the case, the period of limitation for applying for a final decree is three years from

the time when the right to apply accrues. In the present case, the right to apply accrued on the 12th of June, 1922. The time for filing the

application for the final decree expired on the 12th of June, 1925. LA. No. 36 of 1927 presented on 21st January, 1927, would therefore be

clearly barred by time. But the petitioner argues that having regard to the fact that an appeal was filed to the High Court against the judgment and

decree in O.S. No. 7 of 1918, that judgment and decree became merged in the final decree of the High Court in Appeal No. 259 of 1923, that

limitation runs from 21st January, 1924, the date of the final decree and that since I.A. No. 36 of 1927 was presented on 21st January, 1927,

within three years of the High Court's decree, the petition is in time. The respondent argues that since the appeal filed against the preliminary

decree was withdrawn and dismissed without consideration of merits, it cannot be said that the original decree has been merged in the appellate

decree and that therefore the filing of the appeal cannot be availed of by the petitioner for the purpose of getting a fresh starting point for limitation.

5. The question for determination is whether in a case where an appeal against a preliminary decree was filed but was withdrawn and dismissed

with costs, the time for applying for final decree would run from the date fixed in the preliminary decree for payment or from the date of the order

dismissing the appeal. The learned District Judge relying on a decision of the Privy Council in Abdul Majid v. Jawahir Lal ILR (1914) 36 All. 350 :

27 M.L.J. 17 (P.C) declined to accept the petitioner's contention and held that the application was barred by time. It is argued for the petitioner

that the present case does not fall within the scope of the Privy Council decision and that his application is Within time as having been filed within

three years of the date of the High Court's decree.

6. In the appeal before the Privy Council which also arose out of an Application for a final decree, the facts were as follows :--In a suit to enforce

a mortgage a preliminary decree for sale was made by the Subordinate Judge on the 12th of May, 1890. This decree was confirmed by the High Court on the 8th of April, 1893. Against the decree of the High Court an appeal to the Privy Council was admitted; but was dismissed for want of prosecution on the 13th of May, 1901. On the 11th June, 1909, an application was made to the Subordinate Judge "for an order absolute" to sell the mortgaged properties, in other words, "for an order directing enforcement of the order nisi which had been confirmed by the decision of the High. Court of the 8th of April, 1893". This application was obviously barred under Article 179 of the Limitation Act of 1877 (which applied to the case) as having been filed after the expiry of three years from the order of the High Court confirming the decree--which was the final order of the appellate Court: but it was argued before the Privy Council that the decree which was sought to be enforced had been "constructively turned into a decree of the Privy Council by virtue of the dismissal of the appeal on the 13th of May, 1901 and that therefore the period of limitation was twelve years from the 13th May, 1901, under Article 183 of the Limitation Act of 1877 which corresponds to Article 180 of the present Limitation Act. This contention was rejected by their Lordships of the Privy Council with the following observations:

The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from, it merely recognised authoritatively that the appellant had not complied with the conditions under which the appeal was open to him, and that therefore he was in the same position as if he had not appealed at all. To put it shortly, the only decree for sale that exists is the decree, dated the 8th of April, 1893, and that is a decree of the High Court of Allahabad. The operation of this decree has never been stayed and (there is no decree of His Majesty in Council in which it has become merged. The period of limitation applying to the enforcement of it at all material times was therefore a period of three years. The respondent's right is therefore barred by limitation.

7. The same conclusion was reached by their Lordships of the Privy Council in AIR 1914 65 (Privy Council) which was also a case where the

appeal before His Majesty in Council was dismissed as the appellant or his agent had not taken any effective steps for prosecution. The

observations of their Lordships quoted above from Abdul Majid v. Jawahir Lal ILR (1914) 36 All. 350 : 27 M.L.J. 17 (P.C) were quoted by their

Lordships in 26 CWN 858 (Privy Council) . These observations, says the respondent's learned Counsel, make it clear that in their Lordships"

opinion the decree of the Lower Court cannot be considered to have become merged in the decree of the appellate Court unless the appellate

Court dealt judicially with the matter in the suit in other words, heard it on the merits. If this is the basis of the decision of Abdul Majid v. Jawahir

Lal ILR (1914) 36 All. 350 : 27 M.L.J. 17 (P.C) it must follow, that the judgment and decree in O.S. No. 7 of 1918 in the present case cannot be

said to have become merged in the order of the High Court as that order did not deal with the subject-matter of the appeal on its merits, since the

appeal was withdrawn by the appellant. But the appellant seeks to distinguish the decision in Abdul Majid v. Jawahir Lal ILR (1914) 36 All. 350 :

