APPELLATE CIVIL.

Before Page and Graham J.J.

MANMATHA NATH GHOSE

v.

LACHMI DEBI.*

1927

June 14.

Execution of Decree—Limitation for setting aside sale—Civil Procedure Code (Act V of 1908), O. XXI, rr. 22 (2), 90, 92 and s. 47—Limitation Act (IX of 1918), Arts. 166, 181.

Where an illiterate *pardanashin* lady was prevented from making her application in time to set aside the sale of her property under O. XXI, r. 90, of the Code of Civil Procedure by reason of the fraud of the decree-holder :—

Held, that the principles laid down in *Rahimbhoy Habibbhoy* v. *Turner* (1), and *Ram Kinkar Tewari* v. *Sthiti Rampanja* (2), applied to this case and the application was not time-barred.

Where a decree was passed on the 25th February 1916 and an application for leave to issue execution was dismissed for default on the 26th November 1923, and a fresh application for execution was filed on the 10th November 1924, which was the subject matter of the present proceedings :—

Held, that unless the decree-holder could satisfy the Court that within a year prior to the 10th November 1921 an order had been made "against "the party against whom execution was applied for" under O. XXI, r. 22, the application for execution was barred by limitation and that the present proceedings in pursuance of that application were void.

It was not intended by enacting sub-rule (*2*) of order XXI, rule 22 of the Code of Civil Procedure that the mandatory nature of the provisions of sub-rule (*1*) should be abrogated, and in passing the amended rule the

* Appeal from Appellate Order, No. 96 of 1927, against the order of T. Blandford Jameson, Second Additional District Judge, Alipore, dated Jan. 31, 1927, reversing the order of Maulvi Osman Ali, Subordinate Judge, 4th Court, Alipore, dated Oct. 4, 1926.

(1) (1892) L. R. 20 I. A. 1. (2) (1917) 27 C. L. J. 528.

Legislature intended that the *status quo ante* or sub-rule (*1*) should be maintained, except under special circumstances in which "for reasons to be recorded" the Court should think in order that justice should be done that it ought to issue execution without the notice prescribed under sub-rule (*2*).

Shyam Mandal v. *Satinath Banerjee* (1) and *Raja Gopala Ayyar* v. *Ramanujachariar* (2) followed.

As the sale was void by reason of O. XXI, r. 22, it was not necessary to apply to have the sale set aside under s. 47 of the Code.

The residuary article 181 of the Limitation Act applied to such a case and not article 166.

Ram Kinhar Tewari v. *Sthiti Rampanja* (3) and *Raja Gopala Ayyar* v. *Ramanujachariar* (2) followed.

MISCELLANEOUS APPEAL by Manmatha Nath Ghose, the auction-purchaser.

This miscellaneous appeal arose out of an order passed by the learned Additional District Judge of 24-Parganas who set aside a sale under O. XXI, r. 92 of the Code of Civil Procedure and held that the application for execution was barred under section 47 of the Code.

Mr. Sarat Chandra Roy Chowdhury, advocate, *Babu Shanti Kumar Roy Chowdhury* and *Babu Bireswar Chatterjee*, for the appellant.

Mr. Sarat Chandra Bose, advocate, *Babu Haradhan Chatterjee* and *Babu Lal Mohan Mookerjee*, for the respondents.

PAGE J. This is an appeal from an order of the learned Additional District Judge of Alipore reversing an order of the Subordinate Judge of Alipore whereby the learned Additional District Judge set aside a sale under Order XXI, rule 92, and also held that the application for execution was barred under section 47 of the

(1) (1916) I. L. R. 44 Calc. 954. (2) (1923) I. L. R. 47 Mad. 288, 303.
(3) (1917) 27 C. L. J. 528, 531.

1927

MANMATHA NATH GHOSE v. LACHMI DEBI.

PAGE J.

