

*Before Mr. Justice Prinsep and Mr. Justice Wilson.*

RUGHU NATH SINGH MANKU (DECREE-HOLDER) v. PARESHRAM  
MAHATA AND ANOTHER (JUDGMENT-DEBTORS)\*

1882  
November 30.

*Limitation Act XV of 1877, s. 4—Appeal—Cross Appeal—Jurisdiction of  
Appellate Court—Question of limitation not raised in cross appeal.*

On an application for execution of decree, the application was granted, but the interest claimed by the decree-holder on the amount of the decree was disallowed. The decree-holder appealed from the order, but the judgment-debtor filed no cross appeal. On the hearing of the appeal the application for execution was dismissed, on the ground that the execution of the decree was barred by limitation.

*Held*, that, under the circumstances of the case, the Appellate Court was not competent to take the question of limitation into consideration.

*Alimannissa Khatoon v. Syed Hoossein Ali* (1) followed.

THIS was an application for execution of decree. The application was granted by the Court of first instance, but the rate of interest claimed by the decree-holder was disallowed. The decree-holder then appealed. The judgment of the Appellate Court, so far as material, was as follows :—

“The appeal in this case relates to the question of interest. The respondents have not cross appealed; but their pleader raises an objection in bar which must be first considered. He urges that the decree was barred by limitation. This point was raised in the Court below, and decided in the appellant’s favour. The question is, can the Appellate Court interfere with the Munsiff’s judgment on a point decided by that Judge in that judgment and not appealed against? Ordinarily, no doubt, it cannot, but the point of limitation must, it seems to me, be considered, even though it be not pleaded—See s. 4, Act XV of 1877. I think, therefore, that the argument must be admitted and disposed of.”

The lower Appellate Court then decided that the application

\* Appeal from Appellate Order No. 173 of 1882, against the order of A. L. Clay, Esq., Officiating Deputy Commissioner of Manbhoom, dated the 14th March 1882, modifying the order of Baboo Krishnadhan Chowdhuri, Munsiff of Chowkee Burabazar, dated the 21st May 1881.

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1882 for execution was barred by limitation, and he dismissed it with costs.

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The decree-holder appealed to the High Court on the ground, amongst others irrelevant to this report, "That the judgment-debtors not having appealed from the decree of the Munsiff overruling the plea of limitation and allowing execution to issue, the Court of appeal was not competent to interfere with such an order on the appeal of the judgment-creditor, who was dissatisfied with only a part of the Munsiff's order."

Baboo *Rash Behary Ghose* and Baboo *Surender Nath Mutty Lall* for the appellant.

Baboo *Jogesh Chunder Dey* for the respondents.

The following judgments were delivered by the Court (PRINSEP and WILSON, J.J.)—

PRINSEP, J.—The first Court in this case held that the decree was not barred by limitation, and on another point decided in favour of the judgment-debtors.

The decree-holder alone appealed against the latter finding. No objection under s. 561 was taken by the judgment-debtors against the finding as regards limitation which was adverse to him. At the hearing of the appeal, in the course of the argument, the point of limitation was raised, and the lower Appellate Court held that execution was barred.

We are of opinion that the lower Appellate Court was, under the circumstances, not competent to consider this point; and in this respect we concur in the judgment delivered by another Division Bench of this Court in the case of *Alimannissa Khatoon v. Syed Hossein Ali* (1). The District Judge has gone beyond the law in stating that "the point of limitation must be considered, even though it be not pleaded." The terms of s. 4 of the Limitation Act declare that a Court has this power *although limitation has not been set up as a defence*; and we think that this has been rightly interpreted, in the judgment already cited, to mean so far as regards the particular suit, or appeal, then under decision before the Court is concerned. The present case differs from the

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precedent cited only in this respect, that in that case the appellant had not made the question of limitation one of the grounds of appeal. In the case before us the judgment-debtors, against whom the judgment of the first Court on this point was pressed, did not appeal against it, nor did they, when the decree-holder appealed, make any objection in writing within the terms of s. 561. Under these circumstances the lower Appellate Court was not competent to re-open the point. The order of the lower Appellate Court must therefore be reversed, and that of the first Court restored. The decree-holder will be entitled to costs, both in this Court and in the lower Appellate Court.

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WILSON, J.—I am entirely of the same opinion. The effect of s. 4 of the Limitation Act, as I understand it, is simply this: Whenever a case is properly before a Court, whether it is a Court of appeal or a Court of first instance, it is bound to take notice of the question of limitation; but in order to enable the Appellate Court to do that the case must be before it. In the present case the order objected to was not before the Court below at all in its entirety, but only a portion of it. The whole might have been brought before the Court by appeal, or by cross appeal only on objection under s. 561 of the Code. That was not done. The lower Appellate Court therefore had no right to enter into the question of limitation, affecting that part of the order which was not before it.

*Appeal allowed.*

## APPELLATE CRIMINAL.

*Before Mr. Justice Mitter and Mr. Justice Field.*

THE EMPRESS v. BROJOKANTO ROY CHOWDHURI.

1883

*Criminal Procedure Code (X of 1882), s. 133—Nuisance—Erection of Buildings—Unconditional order.* February 28.

Every order made under s. 133 of the Code of Criminal Procedure, Act X of 1882, must appoint a time within which, and a place where, the person to whom it is directed may appear before the Magistrate, and move to have the order set aside or modified.

No unconditional order can be made under that section.

\* Criminal Reference No. 16 of 1883, and Letter No.  $\frac{9}{36}$ , from the order made by J. F. Bradbury Esq., Officiating Sessions Judge of Backergunge, dated the 21st February 1883.