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mate share. If the son who is out of possession brings a suit for possession and omits to implead one of the four sons, there is no reason why he should not be granted a decree for so much of his share as is in possession of the three sons who are made parties to the suit. In such a case the plaintiff can be granted a decree for 3/20th of the property and the decree can in no way adversely affect the 1/20th share of the plaintiff that is in possession of the brother who has not been made a party to the suit.

For the reasons given above we hold that the omission to implead the heirs of Muzammil Begam could not be a ground for dismissing the suit. We may however add that any decree passed in the present suit will in no way be binding on Muzammil Begam's heirs.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Rachhpal Singh

GULAB CHAND AND OTHERS (PLAINTIFFS) *v.* PEAREY LAL (DEFENDANT)*

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Limitation Act, section 12(3); *article* 179—*Application for leave to appeal to Privy Council—Time spent in obtaining copy of judgment—No exclusion of such time.*

An application for leave to appeal to His Majesty in Council is specifically provided for by article 179 of the Limitation Act; it is not an appeal, and sub-section (3) of section 12 of the Limitation Act does not apply to the application. Reading sub-sections (2) and (3) of section 12 it is clear that the legislature has deliberately omitted applications for leave to appeal from sub-section (3). So, the time requisite for obtaining a copy of the judgment can not be excluded in computing the period of limitation for an application for leave to appeal to His Majesty in Council.

Mr. *S. B. L. Gaur,* for the applicants.

Messrs. *P. L. Banerji, Panna Lal* and *Kamta Prasad,* for the opposite party.

*Application No. 16 of 1934, for leave to appeal to His Majesty in Council.

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SULAIMAN, C.J., and RACHHPAL SINGH, J.:—A preliminary objection is taken to this application for leave to appeal to His Majesty in Council that it is barred by time. Judgment in this case was pronounced by the High Court on 23rd January, 1934, and a decree was prepared later on. An application for a copy of the decree was filed on 28th April, 1934, and the copy was ready for delivery on 16th May, 1934. This application for leave to appeal was filed on the 21st of July, 1934. It is therefore obvious that if the time required for obtaining the copy of the decree be not excluded from the period of limitation prescribed for such applications, the application is beyond time. Indeed, the time expired before the long vacation commenced and therefore the applicant is not entitled to add to that period the period of the long vacation.

The learned advocate for the applicants contends before us that under section 12(3) of the Indian Limitation Act he is entitled to exclude the time requisite for obtaining a copy of the judgment also, in addition to the time requisite for obtaining a copy of the decree. He has to concede that there is a ruling of this Court in *Wilayati Begam* v. *Jhandu Mal Mithu Lal* (1) which is directly against him. But he urges before us that the Patna High Court and the Madras High Court have taken a contrary view, and that therefore the matter may be referred to a higher Bench.

In *Mahabir Prasad Tewari* v. *Jamuna Singh* (2) DAWSON MILLER, C.J., of the Patna High Court in delivering the judgment of the court, in which Ross, J., concurred, undoubtedly held that sub-section (3) of section 12 was applicable. But the learned CHIEF JUSTICE also referred to the practice of his Court under which it was necessary that a copy of the judgment from which it is sought to appeal should always be filed with the petition applying for leave. This view appears

(1) (1925) 24 A.L.J., 349. (2) (1922) I.L.R., 1 Pat., 429.

to have been adopted by the Madras High Court; *In re Secretary of State for India* (1). The learned Judges remarked: "But we think that, though sub-section (3) *does not in terms apply,* the language used in it really covers the present case", and put an interpretation on sub-section (3) so as to give it a wider scope and make it applicable to all the categories mentioned in sub-section (2). The main basis of the decision was that a proper application for leave to appeal cannot be drawn up unless a copy of the judgment has been obtained. On the other hand, in *Wilayati Begam* v. *Jhandu Mal Mithu Lal* (2) it was distinctly held by this Court that the language of sub-section (3) when contrasted with sub-section (2) clearly contemplates the exclusion from the scope of sub-section (3) of the case of an application for leave to appeal, and that in this Court it is not at all necessary that the applicant should, at the time of filing his application for leave, file also a copy of the judgment on which the decree is founded. A similar view was in the same year expressed by a Division Bench of the Sindh Judicial Commissioner's Court in *Nur Mahomed* v. *Hassomal* (3).

