

to be construed in the extended sense in which the judgment-creditor in this case for some reason, which is obscure, has argued it should be construed. It is moreover to be observed that Rule 89, clause (b) provides for a deposit for payment to the decree-holder of the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered. The only amount which answers to that description is the amount of the decree of Vithal Vaman for Rs. 240-11-11. The persons who claim rateable distribution are not before the Court, but the objection which they might have put forward has been argued on behalf of the judgment-creditor.

We set aside the order of the Acting District Judge and pass an order setting aside the sale as provided by Order XXI, Rule 89.

The judgment-creditor must pay the costs throughout. But the order as to costs against the second respondent only applies to the costs of the appellate Court. Costs against the first respondent costs throughout.

Order set aside.

G. B. R.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Chandavarkar.

MAHOMED MEHDI FAYA THARIA TOPAN, APPELLANT AND PLAINTIFF,
v. SAKINABAI, RESPONDENT AND DEFENDANT.^o

Husband and wife—Restitution of conjugal rights demanded and refused—Inaction for more than two years—Suit for restitution barred under Limitation Act (XV of 1877), Article 35—Limitation Act (IX of 1908)—General Clauses Act (X of 1897), section 6.

On 11th July 1906 the plaintiff sent his wife (who had left him) a notice demanding restitution of conjugal rights. The demand was refused on 19th

^o Appeal No. 3 of 1912. Suit No. 486 of 1911.

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July 1906, but the plaintiff took no further action for more than two years, and eventually on 20th July 1911 filed a suit for restitution.

Held, that this particular form of remedy had become barred under Article 35 of the old Limitation Act (XV of 1877).

Dhanjibhoy Bomanji v. Hirabai⁽¹⁾, followed.

Held, further, that having become so barred, it could not be revived by the passing of the new Limitation Act (IX of 1908).

The provisions of section 6 of the General Clauses Act (X of 1897) discussed.

This was a suit brought by the plaintiff against his wife for restitution of conjugal rights. The parties were married in Bombay in 1894 according to the Khoja Shia Ismaili ceremonies, and lived together for two years. In 1896, however, the defendant left the plaintiff and went to live with her parents at Mahim. On 11th July 1906 the plaintiff, through his attorneys, called on the defendant to return to him, but she refused by her letter of 19th July 1906. The plaintiff again called on her to return on 16th June 1911, but again she failed to comply with his demand. Eventually this suit was filed on 20th June 1911.

Heaton, J., having dismissed the suit on the ground of limitation, the plaintiff appealed.

Jafferbhai Rahimtoolla (with him *Jinnah*) for the appellant.

Jardine and *Weldon* for the respondent.

Jafferbhai:—The Judge in the Court below doubted the correctness of the decision in *Vinayak Govind v. Babaji*⁽²⁾ but followed it. As a matter of fact, the Judges who decided that case gave no reasons. On the other hand, in *Hope Mills v. Vilthaldas*⁽³⁾ it was held that the remedy in respect of the liability involved in an *ex parte* decree was given by the Civil Procedure

⁽¹⁾ (1901) 25 Bom. 644.

⁽²⁾ (1879) 4 Bōm., 230.

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Code, the Limitation Act merely regulating the time within which the remedy must be sought. So here the right to restitution of conjugal rights is given by Mahomedan law (see *Moonshee Buzloor Ruheem v. Shumsoonnissa Begum*⁽¹⁾), the Limitation Act merely regulating the time within which such right can be enforced. The old Limitation Act barred the remedy, not the right: see *Mohesh Lal v. Busunt Kumaree*⁽²⁾; *Ram Chunder Ghosaul v. Juggutmonmohiney Dabee*⁽³⁾; *Krishna Aiyar v. Balammal*⁽⁴⁾ and *Binda v. Kaunsilia*⁽⁵⁾. By the new Act the bar to the remedy was removed, and the plaintiff can now enforce his right. The language of section 2 of the old Act is the same as that in section 6 of the General Clauses Act. Furthermore, the latter was duly considered in *Hope Mills v. Vithaldas*⁽⁶⁾.

Jardine :—Section 6 of the General Clauses Act takes the place of section 2 of the old Limitation Act. In addition to *Vinayak Govind v. Babaji*⁽⁷⁾, see *Appasami Odayar v. Subramanya Odayar*⁽⁸⁾, *Mohesh Narain Moonshi v. Taruck Nath Moitra*⁽⁹⁾ and *C. Venkataramanier v. Manche Reddy*⁽¹⁰⁾. See also *Rex v. Chandra Dharma*⁽¹¹⁾.

