the Deputy Magistrate of the proviso to s. 147. Whether that proviso really has any application to a case of this kind is a question of considerable difficulty, and one as to which we are not disposed to express any opinion at present. It is sufficient to say that in our judgment the order made by the Deputy Magistrate is not supported by any finding which he has arrived at, and that this order must therefore be set aside. Any costs that may have been paid under the orders of the Court will be refunded.

Order set aside.

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HARI MOHUN THAKUR v. KISSEN SUNDARI.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Macpherson.

BECHARAM DUTTA (JUDGMENT-DEBTOR) APPELLANT *v.* ABDUL WAHED AND OTHERS (DECREE-HOLDERS) RESPONDENTS.*

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Execution of Decree—Limitation—Application for Execution by what limitation governed—Act XV of 1877—Act XIV of 1859, s. 20—Proceeding to enforce judgment.

Act XV of 1877 operates from the date on which it came into force as regards all applications made under it.

Behary Lall v. *Goberdhun Lall* (1) dissented from.

An application for execution was made on the 2nd of March 1872. In the execution proceedings certain properties were attached and a sale proclamation was issued. A claim to a portion of the properties was then preferred by third parties, and allowed on the 17th of June 1872. The decree-holder failed to take necessary measures to bring the remainder of the property to sale, and the case was struck off on the 4th of July 1872. A subsequent application for execution was made on the 14th of June 1875.

Held, that the subsequent application was not barred by the provisions of s. 20, Act XIV of 1859.

Bonâ fide proceedings in resistance of a claim to attach properties are proceedings to enforce a decree within the meaning of s. 20 of Act XIV of 1859.

IN this case Abdul Wahed and others were the holders of a decree obtained, on the 10th January 1872, on a bond against one Becharam Dutta. The first application for execution of this decree was made on the 2nd March 1872, the second on the 14th June

* Appeal from Appellate Order No. 40 of 1884, against the order of J. F. Bradbury, Esq., Judge of Backergunge, dated 22nd of December 1883, affirming the order of Baboo Chandra Nath Ghose, Third Sudder Munsiff of Barrisal, dated the 17th of September 1883.

(1) I. L. R., 9 Calc., 446.

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1875, the third on the 11th June 1878, the fourth on the 8th June 1881, and the fifth and last on the 10th March 1883. The judgment-debtor, on this last application, objected that execution was barred by limitation, inasmuch as the application of the 14th June 1875 was not made within three years from the date of the application made on the 2nd March 1872. The Munsiff decided against him, and the judgment-debtor appealed to the District Judge.

The judgment of the District Judge was as follows :—

"In his application of the 14th August 1883 to the Munsiff, the appellant asserted that the decree had been pronounced *ex parte*, and that execution had not been sued out within three years of the date thereof. Both these allegations being admittedly false he changed his ground at the hearing and urged that the decree could not be executed inasmuch as the second application for execution was not presented within three years of the date of the first. Such was unquestionably the fact, but it cannot avail the appellant. The Judge who entertained the second application for execution had jurisdiction to determine whether it was or was not within time. He decided that it was. According to *Mungul Proshad Dichit* v. *Grija Kant Lahiri* (1) the application of 1875 should have been held to be governed by Act XIV of 1859, but inasmuch as, till the publication of the Privy Council decision above cited, all the High Courts in India invariably held that the law of limitation in force at the time of the presentation of an application for execution governed such application, I do not suppose the provisions of s. 20, Act XIV of 1859 were considered when the application of the 14th June 1875 was admitted. Admitted however it was, and a notice, under Act VIII of 1859, s. 216, issued thereupon, but no further proceedings were taken. Upon the first application immoveable property had been attached and notified for sale. To a portion of the property attached a claim was preferred, and the claim was allowed on the 17th June 1872. The sale of all the property attached seems to have been unnecessarily stayed on account of the claim preferred to a fraction only thereof, and the first application finally proved infructuous. Upon these facts I think the Munsiff would in June 1875 have been justified in considering that the requirements of s. 20, Act XIV of 1859, had been complied with; even however if such a finding cannot be supported, and should be deemed erroneous, it became final long ago. Not only the Court which entertained the application of the 14th June 1875, but those Munsiffs who received the applications of the 11th June 1878 and the 8th June 1881 pronounced by implication that the application of the 14th June 1875 was in time, for unless it had been within time the subsequent applications were clearly barred by

(1) I. L. R., 8 Calc., 51.

limitation. On the application of the 11th June 1878, two attachments issued, but without result, and the proceedings thereon terminated infructuously on the 12th December 1878. The next application was equally infructuous. A notice issued under s. 248 of the Civil Procedure Code and nothing more was done. In this instance, as in every other where proceedings in execution have been protracted, remissness on the decree-holder's part may be safely assumed. The respondents might unquestionably have prosecuted their decree with much more diligence than they exhibited, but in applying in 1883 the provisions of s. 20 of Act XIV of 1859, if they be applicable, it should I think be recollected that till the publication of *Mungul Proshad Dichit* v. *Grija Kant Lahiri* (1) parties, Courts and pleaders were alike under the impression that provided application succeeded application within three years that sufficed to keep the decree alive. It would be unjust therefore to impute to the decree-holders bad faith, because they did not do more than what Act IX of 1871, the law which they and their advisers conceived to govern the execution of their decree, required. Section 20 of Act XIV of 1859, if it applies, does not I consider bar execution of their decree. It is true indeed that even on the hypothesis of the applicability of Act IX of 1871 the petition for execution of the 14th June 1875 was out of time, but *Mungul Proshad Dichit* v. *Grija Kant Lahiri* (1), I apprehend, prohibits our now questioning its admissibility. The admission thereof, by a Court possessing jurisdiction over it, having not been set aside, is final, and has been since confirmed by implication whenever a subsequent application for execution has been entertained and acted upon. The appellant has changed his ground more than once. I have clearly stated what his contention before the Munsiff was. In appeal he has argued further that the application of 1878 likewise not having been prosecuted in good faith was insufficient to save limitation.

