Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Kristo Kinker Ghose Roy and another v. *Burrodacaunt Singh Roy and another from the High Court of Judicature at Fort William in Bengal; delivered 3rd February,* 1872.

Present:

Sir James W. Colvile.
Sir Montague Smith.
Sir Robert P. Collier.

Sir Lawrence Peel.

THIS Appeal, though the facts of it lie in an extremely narrow compass, has raised several questions of general importance and considerable difficulty.

The Appellants, on the 25th of March, 1862, obtained a Judgment against the Respondents for the sum of 9,500rs. with interest from the date of the Plaint, and costs of suit on a claim founded on an agreement to pay to the Appellant Kristokinker an allowance of 900rs. per annum by way of maintainance.

The Respondent, Rajah Burrodakant, appealed against this Decree to the High Court of Calcutta, but by the Decree of that Court made on the 8th of June, 1863, it was ordered and decreed that the Decree of the Lower Court should be, and the same was thereby affirmed; and that the Defendant Appellant should pay to the Plaintiffs' Respondents the sum of 350rs., being the costs of the Appeal

with interest thereon at the rate of 12 per centum per annum from the date of the Decree to the date of realization.

A Petition of Appeal to Her Majesty in Council against the Decree was then presented by the Rajah. He tendered security for costs, and the usual reference was made to ascertain its sufficiency. But the security was never perfected. On the 8th of April, 1865, he presented a Petition to the Court, suggesting that negotiations for a compromise between him and the Appellants were pending, and praying that proceedings in regard to the Appeal to England might be stayed for two months. On the same day the Appellant filed a Petition consenting to that application, and praying that the two months should be granted. The Court, on the 4th August, 1865, made an order "postponing the case for two months, as there were hopes of the parties coming to an amicable settlement." The two months expired on the 6th of October, and nothing came of the negotiations, and, on the 9th of May, 1866, the High Court struck the Appeal off the file in default of prosecution.

On the 22nd of April, 1867, the Appellants made their first application to the Zillah Court for execution against the Respondents, Their application was in the tabular form prescribed by Section 212 of the Code of Procedure which requires the date of the Decree of which execution is sought to be mentioned with other particulars. The only Decree so specified was the Decree of the 25th of March, 1862. But the fact of its affirmance on Appeal was stated in the next column, and the amount sought to be levied included the 350rs. decreed by the High Court as the costs of the Appeal. On the 27th of April, 1867, the Zillah Judge rejected the application for execution on the ground that it was barred by Section 20 of Act XIV of 1859, no step having been taken since the 8th of June, 1863, to keep the Decree in force within the meaning of that section.

The Appellants appealed from that decision to the High Court, which, on the 27th of November, 1867, ruled that, in so far as the Appellants sought to realize the amount decreed to them by the original Decree, their application for execution fell within the three years' limitation of the 20th section; but that, inasmuch as their claim for the costs of the

Appeal being 350 rupees rested on the decree of the High Court, and that was a Court established by Royal Charter, they were entitled, under the 19th section of the Limitation Act, to sue out execution for that amount at any time within twelve years from the date of that Decree; and the case was sent back to the Zillah Court with instructions to deal with it accordingly. The Appellants have brought this Appeal against so much of this Order as held that their right to execution for any part of their demand was barred, but there has been no Cross Appeal against that part of the Order which was in their favour.

The argument on this Appeal has raised the following questions:—

1st. Is the execution of a Decree of the High Court made on appeal from one of the Courts in the Mofussil to be governed by the 20th or by the 19th section of Act XIV of 1859; or, in other words, is it subject to the three years or to the twelve years' rule of limitation?

2ndly. What is the effect of a Decree of the High Court affirming a Decree of a Zillah Court? Is it to be taken to incorporate the latter in itself, so that for the purposes of execution the Decree to be executed is to be taken to be a Decree of the High Court?

3rdly. If, on any ground, the Decree to be executed in this case is to be deemed subject to the three years' limitation, had anything sufficient to keep it in force within the meaning of the 20th section been done within three years of the date of the application for execution?

