APPELLATE CIVIL.

Before S. K. Ghose and Patterson JJ.

KARTIK CHANDRA MUKHERJI

v.

BATA KRISHNA RAY*.

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Mar. 10, 11, 15.

Execution—Decree transferred to another territorial jurisdiction—Application for leave to appeal to Privy Council against order in execution—Compromise—Subsequent order—Limitation—Code of Civil Procedure (Act V of 1908), s. 48(1)(b).

An order passed on compromise by a High Court before which an application for leave to appeal to the Privy Council against an order passed on appeal in execution proceedings was pending,—the original decree having been passed under the jurisdiction of a different High Court,—is a "subsequent order" within the meaning of s. 48, sub-s. (*1*), cl. (*b*) of the Code of Civil Procedure, as a starting point of limitation.

In any case, where the parties, by their agreement, substitute a decree as modified by a petition of compromise for the original decree, and the agreement is to be enforced by execution proceeding, limitation will run from the date of the decree passed on compromise.

D. S. Apte v. *Tirmal Hanmant Savnur* (1); *Hridaymohan Sanyal* v. *Khagendra Nath Sanyal* (2); *Sadasiva Pillai* v. *Ramlinga Pillai* (3); *Hemanta Kumari Debi* v. *Midnapur Zamindari Co.* (4) and *Shashi Bhusan Shaw* v. *Hari Narain Shaw* (5) relied on.

Kirtyanand Singh v. *Prithi Chand Lal Chaudhury* (6); *Gururao Narasingrao Desai* v. *Ramchandra* (7) and *Amalabala Dasi* v. *Sarat Kumari Dasi* (8) distinguished.

Sarada Prasad Ghosh v. *Rokeya Khatun Bibi* (9) explained and distinguished.

Gobardhan Das v. *Dau Dayal* (10) discussed and distinguished.

Obiter: The weight of judicial authority is in favour of the view that, as s. 48 of the Code of Civil Procedure specially provides for limitation, it is not governed by the provisions of ss. 6 and 7 of the Limitation Act.

Girija Nath Roy v. *Patani Bibee* (11); *Akhoy Kumar Soor* v. *Bejoy Chand Mohatap* (12); *Prem Nath Tiwari* v. *Chatarpal Man Tiwari* (13); *Ramkrishna Vithal Kulkarni* v. *Ramchandra Dattatraya Garware* (14) and *Ramana Reddi* v. *Babu Reddi* (15) relied on.

Moro Sadashiv v. *Visaji Raghunath* (16) dissented from.

*Appeal from Original Order, No. 422 of 1935, against the order of Dheerendra Nath Guha, Subordinate Judge of 24-*Parganás*, dated May 15, 1935.

(1) (1925) I. L. R. 49 Bom. 695.
(2) (1929) I. L. R. 57 Cal. 789.
(3) (1875) 15 B. L. R. 383; L. R. 2 I.A. 219.
(4) (1919) I. L. R. 47 Cal. 485; L. R. 46 I. A. 240.
(5) (1921) I. L. R. 48 Cal. 1059.
(6) (1932) I. L. R. 12 Pat. 195; L. R. 60 I. A. 43.
(7) (1932) I. L. R. 57 Bom. 369.
(8) (1931) 54 C. L. J., 593.
(9) (1935) 39 C.W.N. 1036.
(10) (1932) I. L. R. 54 All. 573.
(11) (1889) I. L. R. 17 Cal. 263.
(12) (1902) I. L. R. 29 Cal. 813.
(13) (1915) I. L. R. 37 All. 638.
(14) (1930) I. L. R. 54 Bom. 776.
(15) (1912) I. L. R. 37 Mad. 186.
(16) (1891) I. L.R. 16 Bom. 536.

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APPEAL FROM ORIGINAL ORDER by the judgment-debtor.

The facts of the case and arguments in the appeal are sufficiently stated in the judgment.

Radha Binode Pal and *Shyama Pada Majumdar* for the appellant.

Braja Lal Chakrabarti and *Hari Prasanna Mukherji* for the respondents.

Cur. adv. vult.

