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ABIDUNNISSA KHATOON v. AMIRUNNISSA KHATOON.

Majesty to affirm the judgment of the High Court, and to dismiss this appeal with costs.

Appeal dimissed.

Agents for the appellant: Messrs. *Lawford* and *Waterhouse*.

Agents for the respondent: Mr. *T. L. Wilson*.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Ainslie.

1876 *Dec.* 11.
1877 *Feb.* 22.

DHONESSUR KOOER (DECREE-HOLDER) *v.* ROY GOODER SAHOY (JUDGMENT-DEBTOR).*

Limitation Act (IX of 1871), Sched. II., Art. 167—Application for Execution of Decree—Suit.

PER GARTH, C. J., and MARKBY and AINSLIE, JJ. (KEMP and MACPHERSON, JJ., dissenting.)—The periods of limitation prescribed in Sched. II of Act IX of 1871 are to be computed subject to the provisions contained in the body of the Act.

An application made on the 8th January, 1875, to execute a decree, the last preceding application having been made on the 8th January, 1872, was held to be within the time allowed by Art. 167, Sched. II, Act IX of 1871.

Per Curiam.—The word 'suit,' as used in the Act, does not include 'applications.'

ON the 8th January, 1872, Dhonessur Kooer applied for execution of a decree against Roy Gooder Sahoy, but took no further steps in the matter till the 8th January, 1875, when she made a fresh application to execute the decree. Both the Lower Courts held that this application was barred by the Limitation Act. The decree-holder appealed to the High Court, when, in consequence of the opinion expressed by Jackson, J., in *Banee*

* Miscellaneous Special Appeal, No. 109 of 1876, against an order of E. Drummond, Esq., Judge of Zilla Sarun, dated the 11th February, 1876, affirming an order of S. W. DaCosta, Esq., Subordinate Judge of that district, dated the 28th of May, 1875.

Kant Ghose v. *Haran Kisto Ghose* (1), being in conflict with the opinion of McDonell, J., in the same case, and with the opinion of Birch and McDonell, JJ., in *Raja Promotho Nath Roy Bahadoor* v. *Watson* (2), Kemp and Birch, JJ., who heard the appeal, referred the following questions for the opinion of a Full Bench :—

1. Whether the periods of limitation prescribed in Act IX of 1871, Sched. II, Division 3, are to be computed subject to the provisions contained in the body of the Act ?

2. If the provisions of the Act apply to Sched. III, Division 3, is the word 'suit' to be interpreted so as to comprehend 'applications' in execution of decrees ?

Baboo *Bhoyrub Chunder Banerjee* (with him Baboo *Bama Churn Banerjee*) for the appellant.—S. 13 of the Limitation Act provides that, "in computing the period of limitation prescribed for any suit, the day on which the right to sue accrued shall be excluded." It is submitted that an application for the execution of a decree is a suit within the meaning of that section. [AINSLIE, J.—This Court has ruled more than once that the word 'suit' in s. 1, cl. *a*, does not include applications.] Yes, that must be admitted; see *Rohini Nundun Mitter* v. *Bhogoban Chunder Roy* (3) and *Rughoo Nath Doss* v. *Shiromonee Pat Mohadebee* (4) : but in *Raja Promotho Nath Roy* v. *Watson* (2), Birch and McDonell, JJ., following the decision in *Hurro Chunder Roy Chowdhry* v. *Sooradhonee Debia* (5), held, that the word 'suit' in s. 14 of the Act does include applications for the execution of decrees. In the case last cited, Peacock, C. J., says, with respect to proceedings in execution "the word 'suit' does not necessarily mean an action . . . . Any proceeding in a Court of Justice to enforce a demand is a 'suit;' and this view was adopted by Stuart, C. J., in opposition to the rest of the Court, in the recent case of *Jiwan Singh* v. *Sarnam Singh* (6). Wherever a proceeding is not strictly a proceeding to enforce a demand, special provision seems to have been made

(1) 24 W. R., 405.
(2) *Id.*, 303.
(3) 14 B. L. R., 144, note.
(4) 24 W. R., 20.
(5) B. L. R., Sup. Vol., 985.
(6) I. L. R., 1 All., 97.

