

## APPELLATE CIVIL.

*Before Mr. Justice Mitter and Mr. Justice Grant.*

1886  
June 23.

ANANDO KISHORE DASS BAKSHI (ONE OF THE JUDGMENT-DEBTORS) *v.*  
ANANDO KISHORE BOSE AND ANOTHER (DECREE-HOLDERS).\*

*Limitation Act, (Act XV of 1877), ss. 7 and 8, and Sch. II, Art. 178.—Mesne profits, Decree for—Execution—Application for assessment of mesne profits—Limitation—Joint decree-holders—Minor, Right of, to execute whole decree when remedy of major joint-decree-holder is barred.*

In execution of a decree for possession of certain lands and for mesne profits, dated the 15th August 1878, possession having been obtained in August 1880, two decree-holders, one of whom was a minor, applied on the 4th April 1882 for ascertainment of the amount of such mesne profits. Upon that application the Amin was directed to ascertain the amount due, but after repeated reminders had been sent him, and no report being submitted, the execution case was struck off the file on the 9th October 1882. The minor judgment-creditor having attained his majority on the 17th April 1885, an application was made by both decree-holders for execution of the decree by ascertainment of the amount of mesne profits, and for the recovery of the amount when so ascertained. The judgment-debtors pleaded limitation.

*Held*, that the application was not an application for execution of the decree. The decree was divisible into two parts, and the present application must be treated as for the purpose of obtaining a final decree regarding the mesne profits, the previous decree having been in that respect merely interlocutory—*Baroda Sundari Dabia v. Fergusson* (1); and *Dildar Hossein v. Mujeeddunnissa* (2), followed; *Hem Chunder Chowdhry v. Brojo Soondury Debee* (3), dissented from.

*Held*, also, that the provisions of Art. 178 of Sch. II, of the Limitation Act apply to an application by a decree-holder to make a decree complete, (*Baroda Sundari Dabia v. Fergusson* (1), upon this point dissented from), and further that s. 8 of that Act had no application to the case, and that therefore so far as the application of the major decree-holder was concerned his remedy was barred, as his application should have been made within at least three years from the date of the delivery of possession of the lands decreed.

\*Appeal from Order No. 111 of 1886, against the order of Baboo P. N. Banerjee, Subordinate Judge of Mymensingh, dated the 16th of December 1885.

(1) 11 C. L. R., 17.

(2) I. L. R., 4 Calc., 629.

(3) I. L. R., 8 Calc., 89.

*Held*, further, that under s. 7 of the Limitation Act, the remedy of the minor decree-holder was not barred, as the other decree-holder could not give a valid discharge without his concurrence—(*Ahamudden v. Grish Chunder Shamunt* (1) distinguished) and that, under s. 231 of the Code of Civil Procedure, he was entitled to execute the whole decree, as though the remedy of the major decree-holder was barred his right was not extinguished.

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In this case Anando Kishore Bose and Rukini Mohun Bose obtained a decree on the 15th August 1878 for possession of certain lands and for mesne profits from the date of dispossession up to the date of recovery of possession, Rukini Mohun Bose was a minor at the date the decree was passed, and it was not disputed in the case that he did not attain his majority till the 17th April 1885. The application, out of which this appeal arose, was for execution of the decree, in so far as it appertained to the mesne profits, and was made on the 18th September 1885. After the decree was passed, it appeared that on the 4th April 1882 the decree-holders applied for execution of the decree and ascertainment of the amount of mesne profits, possession of the lands in suit having been obtained in August 1880. Upon that application the Court ordered the Amin to ascertain the amount of mesne profits. It appeared that the Amin did not submit his report up to the 22nd September 1882, and that in the interval that elapsed between the 4th April and that date, the Court on some five or six occasions issued reminders to the Amin to submit his report. On the 9th October 1882 the application for execution was struck off the file of the Court.

