APPELLATE CIVIL.

Before C. C. Ghose and Panton JJ.

1923

Jan. 4.

MUKUNDALAL DE

v.

BANSIDHAR MARWARI.*

Limitation—Execution of decree—Objection—Payment or adjustment not certified to Court, effect of—Limitation Act (IX of 1908), Sch. I, Art. 174—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 2.

The mere omission on the part of the decree-holder to certify the fact of adjustment of the decree notwithstanding his promise to do so, does not entitle the judgment-debtor to override the period of limitation provided in Article 174 of the First Schedule of the Limitation Act, 1908, for an application under clause (2) of rule 2 of Order XXI of the Code of Civil Procedure, and to secure an investigation of the very same matter and an extension of time by invoking the terms of section 47 of the Code.

Trimbak Ramkrishna Ranade v. *Hari Laxman Ranade* (1), *Hansa Godhaji Marwadi* v. *Bhawa Juguji Marwadi* (2), *Biroo Gorain* v. *Jaimurat Koer* (3), *Ganapathy Ayyar* v. *Chenga Reddi* (4), *Imamuddin Khan* v. *Bindubasinin Prasad* (5) and *Kamini Kumar Shaha Chaudhury* v. *Abdul Rahim* (6) referred to.

Gadadhar Panda v. *Shyam Churn Naik* (7) distinguished.

APPEAL from Order by Mukundalal De, the judgment-debtor.

Mukundalal De, the judgment-debtor in a case, filed an objection in an execution case that the decree had been satisfied out of Court by the execution of a

* Appeal from Order, No. 91 of 1922, against the order of H. M. Veitch, District Judge of Bankura, dated Dec. 10, 1921, affirming the order of Panna Lal Bose, Munsif at Bishnupur, dated Sep. 3, 1921.

(1) (1910) I. L. R. 34 Bom. 575.
(2) (1915) I. L. R. 40 Bom. 333.
(3) (1911) 16 C. W. N. 923.
(4) (1905) I. L. R. 29 Mad. 312.
(5) (1919) 5 P. L. J. 70.
(6) (1919) 30 C. L. J. 248.
(7) (1908) 12 C. W. N. 485.

mortgage bond. The bond was executed in August, 1917, and the present objection was not filed till April, 1921. The application was disallowed by the Munsif of Bishnupur. On appeal, the District Judge of Bankura held that the application was *primâ facie* time-barred and that no case of fraud had been established so as to justify an extension of time. The Judge therefore affirmed the decision of the Munsif.

The judgment-debtor, thereupon, preferred this appeal to the High Court and contended, *inter alia*, that the case really came under section 47 of the Code of Civil Procedure and that Article 174 of the Limitation Act had no application and that it was open to the Court to enquire into the question of adjustment, which the decree-holder had fraudulently omitted to certify to the Court.

Dr. Dwarka Nath Mitter (with him *Babu Phaneendra Mohan Das*), for the appellant. The question whether there has been as a matter of fact an adjustment is a question relating to the execution, discharge or satisfaction of the decree and comes within section 47 of the Code. See *Gadadhar Panda* v. *Shyam Churn Naik* (1) and *Kamini Kumar Shaha Chaudhury* v. *Abdul Rahim* (2). Where the decree-holder omits to certify such adjustment to the Court and applies for the execution of the whole decree, he practises a fraud on the Court. Order XXI, rule 11, clause 2 (*e*) of the Civil Procedure Code makes it obligatory on the decree-holder to state in his application for execution whether any adjustment of the decree had been made or not. The Court has power in the proceeding under section 47 to relieve the judgment-debtor against such fraud: *Trimbak Ramkrishna Ranade* v. *Hari*

(1) (1908) 12 C. W. N. 485. (2) (1919) 30 C. L. J. 248.

