

BOMBAY HIGH COURT

Govindnaik Gurunathnaik Kalghatgi

Vs.

Basawannewa Parutappa Karajgi

Second Appeal No. 628 of 1939

(John Beaumont, Kt., C.J. and Sen, J.)

14.11.1940

JUDGMENT

Beaumont, C.J.

1. This is a second appeal from a decision of the Assistant Judge of Dharwar, which raises a question of limitation.

2. The material facts are that there was a mortgage passed in 1920, which became vested in plaintiffs Nos. 1 and 2, plaintiff No. 2 being a minor. They filed a suit to enforce the mortgage, plaintiff No. 1 being the next friend of plaintiff No. 2. On February 20, 1925, a preliminary decree was passed, and an application for a final decree could have been made at any time after August 20, 1925. In January, 1927, plaintiff No. 1 died, and no next friend of plaintiff No. 2 was appointed. The result was that under Order 32, Rule 10, of the Civil Procedure Code, all further proceedings in the suit were stayed for the time being. Plaintiff No. 2 attained his majority on April 12, 1933, and he died on September 13 in the same year. The applicant was adopted by the widow of plaintiff No. 1 in June, 1933, and in July, 1934, applied, as legal representative and heir both of plaintiff No. 1 and of plaintiff No. 2, for a final decree. Both the lower Courts have held that the application is barred under Article 181 of the Indian Limitation Act, which provides that applications for which no period of limitation is provided elsewhere shall be barred after three years from the time when the right to apply accrues. The lower Courts have held that the right to apply for a final decree accrued on August 20, 1925, and as this application was not made until July, 1934, it is barred.

3. If the view of the lower Courts is right, the result is unfortunate. It seems unjust that time to make an application in a suit should continue to run during a period; when the suit has been stayed by statute, and no application is possible. A next friend might die the day after the making of the preliminary decree, and in such case, if no new next friend be appointed for three years, the right to apply for a final decree is barred although it only existed effectively for one day. No doubt, if that is the effect of the Indian Limitation Act, we can only so hold.

4. Section 6 of the Indian Limitation Act, which excludes periods of minority, only applies to a

person entitled to institute a suit or make an application for the execution of a decree, and the application for a final decree in a mortgage suit is not an application for the execution of a decree. That section therefore does not apply. Section 15 of the Act recognizes the principle that in computing the period of limitation prescribed for an application for the execution of a decree, any period during which the execution of the decree has been stayed must be excluded; and it would certainly seem right to apply a similar principle to applications in a suit which has been stayed; in terms, however, the section does not apply. The only authority on the point, to which we have been referred, and which was referred to in the lower Courts, is *Pulin Chandra Sen v. Amin Miah Muzaffar Ahmad*¹. In that case there was a single plaintiff who was a minor and his next friend died. It was held that by virtue of Order 32, Rule 10, the suit was in abeyance, and that when the minor plaintiff attained the age of majority, which was more than three years from the date of the preliminary decree, a right to apply for a final decree first accrued to him. We may, I think, properly follow that case which has stood for some years and not been dissented from, though I feel some doubt whether it is correct to hold that a fresh cause of action arose to the minor on attaining majority. I would rather base the appellant's case on the ground that the right to apply for a final decree was suspended during the period in which the suit was stayed. Such a principle was applied by the Calcutta High Court in *Lakhan Chunder Sen v. Madhusudan Sen*² by the Privy Council in *Nrityamoni Dassi v. Lakhan Chandva Sen*³. In that case parties sued for recovery of certain property, and it was held that the right to bring the action was suspended during a period in which a decree, subsequently reversed in appeal, existed in the applicants' favour, and necessarily prevented them from filing a suit.

5. If the time during which this suit was stayed under Order 32, Rule 10, be excluded, the application is in time. We, therefore, allow the appeal with costs throughout. The application will have to go back to the lower Court to be dealt with according to law.

Sen, J.

6. I agree.

Appeal allowed.

¹ AIR 1933 Cal 508

³(1916) I.L.R. 43 Cal. 660 P.C

²(1907) I.L.R. 35 Cal. 209