APPELLATE CIVIL.

Before Suhrawardy and Page JJ.

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March 9.

PITAMBAR JANA

v.

DAMODAR GUCHAIT.*

Limitation—Execution of decree—Application returned to decree-holder for minor omissions, whether saves limitation in respect of a subsequent application—Limitation Act (IX of 1908), Schedule I, Art. 182 (5)—Civil Procedure Code (Act V of 1908) O. XXI, rr. 11—14.

On May 29, 1918 the plaintiff decree-holder obtained a preliminary mortgage decree. The defendant judgment-debtor preferred an appeal to the High Court, which was finally dismissed on May 18, 1922. During the pendency of this appeal, the decree-holder obtained a final decree on August 20, 1920. As the decision of the High Court in the appeal against the preliminary decree by the judgment-debtor was pronounced subsequently to the final decree the decree-holder made an application for a fresh final decree which was dismissed on August 25, 1923 on the ground that the final decree had already been passed. On the same date the decree-holder applied for execution of the final decree, and appealed against the order refusing the application for a fresh final decree. That appeal was finally dismissed by the High Court on August 23, 1924. August 20th to August 24th 1923 were *dies non*. The application for execution filed by the decree-holder on August 25, 1923 was returned to him on account of some minor omissions with liberty to refile it within 10 days. On June 28, 1924 a fresh application for execution was made giving all the required particulars, and the application of August 25, 1923 was also filed with it. The latter application was again returned as a fresh application had been filed. On an objection being taken by the judgment-debtor that the application filed on June 28, 1924 was barred by limitation as it was preferred more than 3 years after the final decree was passed on August 20, 1920 :—

* Appeal from Appellate Order No. 209 of 1925, against the order of P. E. Cammiade, District Judge of Midnapore, dated Feb. 16, 1925, reversing the order of K. P. Bagchi, Munsif of Tamluk, dated Nov. 24, 1924.

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Held, that as the application by the decree-holder of August 25, 1923 was a valid application, the application made on June 28, 1924 was made within time.

Per SUHRAWARDY J. The expression "in accordance with law" in Article 182 (*5*) should be taken to mean that the application though defective in some particulars was one upon which execution could lawfully be ordered. If the omissions were such as to make it impossible for the Court to issue execution upon it, it should be held that such an application was not in accordance with law.

Kifayat Ali v. *Ram Singh* (1), *Pir Jade* v. *Pir Jade* (2) and other cases referred to and discussed.

Per PAGE J. Where an application for execution in substantial compliance with the law is preferred to the Court, such an application will be effectual to stay the progress of limitation whether the Court admits, or rejects, or returns the application, or allows such application to be amended.

Balkishen v. *Bedmati Koer* (3), *Rama* v. *Varada* (4) and other cases referred to and discussed.

This MISCELLANEOUS APPEAL arose out of an application for execution of a decree. The Munsif held that the application for execution was not barred by limitation. The District Judge held that the application of August 25, 1923 not being in accordance with law the present application was time-barred.

Mr. S. C. Maity (with him *Babu Tridib Nath Roy* and *Babu Purna Chandra Mukherji*), for the appellant, contended that as the application for execution of August 25, 1923 was in substantial compliance with the provisions of Article 182 (*5*) of the Limitation Act, the application which was made on June 28, 1924 was within time.

Babu Santosh Kumar Pal, for the respondents, contended that the application for execution filed on June 28, 1924, was barred by limitation since it was

(1) (1885) I. L. R. 7 All. 359.
(2) (1882) I. L. R. 6 Bom. 681.
(3) (1892) I. L. R. 20 Calc. 388
(4) (1892) I. L. R. 16 Mad. 142.

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more than 3 years after the final decree was passed c August 20, 1920. Inasmuch as the application which was made on August 25, 1923 was not in the form required by law, for the purpose of limitation it should be regarded as not having been made at all.

SUHRAWARDY J. This appeal raises a question relating to limitation and the law on the point may safely be said to be still in a nebulous state. It is necessary to state some facts on which the consideration of the question turns. The decree-holder (the appellant before us) obtained a preliminary decree upon a mortgage in his favour on the 29th May 1918. The judgment-debtor defendant appealed and his appeal was finally dismissed by this Court on the 18th May 1922. During the pendency of the appeal in this Court the plaintiff decree-holder applied for and obtained the final decree on the 20th August 1920. As the decision of the High Court in the appeal against the preliminary decree by the defendant was pronounced subsequent to the final decree the plaintiff made an application for a fresh final decree which application was dismissed on 25th August 1923 on the ground that the final decree had already been passed. On the same date, viz., the 25th August 1923 the plaintiff decree-holder presented an application for execution of the final decree and thereafter appealed against the order refusing to draw up a fresh final decree. That appeal was finally dismissed by this Court on the 23rd August 1924. The application for execution filed by the decree-holder on the 25th August 1923 was returned to him on the ground that there were omissions in the application, first, with regard to the amount of interest to which the decree-holder was entitled to in column 7 and, secondly, with regard to the amount of costs which the decree-holder was

