

1883.

NOBIN
KRISHNA
MOOKERJEE
v.
THE
CHAIRMAN
OF THE
SUBURBAN
MUNICI-
PALITY.

merely because he is a Municipal Commissioner." Having that case before them the Legislature simply limited the explanation to the disqualification of a Commissioner in a case in which the Municipality or Corporation may be interested; they did not include in the explanation the case of a salaried officer of a Municipality or Corporation, and the principle on which the case of *Wood v. The Municipality of Calcutta* (1) was decided, was that a salaried officer of the Municipality is incompetent to sit as a Judge in a case in which that Municipality is interested.

Conviction set aside.

PRIVY COUNCIL.

MINA KONWARI (PLAINTIFF) v. JUGGAT SETANI
(DEFENDANT).*

P. C.*
1883
June 7 & 30

[On appeal from the High Court at Fort William in Bengal.]

Limitation Act (XIV of 1859), s. 22—Registration Act (XX of 1866), s. 53—“Decree” made upon a registered obligation—Summary decision—Petition to postpone sale in execution of decree—Estoppel—Evidence Act (I of 1872), s. 115.

A summary decision means a decision arrived at by a summary proceeding; and a “decree,” made under s. 53 of Act XX of 1866, is a summary decision. Section 20 of Act XIV of 1859 was intended to apply to decisions, whether called judgments, decrees, or orders, made in a regular suit; and s. 22 of the same Act was intended to apply to all other decisions.

A decree made in 1867 under s. 53 of Act XX of 1866, held to be subject, as regards its execution, to the law of limitation provided in Act XIV of 1859, s. 22.

To petition for the postponement of a sale in execution of decree is not an intentional causing or permitting the decree-holder to believe that the judgment-debtor admits, that the decree can be legally executed and occasions no estoppel within the Indian Evidence Act, 1872, s. 115. The judgment-debtor can, notwithstanding his having filed such a petition, maintain that execution is barred by lapse of time.

APPEAL from a decree (27th November 1880), of the High Court, reversing an order (15th July 1880) of the Subordinate Judge of the Moorshedabad district.

* Present: LORD WATSON, SIR B. PEACOCK, SIR R. P. COLLIERE, SIR R. COUCH, and SIR A. HOBHOUSE.

(1) I. L. R., 8 Calc., 891.

This appeal arose out of a petition under s. 229 of the Code of Civil Procedure, 1877, filed by the respondent on the 3rd May 1880 in the Court of the Subordinate Judge of the Moorshedabad district objecting to the execution of a "decree" made by the Principal Sudder Amin of that district on the 9th July 1867 for Rs. 10,494, principal and interest, upon a registered obligation, dated 25th Chait 1273 (6th April 1867), and executed by Set Gopal Chand in favor of Dhunput Singh.

This "decree" had been made under s. 53 of Act XX of 1866, and the question on this appeal was, whether or not execution of it was barred by limitation.

Set Gopal Chand died shortly after the decree was made, leaving his infant son Gopi Chand his heir, of whom Dhunput Singh was appointed guardian. The latter on the 20th July 1870 made the first application for execution, and the order thereon, dated 3rd August 1870, had reference to his position as guardian, and was followed by the striking off of the case for default on the 29th August 1870. Dhunput Singh having afterwards transferred his interest in this decree to his wife, Mina Konwari, the present appellant, her name was substituted for his in the execution file on the 23rd July 1873, and after that date proceedings were taken in the Nuddea district, to which a certificate was sent for the execution of this decree, apparently with reference to the situation of the judgment-debtor's property in Nuddea.

Struck off in default in the Nuddea District Court on the 4th August 1876, the case was restored to the file on the 25th January 1878, and attachment followed. The minor Gopi Chand having died about November 1878, Dhunput Singh was discharged from his office of guardian; and the respondent, Juggat Setani, as the mother of Set Gopal Chand, succeeded to the estate of her childless grandson.

The Nuddea Court having fixed the 8th December 1878 for the sale under the attachment, a petition by the respondent to stay it for two months was filed on that day. This was granted, and a further stay of one month was ordered by consent on the 9th February 1880. The respondent, before the expiration of this last period, filed a petition, alleging that nothing was due under the decree, and offering to bring evidence in support of

1885.

 MINA
 KONWARI
 v.
 JUGGAT
 SETANI.

