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APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Kindersley.

PRABHACARAROW, PETITIONER, *v.* POTANNAH, COUNTER-PETITIONER.*

1878. July 29.

Execution—Limitation—Article 167, *para.* 5, *Act IX of* 1871.

Application for execution of a decree was made on the 10th November 1869, and on the 27th November 1869 notice issued under Section 216 of the Civil Procedure Code. Again on the 4th February 1873 application was made for execution and notice was issued on the 19th February 1873 under Section 216. A subsequent application for execution was made on the 31st August 1874 and the order for notice to issue, under Section 216, was made on the same day. The question raised in appeal against the order to issue execution was whether the plaintiff's right to execution was barred and had been so when the application, dated 31st August 1874, for execution was made.

Held on appeal by the High Court (Kernan and Kindersley, JJ.) that as the application for execution on the 4th February 1873, being more than 3 years after the date of issuing the last prior notice under Section 216, viz., 27th November 1869, was late, under Article 167, para. 5, Act IX of 1871, execution was barred by limitation at and before the date of that application, and that this bar was not removed by the circumstance that the judgment debtor had allowed the service of the notice on him in February 1873 to pass unchallenged: *Raja Chilicany* v. *Rajavulu Naidu* (1) distinguished. *Held* also following *Chunder Coomar Roy* v. *Bhogobutty Prosonno Roy* (2) that "applications to enforce a decree" in paragraph 4 of article 167, Act IX of 1871, mean "applications under Section 212 or otherwise by which proceedings in execution are *commenced* and not applications of an incidental kind made during the pendency of such proceedings."

APPEAL against the order of the District Judge of Vizagapatam, passed on Miscellaneous Petition No. 416 of 1875.

T. Rama Rau for the Appellant.

C. Ramachandra Rau Saib for the Respondent.

* Civil Miscellaneous Appeal No. 50 of 1878, against the order of E. C. G. Thomas, District Judge of Vizagapatam, dated 18th January 1878.

(1) 5 Mad. H.C.R., 100.

(2) I.L.R., 3 Calc., 285.

1878.

RABHA-CARA ROW v. POTANNAH.

The facts and arguments fully appear in the following

JUDGMENT:—This is an appeal by the defendant in Suit No. 35 of 1863 in the Vizagapatam Court, against an order of the District Judge of Vizagapatam, dated the 18th of January 1878, whereby he awarded execution on foot of the decree, the exact date of which does not appear, but which in the year 1866 must have been in existence.

The dates are as follows:—

1869, 10th November.—Application for execution, Section 212, and for notices to show cause under Section 216, Procedure Code.

1869, 27th November.—Notice issued under Section 216.

1870, 19th May.—Warrant to attach issued.

1871, 17th February.—Order to strike off file, the warrant.

1873, 4th February.—Application for execution and notice, Section 216.

1873, 8th February.—Application for execution and order. Order for notice, Section 216, to issue.

1873, 19th February.—Notice issued.

1873, 11th March.—Notice served.

1873, 23rd August.—Warrant of attachment issued.

1873, 29th November.—Order to strike warrant off file, batta not paid.

1874, 31st August.—Application for execution.

1874, 31st August.—Order for notice to issue, Section 216.

1875, 28th September.—Petition shewing cause against issuing execution.

1878, 18th January.—Order appealed from, to issue execution.

The question is whether the plaintiff's right to execution is barred by limitation, and was so when the application, 31st August 1874, for execution was made.

In the Court below the Judge decided that limitation did not apply, inasmuch as, on the 4th February 1873, application was made for execution, and on the 8th February 1873 an order was made to issue a notice under Section 216, and on the 19th of February 1873 such notice was issued. A question was made whether the application of 4th February and the notice issued on the 19th of February were *bonâ fide* proceedings, *i.e.*, intended to

enforce the decree at the time. We think the Judge was right, acting on *Kondaraju Venkata Subbaiya* v. *Rámakrishnamma* (1), in holding that his decision could not be guided by intention, but by the dates. (2)

The Judge appears to have decided that the right to enforce the decree was not barred by limitation on the 4th or 19th of February 1873, and that the order of the 4th February and the notice of the 19th were issued within the period of limitation.

It was contended before us and apparently in the Court below also, that the right to enforce the decree was barred, under Article 167, Act IX of 1871, at the end of three years from the 27th of November 1869, and before the application of the 4th and notice of the 19th of February 1873 were made and issued respectively.

The plaintiff contended that defendant was precluded from going into that question, as he was served with the notice on the 19th of February, and did not shew cause or appeal, and cited *Rája Chilicany* v. *Ragavulu Naidu* (3). The principle of that case is that if a party is served with notice and does not appear and oppose an order for execution, he cannot after that object to the order on the ground that it was out of time. But at the date of that case the Court was not bound to raise the question of the statute, as it is now, under Section 4, Act IX of 1871. Plaintiff further argued that Act IX of 1871 did not apply to this suit instituted before the Act, the decree being in 1866, and referred to Section 2, and therefore that the Act did not apply to the application for execution in the suit; and that as the defendant, on the application in 1874, did not plead the statute, the Judge could not have raised it as a bar.

