

APPELLATE CIVIL

Before Mr. Justice Morris and Mr. Justice Prinsep.

1880
April 29.

SHUMBHOONATH SHAHA (DECREE-HOLDER) v. GURUCHURN
LAHIRI (JUDGMENT-DEBTOR).*

Limitation—Application for Execution of Decree already barred—Limitation Acts (IX of 1871), sched. ii, art. 167; (XV of 1877), ss. 2, 3—Civil Procedure Code (Act X of 1877), s. 280.

No process can legally issue upon an application for the execution of a decree already barred by limitation, nor can an application made under such circumstances be a valid application, or one which, under the Act, would give the execution-creditor a fresh period of limitation. Unless it can be shown that such was the express intention of the legislature, none of the provisions of the present Limitation Act (XV of 1877) can be made applicable to any matter which, at the time when such Limitation Act came into force, had already become barred by the operation of the prior Limitation Act.

In this case an application was made for the execution of a decree on the 27th March 1873, and again on the 31st July 1876 a second application was made for the execution of the same decree. A third application by the judgment-creditor towards the realization of his decree followed on the 25th February 1878. The judgment-debtor contended that, at the time of making the application of the 31st July 1876, such application was barred under art. 167, sched. ii. of the Limitation Act (IX of 1871) then in force, and that the present application could not, therefore, be entertained by the Court. The Court of first instance was of opinion that neither a petition, which accompanied the payment of certain service-fees by the execution-creditor on the 20th of September 1873 towards the publishing of the sale-proclamation in respect of lands attached under the decree, nor the filing of a petition on the 6th November of the same year opposing the claim of third parties to such lands, could be

* Appeal from Order No. 129 of 1879, against the order of J. Tweedie, Esq., Additional Judge of Rajshahye, dated the 29th of March 1879, affirming the order of Baboo Gonesh Chunder Chatterjee, Subordinate Judge of that district, dated the 14th of September 1878.

looked upon in any other light than applications of an incidental kind made during the pendency of execution-proceedings; and, therefore, according to *Chunder Coomar Roy v. Bhogobutty Prosonno Roy* (1), could not be considered sufficient to create a new starting point for a further period of limitation; that the decree, therefore, was barred at the time of the application of the 31st July 1876; and that such application, although admitted by the Court, could not revive a decree once dead, the effect of the law of limitation being not only to bar the remedy, but destroy the right under a decree. For these reasons, the Court rejected the application for execution filed on the 25th of February 1878.

The lower Appellate Court upheld the judgment of the Court below, and dismissed the appeal.

The execution-creditor appealed to the High Court.

Baboo Rash Behari Ghose for the appellant.—Section 2 of Act XV of 1877, the Limitation Act now in force, declares, that nothing contained in its own provisions, nor in Act IX of 1871, shall be deemed to affect any title acquired, or to revive any *right to sue* barred under the last mentioned Act. The section, however, is silent as to the right to revive applications (as opposed to suits) barred under Act IX of 1871, a fact which points to the conclusion that the legislature intended that the law applicable to barred applications should not be the same as that laid down in s. 2 of the present Limitation Act in respect of *rights to sue* barred under the prior Limitation Act. A suit and an application must not be confounded the one with the other. The distinction is drawn in express terms in s. 3 of the present Limitation Act; an additional reason for believing that the word “application” was intentionally omitted from the provisions of s. 2. The Court below was not entitled to consider whether the original decree had already become barred on the 31st July 1876, the application on that date having been accepted and acted upon by the Court before whom it was presented. At any rate the payment of the *tallabana* and the petition against the intervenors were themselves sufficient to give a new starting point to the period of limitation.

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

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SHUMBHOO-
NATH SHAHA
v.
GURUCHURN
LAHRI.

Baboo *Ishan Chunder Chuckerbutty* for the respondent.

The judgment of the Court (MORRIS and PRINSEP, JJ.) was delivered by r.

MORRIS, J.—In this case application to execute a decree was made on 25th February 1878. The lower Court has rejected it, on the ground that, although the next preceding application for execution was made on the 31st July 1876, yet, under Act IX of 1871, sched. ii, art. 167, which was then in force, execution was on that date barred, owing to the application immediately before it having been made on the 27th March 1873, or more than three years previously. The decree which is sought to be executed was, undoubtedly, dead on the 31st July 1876, and no proceedings taken on the application of that date to execute it could revive it. The application could have been opposed on the ground of limitation, and, consequently, no process of execution could have lawfully issued under it. This principle is clearly laid down in the case of *Bissessur Mullick v. Dhiraj Mahtab Chand* (1), and in subsequent rulings of this Court (2). But the objection now taken in appeal is, that, under s. 2, Act XV of 1877, execution can be allowed on the application of 25th February 1878.

It is contended that, as s. 2 of the Limitation Act (XV of 1877) declares, that nothing in that Act shall be deemed to affect any title acquired, or to revive any right to sue barred under Act IX of 1871, applications to execute decrees which do not come within those terms, and which, under Act IX of 1871, are incapable of execution, became revived, the more so as, by s. 3 of Act XV of 1877, in the definition of the term "suit," an application is expressly distinguished from a suit.

It appears to us that it was not the intention of the legislature, by the enactment of Act XV of 1877, to revive decrees which were dead under previous laws of limitation. That this is so may be gathered from s. 230 of the contemporaneous Civil

(1) B. L. R., Sup. Vol., 967; S. C., 518; and *Mingol Prashad Dickit v. Shamu Kant Lakory*, I. L. R., 4 Calc., 10 W. R., F. B., 8.

(2) See *Unnoda Pershad Roy v. Sheikh Koorban Ally*, I. L. R., 3 Calc., 708.—(Rep. note).

Procedure Act, X, of 1877, which limits and cuts down the period for executing decrees then capable of execution.

In our opinion Act XV of 1877 cannot be applied to any thing which, at the time of its becoming law, was barred by the law of limitation which it replaced, unless it can be shown that such was the express intention of the legislature. Such an inference would be opposed to the principles of a law of limitation.

We may observe also, that there is no valid proceeding in the nature of an application "to take some step in aid of execution of the decree" within three years of which the application of the 25th February 1878 was made, consequently the decree-holder cannot take advantage of the alteration in the law regulating the mode of calculation of the period of limitation. We do not consider the application of the 31st July 1876 to be a valid application so as to give the decree-holder a fresh starting point.

We, therefore, dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Pontifex and Mr. Justice McDonell.

NURSING DOYAL (DECREE-HOLDER) v. HURRYHUR SAHA (JUDGMENT-DEBTOR).*

1880
May 12.

Limitation Acts (IX of 1871), sched. ii, art. 167; XV of 1877, s. 2, sched. ii, art. 179—Application—Bar of Remedy—Non-extinguishment of Right.

The Limitation Acts (IX of 1871 and XV of 1877) merely bar the remedy, but do not extinguish the debt.

The words in s. 2 of Act XV of 1877—"nothing herein shall be deemed to revive any right to sue"—should be used in their widest signification, and will include any application invoking the aid of the Court for the purpose of satisfying a demand.

Where, therefore, a judgment-creditor sought, on the 25th September 1877, to execute a decree passed on the 27th May 1874 (which decree, at the time

* Appeal from an Order, No. 279 of 1879, of the Officiating Judge of Gya, dated 11th September 1879.