balance properly passes to the heirs. This view certainly has much to commend it on grounds of justice. But if it be correct, I do not see how we can give any effect to it in this suit. If these rents are liable to all or any class of the debts of Juggodumba, either in relief or in addition to the general assets of her estate, they may be made available for that purpose by a suit brought by the proper parties, that is to say, by the heirs of Juggodumba, who are charged with the administration of that estate and the payment of those debts.

It was stated during the argument and, I think, admitted, that a decree has been made for the administration of Juggodumba's estate. If so, and if these rents are applicable to the payment of her debts or any other, they must, I think, be brought under the control of the Court in the administration suit.

And the Court can in that suit direct any such supplemental or ancellary proceedings as may be necessary for the purpose.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice McDonell, Mr. Justice Prinsep, and Mr. Justice Wilson.

AMBICA PERSHAD SINGH AND OTHERS (JUDGMENT-DEBTORS) *v.* SURDHARI LAL (DECREE-HOLDER.)*

1884. *June* 5.

Limitation Act XV of 1877, *Art.* 179 *(cl.* 4) *Sch. II—Step in aid of execution —Application for proclamation of sale.*

An application to a Court to issue a proclamation of sale in respect of property already attached in execution of a decree, is an application, within the meaning of clause 4 of Art. 179, Sch. II of Act XV of 1877, "to take some step in aid of execution of the decree."

Chunder Coomar Roy v. *Bhogobatti Prosonno Roy* (1) explained.

THIS was a reference made on the 7th February 1884 to a Full Bench by Tottenham and Norris, JJ. The order of reference was as follows:

This is an appeal against the order of the Subordinate Judge of Bhaugulpur by which he overruled the judgment-debtors' plea that execution of a decree against them, dated the 4th of May 1877, was barred by limitation.

* Full Bench Reference on Miscellaneous Appeal No. 283 of 1883 from a decision of the Subordinate Judge of Bhaugulpur, dated the 9th June 1883.

(1) I. L. R., 3 Calc., 235; 1 C. L. R. 23.

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The application for execution was made on the 11th April 1883, a previous one having been made in due form on the 10th June 1879.

The lower Court held that limitation was saved by an application made on the 1st of May 1880, for the issue of a proclamation of sale in respect of certain property then under attachment in pursuance of the formal application of the 10th of June 1879.

The judgment-debtors contended that the attachment was no longer subsisting, and that, therefore, the application of 1st May 1880 was not one in accordance with law.

The lower Court erroneously supposed that the case was governed by the repealed Limitation Act IX of 1871, because the decree was made before that Act was repealed. But it is quite clear to us that Act XV of 1877, which came into force and repealed the former Act on and from the 1st of October 1877, must be applied to this case. The decree-holder's position, however, appears to us to be stronger under the present Act than under Act IX of 1871, so that the change in the law does not affect the correctness of the decision of the point in question. The attachment having been held to be still subsisting on the 1st of May 1880, if the application of that date for the issue of a sale-proclamation was an application to the Court to take some step in aid of execution of the decree, within the meaning of Art. 179, Sch. II, then undoubtedly the present application of the 11th April 1883 being within three years was in time.

That this was so, we should not have had the least hesitation in holding, for our opinion is clear on the point; but for the decision, laid before us, of a Division Bench of this Court in the case of *Joobraj Singh* v. *Buhooria Alumbasee Koer* (1). In that case, which was also governed by Act XV of 1877, the learned Judges held that an application to the Court to sell attached property did not fall under Art. 179, but under Art. 178.

We consider it so clear that such an application does in fact ask the Court to take a step in aid of execution of the decree, and that it is a step essential to execution, that we are wholly unable

(1) 7 C. L. R., 424.

to assent to the ruling laid before us; and we are unable materially to distinguish the present case from that before the Court on that occasion. We think we cannot with propriety decide the case before us in a manner contrary to that which has once been declared by this Court to be correct, and which has been published as such; and we accordingly feel bound to submit the case for the decision of a Full Bench; the question being whether an application to the Court to issue a proclamation of sale in respect of property already attached in execution of the applicants' decree is an application within the meaning of Art. 179, Sch. II, Act XV of 1877, to the Court to take some step in aid of execution of the decree.