27 M.L.J. 17 (P.C) on the ground that what was decided in that case was that there was formally no appeal before the Privy Council, that

therefore there was no decree of the Privy Council to which Article 183 of the Limitation Act would apply, and that the same reasoning should not

be applied to the present case, inasmuch as there was an appeal formally before the Court and that appeal was finally disposed of by an order of

the High Court. According to the appellant's contention where an appeal lay and that appeal was disposed of by an order, that order will amount

to a final order in which the original order appealed against gets merged except as in the case dealt with by the Privy Council which was a case of

dismissal for default. He would confine the operation of the decision in Abdul Majid v. Jazvahir Lal ILR (1914) 36 All. 350 : 27 M.L.J. 17 (P.C)

strictly to cases which have been dismissed for default of prosecution and not to cases like the present one in which the appeal was formally

brought before the Court but was withdrawn and dismissed. The question is whether this distinction sought to be drawn by the appellant's Counsel

can be maintained.

8. I find it somewhat difficult to make up my mind on this point but after giving my best consideration, I am inclined to accept the appellant's

contention. At first sight it may appear, if I may say so with very great respect, that the reasoning of their Lordships that for a judgment of the Lower Court to become merged in the judgment of the appellate Court, the order of the appellate Court should deal judicially with the matter of the suit would apply equally to cases where an appeal has been dismissed for want of prosecution as well as to cases where as in the one before us the appeal was formally withdrawn and dismissed and an order was drawn up dismissing it with costs. But having regard to the circumstances in which the observations were made, I do not think this is, a, correct interpretation of their Lordships' judgment. In that case their Lordships decided that the dismissal of an appeal by His Majesty in Council for want of prosecution does not give a fresh starting point of limitation under Article 179 of the Limitation Act of 1877 and that the limitation ran from the order of the High Court confirming the decree which was the final order of the appellate Court. The observations so strongly relied upon by the respondent that the order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from, were made by their Lordships to meet the argument that the order of the Privy Council must be taken to have constructively turned the decree that was sought to be enforced into a decree of the Privy Council. That was all. Their Lordships' observations do not in any way relate to an order referred to in Clause (2) of Article 179 though at first sight it may appear that in their Lordships' view such an order should also be one dealing judicially with the merits of the appeal. But this point--the nature of the final order within the meaning of Clause (2)--cannot be said to have been inferentially decided as the existence of such an order does not seem to have been an essential part of the argument; for, the real point urged was that there was, what was alleged to be, a decree of the Privy Council and that Article 180 of the Limitation Act" applied to the case; and then, their Lordships pointed out that in the circumstances referred to, the order passed by them dismissing the appeal for want of prosecution cannot be said to be a judicial order. If it is to be understood that in their Lordships' view that the order referred to in Clause (2) of Article 179 should also be an

order dealing judicially with the merits of the appeal, then the decision in *Peria Kovil Rmnanuja Peria*"" *Jeeyangar v. Lakshmi Doss* ILR (1906) 30

Mad 1 : 16 M.L.J. 393 of this Court may have to be reconsidered. In that case, a second appeal was filed against the lower appellate Court's

decree but that was withdrawn and the High Court passed the following order:

The appellant's vakil having applied for permission to withdraw the appeal, it is ordered that this appeal be, and hereby is, dismissed ; and it is

further ordered that the appellant do pay to the respondent his costs of this second appeal.

9. The Full Bench decided that

where a second appeal is preferred and an order is made by the Court to which the appeal is preferred which has the effect of finally disposing of

the appeal, time runs from the date of such order; and it makes no difference that such second appeal was withdrawn by the appellant.

10. This case is very much like the one before us; though the second appeal was not disposed of on the merits, time for limitation was calculated

from the date of the appellate order as it had the effect of finally disposing of the appeal. In my opinion what was laid down by their Lordships of

the Privy Council in *Abdul Majid v. Jawahir Lal* ILR (1914) 36 All. 350 : 27 M.L.J. 17 (P.C) was only this: vis., that in that case the order passed

by their Lordships cannot be considered to be a judicial order passed on appeal because the appeal itself for the reason stated in their Lordships"

judgment never came up for disposal by their Lordships and therefore the period of limitation should not be calculated from the date of the order

passed in appeal within the meaning of Article 183 of the Limitation Act. The other decision of the Privy Council reported in AIR 1914 65 (Privy

Council) does not carry the matter much further. In that case as the appellant had not taken effectual steps for the prosecution of the appeal

presented to His Majesty in Council the Registrar under Rule 5 of the Order in Council dismissed the appeal for non-prosecution. It was held by

their Lordships of the Privy Council that

Such a dismissal for want of prosecution is not the final decree of an appellate Court within the meaning of Article 179, Clause (2) of Schedule II

of the Indian Limitation Act from which the period of limitation can be reckoned under that Article in support of the application for the execution of

a decree.