This contention is wrong, for it has been held in *Krishna Chetti* v. *Ramu Chetti* (4) and other cases, that application for *execution* in suits prior to the Act are within the Act. *Eshan Chunder Bose* v. *Prannath Nag* (5): *Jiwan Singh* v. *Sarnam Singh* (6): *Unnoda Persad Roy* v. *Koorpan Ally* (2).

(1) 4 Mad. H.C.R., 75.

(2) *See* I.L.R., 3 Calc., 518, *Unnoda Persad Roy* v. *Sheikh Koorpan Ally*, and cases there referred to.

(3) 5 Mad. H.C.R., 100.

(4) 8 Mad. H.C.R., 99.

(5) 14 Ben. L.R., 143.

(6) I.L.R., 1 All., 97.

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The important dates under Article 167 of Act IX of 1871 are, as regards this case which is governed by para. 5 of that article—

First.—1869, 27th November.

Second.—1873, 4th February.

It is clear from these dates that more than three years elapsed from the date of the notice issued, 27th November 1869, and the application for the execution, 4th February 1873.

It was, however, suggested in argument that the issuing of the warrant (1870, 17th February) was an application to enforce or keep in force the decree, and that the period of three years commenced *anew* from that date, and that, as the application of the 4th February and order for notice of the 8th February 1873 were applications to enforce or keep in force the decree within three years from the 19th February 1870, the order and notice of February 1873 were within time. The Full Bench in Calcutta, in *Chunder Coomar Roy* v. *Bhogobutty Prosonno Roy*, (1) decided that "applications to enforce a decree" in paragraph 4 of Article 167, Act IX of 1871, mean "applications under Section 212 or otherwise by which proceedings in execution are *commenced*, and not applications of an incidental kind made during the pendency of such proceedings." There the incidental proceedings alluded to were the issuing of an attachment, which was returned with certificate of execution, and an order of the Court directing the judgment creditor to deposit costs of the proclamation. In that decision we agree.

The application to the Court for warrant of attachment is an application to enforce the decree, in a certain sense, *i.e.*, as a proceeding towards and in the course of enforcing the decree, but it is not the initiatory application under Section 212. The principle of that case applies to the present case, though it is one governed by paragraph 5 of Article 167 and not paragraph 4.

In order to arrive at a correct conclusion as to the construction of the Article 167, it is necessary to recollect that that article is a substitute for Section 20 of Act XIV of 1859, the general terms used in which had led to much uncertainty and litigation. The Act of 1871, in order to avoid such uncertainty, manifestly aimed at referring to well understood and defined periods from which time should run. If the construction contended for by the plaintiff was

(1) I.L.R., 3 Calc., 235.

correct, any application in reference to execution, though after notice issued under Section 216, should have the effect of creating a new starting-point; but this would be contrary to the very terms of paragraph 5, Article 167.

We hold that the application for execution on the 4th of February 1873 being more than 3 years after the date of issuing the last prior notice under Section 216, viz., 27th November 1869, was late under Article 167, page 5, Act IX of 1871, and that execution was therefore barred by limitation at and before the date of that application.

We accordingly reverse the decision of the District Judge, and dismiss the application for execution with costs.

The ruling in this case has been confirmed in *Unnoda Persad Roy* v. *Sheikh Koorpan Ally*, I.L.R., 3 Calc., 518.

APPELLATE CRIMINAL.

Before Mr. Justice Innes and Mr. Justice Forbes.

THE EMPRESS *v.* RAMANJIYYA (PRISONER) APPELLANT.* 1878. Sept. 18.

Criminal Procedure Code, section 122—*Confession—Magistrate—Evidence—In Act I of* 1868, *section* 1, *the word "include" is enumerative.*

Where a Magistrate in taking the confession of a prisoner under Section 122 of the Criminal Procedure Code omits to take it in writing, with the formalities prescribed by Section 346 of that Code, such confession is not absolutely inadmissible in evidence. Evidence may be taken to show that the prisoner duly made the statement recorded.

Reg. v. *Shivya and others* (1) dissented from.

A Village Munsif in the Madras Presidency is a "Magistrate" within the meaning of Section 26 of the Indian Evidence Act, 1872.

The word 'include' in Clause 13 and other clauses of Section 1 of Act I of 1868 is intended to be enumerative, not exhaustive.

IN this case the prisoner was charged under Section 411 of the Penal Code, with receiving stolen property. At the trial the Village Munsif stated that the prisoner had confessed to him that he (prisoner) had received the stolen property knowing it to have been stolen. The prisoner alleged that the property (an ingot of gold) was his, but gave no further account of it. A full

* Criminal Appeal No. 284 of 1878, against the sentence of J. G. Horsfall, Session Judge of the Kistna Division, in Case No. 19 of the Calendar for 1878.

(1) I.L.R., 1 Bom., 219.