ORIGINAL CIVIL.

Before Costello J.

ATARMONI DASI

v.

BEPIN BEHARI DHUR & OTHERS.*

1928

July 18.

Execution of Decree—Application for—Code of Civil Procedure (Act V of 1908) O. 21, r. 11 (2)—High Court (Original Side) Rules Chap. VI, r. 12—Indian Limitation Act (Act IX 1908) s. 12 (1); Art. 183 read with s. 3.

Where in an application for execution of a decree more than a year old, the tabular statement had been filed before the master, who ordered the issue of the usual notice, and notices were accordingly issued within the period of limitation,

Held, that the filing of a tabular statement in accordance with O. 21 r. 11 (2) of the Civil Procedure Code is an application to the Court within the meaning of Art. 183 of the Limitation Act read in conjunction with s. 3 of that Act.

Obiter, a notice of motion is distinguishable from the filing of a tabular statement for the purposes of Art. 183 of the Limitation Act.

Monohar Das v. *Futteh Chand* (1), *Amulya Ratan Banerjee* v. *Banku Behari Chatterjee* (2), *Khetter Mohun Sing* v. *Kassy Nath Set* (3) discussed and distinguished.

Kuttayan Chetty v. *Manauna Elappa Chetty* (4), *V. V. Kalmar Venkapaiya* v. *Nazerally Tyabally Singaporewalla* (5), *Re. Gallop* and *the Central Queensland Meat Export Co., Ltd.*, (6), *Sashi Moni Dassee* v. *Dhira Moni Dassee* (7); *Insolvency case In re. Chaitan Das Sarana* (8) followed.

In administration suit No. 875 of 1904, Atarmoni Dasi and Ashutosh Dhur were the plaintiffs, and Kali Charan Dhur, Nobin Chandra Dhur and Susila Sundari Dasi, were amongst others, the defendants. By a decree made in the above suit on the 8th May,

* Original Civil Suit No. 875 of 1904.

(1) (1903) I. L. R. 30 Calc. 979.
(2) (1924) 41 C. L. J. 159.
(3) (1893) I. L. R. 20 Calc. 899.
(4) (1907) 17 Mad. L. J. 215.
(5) (1923) I. L. R. 47 Bom. 764.
(6) [1890] 25 Q. B. D. 230.
(7) & (8) Unreported judgments published along with this judgment.

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1916, the said plaintiffs and the said defendants were ordered to pay to the defendant Kali Charan Dhur the sum of Rs. 2,590-5-3, with interest thereon and costs. Kali Charan made this present application for the execution of the said decree, but as the decree was more than a year old, the Master before whom the Tabular Statement had been filed, directed the issue of the usual notices. And in compliance with such direction notices were duly issued on the 8th May, 1928.

On the application coming up for hearing before Mr. Justice Costello, a preliminary objection was taken on behalf of the said judgment-debtors, viz., that the applicants' decree had become barred by the law of limitation. The point therefore arose for determination whether or not an application under O. 12, r. 11 (*2*) of the Civil Procedure Code meant a completed application on which a final order had been made.

Mr. P. N. Chatterjee, for Nobin Chandra Dhur, opposed the application. The application is barred by limitation. *Monohar Das* v. *Futteh Chand* (1) *Amulya Ratan Banerjee & ors.* v. *Banku Behari Chatterjee* (2). The notice of this application is dated 8th May, 1928, the day on which the period of limitation expired and the notice fixed the date for the hearing of the application several days afterwards. Such a notice is not sufficient to save the application from being barred. *Khetter Mohun Sing* v. *Kassy Nath] Sett* (3); *Hinga Bibee* v. *Munna Bibee* (4). The practice of the Calcutta High Court is different from the practice obtaining in the Bombay and the Madras High Courts, and as such the

(1) (1903) I. L. R. 30 Calc. 979.
(2) (1924) 41 C. L. J. 159.
(3) (1893) I. L. R. 20 Calc. 899.
(4) (1904) I. L. R. 31 Calc. 150.

decisions in *V. V. Kalmar Venkapaiya* v. *Nazerally Tyabally Singaporewalla* (1), and *Kuttayan Chetty* v. *Mananna Elappa Chetty* (2), have no application. In order to save limitation, there must be a revivor of the decree, *i.e.*, there must be a determination by Court either expressly or by implication, that the decree is still capable of execution. *Chatrapal Singh* v. *Set Sumarimull* (3). There has been no such determination by Court here.

