

1903
MAY 20.
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APPELLATE
CIVIL.
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30 C. 758.

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[758] APPELLATE CIVIL.

PROSANNA KUMAR GUHA v. BANI KANTA BHATTACHARJEE.*

[20th May, 1903].

Notice of appeal—Indian Companies Act (VI of 1882) ss. 169 and 214—Appeal out of time.

No appeal against an order made in the matter of the winding up of a Company under the Indian Companies Act of 1882, shall be heard by an Appellate Court unless notice of the same is given within three weeks after any order complained of has been made.

In re Estates Investment Company (1) not followed.

[Ref. 14 C. L. J. 489=12 I. C. 745.]

APPEAL by Prosanna Kumar Guha, (a shareholder) opposite party.

This appeal arose out of an application under s. 214 of the Indian Companies Act. It appears that on the 27th June 1899, an application was presented to the District Judge of Barisal for winding up the "Barisal Timber and Miscellaneous Trading Company."

On the 5th August it was ordered that the Company be wound up, and Babu Bani Kanta Bhattacharjee be appointed Official Liquidator. On the 1st February 1901, the Official Liquidator reported that the accounts of the Company showed that certain sums had been expended on the purchase of *sundri* logs and their despatch to the Government Dockyard at Kidderpore, but that the proceeds of the sale had not been credited to the Company. Subsequently the said Official Liquidator again reported that Prosanna Kumar Guha, a shareholder of the Company, who had been the *de facto* manager at the time of the aforesaid transaction, in collusion with a clerk of the Company, misappropriated the money received from the Kidderpore Docks. Upon this report notices were served upon Prosanna Kumar Guha [759] and Mohim Chander Sarkar to shew cause why they should not repay the amount to the Company and necessary orders be passed against them under s. 214 of the Indian Companies Act. Mohim Sarkar in his written statement alleged that he knew nothing about the receipt of the money. Prosanna Kumar Guha denied having misappropriated the money and having obtained the money by cheque from the Bank of Bengal.

The District Judge found that Prosanna Kumar Guha in his capacity as an officer of the Company misappropriated the money and decreed the suit against him on the 9th July, 1900. Against this decree an appeal was filed in the High Court on the 28th August 1900. No notice of this appeal, as required by s. 169 of the Act, was given within three weeks of the order complained of.

Babu *Surendra Chandra Sen*, for the respondent, took a preliminary objection that, inasmuch as no notice of this appeal was given to his client within three weeks of the order complained of, the appeal could not be heard, regard being had to s. 169 of the Indian Companies Act.

Dr. *Ashutosh Mookerjee* (Babu *Chandra Kanta Ghose* with him) for the appellant. I submit, s. 169 of the Indian Companies Act does not apply to this case. That section applies when the matter of winding up properly takes place under the Act. In this case application was not made by the Company, but by a person who professes to be a shareholder

*Appeal from Original Decree No. 439 of 1900, against the decree of C. W. Pittar, District Judge of Backergunge, dated July 9, 1900.

(1) (1869) L. R. 8 Eq. C. 227.

whose name was removed later on. The case of *In re Estates Investment Company* (1) supports my contention.

MACLEAN C. J. The application in this case was made under s. 214 of the Indian Companies Act of 1882, and, stated briefly, the object of the application was to make the applicant liable for the alleged misfeasance, or breach of trust, or one of the cases under that section.

The matter came before the District Judge of Backergunge. He made a decree against the applicant for a sum of 600 rupees odd; the date of that decree was the 9th of July 1900, and the memorandum of appeal in this Court was not filed until the 28th [760] of August 1900. It is urged for the respondent that, having regard to s. 169 of the same Act, the appeal is out of time by reason of the fact that the notice required by the section was not given within three weeks after the order complained of was made. There is no valid answer to that contention: the language of s. 169 is absolutely clear upon the point.

We have been referred to the case of *In re Estates Investment Company* (1). But that decision is not binding upon us, and, speaking with all respect, I am not disposed to follow it.

The appeal, which is out of time, must be dismissed with costs.

GEIDT J. I concur.

Appeal dismissed.

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30 C. 761(=8 C. W. N. 251.)

[761] APPELLATE CIVIL.

TROYLOKYA NATH BOSE v. JYOTI PROKASH NANDI.*

[2nd, 3rd and 6th April, 1903.]

Limitation—Mortgage—Execution of decree, application for—Limitation Act (XV of 1877) s. 4, Sch. II, Art. 179. Exp. I—Step in aid of execution—Mortgage decree—Subsequent mortgagee—Pleading limitation in appeal—Application to postpone sale—Opposition to application of judgment-debtor.

In an application for execution of a mortgage decree by a prior mortgagee, a subsequent mortgagee as a judgment-debtor is competent to plead limitation either in the first Court or in appeal.

Article 179, Schedule II, of the Limitation Act applies to an application for execution of a mortgage decree.

The time from which limitation runs under cl. 4 of Art. 179 of the Limitation Act is the date of applying, and not the date on which the application is disposed of.

Fakir Muhammad v. Ghulam Husain (2) *Sarat Kumary Dassi v. Jagat Chandra Roy* (3) followed.

An application by the decree-holder to postpone a sale not with a view to enable him to bring the property to sale more advantageously for him, but upon other grounds, is not an application to take some step in aid of execution.

Abdul Hossein v. Fazilun (4) followed.

The decree-holder's opposition to an application of the judgment-debtor to sell the properties in an order different from that in which they have already been directed to be sold is not an application to take some step in aid of execution.

Dharanamma v. Subba (5) distinguished.

* Appeal from Original Order No. 160 of 1900, against the order of Tara Prosanno Banerjee, Subordinate Judge of Monghyr, dated February 24, 1900.

(1) (1869) L. R. 8 Eq. C. 227.

(2) (1878) I. L. R. 1 All. 550.

(3) (1897) 1 C. W. N. 260.

(4) (1892) I. L. R. 20 Cal. 255.

(5) (1883) I. L. R. 7 Mad. 306.