

(1878) 01 CAL CK 0018
In the Calcutta High Court

Unnoda Prasad Roy

APPELLANT

Vs

Sheikh Koorpan Ally

RESPONDENT

Date of Decision : 11-01-1878

Acts Referred:

Limitation Act, 1963 — Article 214

Citation : (1878) ILR (Cal) 519

Hon'ble Judges : Morris, J; Kemp, J

Bench : Division Bench

Judgement

Kemp, J.—The decree-holder is the special appellant in this case. The question is, whether the application which was made on the 19th of June 1875, is within time or not. The Judge of Tipperah has held that it is not. The grounds of special appeal taken are: first, that the lower Appellate Court is wrong in holding that the last application for execution was barred by limitation; second, that the lower Appellate Court is wrong in holding that the proceedings in execution taken before the passing of Act IX of 1871 are to be governed by the said law. The contention of the pleader who appears for the decree-holder on the first ground raised in special appeal is, that a notice having been issued under the provisions of Section 216, on the 7th of August 1872, and the present application being dated the 19th June 1875, he is within time, and that the Judge was not competent to look behind the date of the notice, and to take cognizance of any proceeding which had been taken before the date of that notice.

2. Now the Judge finds that, on the 5th of August 1872, when the application was made by the decree-holder, upon which application the notice was issued under the provisions of Section 216 of the Code, the decree was no longer alive; that it was barred, inasmuch as the application made prior to the 5th of August 1872 is dated the 18th June 1869, or more than three years before the later application. The pleader contends, that the Judge, as we have already stated, is not competent to go behind the notice, and that he ought to have held that the starting point was the 7th of August 1872, irrespective of the fact that the decree

had already become barred by not being enforced between the 18th of June 1869 and the 5th of August 1872. In support of this contention he quotes two rulings, *Rohini Nundun Mitter v. Bhngwan Chunder Roy* 14 B.L.R. 144 : 22 W.R. 154 and a Full Bench ruling, *Eshan Chunder Bose v. Prannath Nag* 14 B.L.R. 143 : 22 W.R. 512. The first ruling by Mr. Justice Mahkuy, sitting with Justice Bomesh Chunder Mitter, decided that, under the new law of limitation, Act IX of 1871, Schedule ii, Article 167, prescribing three years as the time within which application should be made for execution of decrees, it was intended that there should be two specific dates from which the three years were to be counted, without reference to any inquiry whether the proceedings were taken for the purpose of enforcing the decree or were merely colourable for the purpose of keeping the decree alive. Now the Judge in this case could not have gone into the question whether the application and notice u/s 216 was a bond fide application or a colourable application; but the Judge was competent to decide whether, at the time that application was made, any decree was alive or not. he has done so, and found that, at the time that application was made, the decree was not alive. With reference to the Full Bench decision referred to by the pleader at page 512 of the same volume, the late Chief Justice Sir Richard Couch, who delivered the judgment of the Full Bench, observes, that Act IX of 1871 clearly gives to a person who has a decree, the power, so far as regards the law of limitation, of applying for execution of it within three years from its date, or within three years from the date of the application to the Court to enforce it or keep it in force, and that there is no restriction as to the second or third or any subsequent application. Now this ruling assumes that the party who applies has a decree which is alive, and that he can make an application to enforce that decree either within three years from its date or from the date of any application made to enforce or keep in force that decree, or from the date of any notice which he may have issued under the provisions of Section 216. We think that the view of the Judge is a correct view with reference to this ground of special appeal, which we therefore overrule. The second ground taken by the pleader for the appellant is fully disposed of by the case of *Bemul Doss v. Ikbāl Narain* 25 W.R. 249. The principle of this decision is the same as that which has been affirmed by the Full Bench decision in *Bissessur Mullick v. Dhiraj Mahatab Chunder Bahadoor* B.L.R. Sup. Vol. 967 which has not been in any way interfered with by subsequent rulings of the Full Bench.

3. The appeal is dismissed with costs.