

(1870) 02 CAL CK 0001

Calcutta High Court

Case No: Miscellaneous Special Appeal No. 416 of 1869

Khodie Lal

APPELLANT

Vs

Mussamat Biswasu Kunwar

RESPONDENT

Date of Decision: Feb. 1, 1870

Judgement

Bayley, J.

I am of opinion that this appeal must be dismissed with costs. The decree is dated the 6th September 1865. A petition for execution was put in on the 9th July 1868, but the case was subsequently struck off. On the 7th September 1868, there was another application for execution, but this was one day beyond the three years of the date of the decree, in consequence of the previous day, viz., the 6th September, being a Sunday. Upon these facts, the lower appellate Court has held, with reference to the case of *Rajkisto Roy v. Dinobundhoo Surma* Reference to the High Court by the Judge of the Small Cause Court of Hoogly and Serampore, June 14th, 1865 (B.L.R. Sup. 360), that the application was beyond time,

2. In special appeal, it is contended, first, that the lower appellate Court has overlooked the application of the 9th July 1868, which kept the decree in force; and, secondly, that the Full Bench decision does not apply to execution cases, and that, as the last day fell on a Sunday, the application made on Monday next was perfectly within time.

3. As to the first point, we can hardly imagine that the Judge has overlooked the application of the 9th July 1868, when that Court specifically cites it, and it certainly cannot be said that the lower appellate Court was pressed with this point when it distinctly records that the plea urged before it was not the first one here, but the second, to which we now proceed.

4. The decision in *Rajkisto Roy v. Dinobundhoo Surma* Reference to the High Court by the Judge of the Small Cause Court of Hoogly and Serampore, June 14th, 1865 (B.L.R. Sup. 360) is not shown to have been set aside. It is, however, contended that in the case of *Brojo Beharee Sahoy v. Kewal Ram* 10 W.R. 5, *Phear and Hobhouse, JJ.*,

have laid down the principle that the day of application must be excluded from the calculation, and that adopting this principle, and excluding the 7th September, 1868, the application is within three years. That construction of the case, however, seems to be very doubtful, for the judgment goes on to say, that the decree in that case was of the 9th July 1864, and the application for execution was dated the 9th July 1867, and that the words preceding the application" must mean three years within the date of application. Now three years within the date of application must exclude the day of application. But be that as it may, I am of opinion that the Full Bench decision is that which we should follow, and that no principle has been laid down in that decision that the date of application must be excluded from the computation.

5. On these considerations I think that the application of the 7th September was not within time; that when the decree was of the 6th September 1865, even excluding the date on which it was passed, it was the duty of the judgment-creditor to apply within three calendar years of the 6th September, that is, at sometime prior to the 7th September 1865. He did not, however, put in his application within that period, and consequently his present petition is, in my opinion, out of time.

6. I would, therefore, dismiss this special appeal with costs.

Markby, J.

7. I am of the same opinion. I think that according to the doctrine laid down in the Full Bench decision in *Rajkisto Roy v. Dinobundhoo Surma*, Reference to the High Court by the Judge of the Small Cause Court of Hoogly and Serampore, June 14th, 1865 (B.L.R. Sup. 360), a decree is to be held barred as soon as the three years have expired from the date of that decree, and that accordingly this decree was barred on the 6th September 1868. The only thing that raises any doubt in my mind is the decision of *Brojo Beharee Sahoy v. Kewal Ram* 10 W.R. 5, and although it is a little difficult to understand exactly the first part of the judgment which lays down the principle of calculation, it seems quite clear that when the learned Judges came to that part of the judgment where they apply the principle to the facts of the case, they arrive exactly at the same result at which we have arrived in this case. The learned Judges in that case say, the date of the final decree in the present case was the 9th July 1864, and this application for execution was made on the 9th July 1867; that being so, the application in this case was, in our opinion, made just within the three years." I think it is quite clear that when the learned Judges say that the applicant coming on the 9th July 1867 to execute a decree of the 9th July 1864, was just within time, they mean, that it was made on the very last day of the three years, and that the application of the decree-holder on the 10th July would be too late. Applying the same calculation to this case, I think that the present application on the 7th September is too late, and that we have under the decisions no power to extend the time in consequence of the 6th September falling on a Sunday.