[*Costello J.* There is no question of revivor in this application.]

Mr. S. B. Dutt, for Atarmoni Dasi. I adopt the arguments advanced by my learned friend Mr. P. N. Chatterjee.

Mr. S. C. Mitter, for Kali Charan Dhur, in support of the application. The sole question is whether under Art. 183, I have made this application in time. *V. V. Kalmar Venkapaiya* v. *Nazerally Tyabally Singaporewalla* (1); *S. P. R. S. Kuttayan Chetty* v. *Mananna Elappa Chetty* (2), *Re Gallop and the Central Queensland Meat Export Co., Ltd.* (4). According to the decisions in the above cases it is perfectly clear that "the making of an application" does not imply an application in which a final order had been made.

Cur. adv. vult.

COSTELLO J. This is an application made by Kali Charan Dhur, one of the defendants in this administration suit. The decree directed the plaintiffs and the defendants Nobin Chandra Dhur and Susila Sundari Dasi to pay to the applicant Rs. 2,590-5-3 with interest thereon from the date of the decree

(1) (1923) I. L. R. 47 Bom. 764.
(2) (1907) 17 Mad. L. J. 215.
(3) (1916) I. L. R. 43 Calc. 903.
(4) [1890] 25 Q. B. D. 230.

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until realisation. The application is for the execution of that decree under the provisions of O. 21, r. 11 of the Civil Procedure Code and is in the tabular form required by that rule. In column 10 the Applicant states :—

"I, the applicant pray that the said sum of "Rs. 2,590-5-3 with interest thereon at 6 per cent. per "annum from the date of the decree till realisation "and the costs of taking out this execution be "realised by attachment and sale of the right, title "and interest of the judgment-debtors to and in the "immoveable properties specified at the date of the "application and paid to him."

The tabular statement was duly filed before the Master under Ch. 6, r. 12 of the Rules of the Court and as the decree was more than a year old the matter fell to be dealt with under the provisions of O. 21, r. 22 and the Master endorsed the Tabular Statement in this way.

"Let usual notice issue under O. 21, r. 22 (*a*) of the "Code of Civil Procedure".

The notice was duly issued and was dated the 8th May, 1928. It is to be observed that the decree was made on the 8th May, 1916 and the notice was dated the 8th May, 1928, that is to say, exactly twelve years after the date of the decree. Under section 12 (*1*) of the Limitation Act, in computing the period of Limitation, the day from which such period is to be reckoned is excluded. If therefore it can be said that the filing of the Tabular Statement was itself "an application" then the application was made just within the period of limitation prescribed by Art. 183 of the 1st Schedule to the Limitation Act.

Section 3 of the Limitation Act is the 1st Section in "Part II" of the Act which "Part" bears the heading "Limitation of Suits, Appeals and Applications"; so that there are three species of matters which

are dealt with in the Limitation Act and the Schedule to that Act. Section 3 reads as follows:—

"Subject to the provisions contained in sections 4 "to 25 every suit instituted, appeal preferred, and "application made after the period of limitation "prescribed therefor by the first schedule shall be "dismissed".

Upon looking at Art. 183 we find that that is one of the Articles in the Division of the Schedule which deals with "Applications" and the heading of the first column is "Description of application", that of the second column "Period of Limitation", and that of the third column "Time from which the period begins "to run". Reading Art. 183 in conjunction with section 3 the provisions of the Statute relating to limitation of the kind applicable to the present instance may be stated to be as follows:—

Subject to the provisions contained in sections 4 to 25 every application to enforce a judgment decree or order of any Court established by Royal Charter made after the period of 12 years shall be dismissed.

