

1884

HABIB-  
ULLAH  
v.  
QUEEN  
EMPRESS.

alleged inconsistent statements in a deposition may well require, and I think they so require, to be watched with special care. But I can see no sufficient distinction in principle between such contradiction in one deposition and in two. If it is an offence under s. 193 to make two contradictory statements, one or other of which must be false, and to do so with a guilty intention, on two distinct occasions, I think it must be equally an offence to make them on one occasion.

I therefore agree with the view of Tottenham, J., upon the matter referred to me.

WILSON, J. (TOTTENHAM, J., concurring).—The rule must be discharged, but the period during which the rigorous portion of the sentence was suspended will count as part of the original sentence.

*Rule discharged and conviction affirmed.*

## REFERENCE UNDER THE BURMAH COURTS ACT.

*Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Beverley.*

MAHOMED HOSSEIN (PLAINTIFF) v. INODEEN (DEFENDANT).\*

1884

July 7.

*Limitation for second appeals under Burmah Courts Act—Act XVII of 1875, s. 27.*

A second appeal under s. 27 of the Burmah Courts Act is not subject to the limitation of time prescribed for an appeal to a High Court under the Limitation Act of 1877.

In this case, which was one for the specific performance of a contract, the plaintiff obtained a decree in the Court of the Extra Assistant Commissioner of Toungo.

The defendant appealed to the Deputy Commissioner who, on the 6th December 1883, reversed the decision of the lower Court.

On the 14th March 1884 (at which date more than 90 days had passed from the date of the decree of the lower Appellate Court), the plaintiff presented his appeal to the Judicial Commissioner.

\* Reference under the Burmah Courts Act of 1875, made by T. Jardine, Esq., Judicial Commissioner of British Burmah.

Mr. *Gillbanks*, for the appellant, contended that second appeals under s. 27 of the Burmah Courts Act were not appeals under the Civil Procedure Code, but were proceedings which ss. 3 and 4 of that Code left to the rules of the local Act; that under the Burmah Courts Act there was no limit laid down in which appeals were to be presented; and that the 90 days allowed under Art. 156 Sch. II of the Limitation Act did not apply. The Judicial Commissioner entertained a doubt as to the point raised, and referred the question—Whether a second appeal under s. 27 of the Burmah Courts Act is subject to the limitation of time prescribed for appeals to the High Court under Art. 156 of Sch. II of the Limitation Act 1877, or to any other period of limitation?—to the High Court with the following expression of opinion:—

“This appeal is presented under s. 27 of the Burmah Courts Act XVII of 1875. It has been the practice of this Court, when sitting with the powers of a High Court, to apply to appeals made under the above section the term of limitation of 90 days prescribed by Art. 156 of the second schedule of the Limitation Act to appeals made to a High Court under the Code of Civil Procedure. It has been assumed that s. 96 of the Burmah Courts Act justified this practice. The Special Court of British Burmah in the case of *Meo Myohe v. Uga Lo* in construing the words of s. 29 “period prescribed by law for petitions of appeal” held that this period of limitation applied.”

“But s. 29 relates to cases where the lower Court of appeal has confirmed the original decision.”

“Another difference to be noted is that equivalent words to those quoted from s. 29 are not found in s. 27.”

“Moreover, in s. 22 we find a special rule of limitation; and in ss. 37 and 38, where the Limitation Act is applied to certain appeals and applications, express words were evidently deemed necessary by the Legislature.”

“The discretion allowed to the Court of the Judicial Commissioner in admitting a second appeal under s. 27 of the local Act is not limited by the rules found in ss. 584, 585 and 586 of the Code of Civil Procedure; and it may be contended that the Legislature did not mean that the judicial discretion conferred should

1884

---

 MAHOMED  
 HOSSAIN  
 v.  
 INODEEN.

1884

MAHOMED  
HOSSAIN  
v.  
INODEEN.

be limited by specified periods of time, as such limitations might be inconsistent with the doing of the justice for which this jurisdiction is created."

"The differences to which I have referred, are the basis of Mr. *Gillbanks*' argument that the second appeal under s. 27 of the local Act is not an appeal under the Code of Civil Procedure, but a proceeding which ss. 3 and 4 of that Code have to the rules of the local Act."

"I can find no other limitation applicable except that of the period of 90 days under the Limitation Act; and if it be held that this period is not applicable, there will be no express period of limitation, but the Court will have to consider the delay in making second appeal, and the consequences of such delay, only as it considers other circumstances alleged to guide its discretion."