Mr. *Handley* (with him Mr. *Twidale* and Baboo *Anund Gopaul Palit)* for the appellant.

On the 11th July 1879 the property was attached, and the judgment-debtor obtained a postponement of the sale on the 22nd August for six months, the attachment remaining in force. After the expiry of the six months, the decree-holder took no steps to execute the decree until the 1st May 1880, when he applied to have the sale proclamation issued, and his present application is dated the 11th April 1883. I submit the issue of a proclamation of sale does not come within clause 4 of Art. 179 of the second schedule of the Limitation Act at all. If it does come within clause 4, time runs from 1st May 1880; and, if not, time runs from the 11th July 1879, and the application therefore made on the 11th April 1883 would be out of time. The lower Appellate Court have held that limitation was saved by the application of 1st May 1880; unless Act XV of 1879 extends the meaning of Art. 167 of Act IX of 1871, there is nothing to point out that such an application as the present is within the Limitation Act. The case of *Chunder Coomar Roy* v. *Bhogobutty Prosonno Roy* (1) lays down that "an application to enforce a decree" does not include applications of an incidental kind. There was no need for the judgment-creditor to have made an application for the proclamation of sale, the issuing of it should have been done by the Court as a matter of course, it being one of the ministerial duties of the Court to do so. The Code of Civil Procedure no-

(1) I. L. R., 3 Calc., 235; 1 C. L. R. 23.

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where provides for such an application by the judgment-creditor. As to what kind of application falls within the words of the Limitation Act—see *Joobraj Singh* v. *Buhooria Alumbasee Koer* (1); *Govind Chunder Goswami* v. *Rungunmoney* (2); *Kylasa Goundan* v. *Ramasami Ayyan* (3); *Vithal Janardan* v. *Vithojirav Putla Jirav* (4) lays down that the Limitation Act does not apply to application to a Court to do what it has no discretion to refuse, nor to the exercise of functions of a ministerial character. In *Ishwardas Jagjivandas* v. *Dosibai* (5) the Judges agree with the two last cited cases. It is true that in *Radha Prosad Singh* v. *Sundur Lall* (6) the Court held that the deposit of nilamee fees was a step in aid of execution, but *Toree Mahomed* v. *Mahomed Mabood Bux* (7) lays down the contrary. In *Hem Chunder Chowdhry* v. *Brojo Sundari Debya* (8) an application by a judgment-creditor to receive a sum deposited in Court is held not to be "a step in aid of execution." There is, however, a ruling to the contrary, *viz.*, *Venkatarayalu* v. *Narasimha* (9).

Now do the sections in the Civil Procedure Code show that the issue of such a proclamation is a necessary application at all, or is the proclamation a matter which the Court should, as a matter of course, of its own accord see done? Sections 230 and 235 are to be conformed to by the judgment-creditor. Sections 245, 248 249, 286 and 287 are to be conformed to by the Courts; the different matters required by these last sections are the duty of the Court and not of the judgment-creditor. Not one of these sections lay down that an application for proclamation of sale shall be made, by the judgment-creditor; that being so, can it therefore be said that the application made on the 1st May 1880 is "a step taken in aid of execution."

Mr. *O. C. Mullick* and Baboo *Durga Mohun Das* for the respondents were not called upon.

The opinion of the Full Bench, which was as follows, was delivered by

(1) 7 C. L. R., 424.
(2) I. L. R., 6 Calc., 61.
(3) I. L. R., 4 Mad., 172
(4) I. L. R., 6 Bom., 586.
(5) I. L. R., 7 Bom., 316 (322.)
(6) I. L. R., 9 Calc., 644.
(7) I. L. R., 9 Calc., 730.
(8) 10 C. L. R., 272.
(9) I. L. R., 2 Mad., 174.

