

Before Mr. Justice Sir Henry Griffin and Mr. Justice Chamier.  
HIRA SINGH AND ANOTHER (PLAINTIFFS) v. MUSAMMAT AMARTI  
(DEPENDANTS).\*

1912,  
February, 29

*Act No. IX of 1908 (Indian Limitation Act), section 31—Mortgage—Suit for sale—Limitation—Act No. X of 1897 (General Clauses Act), section 10.*

The special period of limitation for suits for foreclosure or for sale by a mortgagee, prescribed by section 31 of the Indian Limitation Act, 1908, namely, two years from the date of the passing of the Act, expired on a Sunday. Held that a suit for sale to which section 31 applied instituted upon the following Monday was within time. *Shevdas Daulatram Marwadi v. Narayenvalad Asaji* (1) dissented from.

The facts of this case were as follows:—

This appeal arises out of a suit on a mortgage bond alleged to have been executed on the 25th January, 1881, by Nathu Singh and Kallu, who are now represented by Musammat Amarti, defendant No. 1. The suit was filed on the 8th August, 1910, the 7th August being a Sunday. The court of first instance decreed the plaintiffs' suit. Musammat Amarti, defendant No. 1, appealed to the lower appellate court. One ground taken in appeal was that the suit was barred by limitation. The lower appellate court held that as the courts were closed on the 7th August, 1910, the last day of limitation, the suit having been filed on the 8th August, 1910, the day on which the courts reopened, was within time. The appeal was accordingly allowed.

The plaintiffs appealed to the High Court.

On the question of limitation the arguments were as follows:—

Babu *Sital Prasad Ghosh*, for the respondents:—

The suit having been filed after the "two years period of grace" had expired, was clearly barred by limitation. The period of limitation "prescribed" by the Act is to be found in the schedule. The Legislature, in view of the Privy Council ruling—*Vasudeva v. Srinivasa* (2)—had provided an additional period of grace, and this period could not be extended by any of the provisions applicable to the "period of limitation prescribed." The prescribed period of limitation is not to be found in section 31 of the Limitation Act but in the schedule annexed thereto: *Dayaram Parasram Marwadi v. Laxman Runja Teli* (3).

\* Second Appeal No. 725 of 1911 from a decree of A. W. R. Cole, Additional Judge of Aligarh, dated the 19th of June, 1911, reversing a decree of Abdul Hasan, Munsif of Khurja, dated the 27th of March, 1911.

(1) (1911) I. L. R., 36 Bom., 268.

(2) (1907) I. L. R., 30 Mad., 426.

(3) (1911) 18 Bom., L. R., 284.

1912

HIRA SINGH  
v.  
MUSAMMAT  
AMARTI.

Section 4 of the Limitation Act is not applicable to section 31, for that section is a self-contained provision and commences with the words "notwithstanding anything in this Act or in the Indian Limitation Act of 1877" which clearly indicate that section 31 excludes the applicability of any other provision of the Limitation Act. The only other proviso which can be relied on, as authorizing the presentation of the suit on the following Monday (August 8th, 1910) is section 10 of the General Clauses Act. In the first place that section was not intended to refer to suits; and, secondly, by the proviso, the section was made inapplicable to proceedings to which the Limitation Act of 1877 applied. The Act of 1877 having been repealed, all references to that Act must be read as references to the new Act of 1908. This principle was recognised by section 8 of the General Clauses Act: *Shevdas Daulatram Marwati v. Narayenulal Asaji* (1).

Mr. M. L. Agarwala, for the appellants, in reply :

The Bombay rulings did not give due effect to section 10 of the General Clauses Act. The proviso to that section only excluded proceedings to which the Limitation Act of 1877 applied, and there is absolutely no warrant for reading the words "the Indian Limitation Act of 1908" for the words "Indian Limitation Act of 1877." There is no provision in the new Act of 1908 analogous to the provision contained in section 158 of the new Civil Procedure Code, whereby any reference made in any Act to the repealed Act of 1877 could be taken to have been made to the new Act of 1908. Section 8 of the General Clauses Act would not authorize such reading, because it only says that any reference to a repealed provision should be construed as a reference to the re-enacted provision. It cannot be said that section 31 of the Act of 1908 is a re-enacted provision substituted for a similar repealed provision. Therefore, the proviso to section 10 not applying, the section itself would apply. The word "proceedings" is wide enough to cover "suits," and therefore the plaint, though presented on Monday, August 8th, 1910, was within time. Section 10 simply embodies the general principle of law, namely, that the law does not compel a man to do that which he could not possibly perform, and there is nothing in the Limitation Act of 1908 to indicate that this general principle of law would not apply to section 31.

