

generally that the rights of tenants at fixed rates shall from the date of the passing of the Act be heritable and transferable. In, as we read them, equally general terms the second paragraph declares that no other right of occupancy shall be transferable by grant, will, or otherwise, except as between persons who have become by inheritance co-sharers in such rights. The term "otherwise" is strictly equivalent to the term in any other way and must we think include all transfers whether voluntary or involuntary. It follows that rights of occupancy other than at fixed rates are not transferable by auction sale in execution of decree to strangers but may be transferred by such sale to any of the persons in whose favour the exception is specially declared.

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### FULL BENCH.

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February 21.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oulfield.*

PARAS RAM (DECREE-HOLDER) v. GARDNER (JUDGMENT-DEBTOR.)\*

*Act IX of 1871, sch. ii, art. 167—Act VIII of 1859, s. 246.—Execution of decree—Limitation—Proceeding to enforce—Previous application—Intermediate suit—Objector.*

*Held* by a Full Bench (PEARSON, J., dissenting) that an application to execute a decree against judgment-debtor's property, made more than three years after the last application for execution was not barred by limitation under art. 167, sch. ii., Act IX of 1871, when the last application was interrupted by a successful objector against whom the decree-holder had to bring a regular suit and succeeded in obtaining a decree; and that the renewed application to execute within three years from the date of the decree in the said suit was not a fresh application for execution against the judgment-debtor, but a continuance or revival of the previous application interrupted by the objector.

*Per* PEARSON, J., *contra* that under art. 167, sch. ii., Act IX of 1871, execution of decree was barred.

Paras Rám sued one Jehangir Samuel Gardner on a bond hypothecating a ten biswa share of Datlana, and obtained a decree on the 23rd March, 1871. An application for the execution of this decree was filed on the 10th June, 1871; and the 21st August, 1871, was fixed for auction sale of the property.

\* Miscellaneous Special Appeal, No. 10 of 1876, from an order of H. M. Chase, Esq., Judge of Aligarh, dated the 3rd December, 1875, affirming an order of Maulvi Sami-ul-lah Khan, Subordinate Judge of Aligarh, dated the 2nd July, 1875.

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One Dabi Das objected to the attachment of the said property in execution of Paras Rám's decree, on the ground that the share aforesaid had been advertised for sale in satisfaction of the decree of Birj Basee and others, and had been purchased by the objector. The objection was allowed on the 16th August, 1871, and the property was released from attachment.

On the 17th June, 1872, Paras Rám sued to bring to auction sale a seven-biswa share out of the ten annas purchased by Dabi Das. In this suit Dabi Das was the sole defendant, and it was decreed against him on the 10th August, 1872.

Subsequently on the 25th March, 1875, Paras Rám applied to the Court of the Subordinate Judge of Aligarh to execute the decree, dated 23rd March, 1871, against Gardner.

The Subordinate Judge ruled that under the provisions of art. 167, sch. ii., Act IX of 1871, execution of the decree was barred, the suit against Dabi Das not being an application to enforce or keep in force the decree against Gardner.

The Judge in appeal holding that the decree-holder could have filed applications to keep the decree in force against Gardner, whilst prosecuting the suit against Dabi Das, confirmed the judgment and decree of the Subordinate Judge.

Paras Rám in special appeal before the High Court contended that the regular suit against Dabi Das was an application to enforce the decree of 23rd March, 1871, and that art. 167, sch. ii of the Limitation Act did not apply to the case.

The Court, (Turner and Oldfield JJ.) referred for decision by the Full Bench the question whether Paras Rám's application, dated 25th March, 1875, for execution of the decree, dated 23rd March, 1871, was an application brought within the period allowed by art. 167, sch. ii., Act IX of 1871, referring to two cases (1) of the Calcutta High Court decided under Act XIV of 1859.

The *Junior Government Pleader* Babu *Dwarkanath Banerji*, *Pandit Bishambhwar Nath*, and *Munshi Hanuman Parshad*, for appellant.

The respondent was unrepresented.

The following judgments were delivered by the Court.

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STUART, C. J.—We are asked by the reference whether the application of the 25th March, 1875, has been brought within the period allowed by art. 167, sch. 2, Act IX of 1871. It was suggested that art. 167 does not apply to such a case, and no doubt it does not come literally and precisely within the limits provided by that article. But in my view, art. 167 does apply, inasmuch as the application of the 25th March, 1875, was not a new or fresh act, but was in legal continuance of the application of June, 1871, and in my judgment therefore art. 167 applies constructively, the three years allowed by the article being reckoned from the 10th August, 1872, when Paras Rám's rights as against Dabi Das were restored to him.

That the execution of the decree is not barred clearly appears from the dates and legal character of the procedure. Paras Rám, the appellant, obtained his decree on the 23rd March, 1871, and he applied for execution of it by attachment and sale of the hypothecated property on the 10th of June, 1871, and the 21st of August, 1871, was fixed for the sale. In the course of the attachment, one Dabi Das objected to the sale on the ground that he had bought the property in execution of a decree he held against the same judgment-debtor, and on the 16th of August, 1871, his objection was allowed. On the 17th of June, 1872, (being within a year from the 16th August, 1871), Paras Ram brought a regular suit against Dabi Das and obtained a decree in his favour on the 10th of August, 1872. On the 25th of March, 1875, Paras Rám filed an application for the execution of his original decree of March, 1871. It is not explained why he allowed the interval to elapse without attempting to use his decree, but he had three years from the 10th of August, 1872, and, therefore, as between that date and the 25th of March, 1875, he was clearly within his rights.