GHOSE J. This is an appeal by one Kartik Chandra Mukherji, a judgment-debtor in an execution proceeding, and it raises a question of limitation. There was a suit for accounts, being Title Suit No. 198 of 1911 in the Court of the Subordinate Judge of Purulia, and it was decreed on September 10, 1916, against one Mukunda Lal Laik. This decree was modified by the High Court at Patna on December 6, 1920. In 1921, the judgment-debtor died leaving a widow, Jugal Kishoree. There were two executions at Dhanbad. A third execution case was transferred to Asansol and executed there on March 23, 1925. Upon an objection under s. 47 of the Code of Civil Procedure, there was a Mis. Case, No. 49 of 1925, and it was dismissed by the Asansol Court on August 7, 1925. Then there was an appeal to this Court, being Mis. Appeal No. 361 of 1925 and it was dismissed by Page and Graham J.J. on July 25, 1927. Thereafter an application for leave to appeal to His Majesty in Council was filed. While it was pending before a Bench presided over by the Chief Justice and C. C. Ghose J., a compromise was arrived at between the judgment-debtor, Jugal Kishoree, on the one hand and the decree-holders Nos. 1 and 2 on the other, the decree-holder No. 3 being

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respondent No. 3 not appearing. The compromise petition was filed on December 5, 1927. It will be relevant to mention the following terms of the compromise. The decretal amount was split up and two-thirds was taken to represent the share of respondent Nos. 1 and 2 (who are the present respondents in this appeal) and one-third was taken to represent the share of respondent No. 3. The arrangement was that the appellant, Jugal Kishoree, would pay the amount in certain instalments. Clause 5 of the compromise runs as follows :—

That if default is made in respect of two consecutive instalments payable to respondents Nos. 1 and 2 or respondent No. 3, execution will proceed for the whole of the instalments due to respondents Nos. 1 and 2 or respondent No. 3 as the case may be. It was further provided that the appeal to His Majesty in Council would not be proceeded with further, that the Execution Case No. 58 of 1926 pending in the Asansol Court would stand dismissed, and that certain properties described in Sch. A and situated in Behala in the District of 24-*Parganâs*, had been accepted by the respondents Nos. 1 and 2 as security. It was also stated that the compromise was beneficial to the minor respondent No. 1 and lastly in cl. 12 it was stated that the terms had been explained to and approved of by the appellant and the said terms had been settled in behalf of the appellant by her grandson K. C. (Kartik Chandra) Mukherji who had authority from her to compromise the case.

It may be added that this Kartik Chandra Mukherji is now the appellant in this appeal. Upon these terms the prayer in the compromise petition was, first, that the Privy Council Appeal might be disposed of in terms of the petition and, secondly, that leave be given to record the said compromise in behalf of the respondent No. 2 who was the guardian of the minor respondent No. 1. In accordance with these prayers an order was made and drawn up in the form of a decree on February 20, 1928. The material question in this appeal will be whether time should run against the decree-holders as from February 20, 1928 or as from December 6, 1920.

To proceed with the history of this litigation. On August 1, 1928, the judgment-debtor, Jugal Kishoree, executed a deed of gift in favour of the present appellant and two others. Jugal Kishoree died and, upon a certificate of non-satisfaction being taken in the Purulia Court, execution was transferred to Alipore

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Court on August 28, 1930, the execution case there being numbered as Execution Case No. 240 of 1930. The execution petition, Ex. C, which is printed at pp. 6 and 7, part II of the paper-book, gives the date and number of suit as "Title Suit No. 198 of 1911 as adjusted by P. C. A. No. 38 of 1927 decided on February 20, 1928". The judgment-debtors are Gopee Bala Debee and Indumatee Debee, the two daughters of Jugal Kishoree. At that time the appellant Kartik Chandra Mukherji was not mentioned. The year and the date of the decree are given as "T. S. No. 198 of 1911 as adjusted by P. C. A. 38 of 1927 dated February 20, 1928". That execution was sought as from the date of the so-called adjustment on February 20, 1928, would further appear from columns 7 and 10 of the petition wherein it was mentioned that there had been default in payment of the instalments due in June and September quarter of 1928 and the whole of the remaining instalments had thus become due. Upon the objection of the aforesaid two ladies, Mis. Case No. 23 of 1931 was started and it was dismissed on July 13, 1932. There was an appeal, namely, M. A. 391 of 1932, and it was disposed of by the High Court on May 17, 1935. It will be useful to state here that in this objection there was no question raised that the decree of February 20, 1928, was in any respect invalid. The present appellant Kartik filed a claim under O. XXI, r. 58 of the Code of Civil Procedure but it was dismissed for having been filed too late. He thereupon filed T. S. No. 151 of 1933 on July 29, 1933. But on December 7, 1934, he had the suit withdrawn on his petition. The Execution Case No. 240 of 1930 which had been pending at Alipore was dismissed for default on January 17, 1934. Thereupon proceedings took place which have given rise to the present appeal. On June 13, 1934, there was an application for execution filed against Kartik Chandra and others and, on the petition of the decree-holders, an adjustment of decree of February 20, 1928, was recorded by the Purulia Court on May 1, 1934. The decree was sent