Therefore it is quite obvious that what has to be considered is whether or not the "Application" in the present matter was or was not made after the period of 12 years from the date of the decree.

It was argued by Mr. Chatterjee on the authority of the cases of *Monohar Das* v. *Futteh Chand* (1) and *Amulya Ratan Banerjee* v. *Banku Behari Chatterjee* (2) that it is not sufficient merely that an application should be made but that some Order should be made by the Court. In my view these decisions do not go so far as to lay down the proposition that the Article requires the *making* of an *Order* in execution in order that the rights of the decree-holder should be preserved, except no doubt in cases

(1) (1903) I. L. R. 30 Calc. 979. (2) (1924) 41 C. L. J. 159.

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where a question arises as to whether or not there has been a revivor within the meaning of the third column of Art. 183. To my mind in order to preserve the rights of the decree-holder it is only necessary that he should make an "*Application*" within the prescribed period of 12 years. On any other view of the matter the result would be to cut down the period of limitation actually prescribed by the Statute, *e.g.*, if the making of an application means the actual hearing of a motion by the Court, it follows that the actual period of limitation has been cut down by the length of time required for notice of that motion. There is a decision of the Bombay High Court [*V. V. Kalmar Venkapaiya* v. *Nazerally Tyabally Singaporewalla* (1)] that where an "Application" is to be made to the Court within the period of limitation prescribed by any Act, it is deemed to be made for the purposes of limitation when the notice of motion is first filed in the proper office of the Court. In my opinion that is the right view of the matter, although I am aware that there are other decisions of this Court which suggest the contrary. There is also a decision of the Madras High Court which goes even further in that it is to the effect that an application to the Registrar of the Court is an application within Art. 183 even though the affidavits supporting the application are filed subsequently. The Bombay decision was in the main based upon the well known decision of Mr. Justice Denman *In re Gallop and the Central Queensland Meat Export Co., Ltd.* (2). The effect of Mr. Justice Denman's judgment in that case (reported in 25 Q. B. D. 230) is that if a notice of motion is given before the last day of any limited time then the application is within the time prescribed. That means that wherever there is a limitation of time

(1) (1923) I. L. R. 47 Bom. 764. (2) [1890] 25 Q. B. D. 230.

prescribed within which one party has to move the Court in any matter in order to preserve his rights, he has safeguarded his position if in fact he gives notice of his motion within the time prescribed, and it is not necessary that such motion should actually be heard by the Court or even have appeared on the list of matters to be heard by the Court within the prescribed period. I respectfully agree entirely with the decision of Mr. Justice Denman and with the decisions reported in *Kalmar Venkapaiya* v. *Nazerally Tyabally Singaporewalla* (1) and *S. P. R. S. Kutlayan Chetty* v. *Mananna Elappa Chetty* (2) to which I have already referred. Nevertheless having regard to the decisions of the Calcutta High Court and in particular to the decision of a Bench of this Court consisting of Sir Comer Petheram C. J. and Norris and Pigot JJ. in the case of *Khetter Mohun Sing* v. *Kassy Nath Sett* (3) were I called upon to do so I should feel myself bound to hold that the mere giving of a notice of motion is not of itself sufficient to preserve the rights of the person giving such notice unless at any rate the notice nominated a return day which fell within the period of limitation. I do venture however with all due deference to express the opinion that that decision may not be quite in accordance with the law in England on analogous points. But in any event that decision has I think no real bearing on the facts of the present case, and none of the decisions to which I have been referred actually cover the point which I have here to decide and for this reason in my view all that I have now to decide is whether or not Kali Charan Dhur *made an application* to enforce his decree within 12 years from the date of the decree. I have no doubt that the lodging or filing of the Tabular

(1) (1923) I. L. R. 47 Bom. 764. (2) (1907) 17 Mad. L. J. 215.
(3) (1893) I. L. R. 20 Calc. 899.

