

(1888) 12 CAL CK 0006
In the Calcutta High Court

Akshoy Kumar Nundi

APPELLANT

Vs

Chunder Mohun Chathati and Others

RESPONDENT

Date of Decision : 04-12-1888

Acts Referred:

Citation : (1889) ILR (Cal) 250

Hon'ble Judges : Trevelyan, J; O'Kinealy, J

Bench : Division Bench

Judgement

O'Kinealy and Trevelyan, JJ.—This appeal arises out of an application for execution of a decree. Previously in a litigation between the two parties, the defendants appealed from the decree of the first Court. That appeal was rejected on the ground that it was presented after time, and defendants then filed a second appeal to this Court which was dismissed with costs. On plaintiff seeking to take out execution of the decree, it was objected that the time ran from the date of the decree of the first Court, and that the application was barred. We do not think that that contention is correct. Section 4 of the Limitation Act says: "Every suit instituted, appeal presented, and application made, after the period of limitation prescribed therefor by the second schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence." Section 5.* says: "If the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, presented or made on the day that the Court re-opens." That shows that what is meant by the words "appeal presented" in the Limitation Act is an appeal presented in the manner prescribed in Section 541 of the Code of Civil Procedure, that is to say, presented by a proper person to the proper Court.

2. Article 179 of the second schedule of the Limitation Act says: "Where there has been an appeal, limitation begins to run from the date of the final decree or order of the Appellate Court." In this appeal it has been contended, on behalf of the respondent, that the words "'where there has been an appeal,'" mean, where there has been an appeal presented and admitted, and in support of that he

refers us to a case of *Dianatullah Beg v. Wajid Ali Shah* ILR All. 438. There are no such words in Sections 4 and 5 as "appeal admitted," and there is nothing in those articles of the Limitation Act, or in Section 541 of the Code of Civil Procedure, that would admit of such a construction.

3. We are; therefore, of opinion that the words, "where there has been an appeal," mean where there has been an appeal in the ordinary sense and in the sense in which it is used in the other portions of the same Act, viz., when a memorandum of appeal has been presented in Court. We think that the lower Courts are wrong in saying that execution is barred. We, accordingly, set aside the orders of the lower Courts with costs.

* Proviso where Court is closed when period expires.

[Section 5: If the period of limitation proscribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, presented or made on the day that the Court re-opens:

Proviso as to appeals and applications for review.

Any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period.]