In answer to the present application the judgment-debtors pleaded limitation, on the ground that no step had been taken within three years to keep the decree alive. The lower Court considered that the reminders issued by the Court to the Amin, between the 4th April 1882 and the 22nd September 1882, constituted steps taken in the execution proceedings, inasmuch as they formed a continuation of the step taken by the decree-holders by their application on the 4th April 1882, because the decree-holders could do nothing further in the matter, until the Amin submitted his report. Upon that ground the lower Court

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held that the present application was not barred, as it was made on the 18th September 1885, or within three years of the 22nd September 1882. The lower Court was further of opinion that, even if the period of three years was to be counted as running from the 4th April 1882, the application was not barred, inasmuch as Rukini Mohun Bose did not attain his majority till the 17th April 1885, and consequently under the provisions of s. 7 of the Limitation Act he was entitled to apply for execution at any time within three years of that date; and further that Anando Kishore Bose was equally now entitled to take out execution, as by the provisions of s. 8 of the Limitation Act it held that time would not run against any of the joint judgment-creditors until the minor attained his majority, as till that occurred the decree-holder could not give a valid discharge.

The lower Court accordingly overruled the objection of the judgment-debtors and granted the application for execution.

Against that order Anando Kishore Dass Bakshi, one of the judgment-debtors, preferred this appeal to the High Court.

*Baboo Ratnessur Sen* for the appellant.

*Baboo Durga Mohan Dass* for the respondents.

The nature of the arguments, and the cases cited upon the hearing of the appeal, appear sufficiently in the judgment of the High Court (MITTER and GRANT, JJ.) which was as follows:

The respondents Rukini Mohun Bose and Anando Kishore Bose obtained a decree against the appellant and others on the 15th August 1878 for possession of certain lands and mesne profits thereof from the date of dispossession to the date of the recovery of possession. Rukini Mohun Bose was then not of age, and was represented by a guardian. The decree directed the amount to be fixed in execution under sections 211 and 212 of the Code of Civil Procedure. Rukini Mohun attained his majority on the 17th April 1885. In execution of this decree possession was taken in the month of August 1880.

On the 4th of April 1882, the respondents applied to the Court for the ascertainment of the mesne profits. The Civil Court Amin was directed by the Court to make the necessary inquiry, and

notwithstanding repeated reminders from the Court, the Amin not having completed his inquiry, the application was struck off on the 9th October 1882.

On the 18th September 1885 the present application was made for the ascertainment of the wasilat, and for the realization of the amount which might be fixed, by the attachment and sale of the judgment-debtors' property. The judgment-debtors pleaded limitation, and the lower Court having overruled it, one of them has preferred this appeal.

The lower Court treated the present application as one for execution of a decree under Art. 179 of the second schedule of the Limitation Act. It has overruled the plea of limitation upon two grounds: It has presumed that the reminders to the Amin appointed to inquire into the amount of mesne profits in the year 1882 must have been given at the instance of the decree-holders. These reminders in the lower Court's opinion constituted steps taken in aid of execution; and as the present application is within three years from the last of these steps, the execution is not barred. The other ground is, that as one of the decree-holders was a minor, till within three years from the date of the present application, his remedy is not barred, under section 7 of the Limitation Act, and as regards the other decree-holder, his remedy is equally not barred under section 8, because he could not give a valid discharge without the concurrence of the other decree-holder, during the minority of the latter.

The lower Court is in error in thinking that under section 8 of the Limitation Act, the remedy of the decree-holder, who was of age at the date of the decree, is not barred; because the last part of that section, upon which the lower Court evidently relies, applies to a case of *all* the joint creditors or claimants being under a legal disability.

But it seems to us that the present application is not an application for execution of a decree.

The decree in this case is divisible into two parts: one for possession of land and the other for mesne profits. That part of it which directs possession to be awarded to the decree-holders is final. But the other part of it is merely an interlocutory decree, declaring that the decree-holders are entitled to recover

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mesne profits, and it would become final when the amount of the mesne profits would be fixed by the Court. The present application is, therefore, an application by which the decree-holders moved the lower Court to make a final decree regarding mesne profits. Although in form it is an application for execution, in reality it is not so—(see *Baroda Sundari Dabia v. Fergusson* (1); *Dildar Hossein v. Mujundumissa* (2); *contra Hem Chunder Chowdhry v. Brojo Soondury Debee* (3). In the last of these cases the first two cases were not cited, and we agree in the view taken in those two Rulings. But in the case of *Baroda Sundari Dabia v. Fergusson* (1), the Judges were of opinion that the decree-holder is not bound to apply for making the decree complete within three years. But the provisions of Art. 178 of the second schedule of the Limitation Act were not considered by the learned Judges. We are of opinion that that article applies to an application by a decree-holder for making the decree complete.