(1) (1911) I. L. R., 86 Bom., 268.

GRIFFIN, J. — This appeal arises out of a suit on a mortgage-bond alleged to have been executed on the 25th January, 1881, by Nathu Singh and Kallu, who are now represented by Musammat Amarti, defendant No. 1. The suit was filed on the 8th August, 1910, the 7th August being a Sunday. The original bond was not produced. The plaintiffs alleged that it was in the possession of defendants 2 to 4 and filed a copy. Musammat Amarti, defendant No. 1, pleaded that the plaintiffs were not entitled to sue without first obtaining a succession certificate, and that the original bond had been paid off. In the court of first instance a succession certificate to collect a debt of Rs. 500 in respect of the bond now in suit was filed by the plaintiffs. No evidence was adduced by either party. The court held that, as the execution of the bond was not specifically denied in the written statement, it must be held to have been admitted and decreed the plaintiffs' suit. Musammat Amarti, defendant No. 1, appealed to the lower appellate court. One ground taken in appeal was that the plaintiffs had not shown that they were entitled to produce secondary evidence of the bond in suit. Another was that the suit was barred by limitation. The lower appellate court held that as the debt due on the bond in suit was over Rs. 2,000, whereas the plaintiff had obtained a succession certificate in respect of a debt of Rs. 500 only, the suit could not be maintained by the plaintiffs and must be dismissed. On the question of limitation the lower appellate court held that as the courts were closed on the 7th August, 1910, the last day of limitation, the suit having been filed on the 8th August, 1910, the day on which the courts reopened, was within time. The court further held that the execution of the bond was admitted by implication. The question whether the plaintiffs were entitled to produce secondary evidence of the bond in suit does not appear to have been argued before the court below. The appeal to that court having been allowed, the plaintiffs come here in second appeal.

I think the suit should not have been dismissed on the ground that the succession certificate held by the plaintiffs was not sufficient to cover the amount due on the bond in suit. The proper procedure for the court to have adopted was to allow the plaintiffs sufficient time within which to obtain an extension of the certificate.

1912

---

HIRA SINGH  
v.  
MUSAMMAT  
AMARTI.

1912

HIRA SINGH  
v.  
MUSAMMAT  
AMARTI.

I also think that some evidence should have been required of the plaintiffs before admitting secondary evidence of the bond in suit. The learned vakil on behalf of the respondent supports the decision of the court below on the ground that on the date on which the suit was filed—the 8th August, 1910—the suit was barred by limitation.

The question of limitation is one of some importance and is not free from difficulty. The Limitation Act No. IX of 1908 became law, so far as section 31 was concerned, on the 7th August, 1908. By section 31 of that Act it was enacted that a suit for foreclosure or a suit for sale by a mortgagee may be instituted within two years from the date of the passing of the Act or within sixty years from the date when the money secured by the mortgage became due, whichever period expires first. The two years expired on August 7th, 1910, which was a Sunday. The suit was filed on August 8th, 1910, the present Limitation Act being then in force.

Sections 3 and 4 of the Limitation Act No. IX of 1908 are as follows :—

3. Subject to the provisions contained in sections 4 to 25 (inclusive), every suit instituted, appeal preferred, and application made, after the period of limitation prescribed therefor by the first schedule, shall be dismissed, although limitation has not been set up as a defence.

4. Where the period of limitation prescribed for any suit, appeal, or application, expires on a day when the court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the court reopens.

At first sight it appears as if 'prescribed' in section 4 should be understood as 'prescribed in the schedule'. There is, however, ample authority for holding that section 5 of the Limitation Act of 1877 (now section 4 of the present Act) may be applied and proceedings not governed by the ordinary limitation law. I need only refer to 23 All., 277, and 28 All., 48, and to the authorities collected at page 297 of Mitra's Limitation Act. If the rule laid down in section 5 of Act No. XV of 1877 may be applied to cases not governed by that Act, it should also be held to apply to cases under the Limitation Act itself.