Code of Civil Procedure. As regards the application under Order XXI, rule 90, it appears that the applicant was the widow of the judgment-debtor, and the learned Subordinate Judge held that there was a deliberate and fraudulent suppression of the notices required by law on the part of the decree-holder, and that by reason of such suppression the applicant had sustained substantial injury. Upon these findings the learned Judge set aside the sale under Order XXI, rule 92. The case for the appellant has been presented to us in an exhaustive manner by Mr. Roy Chowdhury and in respect of the order passed under rule 92 the learned advocate has contended that inasmuch as the application was not made within 30 days of the sale it was barred by limitation, and that as there was no express finding that the applicant was prevented from making her application in time by reason of the fraud of the decree-holder: the application under Order XXI, rule 90 was barred. Now, in her application the applicant not only set out that there had been deliberate suppression of all necessary processes, but added that she was an illiterate *pardanashin* lady, and that she knew nothing about the proceedings until she was informed by her father at a date after the time had expired within which her application under Order XXI, rule 90 should have been made. In my opinion, having regard to the ruling in *Rahimbhoy Hubibbhoy* v. *Turner* (1) and *Ram Kinkar Tewari* v. *Sthiti Rampanja* (2) this contention raised on behalf of the appellant must fail. In those circumstances the order in so far as it was based upon Order XXI, rule 92 is confirmed.

In her petition the applicant also claimed that the judgment-creditor's application for leave to issue execution was barred by limitation. It was alleged

(1) (1892) L. R. 20 I. A. 1. (2) (1917) 27 C. L. J. 528.

by the applicant that the application for leave to issue execution was made long after the decree in the suit had become obsolete by the lapse of time. The learned Subordinate Judge appears to have thought that this allegation on the part of the petitioner amounted to an allegation that the claim upon which the decree was passed was barred by limitation, and he stated that in execution proceedings he could not go into that matter. Of course, in so holding he was taking the right view. But that was not the allegation that was made; which was that the application for leave to execute the decree was made so long after the decree had been passed that it was barred by limitation. In the memorandum of appeal to the learned District Judge the applicant based her second contention both upon the general ground that the application for leave to issue execution had been made long after the execution had become barred and also upon the more narrow ground that the application for execution was not made within a year from the date of the decree nor "within a year from the date of the "last order against the party, (that is the applicant) "against whom execution was applied for", and inasmuch as no notice was served upon the applicant as required by Order XXI, rule 22, the application for execution was void and of no effect. The learned District Judge without coming to a definite conclusion upon the wider ground upon which it was contended that the application for execution was barred held that the execution was illegal upon the narrower ground upon which the applicant relied. In my opinion, in so holding the learned Additional District Judge rightly appraised the legal position of the parties. The decree was passed on the 25th February 1916 and an application for leave to issue execution was dismissed for default on the 26th

1927

MANMATHA NATH GHOSE v. LACHMI DEBI.

PAGE J.

November 1923. The application for leave to issue execution upon which the present proceedings are founded was filed on the 10th November 1924. Therefore, unless the decree-holder could satisfy the Court that within a year prior to 10th November 1924 an order had been made "against the party against whom "execution was applied for" under Order XXI, rule 22 the application for execution was barred by limitation. Mr. Roy Chowdhury referred to three orders one of which was made on the 26th November 1923 and was to the following effect. "Notice returned "after service. Decree-holder takes no further steps. "So the case is dismissed." The learned advocate contended that that order was an order against the applicant under Order XXI, rule 22. All I need say in order to refute that contention is to set out the order itself. It cannot reasonably be suggested that the statement "notice returned after service" is an order against anybody. It is even more unreasonable to suggest that the words "Decree-holder takes no "further steps so the case is dismissed" are an order against the judgment-debtor within the meaning of Order XXI, rule 22.