Applying this Article to the present application, it seems to us that so far as the decree-holder, who was not a minor at the date of the decree is concerned, his remedy is barred. So far as he is concerned, the application should have been made within three years—at least, from the date of the delivery of possession of the lands decreed. But the remedy of the other decree-holder is not barred, because he attained majority within three years from the date of the present application. His remedy is not therefore barred under section 7 of the Limitation Act. Section 8 has no application, because in our opinion the other decree-holder could not give a valid discharge without his concurrence. Upon this point our attention was called to the case of *Ahamudden v. Grish Chander Shamunt* (4). But that was a case of money due to joint creditors under a *contract*. In the present case the judgment-debtors were made liable as *wrong-doers*. We are of opinion that in this case a discharge given by one of the decree-holders could not have been a valid discharge binding upon the other.

The remedy of the respondent Rukini Mohun Bose being

(1) 11 C. L. R., 17.

(3) I. L. R., 8 Calc., 89.

(2) I. L. R., 4 Calc., 629.

(4) I. L. R., 4 Calc., 350.

not barred, and he being one of the two joint decree-holders, he should, in our opinion, be allowed to execute the whole decree under section 231 of the Code of Civil Procedure. We make this order, because in our opinion the *remedy only* of the decree-holder, Anando Kishore Bose is barred, but his *right* is not extinguished. We are aware of a conflict of decisions upon this point—*Nursing Doyal v. Hurryhur Saha* (1); *Krishna Mohun Bose v. Okhilmoni Dossee* (2); *Ram Chunder Ghosaul v. Juggut Monmokinney Dabee* (3). But we agree in the view that the *remedy only* is barred. But we desire to guard ourselves from being understood to say that the remedy barred under a repealed Limitation Act would be revived under the Repealing Act, even if there be no express provision to that effect. We express no opinion upon that point.

The result is, that the order of the lower Court will be varied as directed above.

The appellants will pay the respondent's costs.

*Appeal allowed and order varied.*

H. T. H.

*Before Mr. Justice Mitter and Mr. Justice Grant.*

GIRISH CHUNDER CHOWDHRY (PLAINTIFF) *v.* ABDUL SELAM,  
MINOR, REPRESENTED BY BISHESHER SEN, MANAGER APPOINTED  
BY THE COURT OF WARDS, AND OTHERS (DEFENDANTS).\*

1885  
June 10.

*Minority—Suit by minor—Certificate of administration—Act XL of 1858, s. 3.*

Whenever an application is made for the appointment of a guardian under Act XL of 1858, and an order is passed appointing a person to be guardian of the minor, even though no certificate be taken out by the person so appointed, the minor becomes a ward of Court, and the period of his minority is extended to 21 years—*Stephen v. Stephen* (4); *Stephen v. Stephen* (5), dissented from; *Chunee Mul Johary v. Brojo Nath Roy Chowdhry* (6), followed.

IN this case the plaintiff Girish Chunder Chowdhry sued as a

\* Appeal from Appellate Decree No. 2613 of 1885, against the decree of F. J. G. Campbell, Esq., Judge of Rajshahye, dated the 16th of September 1885, modifying the decree of Baboo Promotho Nath Mukerjee, Subordinate Judge of that District, dated the 18th of September 1884.

(1) I. L. R., 5 Calc., 897.

(4) I. L. R., 8 Calc., 714.

(2) I. L. R., 3 Calc., 331.

(5) I. L. R., 9 Calc., 901.

(3) I. L. R., 4 Calc., 283.

(6) I. L. R., 8 Calc., 967.