

## APPELLATE CIVIL.

Before Mr. Justice Markby and Mr. Justice Prinsep.

CHUNDER MOHUN ROY AND OTHERS (DEFENDANTS) *v.* BHUBON  
MOHINI DABEA (PLAINTIFF).\*

1877  
April 18.

*Limitation—Petition in Formâ Pauperis—Act IX of 1871, s. 4, explanation—Act VIII of 1859, s. 308.*

A put in a petition to sue *in formâ pauperis* for possession of certain foreclosed property within the time specified by the Limitation Act, but on her failing to appear on two occasions when called upon to give evidence of her pauperism, the case was struck off so far as the application to sue *in formâ pauperis* was concerned. At the instance of A the case, however, was again reopened, and a date fixed for her appearance. Two days prior to this date, but at a time beyond the limit fixed by the Limitation Act, A put in a petition asking that the petition which she then made to have her suit proceed as an ordinary suit might be joined with her application to sue *in formâ pauperis*, and the suit be duly tried in the ordinary way. She also paid in the regular amount of stamp duty for an ordinary suit. On the point of limitation, *held*, that the plaint must be considered as filed not on the day of filing the application to sue *in formâ pauperis*, but on the day on which the stamp duty was paid and application made to have the suit tried in the ordinary way.

The explanation to s. 4 of the Limitation Act only applies in cases where, under s. 308 of the Civil Procedure Code, the application for leave to sue *in formâ pauperis* is granted, and the application is numbered and registered as a suit (1).

SUIT for possession of foreclosed lands. The plaint stated that three of the defendants, Modhu Sudun, Madhab Chunder, and Seta Nath Roy, by a deed of conditional sale, dated the 24th September, 1850, sold to the mother of the plaintiff the properties, the subject of the present suit, for a consideration of Rs. 200, on a verbal condition that the said properties should be released on payment of the purchase-

\* Special Appeal, No. 1333 of 1875, from the judgment of the Second Subordinate Judge of Burdwan, reversing a decree of the Munsif of that district, dated 1st December, 1874.

(1) See *Skinner v. Ordè*, I. L. R., 1 All., 230.

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money within four years. On failure by the defendants to pay the money within the said period, the mother of the plaintiff foreclosed the mortgage on the 7th February, 1860. Subsequently, the father of one of the defendants in the present case intervened on the allegation that part of the lands foreclosed belonged to him by purchase. The foreclosure suit was, thereupon, struck off on the 26th June, 1861; leave, however, was reserved to the then plaintiff to bring a regular suit. On the 6th February, 1873, the present plaintiff presented a petition to be allowed to sue *in formâ pauperis* for the possession of the said lands, on the ground that her mother, the original mortgagee, had granted the said lands to the petitioner in November, 1866. The petitioner was thereupon ordered to appear and depose as to her pauperism on the 1st of March, but she failed to appear; and again on the 15th of June she was ordered to appear, but she again failed to put in an appearance before the Court. The case was thereupon struck off the file. Subsequently the petitioner applied for a review, which was granted, and she was ordered to appear on the 9th of August for the purpose of deposing to her pauperism. Before that date, on the 7th of August, she paid stamp duty sufficient for a suit in the ordinary form, whereupon the application was registered for hearing as an ordinary suit.

For the defendants it was contended that the suit was barred.

The Court of first instance held that the suit was instituted on the date when the plaintiff paid the stamp for the suit, and not from the date of filing the original petition to sue *in formâ pauperis*. The suit was, therefore, barred.

On appeal the Judge remanded the case, being of opinion that the plaintiff's claim would not be barred if she was actually a pauper on the 6th of February, 1873, and that the plaintiff had had no sufficient opportunity afforded her to prove this fact.

The Munsif, therefore, took fresh evidence on the point, and decided the question of limitation in favour of the defendant: he also found for the defendant on the facts.

The lower Appellate Court reversed the decision of the Munsif on the merits, but expressed no opinion on the question of limitation.

From this decision the defendant appealed to the High Court.

Babu *Hori Mohun Chuckerbutty* for the appellants.

Babu *Nolit Chunder Sen* for the respondent.

The following judgments were delivered:—

MARKBY, J.—We think on the face of these proceedings we must hold that the suit is barred by limitation. The mortgage is dated the 24th of September, 1850; the default was made on the 24th of September, 1854; notice of foreclosure issued on the 7th February, 1860. It is not shewn on what date the notice was served, but the foreclosure must have become absolute sometime before the 26th June, 1861, because the case was struck off on that date with permission to bring a regular suit, as appears from the plaint. Therefore, the title of the plaintiff must have become absolute at least as early as the 26th June, 1861, and the suit would be barred on the 26th June, 1873.

Now, on the 6th February, 1873, the plaintiff presented a petition to be allowed to sue *in formâ pauperis* to recover possession. She was ordered to appear on the 1st March, and she did not do so. She was again ordered to appear on the 15th June, and she did not do so; and the case was struck off so far as the application to sue *in formâ pauperis* was concerned. The matter was reopened, and she was ordered to appear on the 9th August. On the 7th August, that is two days prior to the date on which she was ordered to appear, she put in a petition asking that the petition which she then made might be joined with her application to sue *in formâ pauperis*, and a number given to the suit, and the suit tried on the civil side of the Court. With that petition she paid in the regular amount of stamp fees as in an ordinary suit. The order was that the suit should be registered and proceeded with in the usual way. The question we have to decide is, whether we are to reckon the plaint in this suit as filed on that date, namely on the 7th August, or whether the plaintiff can take advantage of the clause in the explanation of s. 4 of the Limitation Act, which says that a suit in the case of a pauper is instituted when his application for leave to sue as a pauper is filed. It is, I think, clear that that provision in favour of a pauper only

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applies in cases where, under s. 308 of the Civil Procedure Code, the application for leave to sue *in formâ pauperis* is granted and the suit is numbered and registered. In that case, by the provisions of that section, the application becomes the plaint in the suit, and the suit is considered as having commenced when the petition, which has subsequently been turned into a plaint, was filed. But in this case, in consequence of the second application made by the plaintiff herself, enquiry into her pauperism was stopped, and she elected to proceed in this case as an ordinary suitor and not as a pauper. I think we must take it that she having put in that petition stood merely in the same position as if she had filed her suit on that date. The District Judge seems to think that she will be entitled to the benefit of the explanation of s. 4 of the Limitation Act, if she was in fact a pauper when the original application to sue as a pauper was filed. I think he had no right to reopen that matter at all when it was closed on the application of the plaintiff herself. In order to give her the benefit of that explanation it was necessary that her application should be granted, in which case only her original application for leave to sue as a pauper could be treated as a plaint. Therefore, the date on which the present suit was filed being the 7th August, 1873, and the date on which she was entitled to possession being on some day prior to the 26th June, 1861, the suit is necessarily barred. The decision of the Court below will be reversed and the suit dismissed with costs.

PRINSEP, J.—I wish to add only a few words. The decision of this Court will proceed on the point of limitation on the facts which are most favourable to the plaintiff. The point now under decision depends entirely upon the question as to whether the application to sue as a pauper is to be treated as a plaint. The application can be treated as a plaint only when the leave to sue as a pauper has been granted. In its present state, it is, therefore, incomplete. It is only made complete so far as the present suit is concerned by the payment of fees; and, therefore, it became a plaint on the 7th August, 1873, on which date it was clearly barred.

*Appeal allowed.*