1888
 MINA
 KONWARI
 v.
 JUGGAT
 SETANI.

this statement. The Nuddea Court rejected this petition as "not preferred within a reasonable time before the Court which had passed the decree." The 8th May 1880 was fixed for the sale, and the respondent on the 3rd of that month filed the present petition in the Court of the Subordinate Judge of Moorshedabad, alleging, among other objections, that execution was barred by lapse of time. To these objections an answer was filed by Mina Konwari, and they were disallowed with costs on the 15th July 1880.

On appeal, the High Court (McDONNELL and BROUGHTON, JJ.) reversed this decision. They were of opinion that Act IX of 1871 being applicable, it was not necessary to consider whether there had been proceedings to keep in force the decree of 9th July 1867, within the meaning of Act XIV of 1859, s. 20, as construed by the Judicial Committee in the case of *Maharaja of Burdwan v. Bulram Singh* (1). The law of limitation to be applied they held to be that of Act IX of 1871, Sch. II, art. 167. They found that more than three years had elapsed between the date of the first application for execution and date of the next, between 10th July 1870 and 23rd July 1873. Thus the right to execute the decree of 1867 was, in their opinion, barred by time. This judgment was given before the decision of the Judicial Committee in *Mungul Pershad Dicit v. Grijakant Lahiri* (2).

On this appeal—

Mr. T. H. Cowie, Q.C., and Mr. R. V. Doyne, appeared for the appellant.

Mr. J. T. Woodroffe for the respondent.

For the appellant it was argued that execution of the "decree" of 9th July 1867 was not barred by lapse of time under s. 20 of Act XIV of 1859, which was the law applicable; the suit in which the decree of 9th July 1867 was made having been instituted before the date, viz., 1st April 1873, before which applications in all suits, including applications for execution of decree, were excluded from the operation of Act IX of 1871; see *Mungul Pershad Dicit v. Grijakant Lahiri* (2). Act XIV

(1) 5 B. L. R., 611; 13 Moore's I. A., 479.

(2) I. L. R., 8 Calo, 51; L. R., 8 I. A., 123.

of 1859 being applicable, that consideration arose which the High Court, in erroneously holding Act IX of 1871 to be applicable, excluded from the case. This, in effect, was that an actual *bonâ fide* contest was going on between the decree-holder and the judgment-debtor during the time, or part of the time, which had been treated as running against the decree-holder. It was submitted that there was a pending proceeding within the meaning of s. 20 of Act XIV of 1859, and a step taken to enforce, or keep the decree of 1867 in force within three years preceding the application of 23rd July 1873. The application of 20th July 1870, followed by the orders of 3rd August 1870, and 29th August 1870, was a proceeding to keep the decree in force, within the terms of s. 20 of Act XIV of 1859, as explained in *Maharaja of Burdwan v. Bulram Singh* (1). The application of 23rd July 1873 was therefore within time. Although proceedings to be sufficient to prevent time from running against the decree-holder must be really taken with intent to obtain the fruits of the decree—(see *Hiralall v. Badri Das* (2))—yet it did not follow that such proceedings need be successful; and, on the contrary, even if abortive, they might be treated as *bonâ fide*, within the meaning of Act XIV of 1859, s. 20.

Moreover, in this case when, on the 23rd July 1873, the appellant made a renewed application for execution in the Moorshedabad Court, there was a judicial determination that there should be further proceedings; whereupon, afterwards, there was a transfer to Nuddea. That being a decision, any objection to it should have been made at the time, and it must now stand as a binding order. The High Court had, in consequence of its applying the wrong Act, *viz.*, IX of 1871, avoided the necessary question as to the effect of proceedings taken, and had applied the three years' bar of limitation, under art. 167 of the 2nd schedule of that Act, to a wrong starting point; the correct one being not earlier than the 3rd August 1870.

It was not open to the respondent in regard to the effect of the two petitions for postponement of the sale, on which she obtained a stay of proceedings, to allege the irregularity of orders

(1) 5 B. L. R., 611; 13 Moore's L. A., 479.

(2) I. L. R., 2 All. 792.

1883

 MINA
 KONWARI
 v.
 JUGGAT
 SETANI.

1888
 MINA
 KONWARI
 v.
 JUGGAT
 SETHANI.

anterior to those which she must be taken to have recognized as subsisting. Reference was made to s. 115, Act I of 1872.

