

## **P. Ram Kumar And Anr. vs Chaube Rudra Dutt on 24 July, 1950**

**Equivalent citations: AIR1951ALL493, AIR 1951 ALLAHABAD 493**

**Author: Raghubar Dayal**

**Bench: Raghubar Dayal**

### **JUDGMENT**

Agarwala, J.

1. This is a decree-holders' second appeal arising out of an objection that the execution application was barred by time. The relevant facts are these.
2. The decree under execution was passed by the Assistant Collector, first class, Kanpur, on 30-9-1938. Both the parties appealed to the District Judge. The decree-holders filed their vakalatnama in the judgment-debtor's appeal on 27-2-1939, while the judgment-debtor also filed his vakalatnama in the decree-holders' appeal, but the date is not known. Both the appeals came up for hearing on 15-5-1939. None of the parties seemed to have appeared and both the appeals were dismissed for default on that date. The decree-holders then filed an application for execution on 5-2-1942. The judgment-debtor objected that this application was beyond limitation as it was beyond three years of the date of the decree. His contention was that the order dated 15-5-1939 passed in appeal could not give a fresh starting point for purposes of limitation, as it was not a final order but was merely an order dismissing the appeal for default. The Assistant Collector accepted this contention and held that the application was time-barred. The decree-holders appealed to the District Judge. He dismissed the appeal.
3. The decree-holders have now come up in execution second appeal to this Court and the only point for consideration is whether the limitation for the execution application would be counted from the date of the decree, i. e. 30-9-1938, or from the date of the dismissal of the appeals for default, i. e., 15-5-1939.
4. The learned counsel for the respondent has strongly relied upon the two decisions of their Lordships of the Privy Council in *Batuk Nath v. Mt. Munni Dei*, 36 ALL. 284: (A. I. R. (1) 1914 P. C. 65) and *Abdul Majid v. Jawahir Lal*, 36 ALL. 350 : (A. I. R. (1) 1914 P. C. 66).
5. In *Batuk Nath's* case, 36 ALL. 284: (A.I.R. (1) 1914 P. C. 65), an appeal to His Majesty in Council was dismissed Under Section 5 of the Order in Council of 15-6-1853, which provided that where for a period specified in the order the appellant to His Majesty in Council, or his agent, had not taken any effectual steps for the prosecution of the appeal, his appeal stood dismissed without further

order. It was held that such a dismissal for want of prosecution was not the final order or decree of the appellate Court within the meaning of Article 179, Clause (2), Schedule II, Limitation Act, 1877, corresponding to the present Article 182 (2), Schedule II.

6. In Abdul Majid's case, 36 ALL. 350 : (A. I. R. (1) 1914 P. C. 66), there was the same want of prosecution on behalf of the appellant or his agent in an appeal before His Majesty in Council. An order of His Majesty in Council was passed dismissing the appeal on that ground. It was held that this order, not being a judicial order disposing of the appeal, did not fall within the meaning of the expression 'final order' of the appellate Court under Article 182 (2).

7. It will be observed that in both these Privy Council cases, under the rules relating to appeals before His Majesty in Council, the appeals stood dismissed without any further order by His Majesty in Council. In Batuh Nath's case, 36 ALL. 284 : (A. I. R. (1) 1914 P. C. 65), there was no order at all by His Majesty in Council. In Abdul Majid's case, 36 ALL. 350 : (A. I. R. (1) 1914 P. C. 66), there was an order of His Majesty in Council dismissing the appeal for want of prosecution. But in both the cases the order was an order which was not a judicial order at all.

8. The position in appeals dismissed for want of prosecution in India is, however, different. An appeal in such cases does not stand automatically dismissed for want of prosecution under the provisions of the Civil Procedure Code. It has got to be dismissed by an order of the Court. An order dismissing an appeal for want of prosecution in India is a judicial order disposing of the appeal. Since no further appeal is provided against such an order, it is a final order within the meaning of Clause (2) of Article 182. The expression 'final order' in that clause does not mean an order finally disposing of the rights of the parties. It merely means an order finally disposing of the appeal. The limitation for purposes of an execution application would, therefore, be counted from the date of the order dismissing an appeal for want of prosecution.

9. This view is supported by a later decision of their Lordships of the Privy Council in Hussain Asghar Ali v. Ramditta Mal, 60 Cal. 662: (A.I.R. (20) 1933 P. C. 68). In that case, the question was whether the appeal had abated. The Court dismissed the appeal on the ground that it had abated. It was held that the decision was a judicial decision finally disposing of the appeal and that limitation for purposes of an execution application would be counted from the date of the order.

10. The application in the present case was, therefore, well within time.

11. We, therefore, allow this appeal, set aside the order of the Court below and direct that the execution application be proceeded with in accordance with law.

12. The appellants will have their costs from the respondent in all the Courts.