

(1929) 02 CAL CK 0012
In the Calcutta High Court

Khondkar Mahammad Saleh and Others	APPELLANT
Vs	
Chandra Kumar Mukherji and Others	RESPONDENT

Date of Decision : 06-02-1929

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 6
Limitation Act, 1963 — Section 6, 7

Citation : 122 Ind. Cas. 201

Hon'ble Judges : Panton, J;B.B. Ghose, J

Bench : Division Bench

Judgement

B.B. Ghose, J.—This is an appeal by the original defendant mortgagor in a suit brought on a mortgage, which was executed in 1902, in favour of the father of the present respondent, one Aswini Kumar Mukerji. The due date under the bond for payment of the mortgage-money was 12th April, 1904. The original mortgagee died in December, 1905, leaving his son, the present respondent, his only heir, who was then a minor A suit was brought on the mortgage in 1906 and a preliminary decree was passed on the 30th November, 1906. An order absolute was made under the repealed provisions of the Transfer of Property Act on the 7th January, 1907. In the suit, the plaintiff, who was represented by his guardian ad litem, prayed, amongst other things, that in case the entire amount of the mortgage be not fully satisfied by the sale of the mortgaged properties, then the balance might be realised from the defendant's other moveables and irnmoveables as well as from his person. According to the usual practice then prevailing, the decree was made for realisation of the mortgage money in the first instance out of the mortgaged property, leaving it to the mortgagee to apply for a further decree against the person of the mortgagor, if by the sale of the mortgaged property the entire money was not realised. The mortgaged property was sold on the 16th September, 1908, and it was purchased by the mortgagee for Rs. 83l. The mortgage-decree including all costs was for Rs. 6,666 odd and, therefore, a considerable sum remained due as balance of the mortgage-money. The mortgagee attained majority on the 23rd September, 1923, and an application

was made under Order XXXIV, Rule 6 of the CPC on the 23rd September, 1924, for a personal decree against the mortgagor. The mortgagor pleaded that this application was barred by limitation. The learned Subordinate Judge has overruled, that objection and made a decree against the mortgagor personally for the balance of the money due together with interest, which amounted to Rs. 13,284-6-9. The defendant mortgagor has appealed against that decree and his contention is that the plaintiff's application should be dismissed on the ground that it was barred by limitation.

2. This question raises an interesting point of law which does not seem to have been directly decided by any reported case. The point arises in this way. Under the Limitation Act (XV of 1877), the plaintiff would be entitled to maintain his application for a personal decree after the attainment of majority within the period of limitation prescribed therein. u/s 7 of that Act, a minor might make any application within the prescribed period after the disability of minority had ceased. The new Limitation Act (IX of 1908) was passed in August, 1908, and it came into operation on the 1st January, 1909. u/s 6 of that Act, which replaced Section 7 of Act XV of 1877, instead of the words "make any application," the words "make an application for the execution of a decree" were substituted, the result of which is that, under the Limitation Act now in force, the application for a personal decree against the mortgagor under Order XXXIV, Rule 6, of the CPC would not fall within the provisions of Section 6, or, in other words, the privilege of making the application after the disability of minority has ceased was taken away and a minor must now make such an application within the period prescribed under the First Schedule of the Limitation Act. It has been held by a Full Bench of this Court, in the case of Francis Higgins Pell Vs. Minnie Gregory, that such an application falls within Article 181 of the First Schedule of the Limitation Act (IX of 1908) and, therefore, the period of limitation is three years from the time when the right to apply accrued. The contention of the appellant is that in this case the right to apply accrued in September, 1908. The law of limitation now in force should be applied in the present case and it should, therefore, be held that the application made in September, 1924, is barred by the rule of limitation. It is contended, on the other hand, on behalf of the respondent, as was held by the learned Subordinate Judge, that the Limitation Act (XV of 1877) should apply to this case and although the right to make an application accrued in September, 1908, as the mortgagee was under the disability of minority till 23rd September, 1923, he was entitled to make the application within three years from that date. And as the application was made within that period, it was within time and the learned Subordinate Judge was right in making the decree. The question, therefore, is what law of limitation should be applied to the present application.

3. It is argued on behalf of the appellant that the rule of limitation should be applied according to the law in force at the time when the application was made and the learned Advocate relies upon the case of Soni Ram v. Kanhaiya Lal 19 Ind. Cas. 291 : 40 I.A. 74 : 35 A. 227 : 17 C.L.J. 488 : 13 M.L.T. 437 : 17 C.W.N.