entitled to in column 8 in the form used for application for execution of decrees—being form No. 6, Appendix E. Civil Procedure Code. The order recorded on the back of the petition was "Returned to be refiled within 10 days after necessary correction." It appears that the application returned to the decree-holder was not refiled after the necessary corrections within the 10 days allowed by the above order. On the 28th June 1924 a fresh application was made giving all the necessary particulars and the application which was presented by the decree-holder on the 25th August 1923 was also filed along with it. On the application of the 25th August 1923 which was refiled the following order was recorded: "The previous application for execution is not necessary as a fresh one has been filed. Return." On these facts objection was taken on behalf of the judgment-debtors that the application for execution filed on the 28th June 1924 was barred by limitation since it was more than three years after the final decree was passed on the 20th August 1920. It was maintained on behalf of the decree-holder that the application for execution of the 25th August 1923 was valid to save limitation. It is not disputed that this application was in time, the Court being closed from 20th to 24th August 1923. The Munsif in the Execution Court held that the present application for execution was not barred by limitation. The learned District Judge of Midnapur on appeal reversed the decision of the Munsif and held that the application of the 25th August 1923 not being a proper application the present application is time-barred.

The decree-holder appeals and on his behalf it is argued that the view of law taken by the learned District Judge is erroneous. The only question that arises for consideration is whether the application by

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the decree-holder of the 25th August 1923 was an application in accordance with law, under Article 182(5) of the Limitation Act. There is wide divergence of view of the Indian Courts on this matter. The High Court of Allahabad in the case of *Kifayat Ali* v. *Ram Singh* (1) held that when an application is presented and returned to the decree-holder and not filed within the time allowed by the Court after the necessary amendments, it must be taken on the analogy of section 374 of the Code of 1882 (corresponding to Order XXIII of the Code of 1908) that there was no application presented for execution and that refiling after necessary amendment after the time allowed must be taken as of no avail. The Bombay High Court in the case of *Pir Jade* v. *Pir Jade* (2) held that when an application is filed by the decree-holder and withdrawn with leave to file a fresh application, it must be taken that no application for execution was made by the decree-holder and that the application so made and withdrawn was not an application for execution. The Madras High Court has consistently taken a view which cannot be said to be uniform with the view taken by the Allahabad High Court. In *Rama* v. *Varada* (3) that Court following its earlier decision in *Rama Nadan* v. *Periatambi* (4) held that an application for execution if defective in matters which cannot be said to be material or substantial should be considered to be an application in accordance with law. The same view was taken by that Court in *Ramayyam* v. *Kadir Bacha Sahib* (5) and *Natesa Pillai* v. *Ganapathia Pillai* (6). In this Court the view upon this question has not been always consistent. The question should be approached from two standpoints.

(1) (1885) I. L. R. 7 All. 359.
(2) (1882) I. L. R. 6 Bom. 681.
(3) (1892) I. L. R. 16 Mad. 142.
(4) (1883) I. L. R. 6 Mad. 250.
(5) (1907) I. L. R. 31 Mad. 68.
(6) (1916) I. L. R. 40 Mad. 949.

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In the first place it has to be considered whether an application returned to the decree-holder under Order XXI, rule 17 for amendment and not filed within the time allowed by the Court can be taken to be an application for execution at all. In the second place, it has to be considered whether an application which has been rightly or wrongly returned to the decree-holder for amendment can be held by the Court executing the decree on a fresh application an application made according to law. As to the first point, there is no direct authority in this Court and it has not been considered apart from the second question. But the cases to which I will presently refer did not consider whether an application returned to the decree-holder and not refiled in proper time should be totally negligible for reckoning the period of limitation.

On the second point the case which really presents any difficulty is the case of *Gopal Sah* v. *Janki Koer*(1). In that case an application was presented which was defective in not having complied with the provisions of sections 235 to 238 of the Code of 1882. It was returned to the decree-holder for amendment under section 245 within a week's time. The amended application was not put in within the time fixed but on a later date a fresh application was presented in due form with the previous application attached thereto. When the fresh application was presented it was more than 3 years from the date of the decree and the question therefore that arose in that case was whether the first application was one which could be considered as one in accordance with law within the terms of Article 179, clause (*4*) of Schedule II of the Limitation Act (XV of 1877). The learned Judges held that the first application was not in accordance with law;

(1) (1895) I. L. R. 23 Calc. 217.