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Laxman Ranade (1), *Hansa Godhaji Marwadi* v. *Bhawa Jogaji Marwadi* (2). If it is a question within section 47, then the question of adjustment can be raised within 3 years notwithstanding the provisions of Order XXI, rule 3, cl. (3) of the Code and Article 174 of the Limitation Act. The Bombay cases cited above support this view. See also *Kamini Kumar Shaha Chaudhury* v. *Abdul Rahim* (3). The case of *Biroo Gorain* v. *Jaimurat Koer* (4) is in conflict with the last mentioned case (3) and *Gadadhar Panda* v. *Shyam Churn Naik* (5).

Babu Bijay Kumar Bhattacharya, for the respondent, was not called upon.

GHOSE AND PANTON JJ. The facts which have given rise to this appeal shortly stated are as follows:—On the 7th August, 1916, the present respondent obtained a decree for Rs. 765 against the present appellant. On the 2nd August, 1917, the decree-holder applied for execution of his decree, the execution case being numbered 480 of 1917. On execution being levied, the judgment-debtor, it is alleged, entered into a compromise with the decree-holder, the compromise being in these terms: *viz.*, that the judgment-debtor executed a mortgage bond in favour of the decree-holder for a sum of Rs. 1,500 which was made up as follows: Rs. 1,050 being the consideration in respect of a previous bond, a sum of Rs. 450 being the balance of the decree referred to above, a sum of Rs. 250 paid to the decree-holder in cash and the balance Rs. 65 being remitted by the decree-holder. The judgment-debtor alleges that the decree-holder promised, on the execution of the said bond, that he would certify an

(1) (1910) I. L. R. 34 Bom. 575.
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adjustment of the decree to the Court, whose duty it was to execute the decree, but that, notwithstanding his promise to so certify the adjustment of the decree, the decree-holder failed and neglected to do so. The decree-holder, it is further alleged, applied for execution of the decree notwithstanding the fact of the said adjustment on the 10th February, 1919. It appears that the execution case was struck off for want of prosecution. Some time in April, 1921, the decree-holder made a fresh application for execution of the decree and in opposition to this fresh application for execution of the decree, the judgment-debtor stated that the decree had been lawfully adjusted in 1917 and that the decree-holder had fraudulently failed and neglected to certify to the Court the fact of such adjustment and that by reason of fraud on the part of the decree-holder in failing to certify such adjustment to the Court, he, the judgment-debtor, had been prevented from applying to the Court, under the provisions of sub-section (*2*) of Order XXI, rule 2, for an order that the said adjustment should be recorded and that, in these circumstances, the application for execution was not maintainable and urged, in the alternative, that an extension of time should be granted to him in order to make the necessary application as contemplated in sub-section (*2*) of Order XXI, rule 2 of the Code of Civil Procedure. The lower Appellate Court held that inasmuch as the time allowed to the judgment-debtor to make an application under sub-section (*2*) of Order XXI, rule 2 is 90 days under Article 174 of the First Schedule of the Limitation Act and inasmuch as that period had elapsed, the judgment-debtor could not resist the decree-holder's application for execution of the decree on the ground that the decree had been lawfully adjusted, because the fact

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of such adjustment had remained uncertified to the Court. Dr. Mitter, who has appeared on behalf of the judgment-debtor appellant, has argued, on the authority of *Trimbak Ramkrishna Ranade* v. *Hari Laxman Ranade* (1) and *Hansa Gadhaji Marwadi* v. *Bhawa Jogaji Marwadi* (2), that the omission on the part of the decree-holder to certify the fact of the adjustment of the decree, notwithstanding his promise to do so, was really a fraud upon the Court and, in the circumstances, the Courts below should have dismissed the decree-holder's application for execution or, in the alternative, should have allowed the judgment-debtors' application to have the adjustment recorded under the provisions of sub-section (2) of Order XXI, rule 2. He further argued that if there was fraud on the part of the decree-holder, it was a question which came rightly within the purview of section 47 of the Civil Procedure Code and that in that event no question of limitation provided for in Article 174 of the First Schedule of the Limitation Act would arise as an obstacle in the way of the judgment-debtor. This question has recently been discussed and so far as this Court is concerned, the overwhelming balance of authorities is against Dr. Mitter's contention. It is unnecessary to go through the cases again ; but it is sufficient to observe, as pointed out in *Biroo Gorain* v. *Jaimurat Koer* (3), that a proceeding under sub-section (2) of Order XXI, rule 2 is no doubt a proceeding under section 47 of the Code, inasmuch as it decides a question between the parties to the suit and relating to the execution, satisfaction or discharge of the decree made in the suit. But if the contention now advanced by Dr. Mitter on behalf of the judgment-debtor appellant were to prevail, in all cases where

