

1897

THE CROWN
BREWERY,
MUSSOORIE.
D.
THE COLLEC-
TOR OF
DEHRA DUN.

such reference." If Mr. Winter desired to deny the title of the Crown Brewery to the land, &c., proposed to be taken up, his proper course, we conceive, would have been to withdraw the reference, but his not having done so did not in our opinion give the District Judge jurisdiction to decide the question of title. It therefore follows that whatever the Judge has decided in his judgment as to the title of the Brewery to the land is irrelevant and not called for by the reference. As to the spring and water, we have pointed out that the Collector did not propose to take them up under the Act; no question respecting them was before the Judge, and his finding on this point also is equally irrelevant and without jurisdiction.

There was one point and one point only awaiting decision, namely, the value of the land. On this point no decision has been given: it must now be decided. We set aside the order of the Court below and refer, under section 566 of the Code of Civil Procedure, that point for the determination of the Judge, namely, what is the value of the 17 acres 6 poles of the land together with the trees standing thereon, which the Collector proposes to take up, and what amount of compensation should be given under the Act? As both parties have had full opportunity of giving evidence, no further evidence will be taken. The Judge will send a reply to this reference in two months. On its return ten days will be allowed for objections by either party and the appeal then put up for hearing.

1897
March 17.

Before Mr. Justice Banerji and Mr. Justice Aikman.
SIYADAT-UN-NISSA (DEFENDANT) v. MUHAMMAD MAHMUD
(PLAINTIFF).*

Act No. XV of 1877 (Indian Limitation Act), sections 5 and 12, Sch. ii, Art. 152--Appeal--Limitation--Exclusion of time necessary for obtaining copies of decree and judgment.

If the period prescribed by the second schedule of the Indian Limitation Act, 1877, for the presentation of an appeal expires on a day on which the

* Second Appeal No. 432 of 1895, from a decree of Pandit Raj Nath, Subordinate Judge of Moradabad, dated the 18th January 1895, confirming a decree of Munshi Anant Prasad, Munsif of Anroha, dated the 17th September 1894.

Court is closed, and if the appellant has not obtained copies of the decree and judgment before the closing of the Court and applies for such copies on the date of the reopening of the Court, whilst his right of appeal is still alive, he is entitled to the benefit of the time requisite for obtaining the copies, and if his appeal be presented before the expiry of that time it is not barred by limitation.

A decree was passed against a defendant by the Court of a Munsif on the 17th of September 1894. The appellate Court (Subordinate Judge's Court) was closed from the 6th of October to the 4th of November both days inclusive. On the 5th of November, the defendant-appellant applied for copies of the decree and judgment. The copies were delivered to her on the 6th November, and on the same day she presented her appeal to the appellate Court. *Held* that the appeal was within time.

THE facts of this case are fully stated in the judgment of the Court.

Mr. *Abdul Majid*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

BANERJI and AIKMAN, JJ.—The only question to be determined in this second appeal is whether the appeal preferred to the lower appellate Court by the present appellant was or was not barred by the law of limitation. In order to understand that question it is necessary to state a few dates. The decree of the Court of first instance was made on the 17th of September, 1894. The Courts were closed for the Dasehra Vacation from the 6th of October to the 4th of November, 1894, both days inclusive. On the 5th of November, 1894, the day on which the Courts reopened, the appellant applied for copies of the decree and judgment. The copies were delivered to her on the 6th of November, 1894. On that date she presented her appeal. There can be no doubt that the period of thirty days prescribed by article 152 of schedule II of the Indian Limitation Act, 1877, had expired on that date; but it was contended on behalf of the appellant that, as the thirty days had expired on the 17th of October, 1894, when the Court was closed, she was entitled under the first paragraph of section 5 to present her appeal on the date of the reopening of the Court; that on that date she applied for copies of the decree and judgment, and that, as the copies were not delivered

1897

 SYADAT-
UN-NISSA
v.

 MUHAMMAD
MAHMUD.

1897

SIYADAT-
UN-NISSA
v.
MUHAMMAD
MAHMUD.

on that date, the time requisite for obtaining the copies should have been excluded from computation under section 12, and therefore her appeal was in time on the 6th of November, 1894.

This contention, which was overruled by the Court below, has been reiterated in this appeal, and we are of opinion that it must prevail. It is beyond doubt that, had the copies applied for on the 5th of November, 1894, been prepared and delivered on that date, and had the appeal been presented on that date, it would have been within time. It is equally beyond doubt, and has indeed been conceded, that had the thirtieth day from the date of the decree been the 5th November, 1894, the appellant would have been entitled to exclude the time requisite for obtaining copies of the decree and judgment, that is, to add the number of days occupied in the preparation of the copies to the thirty days prescribed by article 152. In that case the appeal preferred on the 6th of November, 1894, would undoubtedly have been in time. We have to consider whether it was contemplated by the legislature that a different rule as to the computation of limitation would apply if the last day of the period of limitation prescribed in the second schedule expired on a day when the Court was closed. It is conceivable, and indeed it not unfrequently happens, that a judgment is delivered at a late hour on the day preceding a vacation extending over a longer period than thirty days, and it becomes impossible for the party against whom judgment is given to apply for copies of the decree and judgment on that day. Section 541 of the Code of Civil Procedure requires that a memorandum of appeal should be accompanied by a copy of the decree appealed against and, unless the Court dispenses with it, by a copy of the judgment also; and it has been held in this Court that a petition of appeal unaccompanied by such copies is not a valid petition. If therefore the contention be correct that an application for copies of the decree and judgment made on the day of the reopening of the Court after a long vacation lasting over a period exceeding thirty days is beyond time, and that the time requisite for obtaining the copies cannot for that reason be excluded under section 12 of