Mr. J. T. Woodroffe, for the respondent, admitting that Act IX of 1871 was inapplicable, argued that the period of limitation, in reference to the "decree" of 9th July 1869, was given by s. 22 of Act XIV of 1859, not by s. 20 of that Act. An order made under s. 53 of Act XX of 1866, though termed in that section a "decree," was a summary decision within the meaning of s. 22 of Act XIV of 1859 as shown by the limited scope of an order under s. 53, Act XX of 1866, and its being the result of summary proceedings. That such a decree could not declare a lien, or provide for interest after the date of the decree, [*Asma Bibee v. Ramkant Roy Chowdhry* (1), *Adur Monee Debia v. Koolochunder Chatterjee* (2)], and also that no appeal lay against such an order (though it could be set aside on due grounds in execution), tended to show its summary nature. *Bhikambhat v. Fernandez* (3), and *Ramdhan Mandal v. Ramessur Bhattacharjee* (4) were referred to. Execution, therefore, when the first application was made in 1870, was already barred by lapse of time.

But even if s. 22 did not apply, it could not be shown, with reference to s. 20, that application for execution had been made *bonâ fide*, and for the purpose of enforcing the decree of 9th July 1867, within three years before the application of July 1873. The proceedings had not been regularly taken in conformity with the requirements of the Code of Civil Procedure then in force, Act VIII of 1859; while the decree-holder was in a position rendering regularity essential. To bar limitation the proceedings should have been such that execution might have been lawfully issued upon them, as shown to be necessary in the judgment of the Full Bench in *Bissessur Mullick v. Mahtabchand Bahadur* (5). It was not any kind of proceeding that would suffice, *Ram Sahai Singh v. Sheo Sahai Singh* (6); *Raghu Nandan Ram v. Sarmessur*

(1) 19 W. R., 251.

(2) 21 W. R., 140.

(3) I. L. R., 5 Bom. 673.

(4) 2 B. L. R. A. C. 235; 11 W. R., 117.

(5) B. L. R. Sup. Vol. 967; 10 W. R., F. B. 8.

(6) B. L. R. Sup. Vol. 492; 6 W. R. Mis. 98.

Panday (1). The transfer of a decree for execution being only a delegation, then, if there was a striking off, the application to restore the execution proceedings must be made to the transferring Court, *Raja Bhoop Singh Bahadur v. Sunkar Dutt Jha* (2).

1883

MINA
KONWARI
v.
JUGGAT
SETANI.

As to the argument that an estoppel had been caused, it was contended that the objector had raised the objection that the execution was barred by time in the only Court having jurisdiction in the matter, *viz.*, that of Moorshedabad; and for this purpose the postponement was applied for.

Mr. T. H. Cowie, Q.C., replied, arguing that s. 20 of Act XIV of 1859 applied. In reference to the effect of striking off execution proceedings, *Puddomonee Dossee v. Roy Muthooranath Chowdhry* (3) was cited, showing that this may vary according to circumstances.

Their Lordships' judgment was delivered by

SIR R. COUCH.—The question in this appeal is whether the execution of a decree obtained in the Court of the Principal Sudder Amiu of Moorshedabad, by Dhunput Singh against Gopal Chand, is barred by the law of limitation. The appellant is the holder of the decree by assignment from Dhunput Singh. The respondent is the mother of Gopal Chand, and on the death of his minor son Gopi Chand succeeded as the heir of her grandson to the possession of the property which has been attached in execution. The decree was obtained on a mortgage bond, dated the 25th Cheyt 1273 (6th April 1867), for Rs. 9,995, which sum was to be repaid with interest, at the rate of 2 per cent. per mensem, in the month of Jeyt 1274. The bond contained an agreement that it should be specially registered under the provisions of s. 53 of Act XX of 1866. It was presented for registration on the 7th of June 1867, and was registered and the agreement recorded on the 19th, the time fixed for payment having expired on the 13th of the same month.

Act XX of 1866 provides (s. 32) that,—

“Whenever the obligor and obligee of an obligation shall agree that,

(1) 13 B. L. R., 489; 22 W. R., 235.

(2) 6 W. R., Mis. 47.

(3) 12 B. L. R., 411; 20 W. R., 133.

1883
 MINA
 KONWARI
 v.
 JUGGAT
 SETANI.

in the event of the obligation not being duly satisfied, the amount secured thereby may be recorded in a summary way, and shall at the time of registering the said obligation apply to the registering officer to record the said agreement, the registering officer, after making such inquiries as he may think proper, shall record such agreement at the foot of the endorsement and certificate required by ss. 66 and 68 of the Act, and such record shall be signed by him and by the obligor, and shall be copied into the register book, and shall be *prima facie* evidence of the agreement.

“ Within one year (s. 53) from the date on which the amount becomes payable, or where the amount is payable by instalments within one year from the date on which any instalment becomes payable, the obligee of any such obligation registered with such agreement as aforesaid, whether under the said Act No. XVI of 1864, or under this Act, may present a petition to any Court which would have had jurisdiction to try a regular suit on such obligation for the amount secured thereby, or for the instalment sought to be recovered.