It seems to us that the point becomes clear when it is borne in mind what the position was prior to the Limitation Act of 1908. As laid down in *Lakshmanan* v. *Peryasami* (4), *Anderson* v. *Periasami* (5) and pointed out in *Ram Sarup* v. *Jaswant Rai* (6), under the old Act appeals to His Majesty had to be brought within the prescribed time from the date of the decree and the applicant was not at liberty to exclude any time for the purpose of obtaining a copy of the decree or judgment. Thus there was no exclusion either of the time for obtaining a copy of the decree or of the time required for obtaining a copy of the judgment. Sub-section (3) of section 12 was held not to be applicable to an applica-

(1) (1925) I.L.R., 48 Mad., 939.
(2) (1925) 24 A.L.J., 349.
(3) A.I.R., 1925 Sindh, 60.
(4) (1887) I.L.R., 10 Mad., 373.
(5) (1891) I.L.R., 15 Mad., 169.
(6) (1915) I.L.R., 38 All., 82 (83).

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tion for leave to appeal to His Majesty in Council, although there was in one sense an appeal preferred from a decree of the High Court. In 1908 the legislature, on the one hand, reduced the period prescribed for an application for leave to appeal from six months to ninety days, and, on the other, deleted certain words from sub-section (2) so as to make it applicable to all applications for leave to appeal including an application for leave to appeal to His Majesty in Council. The legislature did not think it fit to amend sub-section (3) at all. It is a significant fact that as the section now stands there are three categories of cases to which sub-section (2) applies; (i) an appeal, (ii) an application for leave to appeal and (iii) an application for review of judgment. Two of these categories are practically reproduced in sub-section (3), but there is a deliberate omission of an application for leave to appeal in sub-section (3). The legislature has therefore clearly intended that sub-section (3) should not apply to an application for leave to appeal, but should apply only to appeals.

The matter that is before us at this stage is an application for leave to appeal only and it is only when the leave is granted that the appeal would be admitted. There is a specific article, article 179 of the Limitation Act, which applies to an application for leave to appeal to His Majesty in Council. To such an application sub-section (3) does not apply. It seems to us, therefore, that we cannot stretch the meaning of sub-section (3) in order to make it applicable to an application for leave to appeal also, when the legislature has expressly omitted such cases from sub-section (3).

We are not at all impressed by the contention that in order to draw up grounds of appeal it is essential to obtain a copy of the judgment and that therefore the section should be liberally interpreted so as to obviate this difficulty. Ordinarily a judgment is ready on the date when it is pronounced and a copy can be applied for at once; whereas the decree is not ready on that date

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and has to be prepared subsequently. It happens ordinarily that the time taken for obtaining a copy of the decree is longer than that taken in obtaining a copy of the judgment. The legislature therefore might well have thought it necessary, when reducing the period of limitation, to allow the time requisite for obaining a copy of the decree to be excluded, but not the time requisite for obtaining a copy of the judgment in addition thereto.

Inasmuch as we agree with the view expressed previously in *Wilayati Begam's* case (1) we hold that the application would *prima facie* be barred by time unless the applicant can show good cause for extension of time under section 5 of the Limitation Act. As we are informed that such an application has been filed, let this be put up with that application.

REVISIONAL CIVIL

Before Mr. Justice Niamat-ullah and Mr. Justice Collister

RURAMAL RAMNATH (PLAINTIFF) *v.* KAPILMAN MISIR AND OTHERS (DEFENDANTS)*

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Civil Procedure Code, section 115—"Case decided"—Order refusing application for amendment of plaint—Revision entertainable although other remedy available—Scope of section—Civil Procedure Code, order VI, rule 17—Refusal of jurisdiction or acting illegally in the exercise of it.

A suit was brought on a promissory note, but past dealings between the parties on account books which led to the execution of the note were recited. The plaintiff subsequently applied for amendment of the plaint, seeking to make the original consideration disclosed by the account books an alternative basis of his claim. This application for amendment was refused by the court. *Held*, in revision, that the refusal of the application for amendment of plaint amounted to a "case decided" within the meaning of section 115, Civil Procedure Code, and that in refusing the amendment the court had contravened the provisions of order VI, rule 17 of the Code and thereby had either

*Civil Revision No. 443 of 1933.

(1) (1925) 24 A.L.J., 349.