

its being a term of the contract implied and not expressed. Then it would seem that the proper way of trying whether it is or is not inconsistent with the provisions of the Act of 1872 would be to write it out as part of the contract. Would it then be inconsistent? Clearly not. It would be within section 152; it would be a special contract, saved by that section. It is difficult to see how a term of a contract can be inconsistent with the provisions of the Act of 1872 if it is implied, while it would not be inconsistent if it were expressed in the contract.

These considerations lead their Lordships to the conclusion that the Act of 1872 was not intended to deal with the law relating to common carriers, and notwithstanding the generality of some expressions in the chapter on bailments, they think that common carriers are not within the Act. They are therefore compelled to decide in favour of the view of the High Court of Calcutta, and against that of the High Court of Bombay.

Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be dismissed. The appellants must pay the costs of the appeal.

Solicitors for the appellants: Messrs. Sanderson, Holland, and Adkin.

Solicitors for the respondents: Messrs. Bramall and White.  
C. B.

### APPELLATE CIVIL.

*Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Beverley.*

PEARY MOHUN AICH (JUDGMENT-DEBTOR) v. ANUNDA CHARAN BISWAS (DECREE-HOLDER).\*

1891  
July 3.

*Execution of decree—Transfer of decree for execution—Civil Procedure Code (Act XIV of 1882), ss. 223, 230—Limitation Act (XV of 1877), ss. 5, 6—Extension of time when Court is closed.*

Where parties are prevented from doing a thing in Court on a particular day not by any act of their own, but by the act of the Court itself, they are entitled to do it at the first subsequent opportunity.

\* Appeal from Order No. 111 of 1891, against the order of Baboo Koylash Chunder Mookerjee, Subordinate Judge of Kholna, dated the 30th of December 1890, affirming the order of Baboo Narendra Krishna Dutt, Munsiff of Bagirhaut, dated the 19th of August 1890.

1891

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Where, therefore, after previous attempts to execute a decree, dated the 7th September 1877, an application for transfer of the decree under section 223 of the Code was made and granted on the 2nd September 1889, and on the 9th September (the Court having been closed from the 3rd to the 8th inclusive on account of the Mohurram) the decree-holder applied for execution under section 230 of the Code; *held*, that he was entitled to the benefit of the rule laid down in section 5 of the Limitation Act upon the broad principle above stated. *Shooshee Bhusan Rudro v. Gobind Chunder Roy* (1) applied in principle.

THE decree in this case sought to be executed was that of the Munsiff of Sealdah, bearing date the 7th September 1877. After various attempts to execute this decree, the decree-holder on the 2nd September 1889 applied to transfer it for execution to the Munsiff of Bagirhaut. An order was therefore made, directing the transfer to be made. On the 9th September (the Court having been closed from the 3rd September to the 8th September inclusive on account of the Mohurram) the decree-holder applied to the Munsiff of Bagirhaut for execution. On that date the certificate required under section 224 of the Code had not reached the Court, and did not, as a matter of fact, do so till the 10th September. The judgment-debtor therefore opposed the application on that ground, and also on the ground that it was made more than 12 years from the date of the decree sought to be enforced, the decree-holder not being entitled to the benefit of section 5 of the Limitation Act, inasmuch as section 230 of the Code itself provided a term of limitation. The Munsiff held that the decree-holder was entitled to apply for execution notwithstanding the non-arrival of the certificate, the order for transfer having been made on the 2nd September, and on this point referred to *Nilmony Singh Deo v. Birressur Banneryee* (2). On the point of limitation he held that section 6 of the Limitation Act did not disentitle the decree-holder to the benefit of section 5 of that Act; and that the application for execution having been made on the 9th September was therefore in time.

The judgment-debtor appealed to the Subordinate Judge, and that officer affirmed the order of the Munsiff, adding that although section 220 of the Code prescribed a special law of limitation, yet that section should be considered with the provisions of

(1) I. L. R., 18 Calc., 231.

(2) I. L. R., 16 Calc., 744.

the General Limitation Act, not, however, for the purpose of giving a longer period of limitation, but as showing the meaning of the law itself.