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Statement was in itself the making of an application to this Court in the person of the Master who is the officer of this Court designated to deal with matters of this character. In column 10 of the Tabular Statement the decree-holder in terms says: "*I the applicant* "pray" and so on. To my mind it is scarcely arguable otherwise than that the Tabular Statement is in fact a petition to this Court for the setting in motion of the necessary machinery for the execution of the decree. That Tabular Statement on the face of it being within time, the Master gave directions for notice to be given to the other side to show cause why the decree should not be executed. Therefore without attempting to come to any definite decision as to whether, for example, the giving of a notice of motion would be sufficient irrespective of the hearing of the motion to safeguard the rights of the person giving such notice of motion, I decide that the filing of a Tabular Statement in accordance with O. 21, r. 11 is an application to the Court within the meaning of Art. 183 of the Limitation Act read in conjunction with section 3 of that Act. That being so I hold that this application is made within time and must accordingly be dealt with on its merits.

I am supported in the view that I take in this matter by two unreported decisions * of Mr. Justice Pearson one in suit No. 610 of 1915 *Sashi Moni Dasee* v. *Dhira Moni Dasee* and the other is an insolvency case *In re Chaitan Dis Sarana*.

Attorneys for the plaintiffs *K. M. Rakhit & Co.*

Attorneys for the defendants: A. Bose & Co., S. K. Dutt.

SASHI MONI DASEE *v.* DHIRA MONI DASEE.

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Dec. 22

* PEARSON J. The plaintiffs as executors of Kala Chand Dutt obtained a decree in 1906, the final decree on appeal being on the 12th December

1907. They became entitled under the decree and other orders in the suit to certain costs.

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SASHI MONI DASEE v. DHIRA MONI DASEE.

An application had been made for execution on 22nd August, 1907 and a further application was made on the 16th August, 1919. After that no further steps were taken until the present application.

A suit was brought in 1919 in the Court at Alipur by the present applicants against the executors of Kala Chand Dutt, the executors were discharged and on the 30th April, 1924 a decree was passed by which it was declared that they were entitled to the sums payable under the decree and orders in the present suit. They now ask that they may be allowed to proceed with the execution in place of the executors. This is resisted on the ground that the matter is now barred by limitation and that the application of 16th August 1919 was abandoned. I am unable to accept the proposition of abandonment in the circumstances of the case, and I think it is an application which is still pending. There may have been a long delay, but the application has not been disposed of either under the provisions of Ch. XVII, r. 43 of the Rules and Orders of this Court or otherwise. I think the proper order to make is to give liberty to proceed and order attachment to issue. Allowed with costs : Certified for Counsel.

* * INSOLVENCY CASE IN RE CHAITAN DAS SARANA.

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Feb. 14.

PEARSON J. The debtor was adjudicated on his own petition on the 5th July 1923. No steps were taken for a long time and in April 1925 an application was made by the Official Assignee for committal of the insolvent. That matter was pending for about 5 months but was eventually abandoned. Nothing then happened until November last year when the Official Assignee applied under r. 142 (*a*) for an order for annulment of the adjudication. On the 21st November Tularam Lunia, a creditor, entered appearance in the insolvency proceedings, and on the 23rd November his attorney informed the Official Assignee that he proposed to apply for committal of the insolvent. On the 8th December the Registrar in Insolvency made an order annulling the adjudication on the application of the Official Assignee. On the 20th December Tularam applied for a review of that order, and the order of annulment was set aside by the Registrar's order on the 16th January, 1928. The present application is by way of appeal against that order.

The first objection taken is that the appeal is time-barred, the order being dated 16th January and the period for appealing being 20 days under section 101 of the Insolvency Act. I am aware of the principle laid down in the case reported in 20 Calc. 899 that in certain proceedings of this Court the mere giving of a notice of motion is not in itself sufficient to save limitation if the application is not in fact made within the prescribed time but in the present case the notice of

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motion is filed in the office within the time provided and that according to the practice in this Court is taken as sufficient.

