the octroi duty under the Municipal Act continues to be valid. On this point again the appellant's argument is that the levy of a duty at any stage of the manufacture of *bidis* out of tobacco would be the levy of the excise duty and therefore those provisions were contrary to the provisions permitting the levy of the octroi duty. We have already discussed and rejected in the first part of the judgment this contention. It is wrong to think that two independent imposts arising from two different sets of circumstances were not permitted in law. In our opinion, therefore, there is nothing in the Excise Act to make its provisions contrary to the provisions of Section 66 (1) (e) of the Central Provinces Municipalities Act or to the levy of octroi duty under the same. The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

Agent for the appellants: *Rajinder Narain.*
Agent for the respondent: *S. P. Varma.*
Agent for the Union of India: *P. A. Mehta.*

BHAWANIPORE BANKING CORPORATION, LTD.

v.

GOURI SHANKAR SHARMA

1950

March 14.

[SHRI HARILAL KANIA C.J., SAIYID FAZL ALI, PATANJALI SASTRI, MEHR CHAND MAHAJAN, MUKHERJEA and S. R. DAS JJ.]

Limitation Act (IX of 1908), Art. 182, cls. 2 and 3—Execution of decree—Limitation—Starting point—"Where there has been a review", meaning of—Application for re-opening decree under s. 36, Bengal Money-lenders Act dismissed for default and appeal from order of dismissal—Whether give fresh starting for limitation for execution of decree—Interpretation of Art. 182, cls. 2 and 3.

A preliminary decree on a mortgage was passed *ex parte* on the 21st August, 1940. The judgment debtor made an application under s. 36 of the Bengal Money-lenders Act for re-opening the

1950

Bhawanipore Banking Corporation, Ltd. v. *Gowri Shankar Sharma*

decree and the application was dismissed for default of appearance on the 20th December, 1941, and an application under O. IX, r. 9, C.P.C., for restoration of this application was also dismissed on the 1st June, 1942. In the meanwhile on the 22nd December, 1941, a final decree was passed. The judgment-debtor preferred an appeal from the order dismissing his application under O. IX, r. 9, C.P.C., and this appeal was dismissed for non-prosecution on the 3rd July, 1944. On the 9th April, 1945, the decree-holder applied for execution of the decree:

Held that, even assuming that the word "review" has been used in Art. 182 of the Indian Limitation Act, 1908, in a wide sense and that the application under s. 36 of the Bengal Money-lenders Act was an application for review, cl. 3 of Art. 182 was not applicable to the case inasmuch as the application under s. 36 having been dismissed for default the court had no occasion to apply its mind to the question whether the decree could or should be re-opened and it could not therefore be said that "there has been a review" of the decree within the meaning of the said clause.

Held also, that the words "where there has been an appeal" in cl. 2 of Art. 182 must be read with the words "for the execution of a decree or order" in the 1st column of the Article and the fact that there was an appeal from the order dismissing the application under O. IX, r. 9, made in connection with the proceeding under s. 36 of Money-lenders Act, could not therefore give a fresh starting point for limitation under Art. 182, cl. 2.

APPEAL from the High Court of Judicature at Calcutta: Civil Appeal No. LI of 1949.

Manohar Lal, (*H. K. Mitter* with him), for the appellant.

B. C. Mitter, for the respondent.

1950. March 14. The Judgment of the Court was delivered by.

Fazl Ali J.

FAZL ALI J.—The only question to be decided in this appeal, which arises out of an execution proceeding, is whether the decree under execution is barred by limitation. The first court held that the decree was not barred, but the High Court has come to the opposite conclusion, and the decree-holder has, after obtaining a certificate under Section 110 of the Civil Procedure Code, appealed to this Court.