The judgment-debtor appealed to the High Court.

Baboo *Chandra Kant Sen*, for the appellant.—Where, by a special law other than that of the Limitation Act, a fixed period of limitation is given in which to make any application or file any suit, then such special limitation is to be applied, see section 6 of the Limitation Act, 1877; in this case, therefore, section 230 of the Code prevents the decree-holder from having the benefit of section 5 of the Limitation Act. This rule has been upheld in the Full Bench case of *Nagendro Nath Mullick v. Mathura Mohun Parhi* (1), and the cases therein cited.

Baboo *Dwarkanath Chackerbatty*, for the respondent, referred to *Shooshee Bhusan Rudro v. Gobind Chunder Roy* (2), *Behari Loll Mookerjee v. Mungolamath Mookerjee* (3), *Khoshelal Mahtam v. Guresh Dutt* (4).

The judgment of the Court (PETHERAM, C.J., and BEVERLEY, J.) was as follows:—

This second appeal arises out of an application to execute a decree made by the Munsiff of Sealdah on the 7th September 1877. After various attempts to execute the decree, the judgment-creditor on the 2nd September 1889 applied for the transfer of the decree to the Bagirhaut Court under section 223 of the Code. An order for transfer was made, and on the 9th September the Court having been closed from the 3rd to the 8th (inclusive) on account of the Mohurrum holidays, the decree-holder applied to the Munsiff of Bagirhaut for execution of the decree under section 230. Upon that application being made, the judgment-debtor objected, *inter alia*, that the application ought not to be granted, as it had been made more than 12 years from the date of the decree sought to be enforced (section 230, Code of Civil Procedure).

Both the lower Courts have held that the Court having been closed from the 3rd to the 8th September, and the application

(1) I. L. R., 18 Calc., 368.

(3) I. L. R., 5 Calc., 110.

(2) I. L. R., 18 Calc., 231.

(4) I. L. R., 7 Calc., 690.

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having been made on the 9th, the day on which the Court re-opened, section 5 of the Limitation Act operates to prevent the application from being barred.

It is contended before us that the period of limitation (12 years) being prescribed by the Code of Civil Procedure and not by the Limitation Act, section 5 of the latter Act is not applicable so as to modify the strict provisions of section 230 of the Code. The judgment-debtor relies upon section 6 of the Limitation Act, and upon a series of decisions cited in the recent Full Bench case of *Nagendro Nath Mullick v. Mathura Mohun Parhi* (1), in which it was held that the provisions of the Limitation Act were not applicable to suits under Act X. of 1859.

We are of opinion, however, that section 6 of the Limitation Act has no application to the present case. The Code of Civil Procedure is neither a special nor a local law. It may be that the word "prescribed" in section 5 is intended to be read as "prescribed by this Act;" but whether that be so or not, it seems to us that the decree-holder is entitled to the benefit of the rule laid down in that section upon the broad principle referred to in the case of *Shoshee Bhusan Rudro v. Gobind Chunder Roy* (2), that where the parties are prevented from doing a thing in Court on a particular day, not by any act of their own, but by the act of the Court itself, they are entitled to do it at the first subsequent opportunity. This principle has been followed in several cases, viz., *Behari Loll Mookerjee v. Mungolanath Mookerjee* (3), *Golap Chand Nowluckha v. Khristo Chunder Dass Biswas* (4), *Hossein Ally v. Donzelle* (5), and *Khoshelal Mahton v. Gunesh Dutt* (6), and it has been recognised (as regards future enactments) by section 7 of the General Clauses Act, I of 1887.

We hold, then, that the Court having been closed on the day when this application might have been lawfully granted within the 12 years, and the application having been made on the day the Court re-opened, it must be taken to have been made within time. We accordingly dismiss the appeal with costs.

T. A. P.

*Appeal dismissed.*

(1) I. L. R., 18 Calc., 368.

(4) I. L. R., 5 Calc., 314.

(2) I. L. R., 18 Calc., 231.

(5) I. L. R., 5 Calc., 908.

(3) I. L. R., 5 Calc., 110.

(6) I. L. R., 7 Calc., 690.