the Indian Limitation Act, 1877, the result would be that the defeated suitor would under such circumstances be deprived of his right of appeal. Unless the copies which he was bound to produce with his memorandum of appeal were applied for, prepared and delivered to him on the date of the reopening of the Court, he could not present a valid appeal on that date by reason of his not having obtained and not having had the opportunity of obtaining the copies before that date; and if the copies were not prepared and delivered on that very date, he was not entitled, according to the respondent's contention, to have the benefit of the time occupied in the preparation of the copies. There would thus be a denial to him of the right of appeal which he would otherwise have under the law. We cannot conceive that the law contemplates such an anomalous state of things, and we do not consider we should be justified in holding that it does, unless compelled to do so by clear and unambiguous provisions contained in the Indian Limitation Act. In our opinion the Act does not contain such provisions. Mr. *Sunder Lal* for the respondent urged that the question before us was concluded by the ruling of the Full Bench in *Bechi v. Ahsan-ul-lah Khan* (1), and he pressed on us a passage in the judgment of Mr. Justice Mahmood at pp. 471 and 472 of the report. With reference to that ruling we may observe in the first place that the question which we have to decide in this appeal did not arise in that case and therefore any remarks which may have been made in the judgment on that question were *obiter*. In the next place, the learned Judges did not in that case hold that an appeal presented under circumstances similar to those of the present appeal would be time barred. The observations of Mr. Justice Mahmood to which our attention has been called had reference to a contention raised in that case that a vacation preceding the date of the application for a copy of the decree should be regarded as time requisite for obtaining the copy. We fully agree with Mr. Justice Mahmood that no period of time can be regarded as time requisite for obtaining a copy which

1897

SIYADAT-
UN-NISSA
c.
MUHAMMAD
MAHMUD.

(1) I. L. R., 16 All. 401.

1897

SAYADAT-
UN-NISSA
v.
MUHAMMAD
MAHMUD.

is not subsequent to the presentation of the application for a copy. That, however, is not the question which arises in this case. There can be no doubt that, if the time within which an appeal may under the law of limitation be presented is allowed to expire and the decree to become final, the subsequent presentation of an application for copies of the decree and judgment cannot entitle the appellant to prefer an appeal by excluding from computation the time requisite for obtaining the copies. But what we have to consider is whether an application for copies made on the date of the reopening of the Court is within time. Section 4 of the Indian Limitation Act, 1877, provides that "subject to the provisions contained in sections 5 to 25 (inclusive), every suit instituted, appeal presented and application made after the period of limitation prescribed therefor by the second schedule hereto annexed shall be dismissed." Article 152 of the second schedule should therefore be read subject to the provisions of section 5 and 12. By the first paragraph of section 5, if the period of limitation prescribed for an appeal expires on a day when the Court is closed, the appeal may be presented on the day that the Court reopens. An application for copies of the decree and judgment presented on that day would therefore be an application made before the expiry of the time allowed for the presentation of the appeal, and under section 12 the appellant would be entitled to the benefit of the time requisite for the obtaining of the copies. It was argued by Mr. *Sundar Lal* that, if this view were correct, an appellant who had obtained the necessary copies before the commencement of the vacation would still be entitled to exclude from computation the period requisite for obtaining the copies, and would thus enjoy the benefit of a longer period of limitation than that to which other appellants would be entitled. This argument, though ingenious, is in our opinion fallacious. Section 12, it is true, lays down a rule of exclusion, but it is in reality a rule enabling a certain period, namely, that occupied in the preparation of copies of the decree and judgment, to be added to the period prescribed by the second schedule and to be taken

into account in computing the period of limitation. If the copies were obtained before the commencement of the vacation, the time requisite for obtaining the copies is known, and if that period of time which is already known and the period prescribed by the schedule, both added together, expired on a day on which the Court was closed, section 5 would enable the appellant to present his appeal only on the day of the reopening of the Court and not on a later date. We are accordingly of opinion that if the period prescribed by the second schedule for the presentation of an appeal expires on a day on which the Court is closed, and if the appellant has not obtained copies of the decree and judgment before the closing of the Court and applies for such copies on the date of the reopening of the Court, whilst his right of appeal is still alive, he is entitled to the benefit of the time requisite for obtaining the copies, and if his appeal be presented before the expiry of that time, it is not barred by limitation. If, however, the copies were obtained before the closing of the Court, and the time requisite for obtaining the copies and the period of limitation prescribed by the second schedule added together expired on a day on which the Court was closed, the appeal will not be in time unless presented on the day that the Court reopens. A similar view appears to have been held by the Panjáb Chief Court in *Chatar Singh v. The Empress*, quoted in Rivaz' Edition of the Indian Limitation Act, 4th edition, p. 40.

For the above reasons we hold that the appeal presented by the appellant in the Court below on the 6th of November, 1894, was not beyond time, and that the lower appellate Court has erred in dismissing the appeal as time barred.

We allow this appeal, and, setting aside the decree below, remand the case to the lower appellate Court under section 562 of the Code of Civil Procedure for trial according to law. Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

1897

SIYADAT-
UN-NISSA
v.
MURHAMMAD
MAHMUD.