(1868) 03 CAL CK 0007

Calcutta High Court

Case No: Special Appeal No. 792 of 1866

Sooradhonee Debia		APPELLANT
	Vs	
Hurro Chunder Roy Chowdhry and Others		RESPONDENT

Date of Decision: March 31, 1868

Judgement

Sir Barnes Peacock, Kt., C.J.

Six years from the time when the cause of action arose is the period of limitation fixed by law for suits for mesne profits. The plaintiff was turned out of possession in August 1857. She commenced this suit in February 1865. If the period between November 1858 and the 28th January 1865, when the review was rejected by the Division Bench, or even if the period between November 1858 and 6th September 1864, when the decree of the Division Bench was passed, be deducted, the suit is in time. The question as to whether either of those periods ought to be deducted depends upon the construction of s. 14, Act XIV of 1859; and it Las been referred to a Full Bench for decision in consequence of the case of Khetturnath Dey v. Gossain Doss Dey 4 W.R., Mis., 18. At the time when the case was referred to a Full Bench, I gave my reasons for dissenting from that decision, in which it was held that an application for execution was not a suit within the meaning of s. 14.

2. S. 14 enacts that (reads) the points for determination are, first, whether the prosecution of the claim for mesne profits in the miscellaneous proceedings before the Principal Sudder Ameen was the "prosecuting of a suit" against the same defendant; secondly, whether the mesne profits which the plaintiff then claimed, being the same as those for which she is suing in the present action, can be said to be the same cause of action against the same defendant within the meaning of s. 14; and, thirdly, whether the Court of the Principal Sudder Ameen was a Court of Judicature, which, from defect of jurisdiction or other cause, was unable to decide upon the claim, or which had passed a decision which, on appeal, was annulled on account of any such cause.

3. I have already expressed my opinion upon the two first points in the judgment which I pronounced upon referring the case to a Full Bench; and I entertain no doubt that the prosecution in a Court of Judicature of a summary application to enforce the restitution of mesne profits, received under an erroneous decree which has been reversed, is the prosecution of a suit within the meaning of the Act; and that if the proceedings were for the same demand for which a suit is subsequently brought, and against the same person, the prosecution of the claim is a prosecution of a suit for the same cause of action against the same defendant within the meaning of the section.

4. The word "suit" does not necessarily mean an action, nor do the words "cause of action" and "defendant" necessarily mean cause upon which an action has been brought, or a person against whom an action has been brought, in the ordinary restricted sense of the words. Any proceeding in a Court of Justice to enforce a demand is a suit; the person who applies to the Court is a suitor for relief; the person who defends himself against the enforcement of the relief sought is a defendant; and the claim, if recoverable, is a cause of action.

5. The Legislature has clearly shown what it understood by the word "suit;" for the Act which provides a period of limitation in the case of proceedings by process of execution to enforce judgments and decrees, as well as periods for the limitation of actions or suits in the ordinary acceptance of the words, is described merely as "an Act to provide for the limitation of suits;" and it recites that "it is expedient to amend the law relating to the limitation of snits." We ought not, in my opinion, to fritter away the law by construing words according to a mere technical sense, instead of giving them a broad meaning, so as to embrace all cases intended by the Legislature to be provided for.

6. We should do well, in construing the Acts of the Legislature, to take for our guidance the following remarks, which are to be found in Domat''s Civil Law, Ch. xii, s. 17, p. 88:-- "Since laws are general rules, they cannot regulate the time to come so us to make express provision against all inconveniences which are infinite in number, and that their dispositions should express all the cases that may possibly happen; but it is only the prudence and duty of a lawgiver to foresee the most natural and most ordinary events, and to form his dispositions in such a manner as without entering into the details of the singular cases, he may establish rules common to them all by discerning that which may deserve either exceptions or particular dispositions; and next, it is the duty of the Judges to apply the laws not only to what appears to be regulated by their express dispositions, but to all the cases where a just application of them may be made, and which appear to be comprehended either within the express sense of the law, or within the consequences that may be gathered from it."

