1878

THAKUR PRASAD v. AHSAN ALI.

Code submitted to the Council save the last Bill No. 5, and it may be that the effect of s. 647 escaped attention.

We reply to this reference that the application is governed by the provisions of the repealed Code, but that, if it be governed by Act X of 1877, an appeal would lie from the order.

PEARSON, J.—The appealed order falling within the definition of a decree contained in s. 2 of Act X of 1877, is, in my opinion, appealable under s. 584 of that Act.

The appeal appears to be admissible also under the repealed Act VIII of 1859, under the provisions of s. 6 of Act I of 1868.

APPELLATE CRIMINAL.

1878
May 28.

Before Mr. Justice Pearson.

EMPRESS OF INDIA *v.* RAM CHAND.

Confession made by one of several persons being tried jointly for the same offence—Act I of 1872 *(Evidence Act), s.* 30*—Conviction on uncorroborated confession.*

A conviction of a person who is being tried together with other persons for the same offence cannot proceed merely on an uncorroborated statement in the confession of one of such other persons (1).

THIS case is not reported in detail, as Pearson, J., took in it the same view as Turner, J., in *Empress* v. *Bhawani* (1).

Conviction quashed.

APPELLATE CIVIL.

1878.
June 3.

Before Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.

BEHARI LAL (DECREE-HOLDER) *v.* SALIK RAM (JUDGMENT-DEBTOR) *

Execution of Decree—Act VIII of 1859 *(Civil Procedure Code), ss.* 212, 216*—Limitation—Application to Enforce or Keep in Force a Decree—Act IX of* 1871 *(Limitation Act), sch.* ii, *art* 167.

On the 3rd March, 1875, an application was made by a decree-holder to the Court executing the decree which did not, as required by s. 212 of Act VIII of 1859, state the mode in which the assistance of the Court was required, whether

* Miscellaneous Second Appeal, No. 73 of 1877, from an order of R. Saunders, Esq., Judge of Farukhabad, dated the 14th July, 1877, reversing an order of Pandit Har Sahai, Subordinate Judge, dated the 5th June, 1877.

(1) See *Empress* v. *Bhawani, ante* p. 664 and note to that case.

1878

BEHARI LAL v. SALIK RAM.

by the arrest and imprisonment of the judgment-debtor or attachment of his property, but prayed that the Court would, under s. 216 of that Act, issue a notice to the judgment-debtor to show cause why the decree should not be executed against him. Under this application notice was issued to the judgment-debtor on the 28th March, 1875. On the 27th April, 1875, the execution-case was struck off the file on the ground that the decree-holder did not desire further proceedings to be taken. *Held, per* PEARSON and OLDFIELD, JJ., that, for the purposes of art. 167, sch. ii of Act IX of 1871, the application was one to enforce or keep in force the decree (1), and further that limitation should be computed from the date the notice to the judgment-debtor was issued.

Franks v. *Nuneh Mal* (2) impugned.

Per SPANKIE, J., *contra*.

APPLICATION for the execution of a decree for money by the attachment and sale of certain property was made on the 9th December, 1872. The attachment was made and a sale of the property took place, and a portion of the money due under the decree was realised. On the 24th February, 1873, the execution-case was struck off the file. On the 3rd March, 1875, the decree-holder again made an application relating to the decree. This application contained in a tabular form the particulars required by s. 212 of Act VIII of 1859, with the exception of the mode in which the assistance of the Court was required, *viz.*, whether by the arrest and imprisonment of the judgment-debtors or the attachment of their property. In the application the decree-holder prayed that notices might be issued to the judgment-debtors under s. 216 of the Act. The Court made an order on the 20th March, 1875, directing notices to issue, and notices were issued on the 28th March. On the 27th April, 1875, the execution-case was struck off the file on the ground that the decree-holder did not desire further proceedings to be taken. On the 30th April, 1877, the decree-holder applied for the execution of the decree by the arrest and imprisonment of Salik Ram, one of the judgment-debtors. The judgment-debtor objected that this application was barred by limitation. The Court of first instance held that the application was not barred by limitation, as it was made within three years from the 28th March, 1875, when notices issued to the judgment-debtors. On appeal by the judgment-

(1) See also *Chunder Coomar Roy* v. *Bhogobutty Prosonno Roy*., I. L. R., 3 Calc., 285, and *Jumna Das* v. *Lalitaram*, I. L. R 2 Bom., 294; from which cases it appears that the "application" spoken of in art. 167, cl. 4, sch ii of Act IX of 1871 need not necessarily be an application under s. 212 of Act VIII of 1859, but includes any application to keep in force the decree. See also *Husain Bakhsh* v. *Madge*, I. L. R., 1 All. 525.