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for it. Thus s. 13 specially provides for certain applications, and s. 15, explanation 2, enacts that a plaintiff resisting an appeal presented, on the ground of want of jurisdiction, shall be deemed to be prosecuting a suit within the meaning of that section. The same larger sense appears to be attached to the word 'suit' in s. 7, which deals with the case of persons under legal disability. But, apart from the applicability of s. 13 to proceedings in execution, it is submitted that the appellant's application was made within the period allowed by art. 167 of the 2nd sched. The heading of the 3rd column, "time when period begins to run," is somewhat ambiguous; but the ambiguity is removed if for 'when' we read 'from which' or 'from when.' The corresponding expression in the body of the Act is 'from the time when;' see ss. 18, 19, 20, 21, and 25. Had the word 'from' been used, the day on which the preceding application was made must have been excluded—Act I of 1868, s. 3, cl. 2. [GARTH, C. J.—Unless the day be excluded, time would begin to run before the decree was passed.] Yes, instead of three years there would be only three years minus one day, and supposing the time specified in the 3rd column had been one day, the applicant would, in fact, have had no time at all. The Privy Council have held, on general principles, that the six months allowed for appeals to Her Majesty in Council must be reckoned exclusive of the day on which the decree appealed from was pronounced—*In the matter of the Petition of Ramanoogra Narain* (1).

Baboo *Kally Kissen Sein* for the respondent.—The 2nd Sched. of Act IX of 1871 provides periods of limitation for suits, appeals, and applications; and the heading of the 3rd column is the same, whether suits or applications are referred to. In the case of suits, however, s. 13 expressly enacts that the day on which the cause of action arose shall be excluded. This would be wholly unnecessary if the word 'when' in the heading of the third column is to be read as 'time from when.' Throughout the Act the distinction between 'suits,' 'appeals,' and 'applications' is carefully marked, and

(1) 13 W. R., P. C., 17.

the limitation of the provisions with respect of s. 13 to suits *eo nomine* shows that the Legislature did not intend the section to have the wide application now contended for.

Baboo *Bhoyrub Chunder Banerjee* in reply.

Cur. adv. vult.

GARTH, C. J.—The judgment which I am about to pronounce is concurred in by Markby and Ainslie, JJ.

1. We are of opinion that the periods of limitation prescribed in the 2nd Sched. of the Act of 1871 are to be computed subject to the provisions contained in the body of the Act. The schedules form a part of the Act, and must be read together with it for all purposes of construction.

2. We think that the word 'suits' in the Act of 1871 was not intended to include 'applications.' In the Act of 1859 the word might have had a more extended meaning; but in the Act of 1871 a distinction seems to have been carefully drawn between 'suits,' 'appeals,' and 'applications;' each of these subjects being separately dealt with, and in different divisions of the schedule.

3. It appears to us, however, that, in the special appeal which is the subject of this reference, the Courts below were wrong in refusing the application of the decree-holder upon the ground that she was barred by lapse of time. It was obviously the intention of the Act to give the decree-holder three years, and not less than three years, from the time of his former application, for the purpose of making a fresh one. And the only way of carrying out that intention, and putting a reasonable construction on the Act, is by excluding the day upon which the former application was made from the computation of the three years. It could hardly have been the intention of the Legislature that the three years' limitation should begin to run before the first application had been made; and yet this would be the necessary consequence of the construction which has been adopted by the Courts below.

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It is perfectly true that the provisions of s. 13 do appear to give some colour to that construction; and it is impossible to construe the words in question in either way without some apparent inconsistency; but by reading the phrase at the head of the schedule, 'time when the period begins to run' as meaning 'time from which the period begins to run,' we think we should be doing no real violence to the language of the Act, and that we should be, undoubtedly, carrying out the intention of the Legislature.

In our opinion, therefore, the application was made by the decree-holder in due time: the judgments of both the Lower Courts should be reversed; and the case should be remitted to the Court of first instance to be dealt with upon its merits.

The appellant will be entitled to his costs in this Court as well as in the Courts below.

KEMP, J. (MACPHERSON, J., concurring).—We agree in thinking that an 'application' is not a 'suit' within the meaning of the Limitation Act. But we are unable to say that we concur in the rest of the judgment just delivered. We think, nevertheless, that the result arrived at is probably in accordance with the real intention of the Legislature.