(1) (1910) I. L. R. 34 Bom. 575. (2) (1915) I. L. R. 40 Bom. 333.
(3) (1911) 16 C. W. N. 923.

fraud is imputed to the decree-holder, the provisions of clause (3) of Order XXI, rule 2 would become nugatory; in other words, the provisions of rule 2 would be superseded by the wider provisions of section 47 of the Code. It would also have the effect, as pointed out by the Privy Council in *Chhatrapat Singh Dugar* v. *Kharag Singh Lachmiram* (1) of the Courts allowing themselves to be influenced by the plea of hardship on account of the strict application of the rule under Article 174 of the Limitation Act instead of being guided in their decisions by the clear and unambiguous words of sub-section (2) of Order XXI, rule 2 of the Code of Civil Procedure. The case of *Biroo Gorain* (2) is in accordance with the view taken in *Ganapathy Ayyar* v. *Chenga Reddi* (3) and has also been followed in *Imamuddin Khan* v. *Bindubasinin Prasad* (4). Dr. Mitter has called our attention to *Gadadhar Panda* v. *Shyam Churn Naik* (5) and has argued that inasmuch as it has been held in that case that the question such as has been urged by his client came within the purview of section 47 of the Code, it ought to be held on the authority of the last mentioned case that the question which his client now urges should also be similarly treated as a question under section 47 of the Code and as such it ought to be held that instead of Article 174 being made applicable to the present case, the judgment-debtor should have three years' time to have this matter investigated. Now, with reference to the case of *Gadadhar Panda* (5) as pointed out by Mookerjee J., in *Biroo Gorain* v. *Jaimurat Koer* (2) although there are isolated expressions which may lend support to the view that section 47 may be

(1) (1916) I. L. R. 44 Calc. 535 L. R. 44 I. A. 11.
(2) (1911) 16 C. W. N. 923.
(3) (1905) I. L. R. 29 Mad. 312.
(4) (1919) 5 P. L. J. 70.
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invoked in cases of this description, still when the case is analysed, it does not support the contention of the appellant; and it would appear that the learned Judges did not intend to lay down a general rule that although the period of limitation within which an application by the judgment-debtor under clause (*2*) of rule 2 of Order XXI is to be presented to the Court has expired, it is still open to him to secure an investigation of the very same matter and to secure an extension of time by invoking the terms of section 47 of the Code of Civil Procedure. Dr. Mitter has rightly drawn our attention to the recent decision in *Kamini Kumar Shaha Chaudhury* v. *Abdul Rahim* (1), being a decision of Chatterjea and Duval JJ. On examination of the facts in the last mentioned case, it would appear that the fact of the payment in satisfaction of the decree which was the subject matter of the execution in that case was certified to the Court not in the execution case relating to the particular decree but in another execution case pending between the parties. No question of limitation such as has arisen in the present case arose in that case and the only question which was before the learned Judges for decision was whether on the facts of that particular case, section 47 could be invoked or not. They apparently were of opinion that section 47 would enable the judgment-debtor to have an investigation of the matter arising out of the facts of the particular case. As has been pointed out in the judgment of the Patna High Court, the overwhelming balance of more modern authorities is decidedly against the contention raised by Dr. Mitter and in this view of matter, there is no other alternative but to hold that the appeal fails and must be dismissed with costs.

S. M. *Appeal dismissed.*

(1) (1919) L 30 J. C. 248.