Upon the two first and general questions there have been conflicting decisions by the High Courts in India.

The Order under Appeal appears to have been the earliest which decided that Decrees of the High Court were within the 19th section. It has been followed at least in one case in Bengal decided as lately as the 6th of September, 1870 (6 Bengal Law Reports, p. 52); and it has been recognized as sound law by the High Court of Bombay in the case reported in 5 Bombay High Court Reports, 214. But in two cases decided by the High Court of Madras, on the 4th of March, 1870, it was ruled by Chief Justice Scotland, and Mr. Justice Bittleston (apparently

without any dissent on that point on the part of the other Judges composing the Full Bench of the Court), that a Decree of the High Court made on Appeal from a Mofussil Court, is not a Decree of a Court established by Royal Charter, within the meaning of the 19th section of the Limitation Act, and is a Decree subject to the provisions of the 20th section of that Act. It may be observed that, neither in these Madras cases, nor in that decided at Bombay, was the determination of this question essential to the decision of the Court upon the particular Appeal before it; since in none of them had the period of three years' limitation, if calculated from the date of the Decree of the Appellate Court expired. This ruling, however, of Chief Justice Scotland appears to have led to a reconsideration of the question by the High Court of Bengal.

Their Lordships find that in a case, not cited at the Bar during the argument, which is to be found among the Full Bench Rulings of the High Court of Bengal in the 16th volume of Sutherland's Weekly Reporter, under date the 12th of June, 1871, a division Bench of the High Court referred for the determination of the Full Bench two questions, in the following terms:—1st, whether a Decree of the District Court affirmed on Appeal by the High Court becomes a Decree of the last mentioned Court: and 2ndly, whether execution of that Decree of affirmance passed by the High Court is to be governed by the provisions of Section 19 of the Statute of Limitation Act XIV, of 1859, or Section 20 of that enactment, *i.e.*, whether the rule of three years or of twelve will apply. The Full Bench, consisting of the late Mr. Justice Norman (then acting as Chief Justice), Messrs. Loch, Bayley, MacPherson, and Dwarkanath Mitter, unanimously decided the first of these questions in the affirmative; and ruled on the second that when under Section 361 of the Code of Procedure a Decree of the High Court on its Appellate side is transmitted to the District 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 the 20th Section of Act XIV of 1859.

The preponderance, therefore, of authority in India is now in favour of the proposition that the

execution of Decrees of the High Court made on appeal from the District Courts is subject to the three years' rule of Limitations.

Their Lordships are of opinion that this conclusion is correct.

The object of Act XIV of 1859 was to carry out a recommendation made many years before by the Law Commissioners for India, by passing one general law of limitation applicable to all Courts in India. It is hardly necessary to remark that the Legislature, in framing the Act, had then to deal with two distinct Judicial systems—the one consisting of what had been the Courts of the East India Company, and may here be called the Mofussil Courts; the other, the Courts established in the Presidency Towns and elsewhere by Royal Charter, and administering to all within their jurisdiction, subject to certain statutory exceptions and modifications, the law of England. The law of limitation which governed the former was to be found in the Regulations which had no force within the Presidency Towns; whilst the law of limitation which governed the latter consisted of the Statute of James, together with such other portions of the Statute Law of England applicable to the subject (if any) as had been introduced into India, and the general rules touching the effect to be given to lapse of time which depend on the decisions of the Courts in England. It is not surprising that, in framing a law designed to be common to both systems of Judicature, it was deemed necessary to make certain exceptions to the general rule of uniformity. And it may be presumed that, in dealing with this matter of execution, the Legislature was moved by certain reasons which approved themselves to the minds of those who were conversant with the administration of justice in the Mofussil to subject the execution of the Decrees of the Mofussil Courts, whether of appellate or of original jurisdiction, to the three years' limitation; whilst, on the other hand, being pressed by the weight and value which the Law of England gives to a Judgment or Decree of a superior Court, it determined not to reduce the period for enforcing the Decrees of the Supreme Courts to less than twelve years. Hence the distinction made by the 19th and 20th sections of the Act, in which the term "Courts established by Royal Charter" was

obviously used not by reason of anything inherent in every Court established by Royal Charter, but simply because it was thought to define (whether happily or not it is needless to inquire) certain existing Courts, viz., the Supreme Courts in the three Presidency Towns, and the Recorders' Courts in the Straits Settlements, and possibly to include other Courts of similar constitution and functions which might thereafter be established. The same term, it may be observed, is to be found in the preamble of Act VIII of 1859 (the Code of Procedure), which, when first passed, was not intended to have operation in the Supreme Courts.