"For the reasons recorded above, I do not consider that any of the applications for execution were barred by Act XIV of 1859, and *Mungul Proshad Dichit* v. *Grija Kant Lahiri* (1) prevents our calling in question the admissibility of any but the last. On the last, the question might have arisen whether that of 1881 had been prosecuted with sufficient diligence to save limitation; but this only on the assumption that Act XIV of 1859 governs the execution of the respondents' decree. The Munsiff has acted on that hypothesis, and he may be right in holding that the repeal of Act IX of 1871 by Act XV of 1877 has made no difference. In *Behary Lall* v. *Goberdhun Lall* (2) MITTER and NORRIS, JJ., expressed the view adopted by the Munsiff, but in a later case of *Radha Prosad Singh* v. *Sundur Lall* (3) MITTER and FIELD, JJ., refused to determine the question whether after the passing of

(1) I. L. R., 8 Calc., 51.
(2) I. L. R., 9 Calc., 446.
(3) I. L. R., 9 Calc., 644.

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Act XV of 1877 Act XIV of 1859 could be deemed to still govern the execution of any decree whatsoever. Under these circumstances I think the Munsiff wisely decided in favour of the right to proceed, and I affirm his decision with costs."

From this decision the judgment-debtor appealed to the High Court.

Baboo *Chunder Madhub Ghose* and Baboo *Jogesh Chunder Roy* for the appellant.

Baboo *Rash Behari Ghose* for the respondent.

The judgment of the Court (PRINSEP and MACPHERSON, JJ.) was as follows:—

This is an appeal from an order directing the execution of a decree passed on the 10th of January 1872. The question is whether the execution is barred by the law of limitation.

The lower Court assumed that the whole proceedings, up to and inclusive of the last application for execution, are governed by Act XIV of 1859, but this seems to us to be an incorrect assumption. The Judicial Committee of the Privy Council has held in *Mungul Proshad Dichit* v. *Grija Kant Lahiri*, that the provisions of the Act IX of 1871 do not apply to any suit, or to any application in a suit, instituted before the 1st of April 1873, and that an application for the execution of a decree is an application in the suit in which the decree was obtained. The effect of this decision is, that so long as Act IX of 1871 was in force, Act XIV of 1859 governs all applications for the execution of a decree passed in any suit instituted before the 1st of April 1873. Act IX of 1871, which repealed Act XIV of 1859, was, however, wholly repealed by Act XV of 1877, which came into force on the 1st of October 1877. The latter Act contains no saving clause similar to that in s. 1 of Act IX of 1871, and which made the Act of 1871 inapplicable to any suit instituted before the 1st of April 1873.

Consequently, in our opinion, Act XV of 1877 operates from the date on which it came into force as regards all applications made under it. In the case of *Behary Lall* v. *Goberdhun Lall*

MITTER and NORRIS, JJ., no doubt held that the provisions of Act XV of 1877 did not apply to an application for the execution of a decree obtained before that Act came into force.

In a subsequent case reported in I. L. R. 9 Calc., MITTER, J., seems to have doubted the correctness of his decision in *Behary Lall* v. *Goberdhun Lall*, and we learn that the same learned Judges have since reconsidered the matter and have come to a different conclusion. There is therefore no authority opposed to the view which we entertain.

In the present case applications to execute the decree were made on the following dates:—

2nd March	...	...	... 1872
14th June	...	...	... 1875
11th June	...	...	... 1878
8th June	...	...	... 1881
10th March	...	...	... 1883

The last three being governed by the present Limitation Act (XV of 1877) are within time under clause 4, art. 179 of schedule II. It is contended, however, that as the application of the 14th June 1875 was, when made, barred by limitation, the decree is dead and cannot be revived by any subsequent proceedings. It is unnecessary to consider whether the circumstances in this case and in the case of *Mungul Proshad Dichit* v. *Grija Kant Lahiri* are similar as regards the action of the Court in connection with the subsequent applications, because we think that both Courts have rightly held that the application of the 14th June 1875 was not barred under the provisions of s. 20 of Act XIV of 1859. In the execution proceedings of 1872 property was attached and a sale proclamation was issued; a claim to a portion of the properties was then preferred by third parties, and allowed on the 17th June 1872. The decree-holder failed to take necessary measures to bring the remainder of the property to sale, and the case was struck off on the 4th of July 1872. The application of the 14th June 1875 was therefore within time, if the period of three years is calculated from the date when the claim-case was disposed of. We think it can be so calculated.

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Both Courts have found that the plaintiff was, up to the 17th of June, earnestly resisting the claim which, till disposed of, was a bar to further proceedings.

Bonâ fide proceedings in resistance of a claim to attach properties are, we think, proceedings, within the meaning of s. 20, Act XIV of 1859, taken to enforce the decree. We therefore dismiss the appeal with costs.

Appeal dismissed.