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claims of the defendant who had, previous to his private transfer, applied for rateable distribution and thereby placed himself on the same footing as the attaching decree-holder Mewa Ram.

We accordingly allow this appeal and setting aside the decree of the learned Judge of this Court restore that of the lower appellate court with costs in all courts.

PRIVY COUNCIL

J. C.*
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February, 7

MAQBUL AHMAD AND OTHERS *v.* PRATAP NARAIN SINGH AND OTHERS

[On appeal from the High Court at Allahabad]

Limitation Act (IX of 1908), sections 4, 14(2)—Prescribed period expiring when court closed—Proceeding in wrong court—Discretion of court.

There is a marked difference between the language and effect of section 4 and section 14 of the Indian Limitation Act, 1908. Section 4 provides merely that if the prescribed time for a civil proceeding expires when the court is closed, it can be commenced on the day when the court (which means the proper court) re-opens; the section does not alter the period prescribed for the proceeding. Under section 14, and similar sections, certain periods are to be excluded in computing the prescribed period; the effect is that any days so excluded have to be added to what is primarily the prescribed period.

On June 7, 1920, the appellants obtained a preliminary mortgage decree; under article 181 of schedule I of the Act the period for applying for a final decree was three years from that date, which expired when the court was closed for the vacation. The application was made on June 20, 1923, the day when the court re-opened, but to a court which no longer had jurisdiction in the matter. It was there prosecuted for 48 days and by section 14, sub-section (2), of the Act those days were to be excluded. The appellants applied in the right court on August 6, 1923:

Held, that the application was barred as a period of three years and forty-eight days had expired about July 25, 1923; the appellants were not entitled under section 4 to exclude the period of the vacation.

**Present:* Lord TOMLIN, Lord THANKERTON, Lord RUSSELL OF KILLOWEN, Sir LANCELOT SANDERSON, and Sir SHADI LAL.

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Outside the limited discretion conferred by the Act in certain cases, the court has no general discretion to relieve a suitor from the operation of its provisions.

Basvanappa v. *Krishnadas* (1), disapproved.

Decree of the High Court affirmed.

APPEAL (No. 44 of 1932) from a decree of the High Court (May 6, 1929) affirming a decree of the Subordinate Judge at Basti (April 29, 1924).

On June 7, 1920, the appellants, upon an appeal to the High Court, obtained a preliminary mortgage decree. The question arising in the present appeal was whether an application by them on August 6, 1923, for a final mortgage decree was barred by limitation, and involved a consideration of the effect of section 4 and section 14, sub-section (2), of the Indian Limitation Act, 1908.

The facts and the terms of the relevant sections of the Act appear from the judgment of the Judicial Committee.

Both Courts in India held that the application was barred. In the High Court the learned Judges (SULAIMAN and PULLAN, JJ.) in reference to the effect of section 4 of the Act referred to the Madras decisions in *Mira Mohidin Rowther* v. *Nallaperumal Pillai* (2) and *Ummathu* v. *Pathumma* (3) and stated that the view there taken had been followed in a case in Allahabad. They disagreed with the view expressed in *Basvanappa* v. *Krishnadas* (1).

1935. February, 7. *Abdul Majid*, for the appellants: The period between December 23, 1920, and November 8, 1921, should be excluded; that would make the application in time. The relief there sought was not strictly the "same relief" as is now sought, but the appellants in applying for execution were deceived by the decree being upon the form appropriate to a money decree. That being an error of the court the appellants should not suffer from it.

(1) (1920) I.L.R., 45 Bom., 443. (2) (1911) I.L.R., 36 Mad., 181.
(3) (1921) I.L.R., 44 Mad., 817.

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[*Dunne, K. C.*—The decree was in correct terms as a preliminary mortgage decree though on a printed form inappropriately headed.]

Abdul Majid: Even if that period cannot be excluded, the three years allowed by article 181 expired during the vacation, and as prescribed by section 4 it was made on the day when the court re-opened. It was then made to the proper court.

[Lord TOMLIN: That contention cannot be raised now, as it was not raised in either court in India.]

Abdul Majid: It was rightly held that if it was the wrong court the appellants were entitled to exclude 48 days under section 14, sub-section (2). But they were also entitled to exclude the period of the vacation: *Basvanappa* v. *Krishnadas* (1). It is conceded that a contrary view has been taken in Madras: *Mari Naganna* v. *Peruri Krishnamurthi* (2). Even if the vacation period is not excluded, the 48 days should run from the date when the court re-opened. In any case the barring of the application was a great hardship, and as it was due to the error of the court, also to the change of jurisdiction, in equity therefore the application should be held to have been in time: *Hemendra Mohon Khasnobis* v. *Dharaninath Chanda* (3), *Brij Indar Singh* v. *Kanshi Ram* (4).