7. The rule in s. 14 is as necessary in regard to miscellaneous proceedings as it is with regard to suits in the strict sense of the word; and I think we shall be giving

only due effect to the law, and be putting a proper and reasonable interpretation upon it, by holding that the proceedings before the Principal Sudder Ameen for the recovery of the mesne profits in execution of a decree of reversal, was a suit within the meaning of s. 14 of the Act.

8. I now proceed to consider whether the Court of the Principal Sudder Ameen was a Court of Judicature which, from defect of jurisdiction or other cause, was unable to decide upon the claim for mesne profits, or was a Court which had passed a decision which, on appeal, was annulled on the ground that, from defect of jurisdiction, it was unable to decide upon it.

9. But for the decision of the Division Bench of the 6th September 1864[2], I should have thought it clear that, as a matter of law, when the decree under which the plaintiff was turned out of possession was reversed by the Sudder Court, and it was ordered that the property should remain with the plaintiff, she had a right to be restored to the possession which she had lost, not only of the land, but also of the rents or profits which had been received by the defendant, whilst he was in possession of the land by force of the erroneous decree winch was reversed. When a decree orders a sum of money to be paid to a plaintiff, he is entitled to have that decree executed, although the decree is silent upon the subject of execution. It is the legal effect of a decree that it is to be executed. It is the legal effect of a decree of reversal that the party against whom the decree was given is to have restitution of all that he has been deprived of under it. A Court of Appeal does not necessarily enter into the question, whether a decree, which it is about to reverse, has been executed or not. The decree of reversal necessarily carries with it the right to restitution of all that has been taken under the erroneous decree, in the same manner as an ordinary decree carries with it a right to have it executed; and I should have considered that a decree of reversal necessarily authorized the lower Court to cause restitution to be made of all that the party, against whom the erroneous decree had been enforced, had been deprived by reason of its having been enforced.

10. The Sudder Court ordered that the lands were to remain with the plaintiff. It did not order the lands to be restored to her; but the necessary consequence was that restitution was to be made, and restitution of the lands was made by the Principal Sudder Ameen without any objection. There seems to be no reason why he should not have restored to the plaintiff the rents and profits of which she was deprived during the time she was kept out of possession of her land under the erroneous decree. She applied for restitution of the lands and to have those mesne profits restored to her, and whether right or wrong, the Principal Sudder Ameen entertained her application, assumed that he had jurisdiction to order restitution of the mesne profits, and proceeded to ascertain the amount, and awarded it to her. These proceedings, which were commenced shortly after the reversal of the erroneous judgment in 1858, unfortunately lasted up to 1864, when the plaintiff

obtained an order for the amount of the mesne profits of which she had been deprived. This order was reversed by a Division Bench of this Court in September 1864. The proceedings, therefore, lasted between seven or eight years without any apparent neglect on the part of the plaintiff. In giving judgment, the Division Bench, consisting of Loch, and Seton-Karr, JJ., said:-- "The decree (meaning the decree of reversal) certainly gave Sooradhonee (i.e., the plaintiff) no mesne profits. It merely directed that she should be retained in possession. If she wished for mesne profits during the period she was out of possession, she should have applied to the Court passing the decree to give an order to that effect. But the lower Court had no authority to import into the decree what was not there. It went beyond its jurisdiction in giving mesne profits which the Sudder Court, passing the decree, had not provided for, or had purposely omitted. The decree-holder may be entitled to recover mesne profits. But when application for that purpose was made to the Court below, it should have referred the applicant to the Court making the decree, or to a separate suit; and we do not think that, though the opinion of the lower Court was expressed so far back as 1858, and no appeal was then preferred, we are prevented from taking up the point in the present appeal, which is from an order awarding the amount of those mesne profits ascertained by local investigation. As the Court below has in this matter acted altogether without jurisdiction, we quash the order" 1 W.R., Mis., 5. The decree of the Division Bench, whether right or wrong, and we must assume it to be right, expressly reversed the decision of the Principal Sudder Ameen upon the ground that he had no jurisdiction. It would seem that the Judges considered that the Sudder Court, which reversed the decree, was the proper Court to determine whether the plaintiff was entitled to mesne profits or not. They, however, said that the Principal Sudder Ameen should have referred the applicant to the Court which made the decree, or to a separate suit.