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for execution to the second Court of the Subordinate Judge at Alipore on May 15, 1934. On June 13, 1934, the present Execution Case No. 106 of 1934 was started at Alipore. The petition for execution, which is printed at pp. 22-24 of the paper-book, shows that the execution was being sought against Kartik Chandra Mukherji and others as judgment-debtors in respect of the same decree which was mentioned in the previous Execution Case No. 240 of 1930, namely, "T. S. 198 of 1911 of the Court of the Subordinate Judge of Purulia as adjusted by P. C. A. No. 38 of 1927 decided by the High Court on February 20, 1928." On December 7, 1934, Kartik Chandra Mukherji filed an objection to the execution stating certain grounds including limitation, but, so far as his last point is concerned, no details were given or facts stated.

Before the Subordinate Judge one of the points urged was that the present execution was upon a certificate of non-satisfaction issued by the Purulia Court and was therefore incompetent. The Subordinate Judge held against it and this point has not been raised further in this appeal. Then there remains the question of limitation. Before the Subordinate Judge it was contended that the execution was time-barred, the application having been made after 12 years from the date of the decree as under s. 48 of the Code of Civil Procedure. According to the objector, time would run from December 6, 1920, the date on which the decree of the trial Court was modified by the High Court. The Subordinate Judge has taken the view that the decree, which was drawn up on February 20, 1928, by the Calcutta High Court in terms of the compromise was in the nature of a subsequent order under s. 48(*1*)(*b*). He also proceeds to say that the adjustment was one in the execution proceeding as under O. XXI, r. 2, and he held that limitation should run from February 20, 1928, and so the application for execution was not time-barred. There was a further point as to limitation on the ground that one of the decree-holders, namely, Baidya Nath, was a minor until

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some time in 1934. The Subordinate Judge held that the decree-holders were entitled to protection under s. 7 of the Limitation Act and, in that view also, the application was not barred. Against that judgment the present appeal has been filed.

So far as the question of limitation under s. 48 of the Code of Civil Procedure is concerned, the point for determination is whether the order of the High Court of February 20, 1928, can be taken to be a subsequent order as contemplated by cl. (*b*), sub-s. (*1*). It is conceded by Mr. Chakrabarti for the respondents, that O. XXI, r. 2, C. P. C., has no application. There is a further point, namely, whether, apart from s. 48, it can be said that the decree of February 20, 1928, had been substituted for the old decree for the purpose of execution by agreement between the parties. Dr. Pal for the appellant has contended that the expression "subsequent order" in s. 48(*1*)(*b*) means an order of the Court which passed the decree. On the second question, he has contended that the new decree which was sought to be executed must have been passed by the same Court or the Court exercising the same jurisdiction as the original Court and he has suggested that the test is whether a suit to enforce an agreement may be brought in either of the Courts. Our attention has been directed to certain decided cases in all of which, subject to certain differences as to details, the material facts are very similar. In the case of *D. S. Apte* v. *Tirmal Hanmant Savnur*(1) there was a decree made by a Subordinate Judge on May 28, 1903, and a final decree by the High Court on September 8, 1908. On June 9, 1911, the same Subordinate Judge, sitting as an executing Court, made an order that the amount should be recovered by instalments and that, in case of default to pay any one instalment, the whole amount would be recoverable. The execution petition was filed on December 21, 1921, and so the question of limitation arose. It was held that the application

(1) (1925) I. L. R. 49 Bom. 695, 698.

was not barred. Norman Macleod C.J. said as follows :—

> With great respect, I cannot see myself why the words, " any subsequent order " must be limited as if the words " by the Court which passed the decree " were there. The words " any subsequent order ", to my mind, mean any order made by a competent Court.