The next point is that only a person aggrieved by an order has a *locus standi* under section 8 and it is said that the applicant here has not proved his debt and is consequently not an aggrieved person. It appears to me that the answer to that is that although these persons have not in fact filed their proof of debt the same remark applies to Tularam and would also apply to his *locus standi* in the application before the Registrar. More than that, it is admitted that in the case of Asaram Ramgopal as regards one of the debts and in the case of Madan Chand Pravulal, these two creditors are judgment-creditors and although that may not be binding upon the Official Assignee in insolvency it is nevertheless fairly good *primâ facie* evidence that the debts exist.

It is not altogether clear from the findings of the Registrar what exactly are the grounds on which he has allowed this application. He states that ordinarily he would be reluctant to rescind an order of annulment which would have the effect of giving the go-by to the provisions of r. 142(*a*) but he says there are peculiar circumstances in this case which make it expedient that the estate of the insolvent should be administered in insolvency proceedings, and he says that he is not satisfied that it would be for the benefit of the general body of creditors that the adjudication should be annulled. It is difficult to find out from the materials that were before him what precisely were these peculiar circumstances, apart from the fact that if the adjudication is annulled then it may be difficult for some of the creditors to realize their debt in consequence of the law of limitation though it seems they could still have their cause of action in the Bikanir Courts where the limitation period is longer.

The considerations which impress me upon the arguments that I have heard are first that although the Official Assignee gave his consent to the application that the annulment should be set aside he did not then realise that there was a question whether Tularam was a close relative of the insolvent or not. Upon that fact there is a dispute but the Official Assignee says that had he known what is now alleged on this point he would not have affixed his consent in the manner that he did. Then again if you look at the course of these proceedings it is quite clear that nothing at all has been done by the insolvent for 4 or 5 years since the adjudication order. During the time that the Official Assignee was endeavouring to take penal action against the insolvent with a view to getting him to file his schedule he received no assistance from any creditors, including Tularam, and the matter had to be dropped. There is an allegation that the insolvent is now living within the jurisdiction and carrying on business in Calcutta but the information is couched in very vague and general terms

and no details are given. It is also an important point that in fact no assets have come to light throughout the course of the insolvency. It is not now suggested in any of the affidavits that such assets exist or if they exist where they are or if they are in benami names who is the benamidar. One at any rate of the most important objects of insolvency proceedings is to collect the assets for the benefit of the creditors. If there are no assets then it is useless to proceed with the insolvency. On the whole therefore I think this appeal ought to be allowed and the order of the Registrar set aside. Tularam must pay the costs of the appeal : Certified for Counsel.

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CHAITAN DAS SARANA. *In re.*

O. U. A.

APPELLATE CIVIL.

Before Page and Mallik JJ.

RAM CHANDRA KAPALI

v.

SADAYA CHANDRA RAHA.*

1928

Aug. 13.

Notice—Bengal Village Self-Government Act (Beng. V of 1919), ss. 63 and 64—Right to Sue.

A suit for declaration of title and recovery of possession of land against a Union Board does not come within the provisions of sections 63 and 64 of the Bengal Village Self-Government Act, 1919.

Chunder Sikhur Bundopadhya v. *Obhoy Churn Bagchi* (1) followed.

APPEAL by the plaintiffs Ram Chandra Kapali and others.

This was a suit against the President and members of the Kunda Union Board for declaration of title and possession of certain land which the defendants claimed to be part of a public pathway. The

*Appeal from Appellate Decree, No. 1826 of 1926, against the decision of Hem Chandra Mitra, Subordinate Judge of Tipperah, dated April 24, 1926, confirming a decision of Sarat Chandra Roy Chowdhury, Munsif of Brahmanbaria, dated Aug. 20, 1925.

(1) (1880) I. L. R. 6 Calc. 8.