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and in so holding instead of confining themselves to the facts before them they made some general observations which are pressed on our attention on behalf of the respondents. Prinsep J. pointed out the defects in the application and held that it was so defective that execution could not have been levied upon it. But in considering this question the learned Judge differed from the view taken by the Madras High Court in *Rama* v. *Varada* (1) which held that if the defects in the application are only of a formal character it should still be regarded as an application made in accordance with law within the meaning of the article of the Limitation Act referred to above. Ghose J. based his decision in that case not on the particular facts arising in it but upon the view which he took of the law on the subject, namely, that where an application was rightly or wrongly returned for amendment and the Court considered that the petition in question was one which could not be admitted, if the decree-holder did not comply with the order of the Court within the time fixed for amendment it cannot be held that the application should be regarded as a proper application. The learned Judge consequently held that when an application is returned for amendment by the Court rightly or wrongly it must be considered to be not in accordance with law. This view has been criticised in *Mathura Prasad* v. *Musstt. Anurago Koer*(2). The learned Judges observed thus with reference to *Gopal Sah's* case (3).—

"That it was unnecessary to lay down such a wide general rule exclud-"ing all equitable consideration which might hereafter arise for the "decision of the case before them is clear. In that case the application "did not contain the necessary materials under section 235 and there does "not appear to have been any application capable of execution from the

(1) (1892) I. L. R. 16 Mad. 142. (2) (1910) 14 C. W. N. 481.
(3) (1895) I. L. R. 23 Calc. 217.

"start. That alone seems to entirely distinguish it from the case now "before us and that the wide rule laid down went too far is clear from "the fact that Ghose J., one of the Judges who delivered a judgment in "that case was also a party to the unreported case we have already "referred to, in 1905, where it was held that where an application had "been returned to rectify a mistake for which the decree-holder was not "responsible and was not refiled within the period of limitation the "Execution Court was right to look into the merits and held that the "application was not barred".

In considering as to the exact point on which the case of *Gopal Sah* (1) is an authority I may quote the following words from the judgment of Prinsep J :

"One of the errors committed by the decree-holder was in misstating "the amount of his decree in a lesser sum than he was given and the Sub-"Judge has consequently limited the execution to that smaller sum. If "that had been the only defect the decree would have been capable of "being executed for the smaller sum. But in other respects which it is "unnecessary to mention, the application failed to comply with the require-"ments of sections 235, 236, 237 and 238 applicable to the case "

This observation limits the operation of the view expressed therein and when closely examined is an authority in favour of the appellants before us. The only defect that was pointed here was the omission of certain sums which the decree-holder was entitled to receive from the judgment-debtors but which he did not mention in the application for execution. So that in terms of the judgment of Prinsep J. the decree-holder has misstated the amount of the decree in a lesser sum than he was given and so execution could be taken for that smaller sum. The authority of *Gopal Sah's* case (1) in my opinion has been considerably shaken by the subsequent Full Bench decision in the case of *Gopal Chunder Manna* v. *Gosaindas Kalay* (2). In that case the defective application did not contain the right number of the suit and the date of the decree. The question arose when the subsequent application for execution was made whether

(1) (1895) I. L. R. 23 Calc. 217. (2) (1898) I. L. R. 25 Calc. 594.

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the application with the defects abovementioned returned for amendment but not refiled in time, was to be considered as an application in accordance with law. It was held by the Full Bench that material defects only could vitiate an application; and as the defects in the application for execution then before the Court were not material it was valid to save limitation. The referring judgment was delivered by Banerji J. and the learned Chief Justice in delivering the judgment of the Full Bench accepted the reasoning and the conclusion expressed by that learned Judge. That learned Judge observed as follows:

"The question whether an application for execution or for taking "some step in aid of execution is one according to law within the mean- "ing of Article 179, clause (4), has to be determined with reference to the "circumstances of each case; and while on the one hand an application "must be in substantial compliance with the law in order that it may be "regarded as one coming within the meaning of clause (4), on the other "hand, it is not every informality that would vitiate an application and "take it out of that clause. Were it otherwise, *bonâ fide* applications for "execution would fail to save limitation owing to trivial defects of form,— "a result which I do not think the Legislature could have intended."

With reference to the case of *Gopal Sah* (1) the learned Judge after quoting the passage which I have quoted observed:

"These observations go to some extent to support the view I take, that it is only material defects that can vitiate an application."