That being so, we have to consider how the question is affected by the subsequent amalgamation of the two systems of Judicature, and the establishment of the High Courts by Letters Patent under the powers given by the 24 and 25 Vict. cap. 104, and the 28th Vict. cap. 15. It will be convenient to speak only of the High Court of Bengal. The general scheme of the amalgamation was to constitute one general Court, of which the Judges sitting in various divisional Courts were to exercise the functions both of the Supreme Court and the Appellate Mofussil Courts (the Sudder Dewanny Adalut and the Sudder Nizamut Adalut), all of which were abolished.

The powers and jurisdiction of the Supreme Court, with some slight modification of the latter, were transferred to the High Court to be exercised by it as a Court of Original Jurisdiction; and the powers and jurisdiction of the Appellate Mofussil Courts were transferred to it, to be exercised by it as an Appellate Court. But the law to be administered by it as a Court of Original Jurisdiction was substantially that previously administered by the Supreme Court; whilst that to be administered by it on appeal from the Mofussil Courts was necessarily that of those Courts. The Code of Procedure (Act VIII of 1859) was indeed made the procedure of the Court in its original as well as in its appellate jurisdiction, and superseded the procedure which had previously obtained in the Supreme Court. But that Code did not touch the subject of limitation, which continued to be regulated by Act XIV of 1859.

So far, therefore, there can be no ground for

inferring that there was any intention on the part either of Parliament or of the Crown to alter the period within which a Decree made on appeal from a Mofussil Court could be executed. The Decree like the Decree of the former Sudder Court was to be sent down to the Lower Court, and entry to be made of it in the register of the Lower Court, and execution sued out there. Every reason of policy which induced the Legislature to require that execution to be issued within three years was, presumably, as operative after the amalgamation of the Courts as it was before that event. Accordingly, one of the learned judges who decided the case now under appeal, has admitted that his construction involved consequences "absurd" in themselves, and, presumably, contrary to the intention of the Legislature. He felt, however, bound by the words "Courts established by Royal Charter." It seems to their Lordships, considering the date and history of the Limitation Act, that the High Court of Madras, and the High Court of Bengal in its decision of the 12th June, 1871, were warranted in holding that the High Courts, though unquestionably "Courts established by Royal Charter" in the broad and general sense of the term, were not when exercising their appellate jurisdiction from the Mofussil Courts, such Courts *within the meaning of Act XIV of* 1859.

There remains the difficulty occasioned by the use of the words "such Court," which has been adverted to in some of the Indian cases. But if those words be held to import the Court issuing the process of execution, *i.e.*, the Zillah Court, the difficulty would equally have applied to the Decree of the former Sudder Court, which, not being the Decree of a Court established by Royal Charter, would have been subject to no rule of limitation. It seems necessary to construe the words "such Court" as meaning "any Court not established by Royal Charter within the meaning of the Act." On the whole, therefore, though it is to be regretted that the Indian Legislature did not upon the amalgamation of the Courts provide more precisely for the application of the Limitation Act, and possibly of other statutes to the new Court, their Lordships are of opinion that the first question ought to be determined in accordance with the rulings of the High Court of Madras, and

the Full Bench of the High Court of Bengal. The sound and convenient rule is undoubtedly that the Court which has to execute the Decree of the High Court, should be governed by the rules which govern the execution of its own Decrees, and their Lordships do not feel constrained by the words of the Statutes or of the Letters Patent to adopt the contrary construction.