11. The true scope of these two decisions of the Privy Council has been pointed out in Raghu Prasad Singh v. Jadunandan Prasad Singh (1920) 6

Pat. L.J. 27. See also the decision in Gohur Bepari v. Ramkrishna Shaha (1927) 46 C.L.J. 111. It follows from what I have said above that the

observations in Abdul Majid v. Jawahir Lal ILR (1914) 36 All. 350 : 27 M.L.J. 17 (P.C) relied on by the learned Counsel for the respondent

should be strictly confined to cases where the appeals are dismissed for want of prosecution and should not be applied to a case like the one

before us where the appeal was formally brought before the Court for disposal and was finally disposed of by an order dismissing it with costs. In

such a case, in my opinion, the order of the lower appellate Court supersedes the order of the Court appealed against and time begins to run under

Article 181 from the date of the order passed in appeal. In Venkayya v. Sathiraju ILR (1921) 44 Mad. 714 : 41 M.L.J. 117 it was held that an

application for a final decree for sale under Order 34, Rule 5, Civil Procedure Code, is governed by Article 181 of the Limitation Act and the

starting point, in cases where there has been an appeal from the preliminary decree is the date of the appellate decree whether the latter confirmed

or varied the preliminary decree. I think the same should be the decision in the present case also, notwithstanding the fact that the appeal was

withdrawn and dismissed without a consideration of the merits. In my opinion, the observations referred to in Abdul Majid v. Jawahir Lal ILR

(1914) 36 All. 350 : 27 M.L.J. 17 (P.C) cannot be said to apply to a case like the one now under consideration.

12. In this connection the following observation of the learned Judges in Sahu Nandlal Saran v. Sahu Dharam Kirti Saran (1925) 24 A.L.J. 465

may also be referred to with advantage. In that case it was held that ""where an appellate decree either affirms, modifies or reverses the decree of

the trial Court, the period of twelve years u/s 48 of the CPC should begin from the date of the decree of the appellate Court, but where it has been

held that no appeal lay, the order disposing of the so-called appeal will not amount to a decree and therefore the period of limitation, in such a

case, should be counted from the date of the original decree and not from the date of the so-called appeal."" After referring to the decisions of the

Privy Council in Abdul Majid v. Jawahir Lal ILR (1914) 36 All. 350 : 27 M.L.J. 17 (P.C) and the decision in 26 CWN 858 (Privy Council) and

pointing out that the case before them was stronger ""because in the Privy Council case an appeal did lie and had been properly preferred"" while in

the case before them no appeal lay at all and the proceedings did not terminate in an order dealing judicially with the matter in the suit the learned

judges observed as follows:

The converse proposition, though it is not necessary for us to decide this, would also seem to be in conformity with the spirit of Section 2, with the

decision of their Lordships of the Privy Council and with Indian judicial authority, vis., where an appeal lay and that appeal was disposed of by an

order, that order will amount to a decree except as in the case dealt with by their Lordships of the Privy Council (a case of dismissal for default)

and in other special cases where it is expressly declared by Section 2 that the order shall not amount to a decree.

13. For the above reasons I think it must be held that an order passed by a decree dismissing the appeal with costs notwithstanding the fact that

the appeal was withdrawn by the appellant should be held to be an order finally disposing of the appeal superseding the order of the Court

appealed against and that, for the purpose of the present case, time begins to run from the date of the order of the High Court and therefore, I.A.

No. 36 of 1927, the application for passing of the final decree, is not barred by limitation. I would, therefore, allow the appeal with costs. The

result is that the Petition will be disposed of by the Lower Court on the merits. The Court-fee on the Appeal Memo will be refunded.

Jackson, J.

14. The present point for determination is whether a mortgagee-decree-holder who obtained his preliminary decree on 12th December, 1921, is

within time when applying for a final decree on 21st January, 1927, because an appeal against that preliminary decree was withdrawn and

dismissed on 21st January, 1924. It is pleaded that the preliminary decree became merged in the appellate decree, upon the date of which the right

to apply accrued, and therefore the application is within time.