11. In England, if a judgment is reversed for error, the person against whom the judgment was given is entitled to a writ of restitution. It is not a mere matter of discretion with the Court which reverses a decree, whether the party against whom it was given is or is not to be restored to what he has been deprived of under it.

12. There can be no doubt that, in point of justice, the plaintiff was entitled to have the rents, which the defendant had collected from her land whilst he was in possession of it under the erroneous decree, refunded. This case is not like the case of Mosoodun Lall v. Bekaree Singh Ante, p. 602, in which it was held that it was discretionary with the Court which passed the decree to award interest or not. In that case it was very properly held that the Court executing the decree could not award interest when the decree was silent us to interest.

13. In the case of in re Rajkissen Singh Ante, 605, at p. 609 the Court said, with reference to a decree which had been reversed:-- "The defendants must be restored, without security, to all that was taken from them in execution of the decree of the lower Court." The plaintiff ought to be put in the same position as she would have

been if the decree which has been reversed had never been given.

14. The plaintiff was deprived for nearly a year and half of the rents and profits of her land, not on account of any fault of her own, but under the execution of an erroneous decree. She has not been guilty of laches, nor has she been sleeping over her rights; but she seems to have been a victim to erroneous decisions of the Courts of Justice-Having got the erroneous decree reversed, she has been continuously, but unfortunately without effect, prosecuting her claim for nearly ten years; and now, after she has been referred for redress to a civil action and has prosecuted it with success, and obtained a decree in her favor, which has been upheld by the Zilla Judge on appeal, she is to be told, upon special appeal to this Court, that she is barred by limitation.

15. It is clear that, in the miscellaneous proceeding before the Principal Sudder Ameen in 1858, the plaintiff, upon the reversal by the Sudder Court of the decree against her, applied for the same mesne profits as those which she seeks to recover in this action. The Principal Sudder Ameen awarded them to her, but his decision was reversed upon the ground that he had no power to award them. It is impossible, in my opinion, to say that the decision of the Principal Sudder Ameen was not reversed on the ground that, from defect of jurisdiction or other cause, he was unable to decide upon the plaintiff''s claim to mesne profits. I am, therefore, clearly of opinion that the time during which the plaintiff was prosecuting her claim for these mesne profits, by proceedings before the Principal Sudder Ameen and in the High Court, ought to be deducted in calculating the period of limitation, and that the suit is not barred by limitation.

16. To come to a different conclusion would, I think, bring discredit upon the law and upon the administration of justice. I wrote my judgment before the judgments proposed to be delivered by my honorable colleagues were written, and I may say that Trevor, J., concurred in my opinion that the plaintiff''s suit is not barred. As he has retired, his opinion has not the effect of a judgment, and as there are three Judges of a different opinion, it does not make any difference.

17. Having fully considered the arguments of my honorable colleagues, I still retain the opinion I have expressed.

18. My honorable colleagues Kemp and Macpherson, JJ., agree with me in thinking that in the proceeding which the respondent took in the former suit to obtain the mesne profits, she was engaged in prosecuting a suit upon the same cause of action within the meaning of s. 14, Act XIV of 1859. They admit that, although it is difficult to understand how the proceedings before the Principal Sudder Ameen could have been protracted from 1858 to 1864, no case of want of bona fides or of due diligence in the prosecution of the former proceedings on the part of the respondent has been established.

19. Their judgment is founded upon this, that the decision of the Principal Sudder Ameen awarding mesne profits to the plaintiff was reversed, not because he had no jurisdiction to hear the proceedings or suit then before him, but because he had no authority to import into the decree of the Sudder Court that which was not there. That is in effect deciding that his decision was reversed because he had no jurisdiction to go beyond the decree of the Sudder Court, and to exercise his own independent judgment as to whether the plaintiff was or was not entitled to recover mesne profits. The decision of the Principal Sudder Ameen was reversed, not upon the ground that the plaintiff was not entitled to mesne profits, but upon the ground that the Principal Sudder Ameen was not the proper Court to decide as to her right to mesne profits, and that he ought to have referred her to the Sudder Court or to a new action.

