

(1878) 05 CAL CK 0007

Calcutta High Court

Case No: None

Fakharooddeen
Mahomed Ahsan

APPELLANT

Vs

Pogose and Others

RESPONDENT

Date of Decision: May 27, 1878

Citation: (1879) ILR (Cal) 210

Hon'ble Judges: Tottenham, J; Jackson, J

Bench: Division Bench

Judgement

Jackson, J.

As we have no doubt whatever as to what ought to be the result of this appeal, and as there are other cases depending upon it, we may as well announce what our decision is. We may, if necessary, hereafter state at greater length the reasons which have led to that decision. This suit was dismissed in the Court below upon two preliminary grounds--the first being that the question was in reality *res judicata*, and the second being the ground of limitation. As to the first point, Mr. Branson has satisfied us that the decision of the Court below was wrong. It is not necessary at present that we should do more than cite the case of *Abedoonissa Khatoon v. Ameeroonissa Khatoon* (20 W.R. 305), a decision of the late Chief Justice of the Court, in which we entirely concur, and which decision has since been affirmed by the Judicial Committee of the Privy Council (L.R. 4 IndAp 66 : ILR 2 Cal. 327). It is clear to us that the actual adjudication of this matter would have to be made [212] in a regular suit brought for that purpose, and not by any order made in execution of decree. In fact, this matter was so clear that Mr. Evans has not thought necessary to argue this question.

2. The other ground on which the judgment of the Court below has proceeded is that of limitation. Mr. Branson's argument has proceeded entirely upon what he maintains to be the proper construction of Article 93 of the second schedule of Act IX of 1871. This, to take the view most favourable to the plaintiff, is, a suit "to declare

the forgery of an instrument issued or registered or attempted to be enforced." Certainly, no other article of the schedule can be found which would be more favourable for the purpose of the suit. The time when the period begins to run in such suits is "the date of the issue, registration, or attempt." I should be disposed to hold that these dates were applicable respectively to the circumstances in which the instrument has been published--that is to say, where it has been issued, the time begins to run from the date of the issue; where it has been registered, the time runs from the date of registration, and so on. But it is clear that the suit at any rate would be barred at the expiration of three years from some one or other of the acts described in the third column--that is to say, the issue, registration, or attempt. The acts or matters specified in the third column of the schedule are acts which, according to the intention of the Legislature, put the plaintiff upon the assertion of his rights; and in the case of an instrument which is said to be forged, and which prejudices the plaintiff, the Legislature apparently thought that he ought to commence the suit as he has notice of the instrument by the issue, registration, or attempt to enforce it. If we say that the plaintiff is entitled to have his time run from the latest of those three acts, then it is contended that, in the present suit, he is in time. Mr. Pogose, on obtaining from Najamunnissa a hibinama which the plaintiff seeks to have set aside, applied, during the pendency of Azim Chowdry's appeal, to be put on the record as a respondent. That application was made some time in 1865, and the order upon that is dated January 1866, Now Mr. Branson contends that that was not an enforcement of or an [213] attempt to enforce that instrument. It seems to me it clearly was such an attempt to enforce the instrument as under Article 9 obliged plaintiff to bring his suit within three years of such attempt. It is not necessary for the purposes of that article that the person who is to profit by that instrument should seek to obtain the entire fruits of it. It is quite enough in my opinion if, having obtained the instrument, he seeks to place himself in an advantageous position which, but for the instrument, he could not occupy. It clearly was the first advantage that Mr. Pogose could take by the enforcement of that instrument to have himself placed on the record of the appeal, in order to be benefited by the final decision if the appeal were dismissed. I think, therefore, that when he made that application, he attempted to enforce that instrument, and that the suit ought to have been brought within three years from the date of such attempt. On this ground I think that this appeal ought to be dismissed with costs.