The Full Bench adopted the view, which must now be taken as settled, that if an application for execution returned for amendment and not refiled within the time allowed by the Court under Order XXI, rule 17, Civil Procedure Code, is in substantial compliance with the provisions of the Code being defective merely in omitting immaterial particulars, it should be taken as an application in accordance with law

(1) (1895) I. L. R. 23 Calc. 217.

within the meaning of Article 182 (5) of the Limitation Act. The application of the 25th August 1923 contained a prayer that the properties mortgaged should be sold and the decree-holder's dues realised therefrom. That is an invitation to the Court to take further steps in aid of execution of the decree. In this connection reference may be made to the case of *Sadaj Chandra Jana* v. *Pares Nath Ghosh* (1) where it was held that an application, even though it be deemed so defective as not to be an application for execution, must still be regarded as an application made to proper Court in accordance with law to take some steps in aid of execution. In my opinion, the law has been too broadly stated and it is not necessary for me to go so far as on the facts of the present case I am of opinion that the application made by the decree-holder on the 25th August 1923 was an application in accordance with law. On a consideration of the cases to which I have made reference and the other cases which have been cited at the bar, the conclusion to which I have arrived is that the expression "in accordance with law" in Article 182 (5) should be taken to mean that the application though defective in some particulars was such upon which execution could be issued. If the omissions were such as to make it impossible for the Court to issue execution upon it, as was the case in *Asgar Ali* v. *Troilokya Nath Ghose* (2) where the list of the properties to be attached and sold was not supplied with the application for execution, it should be held that such an application is not in accordance with law. But where the application is such as to enable the Court to take further steps in execution it cannot generally be said that such an application, if not defective in material and substantial matters is

(1) (1921) 35 C. L. J. 82.

(2) (1890) I. L. R. 17 Calc. 631.

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an application not in accordance with law. In the present case there was no bar to the Court levying execution for the lesser sum claimed by the decree-holder and in this view I hold that the application made by the decree-holder on the 25th August 1923 was an application in accordance with law and therefore the present application of the decree-holder is not barred by limitation. I am further of opinion that, if an application is presented to the Court and the Court takes judicial action upon it either in registering the application or by returning it for amendment, such an application though not filed in time fixed by the Court should not be considered as not having been made. The view that I have above taken seems also to be supported by the decision of the Patna High Court in *Bhagvat Prashad Singh* v. *Dwarka Prashad Singh* (1).

In the result, this appeal is allowed, the order of the lower Appellate Court set aside and that of the first Court restored with costs. We assess the hearing-fee at four gold mohurs.

We are further asked to consider whether the present application should be limited to the execution of the amount mentioned in the previous application of the 25th August, 1923. We have not had the advantage of the view of the lower Appellate Court upon this point as it dismissed the present execution on a view which in our judgment is not correct. We therefore do not consider it proper to express any opinion upon this matter at the present stage.

PAGE J. An application for execution of a decree or order must be made within three years from—

"the date of applying in accordance with law to the proper Court for "execution, or to take some step in aid of execution of the decree or "order".

(1) (1923) I. L. R. 2 Pat. 809.

[Act IX of 1908, Schedule I, Article 182 (5).]

An application for execution in order to comply with the law must be made in accordance with the provisions of Order XXI, rules 11 to 14. Such an application for all purposes need not conform in every detail with the provisions mentioned in rules 11 to 14. It is sufficient in order to save limitation under Article 182(5) that the application for execution should be made in a form which substantially complies with the provisions set out in those rules. The question whether an application for execution, or for taking some step in aid of execution, is one "in accordance with law" is to be determined with reference to the circumstances of each particular case; and while on the one hand the application must be in substantial compliance with the provisions of the Code in order that it may be regarded as a valid application within the meaning of Article 182, Clause (5),—

"on the other hand, it is not every informality that would vitiate an "application and take it out of that clause. Were it otherwise, *bonâ fide* "applications for execution would fail to save limitation owing to trivial "defects of form,—a result which I do not think the Legislature could "have intended. The view I take is amply supported by the authority "of decided cases, of which I need only refer to *Balkishen* v. *Bedmati* "*Koer* (1) and *Rama* v. *Varada* (2)."

per Banerji J. in *Gopal Chunder Manna* v. *Gosain* (3).

Now, when the Court receives an application for the execution of a decree under rule 17, it is the duty of the Court to—

"ascertain whether such of the requirements of rules 11 to 14 as "may be applicable to the case have been complied with; and if they "have not been complied with the Court may reject the application or may "allow the defects to be remedied then and there or within a time to be "fixed by it."

(1) (1892) I. L. R. 20 Calc. 388. (2) (1892) I. L. R. 16 Mad. 142.