20. The proceeding before the Principal Sudder Ameen is admitted by Macpherson, J., to have been a suit within the meaning of s. 14, Act XIV of 1859, and the cause of the plaintiff''s application to the Principal Sudder Ameen is admitted to be the same as that for which the present action was instituted. If the plaintiff is not entitled to recover those mesne profits in this action, she will fail on the merits. For the purpose of considering the question of limitation, it must be assumed that she is entitled to recover them. The Principal Sudder Ameen held that she was entitled to them, and awarded them to her. His decision was reversed by a Division Bench of the High Court, whether right or wrong, upon the ground that he had no power to deal with the plaintiff''s claim.

21. The plaintiff''s claim to restitution before the Principal Sudder Ameen was not upon the ground that the mesne profits had been awarded to her by the Sudder Court, but upon the ground that, upon the reversal of the erroneous decree, she was entitled to the mesne profits which the defendant had received while he was in possession of her lands under that decree.

22. The Principal Sudder Ameen thought that he had power to decide upon the plaintiff''s claim, and he did so by awarding the amount to her. The Division Bench thought that he had no power to decide her claim, and reversed his decision upon that ground. His decision upon the claim was, therefore, annulled upon the ground that, from defect of jurisdiction or some other cause, he was legally unable to decide upon it.

23. If the decision of the Principal Sudder Ameen was reversed because he had not the power to award the mesne profits to the plaintiff, a power which, it was admitted, the Sudder Court, or a Court in which a new suit might be instituted, would have had, it must have been because he had cot the power to determine whether the plaintiff ought to have them or not; or, in other words, because he had not the power, for want of jurisdiction or for some other cause, to decide the plaintiff''s claim. I know of no difference between not having power by law to determine or to decide upon a question, and being unable for want of jurisdiction to

determine or to decide upon it. Macpherson, J., with whom Kemp, J., concurs, says:-- "The material point was that, though the lower Court had jurisdiction to deal with the application, the respondent who applied could not show her right to the mesne profits in the absence of a declaration of that right by the Sudder Court." I am at a loss to see how if she could not do so in the miscellaneous proceedings, she could do so in a new action.

24. But be that as it may, that was not the ruling of the Division Bench. They said she might have a right to the mesne profits, and that the Principal Sudder Ameen ought to have referred her to the Court which passed the decree of reversal, or to a separate suit. What was that but saying that the Principal Sudder Ameen had not the same power to determine as to the plaintiff''s right, as the Sudder Court, or the Court in which she might bring a separate suit, would have?

25. We are not sitting on appeal from the Division Bench. We are not to say whether their decision was right or wrong. We are not to decide whether the Principal Sudder Ameen had jurisdiction or not. We are merely to ascertain upon what ground the Division Bench annulled his decision. If they had annulled it upon the ground that the plaintiff was not entitled to the mesne profits of which she had been deprived by the defendant under the erroneous decree, that would have been a different thing. But they did not do so; they annulled the decision expressly upon the ground that the Principal Sudder Ameen acted without jurisdiction.

26. My honorable colleague, Loch, J., in his judgment, says:-- "In saying, as we did at the close of the judgment, that the lower Court acted altogether without jurisdiction, we meant only that it had exceeded its authority, not that it had no jurisdiction to try whether the plaintiff was or was not entitled to recover mesne profits." But how could the plaintiff know what they meant, unless they meant what they said? They held that the Principal Sudder Ameen exceeded his authority in deciding that the plaintiff was entitled to recover mesne profits'', and they reversed his decision upon that ground. It appears to me that they annulled his decision upon the ground that he was unable, from want of jurisdiction or other cause, to decide upon the plaintiff''s claim. They would not have reversed the decision of the Principal Sudder Ameen if he had rejected the plaintiff''s claim and stated that, as the decree of reversal was silent upon the subject of the plaintiff''s right to mesne profits, he was unable to decide upon her claim. If he had so decided, he would have held that, for want of jurisdiction or other cause, he was unable to decide upon it. His decision was reversed because he did decide upon it.