605 : 11 A.L.J. 389 : (1913) M.W.N. 470 : 15 Bom. L.R. 489 : 25 M.L.J. 131 (P.C.) in support of his proposition. He contends that the Subordinate Judge was wrong in holding that the Act of 1908 affected any vested right of the plaintiff, and, therefore, his conclusion that the Limitation Act of 1877 was applicable is erroneous. Reliance has been placed with regard to the rule of construction as to the retrospective operation of Statutes to the cases of *Queen v. Leeds & Bradford Ry. Co.* (1852) 18 Q.B. 343 : 118 E.R. 129 and *Towler v. Chatterton* (1829) 6 Bin 258 : 8 L.J.C.P. (O.S.) 30 : 13 E.R. 1280 : 31 R.R. 411 in support of the contention that the Act of 1908 should be given what is called "retrospective operation." In the case of *Queen v. Leeds & Bradford Ry. Co.* (1852) 18 Q.B. 343 : 118 E.R. 129, an Act was passed which came into operation six weeks after its passing, by which it was enacted that awards for compensation made under the Lands Clauses Act must be applied for and obtained within six months from the time when the damage was done to any property. The question arose whether the Act had a retrospective operation and was to apply to cases of damage done before its passing. The Court decided that it was retrospective and Lord Campbell, C.J., is reported to have observed: "If the Act had come into operation immediately after the time of its being passed, the hardship would have been so great that we might have inferred an intention on the part of the Legislature not to give it a retrospective operation; but when we see that it contains a provision suspending its operation for six weeks, that must be taken as an intimation that the Legislature has provided that as the period of time within which proceedings respecting antecedent damages or injuries might be taken before the proper tribunal. A certain time was allowed before the Act was to come into operation, and that removes all difficulty. The case of *Towler v. Chatterton* (1829) 6 Bin. 258 : 8 L.J.C.P. 30 : 13 E.R. 1280 : 31 R.R. 411 is strongly in point." It is stated in a well-known text book, *Craies on "Statute Law,"* at page 334, that the case of *Towler v. Chatterton* (1829) 6 Bin. 258 : 8 L.J.C.P. 30 : 13 E.R. 1280 : 31 R.R. 411 was, amongst other cases, commented upon somewhat adversely by Rolfe, B., in an elaborate judgment in *Moon v. Durden* (1848) 2 Ex. 22 : 12 Jur. 138 : 154 E.R. 389 : 76 R.R. 479. But notwithstanding these criticisms *Towler v. Chatterton* (1829) 6 Bin 258 : 8 L.J.C.P. 30 : 13 E.R. 1280 : 31 R.R. 411 was followed in *Queen v. Leeds & Bradford Ry. Co.* (1852) 18 Q.B. 343 : 118 E.R. 129. This observation, does not seem to be accurate, as would appear from a report of the judgment of Rolfe, B. in the case of *Moon v. Durden* (1848) 2 Ex. 22 : 12 Jur. 138 : 154 E.R. 389 : 76 R.R. 479. There the learned Baron commented adversely upon two *nisi prius* decisions which were cited before him in support of the contention that a certain Act as regards wagering contracts should be given retrospective effect. But speaking of the decision in *Towler v. Chatterton* (1829) 6 Bin 258 : 8 L.J.C.P. 30 : 13 E.R. 1280 : 31 R.R. 411 the learned Baron makes the following observations: "Whether the decision in *Towler v. Chatterton* (1829) 6 Bing. 258 : 8 L.J.C.P. (O.S.) 30 : 13 E.R. 1280 : 31 R.R. 411 was correct, would depend on whether the true meaning of the 10th section was to fix a date before which all actions must be brought, or a date beyond which no *parol promise* should be sufficient to