Jafferbhai replied.

SCOTT, C. J. :—The plaintiff was married to the defendant in 1894. In 1896 the defendant left him. On the 11th of July 1906 the plaintiff sent her a notice demanding restitution of conjugal rights. This demand was refused by the defendant on 19th of July 1906. The plaintiff took no action for more than two years after

(1) (1867) 11 Moo. I. A. 551.

(6) (1910) 12 Bom. L. R. 730.

(2) (1880) 6 Cal. 340.

(7) (1879) 4 Bom. 230.

(3) (1878) 4 Cal. 283.

(8) (1888) 15 I. A. 167.

(4) (1910) 34 Mad. 398.

(9) (1893) 20 I. A. 30.

(5) (1890) 13 All. 126.

(10) (1874) 7 Mad. H. C. R. 298.

(11) [1905] 2 K. B. 335.

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this refusal. Consequently under the provisions of section 4 and Article 35 of the Limitation Act of 1877 any suit for restitution was liable to dismissal. The particular form of remedy was barred even though the plaintiff's right to the services of his wife remained. This is the effect of the decision of the Full Bench in *Dhanjibhoy Bomanji v. Hirabai*⁽¹⁾. On the 1st of January 1909, however, the Limitation Act of 1877 was repealed and superseded by the Limitation Act of 1908. In that Act, Article 35 of the Act of 1877 has not been reproduced. It contains no Article prescribing a special period for suits for restitution.

On the 16th of June 1911, the plaintiff sent to the defendant a fresh notice to return to his house and allow him the exercise of conjugal rights. As the notice was not complied with, this suit was filed on the 20th of June 1911 for restitution. The question is whether this remedy is now open to the plaintiff or whether it has become barred by the expiry during the currency of the Act of 1877 of two years since the refusal of the defendant in 1896.

The learned Judge, considering himself bound by the decision of this Court in *Vinayak Govind v. Babaji*⁽²⁾ that a remedy which had become barred could not be revived by the passing of a new Limitation Act, dismissed the plaintiff's suit. In our opinion his decision must be affirmed. Section 6 of the General Clauses Act of 1897 provides that the repeal of an enactment shall not revive anything not in force or existing at the time when the repeal takes effect, or affect the previous operation of any enactment so repealed. These provisions couched in general terms have reference to all repealing Acts and produce the result effected specially for the purpose of limitation by section 2 of the Limita-

(1) (1901) 25 Bom. 644.

(2) (1879) 4 Bom. 230.

tion Act of 1877, which provided that nothing in that Act contained should be deemed to revive any right to sue barred under the Act of 1871 or any enactment thereby repealed. The Judicial Committee in *Mohesh Narain Moonshi v. Taruck Nath Moitra*⁽¹⁾ say with reference to section 2 of the Act of 1877 :—

“ It is clear that, on the 1st of April, 1873, the plaintiff's suit was barred by limitation under the Act of 1871, and the Act of 1877 could not revive the plaintiff's right so barred—a point which was indeed decided, in regard to the Limitation Acts of 1859 and 1871, in the case of *Appasami Odayar v. Subramanya Odayar*⁽²⁾.”

On behalf of the plaintiff reference was made to *Rex v. Chandra Dharma*⁽³⁾, and this case also appears to have raised doubts in the mind of the trying Judge ; but as pointed out by Channell, J., in all the cases before the Court of King's Bench “ the defendants were at the time the Act came into operation liable to prosecution, and an alteration of the time within which they might be prosecuted, whether by extension or diminution, was a matter of procedure only. If the time under the old Act had expired before the new Act came into operation the question would have been entirely different.” In the case now before us the right of suit was barred long before the new Limitation Act came into force ; it is not revived by the repeal of Article 35.

We affirm the decree of the lower Court and dismiss the appeal with costs.

Attorneys for the appellant : *Messrs. Mulji & Khambata.*

Attorneys for the respondent : *Messrs. Payne & Co.*

Appeal dismissed.

K. MCI. K.

⁽¹⁾ (1893) 20 I. A. 30 at p. 38.

⁽²⁾ (1888) 15 I. A. 167.

⁽³⁾ [1905] 2 K. B. 335.

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