“ On production in Court of the obligation and of the said record signed as aforesaid, the petitioner shall be entitled to a decree for any sum not exceeding the sum mentioned in the petition, together with interest at the rate specified (if any) to the date of the decree, and a sum for costs to be fixed by the Court.

“ Such decree may be enforced forthwith under the provisions for the enforcement of decrees contained in the Code of Civil Procedure.”

On the 9th of July 1867, Dhunput Singh obtained a decree under this Act, in the following terms: “That the suit be decreed, and the plaintiff do recover the amount of the claim with interest during the pendency of the suit, and costs of the Court, together with interest up to the date of realization at the rate of one rupee per mensem from the property pledged and the defendant.” The latter part of this decree is not authorized by the Act, but it will not be material to consider this.

Gopal Chaud died some time before May 1870, but at what precise time does not appear in the proceedings. He left a minor son, Gopi Chand, and on the 10th of May 1870, the first application was made for execution of the decree. This was made by Dhunput Singh to the Court of Moorshedabad against himself, described as guardian and surburakar, on behalf of Set Gopi Chand, minor, son and heir of Set Gopal Chand. It does not appear how he came to be guardian except that in a petition of the respondent to the Court of Nuddea, which will be afterwards referred to, it is said that

he was, according to the arrangement made by Gopal Chand, appointed guardian of Gopi Chand. On the 11th of May it was ordered that the petition be registered, and the decree-holder do deposit the cost of service of notice on the judgment-debtor within seven days. This was merely a formal order, as Dhunput Singh was himself the person on whom the notice would be served.

1883

 MINA
 KONWARI
 v.
 JUGGAT
 SETANI.

It will be convenient now to consider what was the effect at this time of the law of limitation.

By Act XIV of 1859, s. 20, it is enacted—

“That no process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree or order of such Court unless some proceedings shall have been taken to enforce such judgment, decree, or order, or to keep the same in force within three years next preceding the application for execution.”

And by s. 22,—

“No process of execution shall issue to enforce any summary decision or award of any of the Civil Courts not established by Royal Charter, or of any revenue authority, unless some proceeding shall have been taken to enforce such decision or award, or to keep the same in force within one year next preceding the application for such execution.”

The Court of Moorshedabad was not established by Royal Charter. Their Lordships are of opinion that s. 20 was intended to apply to decisions, whether they might be called judgments, decrees, or orders, made in a regular suit, and s. 22 to all other decisions. Act XX of 1866 does, indeed, say that the petitioner shall be entitled to a *decree*, and that such *decree* may be enforced under the provisions for the enforcement of decrees contained in the Code of Civil Procedure, but s. 52 says that the amount secured by the obligation may be recovered in a *summary* way. Summary decision means a decision arrived at by a summary proceeding, which this certainly is, and the decision being called a decree does not make any difference in this respect. It was held by the High Court at Calcutta, in *Ram Dhan Mandal v. Ramessur Bhattacharjee* (1) that the words “summary decision or award” meant a decision of the Civil Courts not being a decree made in a regular suit or appeal. This construction appears to

(1) 2 B. L. R., 235; 11 W. R., 117.

1883
 MINA
 KONWARI
 v.
 JUGGAT
 SETANI.

have been adopted by the Indian Legislature in the Limitation Act, IX of 1871, in art. 166 of the 2nd schedule, where one year is stated as the period of limitation for the execution of a decision, other than a decree or order passed in a regular suit or an appeal of a Civil Court or an appeal. Here the execution shows that the word "decision" is used as including a decree. Therefore the first application for the execution of this decree was barred by the law of limitation.

It remains to be seen whether in the subsequent proceedings the respondent has become estopped from relying upon this. They may be briefly stated: On the 20th of July 1870 Dhunput Singh applied to the Moorshedabad Court that the decree might be executed in the Court of the District of Nuddea. The Court, adverting to the fact that the decree-holder was himself the guardian of the minor judgment-debtor, on the third of August 1870 made an order that he "do recover the money due to him from the estate of the minor, with the permission of the Judge, or else by appointing another guardian on behalf of the minor, do take proper steps to carry on this execution proceeding in his presence within ten days."