27. It seems to me to have been the object of the Legislature to prevent suitors from being barred by limitation by reckoning against them time fruitlessly hut in good faith occupied in litigation in a Court which, for want of jurisdiction or other cause, has no power to decide upon their claims, or whose decision is annulled upon appeal for such cause. The time is to be deducted not only when, from defect of jurisdiction or other cause, the Court in which the claim is preferred is unable to

decide upon it, but also when the Court believing that it is able to decide upon it, passes a decision, and that decision is annulled upon appeal, upon the ground that it was not able to decide upon it, and was therefore wrong in so doing. It matters not for this purpose whether the Appellate Court is right or wrong; if wrong, it would be just as unjust to reckon the time against the suitor, as it would be if the Appellate Court was right. Parties are not to be barred by limitation by reckoning against them time fruitlessly occupied whilst they ore being handed about from Court to Court by reason of doubts or erroneous decisions upon questions of jurisdiction, or of the powers of the Courts to entertain claims that are brought before them for decision,

28. Macpherson, J., says (and Kemp, J., concurs with him) that he fails to see that this case is one of any special hardship so far as the respondent is concerned; that her remedy by way of review of the Sudder Court''s decision was suggested to her, but she did not avail herself of it, I cannot concur in this remark. At the time when the Division Bench suggested a review, they also suggested the institution of a fresh suit as an alternative remedy. According to the view of the majority of the Judges, she was barred by limitation at the time when the suggestion was made. The plain tiff availed herself of one of the two suggestions, and commenced a fresh suit almost immediately. If she had adopted the other suggestion, and had applied to the High Court to review the judgment of the late Sudder Court, she would probably have been told that it was matter of discretion whether the application for review should be admitted after the regular time, and that she came too late.

29. The judgment of the Principal Sudder Ameen was in fact reversed upon the ground that he had acted without jurisdiction; and the plaintiff has acted upon the faith of what the Judges said, and she brought a new suit according to the suggestion of the Court. How could she or her advisers have possibly imagined that, when she should seek to have the time deducted which she had spent fruitlessly in a Court whose decision had been expressly reversed because it had acted altogether without jurisdiction, she would be told that that was not the ground of reversal? In my opinion a reversal of the decision of the Principal Sudder Ameen expressed to be upon the ground of want of jurisdiction, was a reversal within the meaning of s. 14 of the Limitation Act, whether the Principal Sudder Ameen had jurisdiction or not. Even if it can be said that the decision was not reversed upon the ground of want of jurisdiction, it was clearly annulled upon the ground that the Principal Sudder Ameen, for some other cause, was unable to decide upon the plaintiff''s claim.

30. This case, like every other, must be determined according to law, and not with reference to hardship. Whether the case is one of special hardship or not, it is not for me to say; but I must say that this lady has good grounds to complain either of the uncertainty of the law, or of the manner in which it has been administered in her case. She has been deprived of a large sum of money in consequence of an erroneous decree which has been reversed. She has been endeavouring

continuously for the last ten years to recover that of which, she has been so deprived. She has had three decrees in her favor. No laches are imputed to her. One decree has been reversed with costs, and now the other two are to be reversed, and she is to be turned round upon on the ground that she is barred by limitation.

31. Since this judgment was delivered, I have been referred to the case of Doorgapersaud Roy Chowdhry v. Tarapersaud Roy Chowdhry 8 Moore''s I.A., 308. The case is somewhat analogous. The Privy Council hold that, under the old law of limitation, the time during which the plaintiff was fruitlessly endeavouring to obtain mesne profits in execution of an erroneous order, which was subsequently set aside, was not to be reckoned against him in calculating limitation.

Loch, J.

32. It appears to me that the only safe course for a Court executing a decree to take, is to execute it strictly, without importing into it anything that is not distinctly comprised in it. There can be no doubt that the plaintiff in this case, when she recovered possession of the property from which she had been evicted under the erroneous decree of the lower Court, was entitled to the mesne profits for the period during which she was out of possession, but the decree of the Sudder Court was silent on the subject, and consequently I hold that the lower Court, in executing that decree, should have confined itself to what that decree gave the plaintiff, viz., possession. If the plaintiff required mesne profits for the period of dispossession, she had only to ask the Court which passed the decision to supply the omission, or she might have brought a suit to recover the amount. Either course was open to her, and when the order of the Principal Sudder Ameen awarding mesne profits was reversed by a Division Bench of this Court in September 1864, she had then plenty of time to make an application to the Court.