GARTH, C.J.—I think it clear that in this case the application made by the decree-holder on the 1st of May 1880 for the issue of a sale proclamation was an application "to take some step in aid of execution" within the meaning of clause 4 of Art. 179 of the Limitation Act of 1877.

The language of that clause is somewhat more comprehensive than that of clause 4 of Art. 167 of the Limitation Act of 1871, but under either Act I should consider that the application, which is the subject of the present reference, was not barred by time.

I think it very probable that the construction which was put upon the latter clause in the case of *Joobraj Singh* v. *Buhooria Alumbasee Koer* (1) may have been induced by the language of the Full Bench judgment in the case of *Chunder Coomar Roy* v. *Bhogobutty Prosonno Roy* (2).

It was said, I observe, in that judgment that the words "applying to enforce the decree" in Art. 167 of the Limitation Act of 1871 meant the application (under s. 212 of the Code) *by which proceedings in execution are commenced*; but as I myself took part in that decision, and, in fact, delivered the judgment of the Court, I am enabled to say that this language was unduly narrow, and that it was used with reference to the particular point which was then under discussion.

That point was, whether the payment into Court of the costs of a proclamation of sale by *challan* within the three years, coupled with an application for sale, which was made beyond the three years, was in itself the meaning of clause 4 of Art. 167 of the Act of 1871.

The Full Bench held that it was not, and it was with reference to this question that the judgment was pronounced. But there is no doubt, as I have said before, that the language of our judgment might well have been misconstrued.

I think it clear that under either Limitation Act, but certainly under the Act of 1877, an application, such as was made in the present case, is an application either "to enforce the decree" or "to take some step in aid of execution."

(1) 7 C. L. R., 424.

(2) I. L. R., 3 Calc., 235; 1 C. L. R. 23.

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The point that Mr. Handley, who appeared for the appellant in this case, did his best to impress upon us was this: that the application to issue a proclamation being unnecessary by law, was no application at all. He contended that under s. 287 of the Code, the Court itself was bound to have issued the proclamation, without any action being taken on the part of the decree-holder.

But in this, I think, he is in error; notwithstanding that the attachment had issued, the proceedings from time to time for the purpose of enforcing the sale must always be, and, as a matter of practice, always are, initiated by the decree-holder.

The Court cannot ascertain of its own motion what the wishes of the decree-holder are, or what portion of the property he desires to sell, unless an application is made for that purpose.

As the rest of the Court are also of opinion that the application is not barred, and as this appears to be the only question in the case, we think that the appeal should be dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Beverley.

1884
June 7.

RAM CHARAN BUHARDAR AND OTHERS (PLAINTIFFS) *v.* REAZUDDIN AND OTHERS (DEFENDANTS).*

Res-judicata—Issue advisedly left undecided in former suit.

In 1878 *A*, as the auction-purchaser of a taluq, sued 35 persons for possession of a part of this taluq. In this suit the issues raised were—(1) whether *A* had purchased the whole taluq, or an eight-anna share of the right, title and interest of the judgment-debtors therein; (2) as to the correctness of the boundaries of the taluq as given in the plaint. The Court held that *A* had purchased the right, title and interest of the judgment-debtors in the taluq, and as it appeared that some of the defendants were not judgment-debtors, and as it did not appear what portions of the taluq were held by the several defendants, the lower Appellate Court dismissed the suit, with liberty to the plaintiff to bring a fresh suit within the proper time.

* Appeal from Appellate Decree No. 2517 of 1882, against the decree of F. Rees, Esq., Judge of Noakhali, dated 10th of August 1882, reversing the decree of Baboo Koruna Moy Banerji, Sudder Munsiff of Soodharam, dated the 27th of June 1881.