

JUDGMENT :—Act XIII of 1859 is a penal enactment, and the Act of Limitation is no bar to the enforcement of a penal provision. Though it was passed because the remedy by suit was insufficient, it is no ground for saying that the Act ceases to be applicable when the civil remedy is barred. The expression without lawful or reasonable excuse has reference to the circumstances in which the breach occurred. A plea of limitation which is available only in civil suits cannot be taken to bar punishment for what is an offence. The case before us is perhaps one not foreseen and provided for by the Legislature, but we must construe a penal enactment as it stands. We set aside the order made by the 2nd-class Magistrate and direct him to restore the complaint to his file and to deal with it in accordance with law.

APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Parker.*

PASSANHA (PLAINTIFF),

and

THE MADRAS DEPOSIT AND BENEFIT SOCIETY (DEFENDANTS).*

1888.
February 3

Limitation Act, sch. II, arts. 36, 49.

Plaintiff was the owner of a house mortgaged to defendants. On the 22nd August 1885 defendants sold the house by auction under a power of sale contained in the mortgage and gave possession to the purchaser. On the 2nd September 1887 plaintiff sued the defendants to recover the value of certain timber which was stored in the house and not mortgaged and which plaintiff alleged the defendants had taken possession of and converted to their own use. It was proved that the timber was in the house when defendants took possession from the plaintiff and defendants did not account for it :

Held, (1) that plaintiff was entitled to recover from the defendants the value of the timber and (2) that the suit was not barred by art. 36 of sch. II of Indian Limitation Act, 1879.

CASE referred under s. 69 of the Presidency Small Cause Courts Act, 1882, by J. W. Handley, Chief Judge of the Court of Small Causes at Madras.

* Special Case 83 of 1887.

PASSANHA
v.
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BENEFIT
SOCIETY.

The case was stated as follows :—

“ In this suit plaintiff sought to recover from the defendant Society the value of certain timber which it was alleged defendants seized, took possession of, and converted to their own use and wrongfully deprived the plaintiff of the use and possession thereof.

“ The admitted facts were that plaintiff was the owner of a house in the Mount Road, Madras, which was mortgaged to defendants. On the 22nd August 1885 defendants sold the house by auction under a power of sale in the mortgage having obtained the key on that day from plaintiff's brother, plaintiff being then absent from Madras. Plaintiff's case was that certain timber, consisting of beams, joints, doors, windows and other similar articles, partly new and partly old, and intended for re-building a neighbouring house also belonging to plaintiff, was stored in the house sold by defendants. It was admitted that if there was any such timber in the house it was not subject to the mortgage; but defendants denied all knowledge of the existence of any such timber in the house. It was abundantly proved however that the timber was stored in the house, as alleged by plaintiff, and I found accordingly and that the value of the timber was as claimed in the plaint Rs. 1,500. The sale was conducted outside the house, which was in a partially dismantled condition, and nobody on behalf of defendants seems to have entered the house at the time of the sale or made any examination of its contents. Defendants did not profess to sell the timber, but they sold the house and handed over possession to the purchaser without taking the trouble to ascertain what was in the house. Upon plaintiff's return to Madras some informal communications appear to have taken place between him and one of the Directors of the Society; but it was not till 25th August 1887, shortly before the filing of this suit, that a formal demand in respect of the timber was made by plaintiff through his solicitors, Messrs. Grant and Laing.

“ Two questions of law were raised in the course of the hearing, upon which, at the request of defendant's Attorney, I have to ask the opinion of the High Court.

“ The first question was that of limitation. It was contended on behalf of defendants that the case was governed by art. 36 of sch. II of the Limitation Act. If this were the article applicable to the case, the suit would be barred, if the cause of action arose

on the day of sale, 22nd August 1885, as the period of limitation under that article is 2 years and the suit was filed on 2nd September 1887. But if the correct view is that the cause of action arose on the house being handed over to the purchaser, further evidence would be necessary as to that date. The only evidence on that point, was that of the auctioneer, who said he gave over the key to the purchaser on the balance of the purchase money being paid, which he said was about 8 days after the sale. I held that the case was governed by art. 49 of the schedule, the period of limitation under which is 3 years, and that the suit was therefore not barred.

“ It was further contended on behalf of defendants that there was no evidence of wrongful conversion to entitle plaintiff to recover in this suit. Finding the facts to be, as stated above, I held that plaintiff was entitled to recover. I considered that defendants having taken possession of the house became responsible for it and its contents, and if they chose to sell it without taking proper measures for the security of any property in the house not covered by their mortgage they were liable to make good any loss to plaintiff occasioned by their so doing.

“ I therefore gave judgment for plaintiff for Rs. 1,500 and costs contingent upon a reference to the High Court upon these two points of law.

“ The questions therefore which I have the honor to refer for the opinion of the High Court are these :—

- (1) Is the suit barred by the Law of Limitation ?
- (2) Is plaintiff entitled to recover upon the facts as stated above ? ”

Mr. *Shaw* for plaintiff.

Mr. *Mitchell* for defendants.

The Court (Collins, C.J., and Parker, J.) delivered the following

JUDGMENT :—Upon the facts stated, we are of opinion that the plaintiff is entitled to recover. The defendants took possession of the timber and have not accounted to plaintiff for it. On the question of limitation we think that art. 49 of the Limitation Act does apply. It is open to plaintiff under that article to bring his suit for the specific movable property or for compensation for wrongfully taking the same.

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In our opinion the learned Chief Judge has rightly decided both the questions referred. Defendants are to pay the costs of this reference.

Solicitors for plaintiff—*Grant & Laing.*

Solicitors for defendants—*Barclay & Morgan.*

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Wilkinson.

GOPILANDHU (PLAINTIFF),

and

DOMBURU (DEFENDANT No. 2).*

Limitation Act, sch. II, art. 179 (4)—Application for copy of decree not a step in aid of execution.

The application by a decree-holder for a copy of a decree with intent to apply for execution is not a step in aid of execution within the meaning of cl. 4 of art. 179 of sch. II of the Indian Limitation Act, 1879.

REFERENCE under s. 617 of the Code of Civil Procedure by M. Visvanatha Ayyar, District Munsif of Aska.

The case was stated as follows:—

“Gopilandhu Patnayak obtained a decree for Rs. 40-1-5 against Domburu Maharana, defendant No. 2, on 28th April 1884, in small cause suit No. 137 of 1884, on the file of this court. The decree-holder applied for execution of the said decree for the first time on 20th May 1887. It is alleged in the petition that it is not barred by limitation, firstly, inasmuch as the petitioner had applied for a copy of the decree on 17th September 1884; secondly, inasmuch as the judgment-debtor had made two payments out of court to him, viz., Rs. 9 in June 1884 and Rs. 10 in December 1884, and had got receipts for these payments.

“The decree-holder did not certify these payments to the court, nor did the judgment-debtor file the receipts and ask the court to call upon him to certify these payments. The adjustment out of court was specified for the first time in the present application for execution. The dates of these payments cannot give the decree-holder a fresh starting point of limitation.

* Referred Case No. 14 of 1887.