(2) H. C. R. N.-W. P., 1875, p. 79.

1878

BEHARI LAL v. SALIK RAM,

debtor* the lower appellate Court held that the application was barred by limitation, on the ground that the application made on the 3rd March, 1875, was informal, and consequently did not keep the decree in force. The lower appellate Court relied on *Franks* v. *Nuneh Mal* (1), and Misc. S. A., No. 60 of 1876, dated the 14th December, 1876 (2).

The decree-holder appealed to the High Court, contending that the present application was within time, as that made on the 3rd March, 1875, was sufficient to keep the decree in force.

Munshi *Hanuman Prasad* and Shah *Asad Ali*, for the appellant.

Lala *Har Kishen Das*, for the respondent.

The following judgments were delivered by the Court (PEARSON and SPANKIE, JJ.) :

PEARSON, J.—The precedent to which the Judge refers supports his decision. But I am not myself able to assent altogether to the ruling in the precedent. In the first place, I doubt whether the notice issued by the Court can be regarded as good for nothing and a mere nullity, because it was issued on the strength of an application not strictly in the form and of the nature prescribed by s. 212 of Act VIII of 1859. Probably the Court should have rejected the application for the issue of a notice and required an application of the kind required in s. 212 specifying the particular relief sought, although no relief could be granted until the notice had been issued, and the omission might have been supplied afterwards. But it did upon the application presented to it issue a notice, and art. 167, sch. ii of Act IX of 1871, allows an application to be made for the execution of a decree in cases where a notice under s. 216 of the Code of Civil Procedure has been issued within three years from the date of issuing such notice. In the next place I conceive that the application for the issue of a notice under s. 216, though not an application on which such a notice could properly issue, was still an application to keep in force the decree. The Procedure Code, it is true, provides only for applications for the execution of decrees under s. 212, but the limitation law recognises applications having for their object to keep decrees in force. An application which

(1) H. C. R. N.-W. P., 1875, p. 79. (2) See next page, note (2).

1878

BEHARI LAL v. SALIK RAM.

might be irregular in reference to s. 212 might still be an application of the other kind, and I cannot conceive that the decree-holder had any other object in view in making his application of the 3rd March, 1875, than to keep the decree in force by warning the judgment-debtor that its enforcement was contemplated. The present application is within three years from that date. I am therefore disposed to uphold the order of the Court of first instance and to reverse that of the lower appellate Court. Apparently Chuni Lal (1) has been improperly made a respondent to this appeal, as he was not a party to the proceedings in the lower appellate Court, the subject of the appeal.

SPANKIE, J.—I am still of the same opinion as that expressed in the decision of this Court dated the 14th December, 1876 (2), to which I was a party

The terms of s. 216 of Act VIII of 1859 are precise and clear. "If an interval of more than one year shall have elapsed between the date of the decree or the application for its execution, or if the enforcement of the decree be applied for against the heir or representative of an original party to the suit, the Court shall issue notice to the party against whom execution may be applied for, &c., &c." But there must be an application for execution, alluding to the provisions of s. 212. It precedes and does not succeed the Court's issue of notice under s. 216 to the heir or representative of an original party to the suit, and where no application for execution has been made within three years from the date of the decree, I do not think that the decree-holder can fall back upon the notice issued under s. 216. If the application under s. 212 were bad, it seems to me that the Court had no power to issue the notice, and under such circumstances the mere issue of the notice cannot be regarded as giving the decree-holder a fresh period of limitation. The old procedure ap-

(1) The second judgment-debtor.

(2) Misc. S. A., No. 60 of 1875. In this case the decree-holder applied on the 23rd November, 1875, for the execution of his decree, dated the 25th January, 1872, relying on an application dated the 22nd January, 1875, as one from which limitation ran. This application prayed that notice might issue, and stated that application would subsequently be made to the Court for its assistance in bringing the property of the judgment-debtor to sale. A notice was issued but the decree-holder took no further steps and the execution-case was struck off the file. Stuart, C.J., and Spankie, J., held that, as no application for execution was made within three years from the date of the decree, the decree-holder could not fall back upon the notice issued under s. 216 of Act VIII of 1859 as bringing his application of the 23rd November, 1875, within time.

plies to this case. The order affirmed by my Honorable colleague would I suppose issue. But this appeal was filed on the 9th November, and therefore perhaps Act X of 1877 applies. If so, I should wish to refer the point of law to another Judge.