15. Although under the CPC (O. 41, Rule 5) an appeal shall not operate as a stay of proceedings under a decree, yet if there is an appeal against

the preliminary decree there is no conclusive decree under which the decree-holder can proceed.

The essential condition to the making of a final decree is the existence of a preliminary decree which has become conclusive between the parties.

When an appeal has been preferred, it is the decree of the appellate Court which is the [final] decree in the cause." (1926) L.R. 53 I.A. 197 (Privy Council) .

16. The "final" which I have bracketted means of course conclusive ; it is not the antithesis of preliminary.

17. So far there is no difficulty; time runs from the appellate Court decree. But then the question has arisen: what if the appellate Court does not decree?

18. The Allahabad High Court attempted to get over this difficulty by ruling that whenever the appellate Court dismisses an appeal, it passes a decree. Abdul Majid v. Jawahir Lal ILR (1910) 33 All. 154. But the special case under its consideration where the Privy Council had

recommended His Majesty to dismiss the appeal for non-prosecution--was taken up on appeal to the Privy Council which pronounced as follows:

The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an

order adopting or confirming the decision appealed from. It merely recognised authoritatively that the appellant had not complied with the

conditions under which the appeal was open to him, and that therefore he was in the same position as if he had not appealed at all there is no

decree of His Majesty in Council in which the preliminary decree has become merged." Abdul Majid v. Jawahir Lal ILR (1914) 36 All. 350 : 27

M.L.J. 17 (P.C.).

19. Then comes the question, is a dismissal upon withdrawal also a mere recognition that the appellant has not complied with requisite conditions, or is it a decree?

20. Although the withdrawal of an appeal is mentioned in Order 41, Rule 22(4) the Code nowhere lays down the procedure of the Court upon

such withdrawal, and any consequent dismissal must presumably be u/s 151, Civil Procedure Code.

21. In Bombay it may not be the practice to dismiss; for in Patioji v. Ganu ILR

(1890) 15 Bom. 370 the High Court appears simply to have permitted withdrawal; and such permission was held not to be a decree.

22. This ruling is considered by a Full Bench of our Court in *Peria Kovil Ramanuja Peria Jeeyangar v. Lakshmi Doss* ILR (1906) 30 Mad 1 : 16

M.L.J. 393 , where it is held that time runs from the date of an order which has the effect of finally disposing of an appeal.

23. The Full Bench "does not say whether in its opinion an order of dismissal consequent upon a withdrawal is a decree.

24. The determining factor would seem, to be whether or no the Court has in the terms of Section 2, Civil Procedure Code, ""expressed an adjudication"" or in the terms of the Privy Council ruling has ""dealt judicially with the matter"".

25. The exact order of dismissal runs thus: ""The appeal is withdrawn. It is dismissed with costs. The costs will be , proportionate to the interests of the 6th and 7th respondents who appear by counsel. . . .

26. No doubt if the Court had been so disposed it might simply have recorded ""Leave granted to withdraw,"" and then the appellant would be in the same position as if he had not appealed at all; but when the Court went further and considered the award and distribution of costs it is difficult to see how it has not expressed an adjudication and therefore passed a decree. How are the costs recoverable except under the decree of the

High Court?

27. If the principle applicable to non-compliance of conditions is extended to withdrawal, it may lead to deplorable, results.

28. A mortgagee obtains a preliminary decree, which becomes inconclusive by reason of an appeal being lodged. Then if preliminary conditions are not complied with, in all human probability, although the decree-holder is thrown back upon the original date of his decree, he will be within

three years, and may not have much cause to complain that the unjustifiable action of his judgment-debtor in preferring an infructuous appeal has deprived him of several months to which the statute entitled him. But suppose the preliminary conditions are duly complied with, and the appeal comes on for hearing, and then the appellants withdraw. Then the decree-holder may find himself time-barred; for in these days an appeal may well

be pending over three years. No doubt in such circumstances the Court might

refuse withdrawal; but it is startling to consider that the perfectly normal and natural order of the Court ""Withdrawn Dismissed. Costs to respondents"" would have the effect of unsuiting the respondents as barred by limitation.

29. But apart from this *reductio ad absurdum*, in my opinion the order ""Dismissed with costs"" is a decree, and time runs from that order.

30. I should allow this appeal with costs to appellant.