"I incline to this opinion; but as I entertain doubts, and as the practice of applying the period of 90 days has existed for some years, I determine to refer the questions of limitation of second appeals under s. 27 of the Burmah Courts Act to the High Court."

No one appeared on the reference.

The opinion of the Court (GARTH, C.J., and BEVERLEY, J.) was given by

GARTH, C.J.—This is a reference from the Judicial Commissioner of British Burmah under s. 31 of the Burmah Courts Act XVII of 1875.

The question referred for the decision of this Court appears to be this: Whether a second appeal under s. 27 of the Burmah Courts Act is subject to the limitation of time prescribed for appeals to the High Court under the Indian Limitation Act; or in fact, to any limitation whatever?

The Judicial Commissioner states that "it has been the practice of this Court, when sitting with the powers of a High Court, to apply to appeals made under the above section, the term of limitation of 90 days prescribed by Art. 156 of the second schedule of the Indian Limitation Act, for appeals made to a High Court under the Code of Civil Procedure." The question has been raised however, whether the Limitation Act applies to a second appeal under s. 27 of the Burmah Courts Act.

The rules as to second appeals under the Burmah Courts Act are contained in ss. 27—29 of that Act.

In the first place, s. 27 deals with cases in which the Deputy Commissioner or Commissioner on appeal has *reversed* or *modified* the decision of the Court of first instance. In such cases, the Judicial Commissioner *may receive a second appeal*, if on a perusal of the grounds of appeal and of copies of the judgments of the subordinate Courts, a further consideration of the case appears to him to be requisite for the ends of justice.

The reception of the appeal is a matter for his discretion.

Then the Act goes on to deal with cases, in which the Appellate Court has *confirmed the decision of the Court of first instance*. In these cases, if the question is *one of fact only*, the decision by s. 28 is final. If, on the other hand, the question was one of law, then by s. 29 the party aggrieved by such decision may either, (1) apply to the Court to state a case for the opinion of the Judicial Commissioner, or (2) ask for leave to appeal to the Judicial Commissioner.

In either of these cases the application (1) or the appeal (2) must be made within the period prescribed by law for petitions of appeal.

Then s. 34 deals with cases where the first Appellate Court has refused to state a case, or to give leave to appeal under s. 29.

And in those cases also the Judicial Commissioner may, if he pleases, call for the record of the case, and proceed to try it as if it had been preferred in due course under s. 29.

The general question, whether the provisions of the Limitation Act were intended to apply to *appeals* as of right under the Burmah Courts Act, is not now before us. It is possible that the Legislature intended to make them applicable, though whether it has done so is another matter. It seems to us, however, that there is a distinction between appeals, which may *be preferred as a matter of right*, and such appeals as are referred to in ss. 27 and 34, and that this distinction is of the utmost importance in the consideration of the question now referred to us.

In cases of first appeal, and in cases under s. 29 when an application to state a case, or for leave to appeal is made to the *first Appellate Court*, provision is made for a period of

1884

---

 MAHOMED  
 HOSSEIN  
 v.  
 INOUREN.

1884  
 MAHOMED  
 HOSSEIN  
 v.  
 INOBBEN.

limitation within which such appeal or application should be preferred. But in cases falling under s. 27 or s. 34, when the application is made direct to the Judicial Commissioner, and when the reception of the appeal is left to his discretion, there is no provision made in regard to limitation. We cannot but consider that distinction is intentional. We think it must have been intended, that while a period of limitation is prescribed for appeals which may be preferred as a matter of right and *which the Appellate Court is bound to entertain*, cases under s. 27 or s. 34 of the Act should be left to the unfettered discretion of the Judicial Commissioner. It is discretionary with him to receive the appeal, and in the same way we think that the period within which he may receive it is also left to his discretion.

No doubt, the Judicial Commissioner, in the exercise of this discretion, would do well to consider whether the application to him has been made within a reasonable time, and he would probably refuse to interfere, if the applicant had been guilty of undue delay; but this is a matter for his discretion only, and no rule of limitation has been laid down which would prevent his interference, if at any time he thought it right to rehear or reconsider the case.

It is possible, that any application made to him to rehear or reconsider the case, would be subject to the general rule of limitation contained in Art. 178 of the Limitation Acts, and that consequently it must be made within three years from the time when the right to apply accrued. That question, however, does not arise in the present case.

We think therefore that the view taken by the Judicial Commissioner is correct.