take a case out of the operation of the Statute of limitations. The Court of Common Pleas adopted the former construction. Neither construction would do injustice by infringing the rule which in general makes all Statutes prospective in their operation, and the Court of Common Pleas may have been right in their view of the Statute; at all events, it is immaterial, in the present case, to discuss that point." In the present case, the question really is whether the Limitation Act (IX of 1908) affects a vested right as to making applications by the alteration made by Section 6 in the previous law contained in Section 7 of Act XV of 1877. It is a settled principle that there is no vested right in procedure or costs. In *Wright v. Hale* (1860) 6 H. & N. 227 : 30 L.J. Ex. 40 : 6 Jur. 1212 : 3 L.T. 444 : 9 W.R. 157 : 123 R.R. 477 : 158 E.R. 91, Pollock, C.B., observed that there is a considerable difference between new enactments which affect vested rights and those which merely affect the procedure in Courts. In *In Re: Athlumney* (1898) 2 Q.B. 547 : 67 L.J.Q.B. 935 : 79 L.T. 303 : 47 W.R. 144, Wright, J., says- "Perhaps no rule of construction is more firmly established than this-that a retrospective operation is not to be given to a Statute so as to impair an existing right or obligation, otherwise than as regards a matter of procedure, unless that effect cannot be avoided without "doing violence to the language of the enactment." After citing a large number of authorities in support of the proposition, the learned Judge observes at page 553 Page of (1898) 2 Q. B - [Ed.] "One exception to the general rule has sometimes been suggested, namely, that where, as here, the commencement of the operation of an Act is suspended for a time, this is an indication that no further restriction upon retrospective operation is intended. But this exception seems never to have been suggested except in relation to Statutes affecting procedure, such as Statutes of limitation, and even in relation to them it is questioned in *Moon v. Durden* (1848) 2 Ex. 22 : 12 Jur. 138 : 154 E.R. 389 : 76 R.R. 479." I have pointed out above from the judgment of Rolfe, B., in *Moon v. Durden* (1848) 2 Ex. 22 : 12 Jur. 138 : 154 E.R. 389 : 76 R.R. 479, that the learned Baron did not actually disapprove of the law laid down in *Towler v. Chatterton* (1829) 6 Bin. 258 : 8 L.J.C.P. 30 : 13 E.R. 1280 : 31 R.R. 411. I may also state here in passing that two other learned Barons who constituted the Court of Exchequer with Rolfe, B., did not say anything with regard to this question. The question, therefore, is whether the Limitation Act of 1908 affected any vested right or it was merely a law affecting procedure. It is clear from the observations of Wright, J., that Statutes of Limitation cannot be considered as anything else than matters relating to procedure and ordinarily such Statutes have their operation from the date fixed in the Statute and governs all matters brought before the Court after the commencement of the operation of the Statute. There is, however, one exception which has been pointed out in the case of *Gopeshwar Pal v. Jiban Chandra Chandra* 24 Ind. Cas. 37 : 41 C. 1125 : 19 C.L.J. 549 : 18 C.W.N. 804, decided by a Special Bench of this Court. There, the period of limitation under the Third Schedule of the Bengal Tenancy Act was amended in such a way as to take away the rights of certain persons to bring a suit within the period of limitation prescribed by the Act before the amendment came into operation. The Court observed as follows: "Here the

plaintiff at the time when the amending Act was passed had vested right of suit, and we see nothing in the Act as amended that demands the construction that the plaintiff was thereby deprived of a right of suit vested in him at the date of the passing of the amending Act. It is not (in our opinion) even a fair reading of Section 184 and the Third Schedule of the Bengal Tenancy Act, as amended, to hold, that it was intended to impose an impossible condition under pain of the forfeiture of a vested right and we can only construe the amendment as not applying to cases where its provisions cannot be obeyed. The law as amended may regulate the procedure in suits in which the plaintiff could comply with its provisions, but cannot (in our opinion) govern suits where such compliance was from the first impossible. The effect is to regulate not to confiscate. There are thus two positions; where in accordance with its provisions a suit could be brought after the passing of the amendment, it may be that the amendment would apply, but where it could not, then the amendment would have no application." Then dealing with the case of *Soni Ram v. Kanhaiya Lal* 19 Ind. Cas. 291 : 40 I.A. 74 : 35 A. 227 : 17 C.L.J. 488 : 13 M.L.T. 437 : 17 C.W.N. 605 : 11 A.L.J. 389 : (1913) M.W.N. 470 : 15 Bom. L.R. 489 : 25 M.L.J. 131 (P.C.), the learned Judges say that that case applies where it was possible for the plaintiff to bring a suit in accordance with the provisions of the new Limitation Act after the passing of the amendment and there the amendment would apply. Now, applying this rule to the present case, there cannot be any doubt that the plaintiff might have made his application within the period of limitation prescribed under Act IX of 1908. The time when the right accrued was September, 1908, and three years would expire in September, 1911. Therefore, the mortgagee had about two years nine months" time after the passing of the Act of 1908 to make his application and hence there was no hardship which was discussed in the cases of *Towler v. Chatterton* (1829) 6 Bin 258 : 8 L.J.C.P. 30 : 13 E.R. 1280 : 31 R.R. 411 and *Queen v. Leeds & Bradford Ry. Co.* (1852) 18 Q.B. 343 : 118 E.R. 129. It is not necessary in this case to lay any stress upon the fact that the Limitation Act of 1908 was passed in August, 1908, and it was to come into operation on 1st January, 1909. That fact might have been important if the position of the plaintiff was such that he would have no time under the new law to make any application after the Act came into operation. But, as a matter of fact, as I have already pointed out, he had two years nine months under the new law within which he could make his application. Therefore, in my judgment, it cannot be doubted that the rule of limitation applicable to the present case should be that laid down by Act IX of 1908. Reliance has been placed by the respondent on the case of *Promotha Nath Pal v. Sourav Dasi* 58 Ind. Cas. 327 : 47 C. 1108 : 31 C.L.J. 463 : 24 C.W.N. 1011 and particularly on the observations in the judgment at page 469 Page of 31C. L.J.-[Ed.] in support of the contention that the old Law of Limitation, Act XV of 1877 should apply to the present case. That is, however, a case quite different from the present. There, the plaintiff had brought a suit against an assignee of a, purchaser at an auction sale. Such a suit was not prohibited under the CPC of 1882. The plaintiff had a subsisting right to sue such an assignee. u/s 66 of the CPC of 1908, such a suit is not maintainable. The