The interruption to the execution of his decree was not occasioned by any fault or laches of his own, but was caused by the illegal intervention of Dabi Das. Paras Rám's procedure, therefore, under his decree must be held to have been legally continuous, and he may proceed to its execution.

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As to the application of the 25th of March, 1875, being a fresh application having no such connection with what had gone before as we can now take judicial notice of, I cannot so regard it. On referring to it, I find that it recites the whole previous procedure and simply repeats the prayer for execution of the decree which was made in June, 1871. It was, therefore, an application in legal continuance of the former process up to the 10th August, 1872, when Paras Rám obtained his decree in regular suit, and it ought to be granted as being within time.

PEARSON, J.—The application of the 25th March, 1875, may be regarded as an application to the Court to proceed with the former application of the 10th June, 1871, the proceeding under which had been interrupted by Dabi Das' objection and the order allowing it; but if so regarded, is, nevertheless, in substance and effect an application for the execution of the decree of the 23rd March, 1871; and art. 167, sch. 2, Act IX of 1871, is applicable to it, and requires that it should have been presented within three years from the date of the former application above mentioned. It can scarcely be contended that there is no limitation to the time within which the decree-holder was competent to make such an application as that of the 25th March, 1875; but if the limitation prescribed by art. 167 be not applicable, I do not find any other limitation provided by the law. I see nothing in the law to warrant us in ruling that he was at liberty or bound to make such an application within three years from the date of the decree obtained by him in his suit against Dabi Das on the 15th August, 1872. It might be reasonable and equitable to exclude from the computation of the period of limitation fixed by art. 167 the time during which such a suit was pending but such a course is not authorized by the law. The absence of any provision for the exclusion of that time may be a defect in the law, and cases may be supposed in which the defect might cause hardship. In the present case the decree-holder delayed for ten months to bring his suit against Dabi Das, and after obtaining a decree therein delayed for thirty-one months to apply to the Court to proceed with the execution of the decree of the 23rd March, 1871. His suit against Dabi Das was pending less than two months; and the exclusion from the computation of the period of limitation of the time during which it was pending would not

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bring his application within time. In my opinion the lower Courts have rightly held art. 167 to be applicable to his application of the 25th March, 1875, and to preclude its entertainment.

TURNER, J.—The application made for the execution of this decree by attachment and sale proceeded to such a point that as against the judgment-debtor a sale was ordered when its further prosecution was interrupted by the intervention of a third party, who succeeded in establishing his objection to the satisfaction of the Court executing the decree. The only course open to the decree-holder to procure a revision of the order allowing the objection was by the institution of a regular suit against the objection. This course he adopted, and having obtained a decree setting aside the order allowing the objection and declaring the liability of the property to be brought to sale in execution of the decree he had obtained against the original judgment-debtor, he then applied to the Court executing that decree to proceed with the application for execution which had been interrupted. On the ground that the application we are considering is not a fresh application to execute the decree, but an application to carry out the order which as against the judgment-debtor had become final and of which the prosecution was interrupted by the allowance of the objection of a third party since disallowed, I am of opinion that the provisions of the Limitation Act relating to applications for the execution of decree do not apply to it.

SPANKIE, J.—I accept the view that the application of the 25th March, 1875, must be regarded as one for a continuance of the former proceedings in execution and not as a fresh application for execution within the meaning of art. 167, sch. ii., Act IX of 1871. S. 246, Act VIII of 1859 provides that a suit may be brought to contest an order made under it, and if the suit be duly instituted within one year as required by Act IX of 1871, and the order of the Court in execution be reversed, it appears to me that the decree-holder is at liberty to ask that the order which should have been but was not made, should issue.

I hardly think that we are called upon to consider whether this view of the case would not do away with limitation altogether.

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All that is contended is that the former application was practically reversed when a decree in the regular suit allowed by s. 246, Act VIII of 1859, reversed the order of the Court executing the decree. It may be said that there are circumstances in the case referred to us, which are unfavourable to the decree-holder and show that he did not use due diligence in bringing his suit or in making his application to revive the former execution proceedings. This may be so, and, if so, it is for the divisional bench to deal with that part of the case.

OLDFIELD J.—I think we may hold that the last application may be considered as a continuance or renewal of the former application for execution in which the proceedings had been interrupted by the reference to the Civil Court, and were renewed on the second application, the latter will not therefore be an application to which the period of limitation in art. 167 will apply.

THE DIVISION BENCH TURNER and OLDFIELD, JJ. made the following order in the special appeal.—In accordance with the opinion expressed by the majority of the Court, we hold the application within time. Setting aside the order of the Courts below we remand the application for disposal on the merits to the Subordinate Judge's Court. Costs of the appeal in the Judge's Court and in this Court to abide and follow the result.

## APPELLATE CIVIL.

*Before Mr. Justice Pearson and Mr. Justice Turner.*

CHUNIA AND ANOTHER (PLAINTIFFS) v. RAM DIAL AND ANOTHER (DEFENDANTS).

*Act VII of 1870 (Court Fees Act), ss. 3 (c), 12, and sch. ii, art. 17, (iii)—Suit for a Declaratory Decree—Consequential Relief—Decision of questions relating to Valuation—Appeal.*

S. 12 of the Court Fees Act prohibits appeals on questions relating to valuation for the purpose of determining the amount of a fee, but does not prevent a Court of appeal from determining whether or not consequential relief is sought in a

\*Special Appeal, No. 1032 of 1876, from a decree of S. S. Melville, Esq., Judge of Cawnpore, dated the 26th June, 1876, affirming a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 27th September, 1875.