Dunne, K. C., and *Wallach*, for respondents 1 to 5 were not called upon.

The judgment of their Lordships was delivered by Lord TOMLIN:

This is an appeal from a decree of the High Court of Judicature at Allahabad dated the 6th May, 1929, by which a decree dated the 29th April, 1924, made by the Subordinate Judge at Basti was affirmed. The decree of the Subordinate Judge had dismissed the application of the decree-holder in a mortgage suit to have the preliminary decree in the suit made absolute. The present appeal is brought by representatives of the decree-holder

(1) (1920) I.L.R., 45 Bom., 443.
(2) (1931) I.L.R., 55 Mad., 286.
(3) (1920) 25 C.W.N., 376.
(4) (1917) L.R., 44 I.A., 218.

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since deceased, complaining of the decrees to which reference has been made.

The facts of the case are shortly these. A preliminary mortgage decree was obtained on the 7th May, 1917, which was amended in some respects not material to be particularised on the 22nd May, 1917.

There were a number of mortgagors interested in different villages comprised in the mortgage, and some of them appealed to the High Court against the preliminary decree. There were in fact two such appeals. One appeal succeeded, with the result that certain villages were excluded from the decree, and the suit of the mortgagee was dismissed as against those appellants. So far as they were concerned, that was the end of the matter.

There was a second appeal, by which certain of the mortgagors sought to exclude other villages from the decree, and that appeal failed.

The decrees of the High Court disposing of those appeals were made on the 7th June, 1920.

After the decrees of the High Court dealing with the appeals in the way that has been indicated, the decree-holder proceeded to seek execution under the preliminary decree and between the 23rd December, 1920, and the 8th November, 1921, he was occupied with those proceedings. It was held that he was not entitled to proceed by way of execution under the preliminary decree, and that all he could do was to take the proper steps to obtain a final decree in the suit.

The Additional Subordinate Judge, before whose court the mortgage suit was instituted and by whom the preliminary decree had been made, was, after the making of the preliminary decree, abolished and his jurisdiction was transferred to the Subordinate Judge at Basti.

At a later stage another Additional Judge was appointed, with specified jurisdiction, and on the 20th June, 1923, being the day after the end of the long vacation, the decree-holder made an application for a final decree

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for sale in the court of the new Additional Subordinate Judge. His petition was returned to him on the 6th August, 1923, with an intimation that he had presented it in the wrong court, that the Additional Subordinate Judge had no jurisdiction, and that the court of the Subordinate Judge at Basti was the proper court in which to proceed.

Accordingly, on the day on which he got back his petition, he presented it in the court of the Subordinate Judge at Basti. When that application came on, it was objected to upon the ground that it was out of time and barred by article 181 of the Limitation Act, three years since the 7th June, 1920, having expired.

The decree-holder, however, sought to escape from that defence by alleging that he was entitled to the exclusion of three periods in computing the prescribed period. The first period was from the 23rd December, 1920, to the 8th November, 1921, while he was seeking execution under the preliminary decree, which he contended, ought to be excluded in computing the prescribed period under the provisions of section 14 of the Limitation Act. The second period was from the 20th May, 1923, to the 19th June, 1923, being the period of the long vacation, which he claimed should have been excluded under the provisions of section 4 of the Limitation Act. The third period was from the 20th June, 1923, to the 6th August, 1923, being the period between the date of the application to the Additional Subordinate Judge and the presentation of the petition to the Subordinate Judge. That he urged should be excluded by virtue of section 14 of the Limitation Act.

The Courts in India have determined the matter against the appellants, the decree-holder's representatives; holding that the period during which execution proceedings were proceeding cannot be excluded from the calculation under section 14, and that though the period from the 20th June, 1923, to the 6th August,

1923, ought to be allowed no allowance should be made in respect of the period which represents the long vacation, namely from the 20th May, 1923, to the 19th June, 1923. The result was that the application on the 6th August, 1923, was held to be out of time and barred by article 181.

The appellants before their Lordships' Board by their counsel have presented five propositions: firstly, that the period during which the execution proceedings were pending should be excluded; secondly, that the vacation period should be excluded: thirdly, that the period up to the 6th August, which has in fact been allowed to the decree-holder, was properly allowed to him; fourthly, that the application was in fact made to the proper court on the 20th June, 1923, and that the Additional Subordinate Judge was the proper Judge to deal with it; and, lastly, that the court had a general judicial jurisdiction, outside the Limitation Act, to relieve a suitor from the provisions of the Act in a case where hardship is established.

It will be convenient to call attention to the provisions of the relevant sections of the Limitation Act. They are sections 3, 4 and 14(2). By section 3 it is provided: "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." Section 4 provides: "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 when the court re-opens." Section 14(2) provides: "In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or in a court of appeal, against the same party for the same relief, shall be excluded where such proceeding is prosecuted

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in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it."