33. In the Shoosung case 2 W.R., 80, the Division Bench reversed the order of the lower Court, which had been executed before the appeal was heard, and directed that the appellant should be restored to possession, and recover from the respondent all sums realized by him during his possession under the erroneous decree, with interest. Such an order should have been made in the plaintiff''s case, and till it was made, the Principal Sudder Ameen should have confined himself to giving back possession as decreed to the plaintiff.

34. With regard to the word "suit" as used in s. 14 of Act XIV of 1859, if that and other sections, such as 11 and 12, had been placed after s. 23, there would, I think, have been little doubt as to the meaning of the word, and that the provisions of the sections applied equally to all the previous sections. Placed as it is in the middle of the Act, it appears to me to refer only to what has gone before, and to relate only to suits previous to judgment. S. 18 appears to me to draw a line between the two parts of the Act. Suits are not mentioned again in the remainder of the Act, and the words of that section certainly apply to what has gone before, and not to what

follows.

35. It may be said that proceedings in execution are only a continuance of the suit--that they are merely the necessary steps taken to secure the benefit of the suit which has been decreed, and, as such, are but the subsequent parts to make it complete. While I admit this, I must at the same time assert that in the Courts of this country not established by Royal Charter, the suit has always been considered to come to an end with the judgment, and applications for execution were looked upon as separate proceedings: and, looking at the Act, it appears to me to be drawn up with a recognition of this distinction between the suit itself and the proceedings which followed, and related to the execution of the decree passed in the suit. The judgment of the late Sudder Court in the case of Womesh Chunder Roy v. Bhugwan Chunder Roy 2 S.D.A. Rep., 17th Dec. 1860, 401 shows the distinction which used to be drawn between suits and proceedings taken in execution. I do not think that any argument in favor of the view taken of the word "suits" in the order of reference can be gathered from the title of this law, when it is remembered that, up to the passing of Act XIV of 1859, we had no statute law prescribing the time within which execution of decrees should be taken out, and that "limitation," when it is used in the Regulations, applies to suits in which no judgment had been passed, and not to proceedings taken after judgment has been delivered. Wherever the word "suits" is made use of in Act XIV of 1859, in means cases in which no judgment has been pronounced, and it appears to me that the word was not intended by the Legislature to be applied to proceedings to enforce execution of a decree.

36. Holding the opinion I have expressed above, it is hardly necessary for me to say more, but, as I was one of the Judges who passed the order of September 1864, I think it proper to explain the meaning of the words "want of jurisdiction" used in that judgment, and which may be gathered from the earlier part of that judgment. A Court may have no jurisdiction at all, or having jurisdiction, it may exceed its authority, and thus be said to act without or beyond its jurisdiction. The words used were:--"But the lower Court had no authority to import into the decree what was not there. It went beyond its jurisdiction in giving mesne profits, which the Sudder Court, passing the decree, had not provided for, or had purposely omitted." In saying as we do at the close of the judgment that the lower Court acted "altogether without jurisdiction," we meant only that it had exceeded its authority, not that it had no jurisdiction to determine whether the plaintiff was or was not entitled to recover mesne profits. The Full Bench, in its judgment of the 31st August 1866, In the matter of the Petition of Subjan Ostagar Ante, p. 531, in giving an explanation of the words "exercised a jurisdiction not vested in it by law," used in s. 35, Act XXIII of 1861, held that these words comprised not only cases in which the Subordinate Appellate Court had no jurisdiction at all, but also cases in which such Court having jurisdiction exceeds its jurisdiction. In this latter sense, I consider that the Principal Sudder Ameen acted without jurisdiction in this case.

37. Even if I concurred in the opinion expressed by my learned colleagues that the proceedings taken in execution of a decree were a suit within the meaning and intention of the Act XIV of 1859, I should not be prepared to allow the plaintiff the benefit of the time during which she was engaged in carrying out the execution-proceedings in the Principal Sudder Ameen''s Court, unless the words "defect of jurisdiction or other cause," mentioned in s. 14 of that Act, can be held to apply to cases in which a Court has acted in excess of its jurisdiction.

Macpherson and Kemp, JJ.