The facts may be briefly stated as follows. On the 21st August, 1940, a preliminary mortgage decree was

passed *ex parte* in a suit instituted by the appellant to enforce a mortgage. On the 19th September, 1940, the judgment-debtor made an application under Order IX, rule 13, of the Civil Procedure Code for setting aside the *ex parte* decree, but this application was rejected on the 7th June, 1941. On the 11th July, 1941, the judgment-debtor filed an application under Section 36 of the Bengal Moneylenders Act, for reopening the preliminary decree, but this application was dismissed for default of appearance on the 20th December, 1941. Thereafter, a final mortgage decree was passed in favour of the appellant, on the 22nd December. The judgment-debtor then made an application under Order IX, rule 9, of the Civil Procedure Code for the restoration of the proceedings under Section 36 of the Moneylenders Act. The application was however dismissed on the 1st June, 1942, both on the ground that no sufficient cause for the non-appearance of the applicant and his failure to take steps in the proceedings was shown and on the ground that no purpose would be served by reopening the preliminary decree after the final decree had been passed. The judgment-debtor thereafter preferred an appeal to the High Court at Calcutta from the decision dismissing his application under Order IX, rule 9, but the appeal was dismissed for non-prosecution, on the 3rd July, 1944. On the 9th April, 1945, the appellant filed an application for executing the decree against the original judgment-debtor, though he had died previously, and this application was dismissed for default on the 11th May, 1945. On the 2nd June, 1945, the present application for execution was filed, and the question which we have to decide is whether this application is in time.

It is quite clear that the application for execution having been made more than three years after the date of the final decree, it must be held to be time-barred, unless, as has been contended before us, the case falls under either clause 2 or clause 3 of article 182 of the Indian Limitation Act. Under these clauses, time to make the application begins to run from—

1950

Bhawanipore Banking Corporation Ltd. v. *Gouri Shankar Sharma.*

Fazl Ali J.

"2. (Where there has been an appeal) the date of the final decree or order of the appellate Court, or the withdrawal of the appeal, or

3. (Where there has been a review of judgment) the date of the decision passed on the review...."

It is contended that the case is covered by clause 3, and the ground urged in support of this contention is that the application made by the judgment-debtor for reopening the preliminary mortgage decree under Section 36 of the Moneylenders Act must be regarded as an application for review and time should be held to run from the date of the final order passed in the proceedings connected with that application. In our opinion, there is no substance in this contention. The important words in clause 3 of article 182 are: (1) "where there has been a review" and (2) "the decision passed on the review". These words show that before a case can be brought under article 182, clause 3, it must be shown firstly that the court had undertaken to review the relevant decree or order and secondly, that there has been a decision on the review. In the present case, even if it be assumed that the word "review" has been used in article 182 in a large sense and that the application for reopening the decree under Section 36 of the Bengal Moneylenders Act was an application for review, the appellant cannot succeed, because the court never undertook or purported to review the decree in question. What actually happened was that the application under Section 36 for reopening the preliminary decree (not the final decree which is the decree sought to be executed) was dismissed for default and the application under Order IX, rule 9, of the Civil Procedure Code for the restoration of the proceedings under Section 36 of the Moneylenders Act was also dismissed. Even if the fact that the judgment-debtor's application under Section 36 was directed against the preliminary mortgage decree is overlooked, that application having been dismissed for default, the court never had occasion to apply its mind to the question as to whether the decree could or should be reopened, and hence it cannot be said that "there has been a review" of the

decree. The proceedings under Order II, rule 9, of the Code of Civil Procedure are not material to the present discussion, because they did not involve a review of the decree under execution but a review, if it is at all possible to call it a review, (which, in our opinion, it is not), of the order dismissing the judgment-debtor's application under Section 36 for default.

It was also suggested by the learned counsel for the appellant that the case might be held to be covered by clause 2 of article 182 on the ground that, even though no appeal was preferred from the final mortgage decree, the words "where there has been an appeal" are comprehensive enough to include in this case the appeal from the order dismissing the application under Order IX, rule 9, of the Civil Procedure Code, made in connection with the proceedings under Section 36 of the Moneylenders Act. This argument also is a highly far-fetched one, because the expression "where there has been an appeal" must be read with the words in column 1 of article 182, viz., "for the execution of a decree or order of any civil Court.....", and, however broadly we may construe it, it cannot be held to cover an appeal from an order which is passed in a collateral proceeding or which has no direct or immediate connection with the decree under execution.

In our view, this appeal has no substance, and we accordingly dismiss it with costs.

Appeal dismissed.

Agent for the appellant: *P. K. Chatterji.*

Agent for the respondent: *R.R. Biswas.*