Dr. Pal has contended that the authority of this decision has been weakened by the judgment of the Privy Council in the case of *Kirtyanand Singh* v. *Prithi Chand Lal Chaudhury* (1). There it was held that the expression " any subsequent order " in s. 48 (*1*)(*b*) means an order in the suit in which the decree is made. All that Dr. Pal can argue is that the view of the Bombay High Court is perhaps too wide. He cannot argue that in the Patna case, the Bombay view has been overruled. Moreover in that case their Lordships were dealing with an order which had been made in a different suit and it was from that point of view that their Lordships held that on the true construction of the section the subsequent order must be an order made in the suit in which the decree was made. In the case *Hridaymohan Sanyal* v. *Khagendra Nath Sanyal* (2), the facts which are almost the same as in the present case were looked at from the point of view of an agreement between the parties. There it was held that the original decree had been superseded by the compromise, which was the reason for distinguishing it from the case of *Syama Sundari Devi* v. *Sree Raj Gopal Acharya Gossami* (3). It was pointed out that a new arrangement had been entered into and that in the execution case the decree-holder wanted to execute the substituted decree. " The provisions of "s. 48 cannot bar that application, if that application " be otherwise sustainable " (p. 794). Dr. Pal has not contended that this decision is wrong, but he has sought to distinguish it on the ground that it does not appear that the executing Court there was different from the trial Court and that, if it was necessary to file a suit for the enforcement of the agreement,

(1) (1932) I.L.R. 12 Pat. 195; L. R. 60 I.A. 43.

(2) (1929) I. L. R. 57 Cal. 789, 794-8.

(3) (1922) 27 C. W. N. xliii.

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it would not have been in the same Court. Dealing with this question B. B. Ghose J. remarked as follows :—

> But the only question in this case is that, if the decree-holder might have brought a separate suit on the agreement, can he not ask for relief in execution by reason of the agreement entered into between the parties that the money should be realised in execution ?

In the judgment reference was made to the case of *Pisani* v. *Attorney-General for Gibralter* (1). In that case the Crown instituted a suit for a declaration that certain properties had escheated for want of heirs. The Attorney-General, finding it not very hopeful to prove want of heirs, desired to have it decided which of the defendants was entitled to succeed and ultimately the suit was converted into one for decision of title as between certain defendants. This was done by agreement and the plaint was accordingly amended. It was remarked as follows :—

> It is true that there was a deviation from the *cursus curiae*, but the Court had jurisdiction over the subject, and the assumption of the duty of another tribunal is not involved in the question. Departures from ordinary practice by consent are of every day occurrence ; but unless there is an attempt to give the Court a jurisdiction which it does not possess, or something occurs which is such a violent strain upon its procedure that it puts it entirely out of its course, so that a Court of appeal cannot properly review the decision, such departures have never been held to deprive either of the parties of the right of appeal.

This view has been adopted in other cases, as for instance, in the case of *Sadasiva Pillai* v. *Ramlinga Pillai* (2). Dr. Pal has therefore rested his contention on this that the High Court at the time of making its order of August 20, 1928, had no longer *seisin* of the matter, M. A. 361 of 1925 having been disposed of on July 25, 1927. He has further pointed out that the security which was given in Sch. A to the compromise petition was situated within the jurisdiction of the Alipore Court. We are unable to hold that this circumstance afforded a formidable obstacle to the High Court exercising its jurisdiction. According to the ordinary procedure the matter was still pending before the High Court on account of the application

(1) (1874) L. R. 5 P.C. 516, 522.

(2) (1875) 15 B. L. R. 383 ; L. R. 2 I. A. 219.