If this be so, the consideration of the second question is not necessary for the determination of this appeal; since it is admitted that the period of three years, if calculated from the date of the Decree of the High Court, had expired before the application for execution was made.

Now, indeed, is the general question, upon which there have also been conflicting decisions in India, of much practical importance; since it is admitted that the date from which the three years are to be calculated is the date of the Decree of the Appellate Court; whether that Decree is to be treated as the Decree to be executed; or the appeal of which it is the termination is to be deemed "a proceeding taken to keep the original Decree in force." That an appeal prosecuted to a Decree would be such a proceeding is shown both by the Judgment of the Full Bench delivered by Chief Justice Peacock, in the 7th Weekly Reporter, p. 521; and also by the Judgment of this Board, delivered by Lord Cairns, in the case of Maharajah Dheraj Mahtab Chand, on the 14th of July, 1870.

The state of the Indian authorities upon the general question seems to be this. In the case before us, the High Court obviously proceeded on the principle that a simple decree of affirmance did not so incorporate the mandatory part of the original Decree as to make, for all purposes, the Decree of the Appellate Court the sole Decree to be executed. And this ruling appears to have been followed in the case in the 6th Bengal Reports, p. 52, in which it was ruled that, in order to make the Decree of the Appellate Court, the final Decree in the suit for all the purposes of execution, it was necessary that it should have decreed a material modification of the original Decree. The rule so expressed seems open to the objection of vagueness. The Full Bench of the High Court of Bengal, however, in the decision of the 12th of June, 1871, already referred to, has

ruled that, whether the decree of the Lower Court is reversed, or modified, or affirmed, the Decree passed by the Appellate Court is the final Decree in the suit; and, in the words of Mr. Justice Mitter, "as such the only Decree which is capable of being enforced by execution. And that is in accordance with the Madras decision already cited. Chief Justice Scotland's words are "whether that Decree be in affirmance, or reversal, or modification of the Decree appealed from, it becomes the final Decree in the suit, and therefore the Decree enforceable by execution."

The function of an Appellate Court is to determine what Decree the Court below ought to have made. It may affirm, reverse, or vary the Decree under appeal. In the first case, it leaves the original Decree standing, superadding, it may be, an order for the payment of the costs of the appeal, or for interest on the amount originally decreed. In the other two cases it substitutes other relief for the relief originally given.

In all these cases the Decree of the Appellate Court may be regarded either as a direction to the Lower Court to make and execute a Decree of its own accordingly, or as an independent Decree, whether it is to be executed by the Appellate Court or by the Lower Court. In the latter case a further question arises, viz., whether the original Decree, if wholly affirmed (or so much of it as has been affirmed, if it has been partially affirmed), is to be treated as merged or incorporated in the Decree of the Appellate Court as the sole Decree capable of execution, or whether both Decrees should be treated as standing, execution being had on each in respect of what is enjoined by the one, and not expressly enjoined by the other.

In this country the nature and effect of a Decree on appeal would seem to vary according to the nature of the Decree under appeal, the constitution of the Appellate Tribunal, the proceedings in appeal, and the fact whether the record or merely a transcript is brought up. The determination, however, of the question before their Lordships must depend on the provisions of the Indian Code of Procedure. It is clear that, under that code, whatever Decree is executed, is to be executed by the Lower Court, in

which the record remains, or to which it is to be returned.

But sections 360, 361, and 362, which prescribe the form of the Decree of the Appellate Court, direct a copy of it to be entered on the register, and treat that Decree as a Decree to be executed, seem to exclude the notion that it is a mere direction to the Lower Court to pass and execute a certain Decree.

If the question were *res integra* their Lordships would incline to the view taken by the Judges of the High Court in the present case, viz.: that the execution ought to proceed on a Decree, of which the mandatory part expressly declares the right sought to be enforced. Considering however that, for the reasons already given, the question is not of much practical importance, their Lordships will not express dissent from the rulings of the Madras Court, and of the Full Bench of the Bengal Court, further than by saying that there may be cases in which the Appellate Court, particularly on special Appeal, might see good reasons to limit its decision to a simple dismissal of the Appeal, and to abstain from confirming a Decree erroneous or questionable, yet not open to examination by reason of the special and limited nature of the Appeal. Their Lordships may further suggest that in all cases it may be expedient expressly to embody in a Decree of Affirmance so much of the Decree below as it is intended to affirm, and thus avoid the necessity of a reference to the superseded Decree.