(3) (1898) I. L. R. 25 Calc. 594.

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In my opinion, if the Court holds that there is some material and substantial defect which vitiates the application the Court ought to reject it and not allow the defect to be remedied; for if an invalid application is returned for amendment and not rejected, the applicant thereby may be misled, and may refrain from preferring a fresh application in substantial compliance with the law as he would have been able to do forthwith if the invalid application had been rejected. Further, I am of opinion that if the Court permits the defect to be remedied within a time fixed by it, at the expiration of that time the application if unamended ought to be rejected; see *Fuzloor Ruhman* v. *Altaf Hossen*(1), *Asgarali* v. *Troilokya Nath Ghose*(2). I agree that in this case the application for execution preferred on the 25th August 1923 was in substantial compliance with the law. It was strenuously contested before us, however, upon the authority of *Gopal Sah* v. *Janki Koer*(3) that if a Court holds that an application for execution does not conform with each and every provision set out in rules 11 to 14 it must be taken that the application for execution will not be effectual to enable the decree-holder to evade the law of limitation. In that case Mr. Justice Prinsep observed that

"It was not an application in accordance with law, because it did not "fulfil the requirements of the law. No Court can do otherwise than "determine that fact. To find that what the law requires on matters of "form need not be complied with to make an application one in accordance "with law, seems to me to allow a transgression of the law, and yet to "find that it has been complied with. I am aware that in *Rama* v. "*Varada*(4) a different opinion has been expressed, but with every "deference and respect for the learned Judges of the Madras High Court, "I cannot agree with them in their interpretation of the law."

(1) (1884) I. L. R. 10 Calc. 541.
(2) (1890) I. L. R. 17 Calc. 631.
(3) (1895) I. L. R. 23 Calc. 217.
(4) (1892) I. L. R. 16 Mad. 142.

Now, the above observations of the learned Judge must be regarded as *obiter*, for the decision in that case proceeded upon the assumption that the application for execution was not in accordance with law; and, therefore, it was not necessary for the Court to consider what the result would be if an application substantially in accordance with the form prescribed was rejected or returned for the purpose of remedying certain informal defects which the Court held were inherent in it. In my opinion, the above observations of the learned Judge cannot be reconciled with the decision of the Full Bench in *Gopal Chunder Manna's* case(1), and cannot now be regarded as a correct exposition of the law.

The learned pleader for the respondents urged a further contention before us that inasmuch as the application had been returned to the decree-holder for amendment, and the amendment was not effected within the time appointed by the Court, the application must be regarded as though it never had been made; and he cited *Gopal Sah's* case(2) in support of his contention. Prinsep J. in that case observed that:

"The Allahabad High Court has held in *Kifayat Ali* v. *Ram Singh*(3) "—a case which is on all fours with the case before us—that when an in- "formal application for execution has been returned for amendment under "Section 245 what has been done in the matter by the decree-holder has "been undone by him, and the proceeding became to all intents and "purposes as though no application had been put in."

But it is to be observed in respect of the two cases of *Pir Jade* v. *Pir Jade*(4) and *Kifayat Ali* v. *Ram Singh*(3) upon which the learned Judge founded his opinion that in one case the application for execution had been dismissed, and in the other withdrawn, at the instance of the decree-holder. It is, of course,

(1) (1898) I. L. R. 25 Calc. 594.
(2) (1895) I. L. R. 23 Calc. 217.
(3) (1885) I. L. R. 7 All. 359.
(4) (1882) I. L. R. 6 Bom. 681.

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beyond controversy that where a decree-holder deliberately withdraws, or invites the Court to dismiss, his application he cannot afterwards rely upon that application for the purpose of saving limitation in respect of a subsequent application for execution. But such cases differ *toto coelo* from cases in which the application for execution is returned *in invitum* to the applicant. In my opinion, having regard to the decision in *Rama* v. *Varada*(1) which, although dissented from in *Gopal Sah's* case(2), was afterwards affirmed by a Full Bench in *Gopal Chunder Manna* v. *Gosain Das Kalay*(3), and the observations of Mr. Justice Banerji in the Full Bench case, the true view is that where an application for execution in substantial compliance with the law is preferred to the Court, such an application will be effectual to stay the progress of limitation whether the Court admits, or rejects, or returns the application, or allows such application to be amended. For these reasons I agree that the appeal should be allowed, and an order made in the sense that my learned brother proposes.

B. M. S. *Appeal allowed.*

(1) (1892) I. L. R. 16 Mad. 142. (2) (1895) I. L. R. 23 Calc. 217.
(3) (1898) I. L. R. 25 Calc. 594.