Two later orders were referred to. But these orders which relate solely to an application for review of an order dismissing the execution case did not purport in any sense to be orders directed against the judgment-debtor or the applicant. What is the effect of process in execution being issued without the notice which must be served under Order XXI rule 22? Before the passing of the Code of Civil Procedure in 1908 it had been held by the Privy Council that the effect of issuing processes without complying with the provisions of Order XXI, rule 22 was that the execution proceedings were void. The decision in *Raghu Nath Das* v. *Sundar Das*

Khetri (1), was according to reason and good sense, if I may be permitted to say so, and that decision was that after a year had elapsed from the date when the decree had been passed it was only fair to the judgment-debtor that he should be given notice of the application for leave to execute a decree in order that he might have an opportunity of showing cause why the process should not be issued against him; otherwise, it might happen that a dishonest decree-holder would be able to snap an order granting leave to execute the decree from the Court and attach the debtor's property without the debtor having an opportunity of questioning the regularity or the fairness of the execution. In 1908 sub-rule (*2*) of rule 22, was added, and it was strenuously contended by Mr. Roy Chowdhury that the effect of that proviso was fundamentally to alter the whole complexion of Order XXI, rule 22, because, as he urged, if once discretion is given to the Court to issue or not to issue execution the failure to comply with the machinery of sub-rule (*2*) is a mere irregularity. Is that a sound argument? In my opinion a perusal of sub-rule (*2*) shows that the intention of the Legislature was to maintain the necessity of a notice under sub-rule (*1*) and that the legal position of the parties concerned should remain unchanged except in cases where the terms of sub-rule (*2*) are complied with. The object of passing sub-rule (*2*) apparently was that there might be rare cases where insistence upon a strict compliance with sub-rule (*1*) might work hardship. It might be imperative in order that justice should be done that execution should be levied forthwith. It would not be difficult to enumerate instances in which the necessity for immediate execution would arise in order that justice should be done. It was to meet

(1) (1914) I. L. R. 42 Calc. 72.

1927

MANMATHA NATH GHOSE v. LACHMI DEBI

PAGE J.

such exceptional cases that the Legislature passed sub-rule (*2*). But in my opinion, it was not intended by enacting sub-rule (*2*) that the mandatory nature of the provisions of sub-rule (*1*) should be abrogated, and as we read, the amended rule the legislature intended that the *status quo ante* of sub-rule (*1*) should be maintained except under special circumstances in which "for reasons to be recorded" the Court should think in order that justice should be done that it ought to issue execution without notice under sub-rule (*2*). That, in my opinion, is the true construction of rule 22 apart from authority. But this construction is in consonance with the interpretation of rule 22 as amended by the Calcutta High Court in *Shyam Mandal* v. *Satinath Banerjee* (1), and a Full Bench of the Madras High Court in *Raja Gopala Ayyar* v. *Ramanujachariar* (2).

The result is that the execution proceedings founded upon the application of the 10th of November 1924 are void. The sale took place on the 13th July 1925 and the petition upon which the order under review was founded was filed on the 4th of December 1925. The learned avocate for the appellant strenuously urged that the petition was out of time because it was an application to set aside a sale under section 47 of the Code, and, therefore, must be brought within thirty days of the sale under Article 166 of the Limitation Act. The fallacy underlying that contention, I think, is that although it is an application under section 47, and, therefore, under the Code it is not an application to set aside a sale as is the other branch of the application under Order XXI, rule 90 for the sale being void need not have been set aside at all, and the order as passed was, in substance, merely a declaration

(1) (1916) I. L. R. 44 Calc. 954. (2) (1923) I. L. R. 47 Mad. 288.

that the sale was null and of no effect. For an application of that nature there is no special provision among the articles in the first schedule of the Limitation Act. It needs must come under the residuary article 181 and if article 181 is applicable the present application was within time. That appears to me to be clear on principle, and it is also concluded by authority. See *Ram Kinkar Tewari* v. *Sthiti Ram Panja* (1) and *Raja Gopala Ayyar* v. *Ramanujachariar* (2).

The result is that the order appealed from is varied by striking out the words "on the above conditions". In other respects the appeal is dismissed with costs.

This order is passed without prejudice to any right which the parties may possess *inter se* in respect of the premises that are the subject-matter of the present proceedings.

GRAHAM J. I agree.

Appeal dismissed.

B. M. S.

(1) (1917) 27 C. L. J. 528, 531. (2) (1923) I. L. R. 47 Mad. 288, 303.