Section 10 of the General Clauses Act lays down the same rule as section 4 of the Limitation Act. It would appear that it was the intention of the Legislature that the rule should be of universal application. In the case before us, in the absence of any clear and unmistakable provision that the rule does not apply, I would hold

that the plaintiff is entitled to the benefit of section 4 of the Limitation Act.

I regret I am unable to agree with the learned Judges of the Bombay High Court who in *Shevdas Daulatram Marwadi v. Narayenvalud Asaji* (1) have arrived at an opposite conclusion. They were of opinion that section 31 of the Limitation Act of 1908 provided a period of grace, and that the special statutory provisions, section 10 of the General Clauses Act and section 4 of the Limitation Act, did not apply to the case.

In my opinion the time fixed for the institution of suits under section 31 is as much 'prescribed' as if suits under that section found place in the schedule. I would, therefore, allow the appeal and remand the case for decision to the court below, having regard to the observations set out above. The plaintiffs should be allowed an opportunity of producing evidence of facts which would entitle them to produce secondary evidence of the bond.

CHAMBER, J.—I agree that the suit should not have been dismissed upon the ground that the succession certificate produced by the plaintiff was not in order. The plaintiff should have been given time to get the certificate amended or extended.

I agree also that some evidence should have been required of the plaintiff that the mortgage-deed was in possession of defendants 2 to 4 before the plaintiff was allowed to use a copy of the deed.

On the question of limitation, I should like to say a few words. Section 31 of the Limitation Act, 1908, provides that, notwithstanding anything contained in that Act or in the Limitation Act, 1877, in the territories mentioned in the second schedule (which include the United Provinces) a suit for foreclosure or a suit for sale by a mortgagee may be instituted within two years from the date of the passing of the Act.

The last day of the two years was Sunday, August 7th, 1910. The present suit was instituted on Monday, August 8th. The question is whether the suit was within time with reference to the provisions of section 4 of the Limitation Act or section 10 of the General Clauses Act. It is contended on behalf of the defendant that section 4 of the Limitation Act does not apply, that it should be read with section 3, and that the words "period of limitation pre-

1912

HIRA SINGH  
v.  
MUSAMMAT  
AMARTI.

1912

HIRA SINGH  
v.  
MUSAMMAT  
AMARTI.

scribed" in section 4, mean period of limitation prescribed in the first schedule to the Act. There is a good deal to be said for this view, but it has been held by this court in several cases that the provisions of what is now section 4 apply to periods of limitation prescribed by other Acts.

Supposing, however, that section 4 does not apply to this case for the reason that the period is not "prescribed" within the meaning of section 4 of the Act, I am of opinion that the case is covered by section 10 of the General Clauses Act. The last mentioned section runs as follows :—

"10 (1) Where by any Act of the Governor General in Council or Regulation made after the commencement of this Act any act or proceeding is directed or allowed to be done or taken in any court or office on a certain day or within a prescribed period, then, if the court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as taken or done in due time if it is done or taken on the next day afterwards on which the court or office is open ;

Provided that nothing in this section shall be taken to apply to any act or proceeding to which the Indian Limitation Act, 1877, applies."

The defendant contends that as the Limitation Act, 1877, has been replaced by the Limitation Act, 1908, the proviso should be read as if the figures in it were '1908.'

She relies in the first instance upon section 8 of the General Clauses Act. It appears to me that that section does not apply at all to the case in hand. Section 31 of the Limitation Act, 1908, was enacted to meet a peculiar state of affairs. It is an entirely new provision and cannot in any way be regarded as the re-enactment with modifications of any provision of the Limitation Act of 1877. Sir M. D. Chalmers's note to section 8 of the General Clauses Act (Edition of 1899) is as follows :—

"This section is new and is taken from section 98 (1) of the Interpretation Act, 1859. It enacts as a general rule a provision which is commonly inserted in Acts (see for instance section 3 of the Code of Criminal Procedure, 1898), but which is sometimes forgotten. Its operation may be illustrated as follows :— Suppose the Acts amending the Indian Penal Code were consolidated and in the new Code, section 188 (disobedience to orders of public servants) became section 200. Then any Act or document which referred to section 188 of the old Code would have to be construed as referring to section 200 of the new Code."

This note seems to me to state accurately the object and scope of the section.

Had the Limitation Act of 1908 contained a provision corresponding to the first few words of section 2 of the Limitation Act,

1912

HIRA SINGH  
v.  
MUSAMMAT  
AMARTI.