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for leave to appeal. Therefore practically it was the High Court which had *seisin* of the matter and nothing arising out of the application for leave to appeal or out of the Mis. Appeal to the High Court had been remitted back to the lower Court. That there were two separate Division Benches, one dealing with the Mis. appeals and the other dealing with applications for leave to appeal before His Majesty in Council, makes no difference so far as the jurisdiction of the High Court is concerned. With regard to the properties mentioned in Sch. A, the decree-holders would have their remedy whether by suit or by execution in the Alipore Court and ultimately in the High Court. Dr. Pal has contended that so far as the matter of the security in Sch. A is concerned it would be outside the application for leave to appeal and therefore the operative part of the decree made by the High Court on February 20, 1928, was not related to the security. In the case of *Hemanta Kumari Debi* v. *Midnapur Zamindari Co.* (1), it was held that the operative part of the decree would be properly confined to the actual subject matter of the then existing litigation. But whether matters included in a compromise are or are not outside the scope of the suit is a question which has to be decided with reference to the circumstances. It has been held that the mutual connection with the different parts of the reliefs granted by a consent decree is an important element of consideration in each case in deciding whether any portion of the relief is within the scope of the suit. No hard and fast rule can be laid down, each case being governed by its own facts. *Gobinda Chandra Pal* v. *Dwarka Nath Pal* (2). It has also been pointed out that facts have got to be looked at in order to decide whether matters had been introduced in the suit that do not relate to the suit, but where the terms fall within the consideration for the adjustment of the matter in dispute, whether they are the subject-matter of the suit or not, they have become related to the suit and can be

(1) (1919) I. L. R. 47 Cal. 485; L. R. 46 I.A. 240.

(2) (1908) I. L. R. 35 Cal. 837.

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embodied in the decree. *Shashi Bhusan Shaw* v. *Hari Narain Shaw* (1). Mr. Chakrabarti for the respondents has suggested that, according to the terms of the compromise, the security mentioned in Sch. A was the consideration for the compromise and, therefore, it was not outside the scope of the order which was made by the High Court on February 20, 1928, by which the application for leave to appeal was allowed to be withdrawn. In the case of *Gururao Narasingrao Desai* v. *Ramchandra* (2), there was no difficulty, because there a final order for the admission of an appeal to His Majesty in Council had already been made by the High Court and thereafter a compromise was sought to be made between the parties. So it was held that the High Court had no power even by consent of the parties to supersede its first decree. Nor is this a case where there was an apparent want of jurisdiction as was contemplated in the case of *Amalabala Dasi* v. *Sarat Kumari Dasi* (3). Mr. Chakrabarti has pointed out that the present objection as to want of jurisdiction on the part of the High Court was not raised at any previous stage either by the present appellant or by the judgment-debtor in the previous execution case. The question turns upon what was the intention of the parties. Having regard to the terms of the petition of compromise we are of opinion that it was the intention of the parties that the application for leave to appeal to His Majesty in Council should be withdrawn, that the decretal amount should be paid according to the procedure stated therein to suit the convenience of the parties, and that the consideration for all this compromise was the security which was mentioned in Sch. A. It was further the intention of the parties that future default would be realised by execution and not by suit. There was also the fact which cannot be overlooked that the present appellant was himself a prominent partaker in this compromise, though not in the capacity of an actual party as a judgment-debtor.

(1) (1921) I. L. R. 48 Cal. 1059. (2) (1932) I. L. R. 57 Bom. 369.
(3) (1931) 54 C. L. J. 593.

The case of *Sarada Prasad Ghosh* v. *Rokeya Khatun Bibi* (1) takes a different view from the I. L. R. 57 Cal. case without actually overruling it. It is, however, possible to distinguish the two cases on the facts. In the 39 C. W. N. case there was a decree made on July 26, 1930, and adjustment on compromise on August 13, 1930, by which it was agreed that the amount would be payable by instalments and on default to be realised by execution. The last execution was filed at a period which was beyond three years from the compromise but within three years from the date of the original decree. The question was whether the parties could supersede the original decree by agreement. The learned Judges took the view that it was not necessary to decide that question, but they held that the parties could not extend limitation. Section 48 of the Code of Civil Procedure, however, did not apply because limitation was provided for either under the Bengal Tenancy Act or under Art. 182 of the Limitation Act. Lastly there is the case of *Gobardhan Das* v. *Dau Dayal* (2). That case expressly dissented from the I. L. R. 57 Cal. case and it was followed in the 39 C. W. N. case. The facts, however, are not quite the same. There was a decree made on February 10, 1915, and application for execution on March 21, 1923. In accordance therewith a warrant was issued. There was a compromise on August 29, 1933, according to which the parties agreed to have payments made by instalments. Thereupon the Court made the following order :—"Parties "have come to a compromise. Warrant may "be cancelled." That was all. On January 16, 1928, the decree-holder applied for execution. It was held that the application was barred under s. 48 of the Code of Civil Procedure. Sulaiman C. J. pointed out (at p. 592) that when the compromise was filed, the Court ordered that the warrant might be cancelled. So there was no question of any subsequent order as under s. 48(*1*)(*b*). At p. 586, however,

(1) (1935) 39 C. W. N. 1036. (2) (1932) I. L. R. 54 All. 573.