learned Judges held that Section 66 of the Code had no retrospective operation, as it actually took away a right of suit which is a vested right. Reliance has also been placed on the case of *Fazil Karim v. Annada Mohan Ray* 11 Ind. Cas. 401 : 15 C.W.N. 845. There, a judgment-debtor made an application for setting aside an auction sale. The sale was held in 1903, when the old Limitation Act (XV of 1877) was in operation. He had a right to make his application within three years after the attainment of majority under that Act. But, under the Limitation Act of 1908, he would have to apply within three years of the accrual of the right to make the application. The judgment debtor made his application in January, 1909, when he was still a minor. That case was decided before the decision of the Judicial Committee in *Soni Ram v. Kanhaiya Lal* 19 Ind. Cas. 291 : 40 I.A. 74 : 35 A. 227 : 17 C.L.J. 488 : 13 M.L.T. 437 : 17 C.W.N. 605 : 11 A.L.J. 389 : (1913) M.W.N. 470 : 15 Bom. L.R. 489 : 25 M.L.J. 131 (P.C.). The judgment-debtor could have made his application after the passing of the Limitation Act of 1908 and before it came into operation in January, 1909, but he did not do so. He did not avail himself of the opportunity. His case does not fall within the exception formulated in the Special Bench case of *Gopeshwar Pall v. Jiban Chandra Chandra* 24 Ind. Cas. 37 : 41 C. 1125 : 19 C.L.J. 549 : 18 C.W.N. 804 referred to above. In my opinion, that case should be considered as no longer law after the decision of the cases referred to above.

4. Reliance was next placed on the Special Bench case of *Sadar Ali and Others Vs. Doliluddin Ostagar*, where it was held, following the well-known case of *Colonial Sugar Refining Co., Ltd. v. Irving* (1905) A.C. 369 : 74 L.J.P.C. 77 : 92 L.T. 738 : 21 T.L.R. 513 that a right of appeal is a substantive right which could not be taken away without an express provision for it. This was also held to be so in the case of AIR 1927 242 (Privy Council) , decided by their Lordships of the Judicial Committee. Those cases dealt with a substantive right and not with a question of procedure, such as limitation of suits and have no bearing on the question before us. The real position in the present case is, as summarised in Maxwell's "Interpretation of Statutes," 6th Edition, at page 399, while dealing with the cases of *Towler v. Chatterton* (1829) 6 Bin. 258 : 8 L.J.C.P. 30 : 13 E.R. 1280 : 31 R.R. 411 and *Queen v. Leeds & Bradford Ry. Co.* (1852) 18 Q.B. 343 : 118 E.R. 129. The learned author Bays: "In both of the above cases, however, the construction, thought fatal to the enforcement of a vested right, by shortening the time for enforcing it, did not in terms take away any such right; and in both it seems to fall within the general principle that the presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of the Courts, even where the alteration which the Statute makes has been disadvantageous to one of the parties. Although to make a law for punishing that which, at the time when it was done, was not punishable is contrary to sound principle; a law which merely alters the procedure may with perfect propriety, be made applicable to past as well as future transactions and no secondary meaning is to be sought for an enactment of such a kind. No person has a vested right in any course of procedure." What

the enactment of 1908 did was to cut down the period within which the infant was entitled to exercise his vested right and did not as a matter of fact take away that right.

5. On these grounds, I am of opinion that the appeal must be allowed, the judgment and decree of the learned Subordinate Judge set aside and the application of the mortgagee dismissed with costs in both the Courts.

Panton, J.

6. I agree.