38. I concur with the Chief Justice in the opinion, and in the reasons given for the opinion, that in the proceedings which the respondent took in the former suit to obtain wasilat, she was, within the meaning of s. 14 of Act XIV of 1859, "engaged in prosecuting a suit upon the same cause of action." But I regret that I differ in the conclusions at which I have arrived upon the other questions which arise in this reference.

39. S. 14 requires that the prosecution of the suit shall have been carried on bon fide and with due diligence. I cannot say that want of bona fides or due diligence in the former proceedings has been proved. Nevertheless, it is difficult to understand how the proceedings before the Principal Sudder Ameen, which had for their object merely the ascertainment of the mesne profits of less than two years, could have been protracted from 1858 to 1864, if any reasonable diligence had in fact been exercised by the respondent.

40. Then, was the decision of the Principal Sudder Ameen awarding wasilat annulled by the High Court, on September 6th, 1864, from "defect of jurisdiction or for any such cause?" In disposing of this point, I shall express no opinion as to whether the Division Court was right or not in reversing the order of the Principal Sudder Ameen, for that question does not directly arise on the present reference. It seems to me that the order of the Principal Sudder Ameen was not annulled for a defect of "jurisdiction" properly so called, or "for any such cause." No doubt, in the judgment of the 6th September 1864, the word "jurisdiction" is used. But it was not used then in its proper sense, or in the sense in which it is used in s. 14 of Act XIV of 1859. The Court said 1 W.R., Mis., 5:--"But the lower Court had no authority to import into the decree what was not there. It went beyond its jurisdiction in giving mesne profits, which the Sudder Court, passing the decree, had not provided for, or had purposely omitted. The decree-holder may be entitled to recover mesne profits. But when application for that purpose was made to the Court below, it should have referred the applicant to the Court making the decree, or to a separate suit, and we do not thick that, though the opinion of the lower Court was expressed so far back as 1858, and no appeal was then preferred, we are prevented from taking up the point in the present appeal, which is from an order awarding the amount of those mesne profits, ascertained by local investigation. As the Court below has, in this matter, acted altogether without jurisdiction, we quash the order, and decree the appeal

with costs."

41. The sense in which the term "jurisdiction" was intended to be used is, I think, clear, and is to be found in the passage in which it is said that "the lower Court had no authority to import into the decree what was not there." It cannot be said that the lower Court had not jurisdiction, in the ordinary sense of the term, to deal with this matter. The original suit was one in which the Court admittedly had jurisdiction, and any application made in the course of the suit, whether with a view to execution or otherwise, was made to a Court having jurisdiction. It is one thing to say that a Court has not the power to make, or cannot properly make, a particular order in a suit, and quite another thing to say that the Court has not jurisdiction to entertain the suit, or the particular application which it ought not to grant. In disposing of the question properly before it and cognizable by it,--as to how effect was to be given to the decree of the Sudder Court,--the lower Court gave to the respondent more than it should (in the opinion of the High Court) have given; and so far as it gave too much, its order was reversed. The lower Court might, beyond all doubt (even according to the ruling of the Division Court) have made the order which it passed, if the Sudder Court had declared the respondent''s right to the wasilat which she sought. It was not because it had no jurisdiction, but because the Sudder Court had not declared the right, that the lower Court was deemed to be wrong in giving the mesne profits. There was, in fact, no want of jurisdiction, nor anything of the kind; and I think that the learned Judges, in their judgment of the 6th of September 1864, said no more than that the lower Court ought not to have acted as it did without a distinct declaration by the Sudder Court of the respondent''s right to the wasilat. The material point was, that though the lower Court had jurisdiction to deal with the application, the respondent who applied could not show her right to the mesne profits in the absence of a declaration of that right by the Sudder Court.

42. I think that the appellant''s contention is right, and the respondent''s suit is barred by limitation. The law of limitation often operates with much hardship upon individuals. But I fail to see that the present case is one of any special hardship, so far as the respondent is concerned. Her remedy by way of review of the Sudder Court''s decision was suggested to her, but she did not avail herself of it, which, with reference to the provisions of Act XIV of 1859, if for no other reasons, she certainly ought to have done.

---

[1]See Act IX of 1871, s. 15

[2]Between the present parties in the former execution-proceedings, 1 W.R., Mis., 5