Privy Council Appeal No. 71 *of* 1912 ; *Allahabad Appeal No.* 41 *of* 1910.

Batuk Nath - - - - - *Appellant*,

v.

Musammat Munni Dei and others - - *Respondents.*

FROM

THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN PROVINCES, ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH MARCH 1914.

Present at the Hearing :

LORD SHAW. SIR JOHN EDGE.
LORD SUMNER. MR. AMEER ALI.

[*Delivered by* SIR JOHN EDGE.]

This is an appeal from a decree, dated the 4th June 1910, of the High Court of Judicature at Allahabad, which dismissed an appeal by the appellant here from a decree of the Subordinate Judge of Agra, dated the 8th September 1908, dismissing an application which had been made on the 2nd October 1907 to the Court of the Subordinate Judge by Babu Batuk Nath for the execution of a decree of the 29th March 1898.

The decree of the 29th March 1898 had been made by the then Subordinate Judge of Agra in favour of one Sheo Narain in a suit which had been brought by him under the Transfer of Property Act, 1882, for sale of certain immovable property. By that decree it was ordered that if Sheo Narain should fail to pay a prior mortgage debt within five months from the 29th

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March 1898 his suit should stand dismissed with costs. From that decree of the 29th March 1898 an appeal was brought to the High Court of Judicature at Allahabad. That appeal was dismissed by the High Court by its decree of the 12th February 1900, but in dismissing the appeal the High Court extended the time for payment of the prior mortgage debt to the 9th August 1900. It has not been alleged or proved that any certified copy of the decree of the 29th March 1898 was registered within the meaning of Article 179 of the Second Schedule of the Indian Limitation Act, 1877. From the decree of the 12th February 1900 of the High Court an appeal to His Majesty in Council was brought. On the 15th December 1904 the appeal to His Majesty in Council stood dismissed for non-prosecution under Rule V. of the Order in Council of the 13th June 1853 without further order.

On the 26th September 1901 Sheo Narain had assigned his decree of the 29th March 1898 to Babu Batuk Nath. During the pendency of the appeal to His Majesty in Council some orders had been made by the Court of the Subordinate Judge of Agra extending the time for the payment of the prior mortgage debt, but the last application for an extension of time for the payment of the prior mortgage debt which was made to his Court was dismissed by the then Subordinate Judge of Agra by his order of the 20th March 1902, and on the 7th June 1902 the Subordinate Judge dismissed an application for a review of his order of the 20th March 1902.

In making his decree of the 8th September 1908 dismissing the application of the 2nd October 1907, the Subordinate Judge held that the period of limitation which was applicable to the case ran from the dismissal for want of prosecution of the appeal to His Majesty in Council, that is

to say, from the 15th December 1904, and consequently that the application for execution had been made within time; he doubtless was under the impression that the appeal had been dismissed by an order of His Majesty in Council made in the appeal. The Subordinate Judge dismissed the application on the ground that the terms as to the payment of the prior mortgage debt imposed by the decree of the 29th March 1898, not having been complied with within the extended time, the suit by the terms of that decree had stood dismissed. The attention of the learned Judges of the High Court does not appear to have been drawn to the question of limitation; they dismissed the appeal to their Court on the ground upon which the application had been dismissed by the Subordinate Judge.

It appears to their Lordships that the application of the 2nd October 1907 was made after the period of limitation prescribed for such an application by Article 179 of the Second Schedule of the Indian Limitation Act, 1877, had expired, and that the application should, in accordance with Section 4 of that Act, have been dismissed unless the dismissal of the 15th December 1904 for want of prosecution of the appeal to His Majesty in Council was by a final decree or order of His Majesty in Council made in the appeal. There was, however, no order of His Majesty in Council dismissing the appeal, nor was it necessary that any such order should be made in the appeal. Under Rule V. of the Order in Council of the 13th June 1853, the appellant or his agent not having taken effectual steps for the prosecution of the appeal, the appeal stood dismissed without further order.

As their Lordships hold that the application of the 2nd October 1907 was barred by limitation, and should on that ground have been dismissed,

they do not consider it necessary to express any opinion on the grounds upon which the High Court made the decree which is under appeal. Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of this appeal.

In the Privy Council.

BATUK NATH

v.

MUSAMMAT MUNNI DEI AND OTHERS.

DELIVERED BY SIR JOHN EDGE.

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