On the 29th of August 1870, by an order reciting this order, and that no steps had been taken, it was ordered that the case be struck off for default. On the 23rd July 1873, Dhunput Singh and the appellant presented petitions to the Moorshedabad Court stating that the decree, along with other decrees, had been sold by Dhunput Singh to the appellant for Rs. 1,000, and praying that she might be substituted for him, and the amount of the decree ordered to be paid to her. The appellant is the wife of Dhunput Singh, but this was not stated in the petitions. The object seems to have been to avoid complying with the order of the 3rd of August 1870. On the 28th of August the substitution was ordered. On the 12th of December 1873 it was ordered "that for want of prosecution on the part of the decree-holder this case be struck off for the present." The next step was an application on the 22nd of September 1874 on the part of the appellant for execution of the decree in the district of Nuddea, which was ordered on the 7th of December 1874. On the 9th of April 1875 this application was registered

in the Nuddea Court, and, on the 4th of August 1876, it was struck off in default. On the 25th of January 1878 another application for execution was made to the Nuddea Court. Gopi Chand, the minor, died in November 1878. The application to the Court, which became necessary on his death, either under s. 210 of Act VIII of 1859, or s. 234 of Act X of 1877, the new Civil Procedure Code, whichever might, according to s. 3 of Act XII of 1879, be applicable, was not made. Notwithstanding this omission the execution proceedings appear to have been continued, for there is in the proceedings a petition, dated the 8th of December 1879, of the respondent by Umanath Ghosal, described as pleader for the petitioner, stating that the decree-holder had executed the decree against her, got her property attached, and that day had been fixed for the sale, and praying that two months' time might be sanctioned, and, the attachment subsisting, the 8th of February next might be fixed for the sale. This was assented to by the pleader for the appellant, and an order was made accordingly. On the 9th of February 1880 another petition of the respondent was presented by Nobin Chunder Sircar, another pleader, stating that the decree-holder had consented to allow time up to the 1st of March, and praying that that day might be fixed for the sale, which was ordered with the consent of the pleader for the decree-holder. On the 8th of March part of the attached property was sold, and the petition of the respondent to the Nuddea Court to set aside the execution having been rejected on the 6th of March, and an order made for a further sale on the 8th of May, the respondent, on the 3rd of May 1880, petitioned the Moorshedabad Court to stay the sale and adjudicate upon the objections, among others which need not be mentioned, that the execution of the decree was barred by limitation, and the proceedings in execution had been without jurisdiction: and she denied that she knew of the proceedings. The appellant, in his petition in answer, relied upon the petitions of the 8th of December and 9th of February. The Subordinate Judge of Moorshedabad rejected this petition, and there was an appeal to the High Court. That Court applied to the case the Limitation Act, IX of 1871, art. 167 of which gives, in the case of a decree or order of a Civil Court not established by Royal

1883

 MINA
 KONWARI
 v.
 JUGGAT
 SETANI.

1888
 MINA
 KONWARI
 v.
 JUGGAT
 SETANI.

Charter, three years from the date of applying to enforce or keep it in force as the period of limitation, and held that the question was whether, within three years before the 23rd of July 1878, anything had been done to enforce or keep in force the decree. They allowed the appeal, on the ground that no application for execution had been made within three years; but, it having since been decided by this Committee, in *Mungul Pershad Dicht v. Grijakant Lahiri* (1) that, as regards suits instituted before the 1st of April 1878, all applications in them are excluded from the operation of Act IX of 1871, it is admitted that the decision cannot be sustained on that ground. It does not seem to have been considered whether art. 166 was not applicable. It has been held to be applicable to such a case by the High Court of Bombay, in *Bhikambhat v Fernandez* (2).

Their Lordships observe that, although the respondent denied any knowledge of the petitions presented in her name, and the appellant relied upon them, no evidence was given that they were authorized by her; and, further, that the proper steps consequent upon the death of Gopi Chand not having been taken in the Moorshedabad Court, the Nuddea Court had no authority to execute the decree against the respondent. The petitions are of a very suspicious character, and their object appears to have been to have a sale without proclamation. The proceeding in the Nuddea Court against the respondent was altogether irregular, if it was not without jurisdiction, and the petitions to postpone the sale cannot be treated as an estoppel. They contain no admission that the decree could be legally executed against the respondent, and are not within the description of an estoppel given in the Indian Evidence Act, 1872, s. 115 and following sections.

Their Lordships will therefore humbly advise Her Majesty that the decree of the High Court, by which the order of the lower Court was set aside and the application for execution dismissed, should be affirmed, and this appeal be dismissed, and the costs will be paid by the appellant.

Appeal dismissed.

Solicitor for the appellant: Mr. T. L. Wilson.

Solicitors for the respondent: Messrs. Henderson and Co.

(1) L. R., 8 I A., 123; I. L. R., 8 Cal., 51.

(2) I. L. R. 5 Bom., 673.