From a passage in the Judgment of Mr. Justice Mitter, already referred to, it appears to have been decided in India, that what are there termed "the Decrees of the Privy Council," are not subject to any law of limitation. That question is not before their Lordships; and if it ever arises, must be determined on its own merits.

The ground of the decision seems to have been, that the Order of Her Majesty in Council being an act done by virtue of her Prerogative, it was not competent to the Indian Legislature to limit the time within which that Order could be enforced. Their Lordships desire to say, that they are not prepared, without full argument and consideration, to accept this ruling as correct. Should the ques-

tion ever be brought here, it will have to be considered whether the Order in Council, which is not, properly speaking, the Decree of a Court, but an Order of Her Majesty made on the recommendation of a Committee of Her Privy Council, does more than prescribe what shall be the final Decree in the cause, leaving it to be executed by the ordinary process of the Courts in India. It may well thus finally ascertain and define the rights of the parties without relieving them from the obligation imposed upon them by the general law of enforcing those rights with due diligence,—a matter with which the Prerogative has no concern.

The result of what has been said is, that the determination of this Appeal must depend on the third question, viz., whether any proceeding sufficient to keep the Decree in force within the meaning of the 20th section, was had between the 8th of June, 1863, and the 22nd of April, 1867, the date of the application for execution. It has been argued that the presentation of the Petition of Appeal to England, was such a proceeding, and that the period of limitation was to be calculated from the 9th of May, 1866, when that Petition was finally dismissed.

It was further argued that the filing by the Appellants of the petition consenting to the Respondent's application for further time to prosecute his Appeal was such a proceeding, and that the time was to be calculated from the date of that Petition (the 8th of April, 1864), or from the 4th of October, 1865, when the two months granted expired. Their Lordships are of opinion that there is no ground for the first contention; that the Respondent's Petition of Appeal being a proceeding taken in order to destroy the Decree, cannot of itself be treated as a proceeding to keep it in force; and in this opinion they are supported by all the Indian authorities cited, except the observations of Mr. Justice Holloway in the Madras case. It is, however, admitted that had the Appeal to England been allowed, the present Appellants, being Respondents to it, and, as such, supporting the Decrees, would have been entitled to sue out execution at any time within three years at least after the final dismissal of that Appeal.

The Appeal, it is true, never was allowed, but during the period between the date of the presenta-

tion of the Petition and that of its dismissal, the allowance of the Appeal depended on the Respondent's compliance with the rules which regulate the admission and allowance of Appeals to England; and the Appellants had a right to intervene and see that there was a compliance with these rules, particularly with such of them as relate to security, and, in the event of non-compliance, to insist on the dismissal of the Petition. In their Lordships' opinion there is, in this case, sufficient evidence that the Appellants did so intervene. The Petition, by which they consented to the application for two months' further time, is pregnant evidence of this fact; for unless they had then been active parties to the proceedings their consent would have been unnecessary. Their Lordships, therefore, though they would have been glad to have had fuller evidence of what was actually done in this matter, have come to the conclusion that there was at that time such a *contestatio* between the parties touching the allowance of the Appeal to England as suffices to bring this case within the principle laid down by Lord Cairns in the case of Maharajah Dheraj Mahtab Chand, already referred to, and to relieve their Lordships from the necessity of depriving the Appellants of the fruits of what appear to be just Decrees by the application of the Statute of Limitations.

Their Lordships, therefore, will humbly advise Her Majesty that this Appeal ought to be allowed; that the orders of the Zillah Judge and of the High Court ought to be reversed; and that the Appellants ought to be declared entitled to sue out execution of the Decrees, and to recover also the costs of the proceedings in execution in both the Indian Courts. They will also be entitled to the costs of this Appeal.

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