

1889 has not paid. If he does pay he will be entitled to possession of the property, and if he does not pay, it will be open to the other side to proceed in accordance with the law and to apply for an order under s. 87 of the Transfer of Property Act.

PORESH
NATH
MOJUMDAR
v.
RAMJODU
MOJUMDAR.

The appellant is entitled to his costs in all the Courts.

C. D. P. *Appeal allowed.*

Before Mr. Justice O'Kinealy and Mr. Justice Trevelyan.

1888 AKSHOY KUMAR NUNDI (PLAINTIFF) v. CHUNDER MOHUN CHA-
December 4. THATI AND OTHERS (DEFENDANTS).^o

Limitation Act (XV of 1877), Art. 179, cl. 2—“Appeal presented”—“Where there has been an appeal.”—Civil Procedure Code (Act XIV of 1882), s. 541—Execution of decree.

The words “*appeal presented*” in the Limitation Act 1877, mean an appeal presented in the manner prescribed in s. 541 of the Code of Civil Procedure.

The words “*where there has been an appeal*,” in Art. 179, cl. 2, of Sch. II, of the Limitation Act, 1877, mean where a memorandum of appeal has been presented in Court.

In the execution of a decree against which an appeal has been presented but rejected on the ground that it was after time, limitation begins to run from the date of the final decree or order of the Appellate Court.

APPEAL from the order of the District Judge of Dacca, affirming the order of the 25th February 1888, of the First Munsiff of Munshigunge, refusing an application for the execution of a decree as time-barred.

On 31st December 1884, the plaintiff Akshoy Kumar Nundi obtained a decree against the defendants Chunder Mohun Chathati and others. From this decree the defendants appealed to the Judge. The appeal was presented after time, and on this ground was rejected on the 10th February 1885. The defendants then filed a second appeal in the High Court, which was dismissed with costs on the 16th February 1886.

On 4th January 1888, more than three years from the date of the decree of the Court of first instance, the plaintiff applied for the execution of his decree. The First Munsiff of Munshigunge

* Appeal from Order No. 293 of 1888, against the Order of T. D. Beighton, Esq., Judge of Dacca, dated the 3rd of May 1888, affirming the order of Baboo Jadub Chunder Sen, Munsiff of Munshigunge, dated the 25th of February 1888,

held that the application was barred by three years' limitation under Art. 179, Sch. II of the Limitation Act: that time began to run from the date of the decree of the Court of first instance, the appeal to the District Judge being in fact no appeal since it had been dismissed as out of time; and, accordingly, he dismissed the application on the 25th February 1888.

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On appeal the Judge upheld the order of the Munsiff; and the plaintiff appealed to the High Court.

Baboo *Huri Mohun Chuckerbutty* for the appellant.

Baboo *Srinath Das* and *Baikant Nath Das* for the respondents.

The judgment of the Court (O'KINEALY and TREVELYAN, JJ.) was as follows:—

This appeal arises out of an application for execution of a decree. Previously in a litigation between the two parties, the defendants appealed from the decree of the first Court. That appeal was rejected on the ground that it was presented after time, and defendants then filed a second appeal to this Court which was dismissed with costs. On plaintiff seeking to take out execution of the decree, it was objected that the time ran from the date of the decree of the first Court, and that the application was barred. We do not think that that contention is correct. Section 4 of the Limitation Act says: * * * "Every suit instituted, appeal presented, and application made, after the period of limitation prescribed therefor by the second schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence." Section 5 says: "If 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 presented or made on the day that the Court re-opens." That shows that what is meant by the words "appeal presented" in the Limitation Act is an appeal presented in the manner prescribed in s. 541 of the Code of Civil Procedure, that is to say, presented by a proper person to the proper Court.

Article 179 of the second schedule of the Limitation Act says: "Where there has been an appeal, limitation begins to run from the date of the final decree or order of the Appellate Court." In

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this appeal it has been contended, on behalf of the respondent, that the words "where there has been an appeal," mean, where there has been an appeal presented and admitted, and in support of that he refers us to a case of *Dianatullah Beg v. Wajid Ali Shah* (1). There are no such words in ss. 4 and 5 as "appeal admitted," and there is nothing in those articles of the Limitation Act, or in s. 541 of the Code of Civil Procedure, that would admit of such a construction.

We are, therefore, of opinion that the words, "where there has been an appeal," mean where there has been an appeal in the ordinary sense and in the sense in which it is used in the other portions of the same Act, *viz.*, when a memorandum of appeal has been presented in Court. We think that the lower Courts are wrong in saying that execution is barred. We, accordingly, set aside the orders of the lower Courts with costs.

C. D. P.

Appeal allowed.

ORIGINAL CIVIL.

Before Sir W. Comer Peitham, Knight, Chief Justice, and Mr. Justice Wilson.

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February 14

BENODE COOMAREE DOSSEE (DEFENDANT) v. SOUDAMINEY DOSSEE (PLAINTIFF).*

Injunction—Mandatory injunction—Damages—Light and air—Ancient lights.

Where a plaintiff has not brought his suit or applied for an injunction at the earliest opportunity, but has waited till the building complained of by him has been completed, and then asks the Court to have it removed, a mandatory injunction will not generally be granted, although there might be cases where it would be granted.

Mere notice not to continue building so as to obstruct a plaintiff's rights, is not, when not followed by legal proceedings, a sufficiently special circumstance for granting such relief.

Jannadas Shankarlal v. Atmaram Harijan (2) referred to.

The law regarding relief by mandatory injunction explained.

* Appeal No. 25 of 1888 against the decree of Mr. Justice Trevelyan, dated the 26th July 1888.

(1) I. L. R., 6 All., 438.

(2) I. L. R., 2 Bom., 138.