If the appellants were entitled to succeed in regard to the first period, that is, from the 23rd December, 1920, to the 8th November, 1921, having regard to the length of that period, that would be sufficient for them. Their Lordships, however, are of opinion that the Courts in India were clearly right in the way they dealt with the point. It is impossible to say, apart from any other objection, that the application to obtain execution under the preliminary decree was an application for the same relief as the application to the court for a final mortgage decree for sale in the suit.

That being so, it is not permissible, on the basis of section 14, in computing the period of limitation prescribed, to exclude that particular period.

The second period is the period of the long vacation. In regard to that matter, the appellants seem to their Lordships to be in a position which is in the nature of a dilemma. It is to be noted that there is a marked distinction in form between section 4 and section 14. The language employed in section 4 indicates that it has nothing to do with computing the prescribed period. What the section provides is that, where the period prescribed expires on a day when the court is closed, notwithstanding that fact the application may be made on the day that the court re-opens; so that there is nothing in the section which alters the length of the prescribed period; whereas in section 14, and other sections of a similar nature in the Act, the direction begins with the words: "In computing the period of limitation prescribed for any application" certain periods shall be excluded. It therefore seems to their Lordships that, where there is ground for excluding certain periods under section 14, in order to ascertain what is the date of the expiration of the prescribed period, the days excluded from operating by way of limitation have to be added to what is primarily the prescribed period; that is to say, if the prescribed period is three years, and twenty days

ought to be excluded in order to determine when the prescribed period expires, twenty days have to be added to the three years, and the date of the expiration of the prescribed period is thus ascertained.

That being so, the appellants appear to be in this difficulty. They have been allowed, and (as their Lordships think), properly allowed, the period from the 20th June, 1923, to the 6th August, 1923. At page 33 of the record, this passage in the judgment of the High Court appears: "Even, therefore, if the three years and forty-eight days are counted from that date, the time expired some time about the 25th July, 1923. That did not fall within the long vacation. It therefore follows that the plaintiffs are not entitled to the benefit of section 4."

That view of the way to calculate the prescribed period seems to their Lordships to be correct; but, even if it were not correct and it were necessary to turn to section 4, the language of section 4 is such that it seems to their Lordships to be impossible to apply it to a case like the present. What it provides is that, where the period of limitation prescribed expires on a day when the court is closed, the application may be made on the day when the court re-opens. In their Lordships' view that means the proper court in which the application ought to have been made and, on that view of it, it is impossible to say that this application was made to the proper court on the day on which that court re-opened. Therefore, on either view of the case, the appellants necessarily fail in regard to that period.

That would be enough to dispose of the appeal but for the fact that two further points have been put before their Lordships: First that the application was in fact made to the proper court on the 20th June; and that the Additional Subordinate Judge was the proper Judge. The point does not appear to have been raised in the Courts in India. It was assumed, as a fact, that the Additional Subordinate Judge had no jurisdiction. There is no material before their Lordships upon which they could entertain the suggestion that they should interfere with

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that finding and, in their view, that is a point which cannot be made here.

Secondly, it was urged that there was some sort of judicial discretion which would enable the court to relieve the appellants from the operation of the Limitation Act in a case of hardship and that this was a case of hardship, and in particular because it was alleged that the decree-holder was, in regard to the proceedings which he took by way of execution, in some way misled by some mistake in the form of the preliminary decree. It is enough to say that there is no authority to support the proposition contended for. In their Lordships' opinion it is impossible to hold that, in a matter which is governed by the Act, an Act which in some limited respects gives the court a statutory discretion, there can be implied in the court, outside the limits of the Act, a general discretion to dispense with its provisions. It is to be noted that this view is supported by the fact that section 3 of the Act is peremptory and that the duty of the court is to notice the Act and give effect to it, even though it is not referred to in the pleadings.

Their Lordships only desire to add one other word, and it is this, that the decision which has been referred to in the case of *Basvanappa* v. *Krishnadas* (1) cannot, in their view, be supported, having regard to the provisions of sections 3, 4 and 14 of the Limitation Act.

As counsel for the appellants referred to section 5 of the Act and suggested that there was some discretion under that section which could be exercised by the court in this case, it is right to say that in their Lordships' view that section has no application at all to the circumstances of this case.

In the result, therefore, their Lordships are of opinion that the appeal should be dismissed, and they will humbly advise His Majesty accordingly. The costs of the appeal must be paid by the appellants.

Solicitors for appellants: *Francis and Harker.*

Solicitors for respondents: *Hy. S. L. Polak & Co.*

(1) (1920) I.L.R., 45 Bom., 443.