1877, as that section stood at the date of the repeal of the Act, or to section 3 of the Code of Criminal Procedure, 1898, or section 158 of the Code of Civil Procedure, 1908, then it would have been permissible to read the proviso to section 10 of the General Clauses Act as referring to the Limitation Act of 1908. As matters stand, I am of opinion that this cannot be done. I see no reason why the words 'prescribed period' in section 10 of the General Clauses Act should not be held to apply to the period prescribed by section 31 of the Limitation Act of 1908. The defendants rely upon the decision of the Bombay High Court in *Shevdas Daulatram Marwadi v. Narayenvalud Asaji* (1). In that case the court gave no reasons for holding that section 10 of the General Clauses Act did not apply to a case like this. The reason given in the order by which the case was referred to the High Court is that the proviso to section 10 of the General Clauses Act should now be read as referring to the Limitation Act of 1908 on account of the provisions of section 8 of the General Clauses Act. For the reasons already given by me, I am of opinion that section 8 does not apply to the case.

It was suggested that the proviso to section 10 was and is surplusage, and that apart from it the preceding part of the section does not apply to any case governed by the Limitation Act for the time being in force. If the opening part of the section was not intended to apply to any case governed by the Limitation Act, it was because it was supposed that sufficient provision had already been made in the Limitation Act itself. The proviso to section 10 of the General Clauses Act still excludes from that section all cases which are covered by provisions of the Limitation Act of 1908, re-enacting with or without modification provisions of the Limitation Act, 1877. I see no reason for reading the provisions of the first paragraph of section 10 of the General Clauses Act in any but their ordinary and natural sense. They seem to me to be wide enough to cover the present case if it is not governed by section 4 of the Limitation Act.

For the above reasons, I am of opinion that this suit was filed within time, whether it is governed by section 4 of the Limitation Act or by section 10 of the General Clauses Act. I agree in the order proposed by my learned colleague.

(1) (1911) I. L. R., 36 Bom., 268.

1912

HIRA SINGH  
v.  
MUSAMMAT  
AMARTI.

BY THE COURT.—The appeal is allowed. The case will go back to the court below for decision having regard to the observations made in our judgment. The plaintiffs will be allowed an opportunity of adducing evidence of the facts entitling them to produce secondary evidence of the bond. Costs in this appeal will be costs in the cause. Defendants will be entitled to produce rebutting evidence.

*Appeal allowed. Cause remanded.*

1912.

February 29.

*Before Mr. Justice Karamat Husain and Mr. Justice Tudball.*

MAKHAN LAL (PETITIONER) v. SRI LAL (OPPOSITE PARTY).\*

*Act No. XII of 1887 (Bengal, N.-W. P. and Assam Civil Courts Act), sections 8, 20—Act No. III of 1907, (Provincial Insolvency Act), sections 43, 46, 3—Appeal—Jurisdiction—Effect of order of District Judge assigning work to Additional Judge.*

Where an Additional District Judge sentenced an applicant for insolvency under section 43 of the Provincial Insolvency Act, 1907, acting in the matter under an order of the District Judge assigning the particular class of work to him under section 8 of the Bengal, N. W. P. and Assam Civil Courts Act, 1887, it was held that an appeal from the Additional Judge's order lay to the High Court and not to the District Judge.

The facts out of which this appeal arose were, briefly, as follows:—

One Makhan Lal applied to the District Judge of Aligarh to be adjudicated an insolvent. The District Judge transferred that application to the file of the Additional District Judge. One Sri Lal was one of the opposing creditors. The Additional Judge found the applicant guilty under section 43 (2) of the Provincial Insolvency Act and sentenced him to one month's simple imprisonment. Makhan Lal appealed to the High Court.

Pandit Jaggivan Nath Takru, for the respondent, raised a preliminary objection that the appeal lay to the District Judge and not to the High Court. He submitted that the court of the Additional Judge was inferior to that of the District Judge; *vide* section 39 of the Bengal, Assam and N.-W. P. Civil Courts Act, 1887. In section 3 of that Act, the different courts have been named in order of their inferiority. An appeal from an order of a court subordinate to the District Judge lay to the District Judge—*vide* section 46 of the Insolvency Act—and no appeal lay to the High Court.

\* First Appeal No. 112 of 1911, from an order of A. W. R. Cole, Additional Judge of Aligarh, dated the 23rd of September, 1911.