The learned Judges differing in opinion on the point of limitation, the appeal was referred to Oldfield, J., under the provisions of s. 575 of Act X of 1877. The following judgment was delivered by

OLDFIELD, J.—I am of opinion that the execution of the decree is not barred by limitation.

The decree-holder filed an application on the 3rd March, 1875, accompanied by a copy of the decree, asking that, after service of notice on the judgment-debtor, steps might be taken to realise the amount of the decree. Most of the particulars required by s. 212 were entered in the application, but it was silent as to the mode in which the assistance of the Court was required, whether by delivery of property specifically decreed, the arrest and imprisonment of the judgment-debtor, or attachment of his property or otherwise; but this defect in the application will not, I consider, render it of no legal effect for the purposes of limitation. All that the law of limitation enacts is that the limitation shall run from the date of applying to the Court to enforce or keep in force the decree, and all that would seem to be required is that there shall have been an application with the object of enforcing or keeping in force the decree. We should strain the language of the law by putting any other construction on it. If the application is such as to show that it was made with that object, though informal, it will be an application within the meaning of the law of limitation, and there can be no doubt in this case that the application had the object of enforcing and keeping in force the decree.

But the law of limitation also provides that the time shall run from the date of issuing a notice under s. 216 of the Code of Civil Procedure. A notice was issued in this case by the Court acting under s. 216 upon the application above referred to, and it appears to me too that the date of the notice will give a period from which the limitation will run. The issue of such a notice is incumbent on the Court where an application has been made under the circumstances

1878

BEHARI LAL v. SALIK RAM.

stated in s. 216. The issue of the notice is the act of the Court apart from any requisition by the decree-holder to issue it, and I think it cannot be held that this act of the Court, when purporting to be done under the authority of s. 216, is illegal, and the notice issued of no legal effect in consequence, merely because the application filed by the decree-holder, with reference to which the Court acted, may have been irregular in form, or defective in some of the particulars required by s. 212. The fact that the Court treated the application as one for enforcing the decree and issued the notice upon it under s. 216 of Act VIII of 1859 appears to me sufficient.

I find that the rulings of this Court have been conflicting on the points raised in this case. While two rulings (1) have been pointed out against the view now taken, a later one (2) is in favour of it.

The order of the lower appellate Court is reversed, and that of the Court of first instance restored, and this appeal is decreed with costs.

Appeal allowed.

APPELLATE CRIMINAL.

1878. *June* 10.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

EMPRESS OF INDIA v. KARAN SINGH.

Summary Trial—Record in Appealable Case—Judgment—Error or Defect in Proceedings—Act X of 1872 *(Criminal Procedure Code), ss.* 228, 283.

K was tried by a Magistrate in a summary way and convicted. He appealed to the Court of Session, which quashed his conviction on the ground merely that the substance of the evidence on which the conviction was had was not embodied in the

(1) *Franks* v. *Nuneh Mal*, H. C. R., N.-W. P., 1875, p. 79; Misc. S. A., No. 60 of 1876, dated the 14th December, 1876.

(2) Misc. S. A., No. 35 of 1877, dated the 26th June, 1877. In this case the decree-holder applied, on the 31st August, 1870, in the form required by s. 212 of Act VIII of 1859, except that he did not state what was the assistance he desired from the Court. He stated in his application as follows: "Let a notice be issued, and then other applications will be made." A notice was accordingly issued, but as the decree-holder took no further steps in the matter notwithstanding that the Court called on him to do so within three days, the execution-case was struck off the file. Similar applications were made by the decree-holder in March, 1872, and on the 22nd January, 1875, under which notices were issued. The first of these was struck off the file because the decree-holder failed to comply with the Court's order to make any application he had to make within five days. The second was struck off on the decree-holder's application. He applied on the 1st September, 1876, for the execution of the decree, by the arrest of the judgment-debtor. Stuart, C.J., and Pearson, J., held that the decree was capable of execution, observing that "all the applications appear to have been designed to keep in force the decree: the present application was within three years of the last application and *a fortiori* within three years of the notice issued thereunder."