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Sulaiman C. J. proceeds to consider whether the original decree can be altogether superseded by a new arrangement and in that connection he differs from the view taken in the I. L. R. 57 Cal. case. It seems to us that, so far as the present case is concerned, the Allahabad case is distinguishable. Dr. Pal contends that in the present case the High Court did not make an order as to payment under s. 48(*1*)(*b*). But the order of February 20, 1928, goes far beyond that in the Allahabad case and, if read along with the petition of compromise, it must be taken to be an order directing payment of money in accordance with the terms of the petition of compromise. Our conclusion, therefore, is that the order of the High Court which was made on February 20, 1928, and which was included in the application for execution was in the nature of a subsequent order made by a competent Court under s. 48(*1*)(*b*). We, therefore, think that, in any case, the parties had, by their agreement, substituted the decree as modified by the petition of compromise for the original decree and, having regard to all the circumstances, it was competent for the decree-holders to apply for execution of the decree which was not barred. Therefore, limitation must run as from February 20, 1928, and consequently it is within time.

The next question is whether the decree-holders are entitled to the benefit of s. 7 of the Limitation Act in view of the fact that one of them, namely, Baidya Nath, was a minor until sometime in 1904. Having regard to our decision on the first point under s. 48 of the Code of Civil Procedure this question does not arise. Still as it has been argued here as also in the lower Court we propose to deal with it. It has been pointed out to us that the judgment of this Court dated July 25, 1927, *vide* Ext. A, which is also reported in 32 C. W. N. 192, binds the present appellant to this extent that the respondent Bata Krishna cannot be held to have been capable of giving discharge without the concurrence of the minors within s. 7 of the Limitation Act. The only question now is whether limitation

should run according to s. 48 of the Code of Civil Procedure or whether the decree-holders respondents are entitled to an extended period under s. 7 of the Limitation Act. Our attention has been directed to certain cases decided by the different High Courts. *Girija Nath Roy* v. *Patani Bibee* (1); *Akhoy Kumar Soor* v. *Bejoy Chand Mohatap* (2); *Moro Sadashiv* v. *Visaji Raghunath* (3); *Prem Nath Tiwari* v. *Chatarpal Man Tiwari* (4); *Ramkrishna Vithal Kulkarni* v. *Ramchandra Dattatraya Garware* (5) and *Ramana Reddi* v. *Babu Reddi* (6). All these cases agree in holding that s. 6 of the Limitation Act is expressly limited to cases where limitation is prescribed in the first schedule to the Act, and that where limitation is provided for in some Act outside the provisions of the Limitation Act such special limitation is not affected by s. 6 or s. 7. We do not consider that the two Calcutta cases referred to above encourage a different view. The case in I. L. R. 16 Bom. 536, however, proceeds further to hold that, under the general principle of law, a minor is entitled to an extension of the period. This has been expressly dissented from in the later cases in Madras and in Allahabad. The weight of judicial authority is thus in favour of the view that, as s. 48 specially provides for limitation, it is not governed by the provisions of s. 6 or 7 of the Limitation Act. Consequently, the decree-holders are not entitled to that extended period. Having regard to our decision on the first point we consider that the application for execution is not time-barred.

The result is that this appeal must stand dismissed with costs. Hearing-fee being assessed at five gold mohurs.

PATTERSON J. I agree.

Appeal dismissed.

(1) (1889) I. L. R. 17 Cal. 263.
(2) (1902) I. L. R. 29 Cal. 813.
(3) (1891) I. L. R. 16 Bom. 536.
(4) (1915) I. L. R. 37 All. 638.
(5) (1930) I. L. R. 54 Bom. 776.
(6) (1912) I. L. R. 37 Mad. 186.

A. A.