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Birpur, and which is said not to include the *jama* of the alluvial mahál. But the entry of *jama* is merely descriptive, while the essential part of the document is the entry in respect of the subject of sale, and this is the "entire taluka Birpur", a term sufficiently comprehensive to include the alluvial mahál appertaining to the taluka, and we may observe that the draft sale-deed, dated 21st January, 1874, expressly includes alluvial lands, and what is more to the purpose the sale-deed executed by order of the Court which gave the plaintiffs their decree expressly includes the disputed lands as conveyed to them by the auction-purchaser.

We reverse the decree of the lower Court and decree the claim with all costs.

Appeal allowed.

PRIVY COUNCIL.

P. C.
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March 9.

HIRA LAL (DECREE-HOLDER) *v.* BADRI DAS AND OTHERS (JUDGMENT-DEBTORS).

[On appeal from the High Court of Judicature at Allahabad, North-Western Provinces.]

Limitation—Proceeding to enforce decree—Act XIV. of 1859, *s.* 20.

It was the object of the Legislature in Act XIV. of 1859, s. 14, with regard to the limitation for the commencement of a suit, to exclude the time during which a party to the suit may have been litigating, *bonâ fide* and with due diligence, before a Judge whom he has supposed to have had jurisdiction, but who yet may not have had it. The same principle prevails in the construction of s. 20, with regard to executions. *Held*, accordingly, that a proceeding, taken *bonâ fide* and with due diligence, before a Judge whom the judgment-creditor believed, *bonâ fide*, though erroneously, to have jurisdiction,—in this case the Judge himself, also, having believed that he had jurisdiction, and having acted accordingly,—was a proceeding to enforce the decree within the meaning of s. 20.

APPEAL from a judgment of the High Court of the North-Western Provinces (25th May, 1877,) affirming a judgment of the Judge of Agra (31st May, 1876,) allowing the objection of the respondents to the execution in 1874 of a decree obtained in 1867.

In 1867 the decree of which execution was refused in the Indian Courts was obtained by the appellant and one Makhan

Present:—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

Lal, since deceased, for Rs. 11,566. A certificate for execution was issued on the 23rd March, 1868, by the Judge of that Court who in December, 1868, (nothing having been realized under it,) ordered that the execution be made over to the Subordinate Judge. The latter in December, 1868, ordered issue of attachment; and, on this proving fruitless, the execution-case, on the 3rd April, 1869, was struck off the file by the Subordinate Judge. The proceedings taken from time to time by the decree-holders in the Court of the Subordinate Judge to enforce the decree after that date until the re-institution of the proceedings in execution of the decree in the Court of the Judge of Agra, by petition of the 9th April, 1874, are stated in their Lordships' judgment.

Mr. *L. Graham* appeared for the appellant.

The respondents did not appear.

Mr. *Graham* referred to the following cases, contending that the proceedings taken by the decree-holders had been sufficient, within the meaning of s. 20 of Act XIV. of 1859, to prevent the operation of that section, to bar execution.—*D. A. Dalvi* v. *Lakshuman Hari Pátil* (1): *Dheeraj Mahtab Chund* v. *Bulram Singh* (2): *Ram Sahai Singh* v. *Degan Singh* (3): *Roy Dhunpat Singh Roy* v. *Madhomotee Dabia* (4): *Benoderam Sen* v. *Brojendro Narain Roy* (5).

Their Lordships' judgment was delivered by

SIR BARNES PEACOCK.—The question in this case is whether the judgment-creditors, who on the 14th of January 1867, obtained in the Court of the Judge at Agra a decree against the respondents, were on the 9th of April 1874 barred by limitation from executing it. It appears that on the 3rd of December, 1868, the Judge sent the decree to the Subordinate Judge of the district to be executed by him, and that on the 3rd of April, 1869, the Subordinate Judge struck the execution-case off the file. On 9th of April, 1874, the case was re-instituted in the Court of the Judge by the petition which has given rise to the question now to be determined.

(1) 4 Bom. H. C. Rep, A. C. J., 86.
(2) 13 Moo. Ind. App. 479.
(3) 6 W. R. Misc., 98.
(4) 11 B. L. R., P. C., 23.
(5) 13 B. L. R., P. C., 169.

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Between the 3rd April, 1869, when the Subordinate Judge struck the case off his file, and the 9th April, 1874, proceedings were from time to time taken by the decree-holders in the Court of the Subordinate Judge to enforce the decree, but the question is whether those proceedings were sufficient to prevent the operation of the Limitation Act XIV. of 1859, s. 20.

It appears that on the 18th February, 1870, an application was made by the decree-holders to the Subordinate Judge to set off a debt of Rs. 1,300, which they owed to a debtor of the respondents, against so much of the amount due to them under the decree, and the Subordinate Judge made an order that the application should be granted, that the decree-holders should file a receipt for Rs. 1,300, and that the case should be struck off the pending file. On the 18th February, 1870, therefore, the Subordinate Judge made an order by which a portion of the debt, to the extent of Rs. 1,300, was satisfied. Subsequently on the 8th of January 1872 an application was made to the Subordinate Judge to send a certificate of the decree to the Political Agency at Indore in order that the decree might be executed there, whereupon he made an order that the Judge should be requested to send the record of the execution of decree; but inasmuch as an interval of more than one year had elapsed since the last order it was necessary, under s. 216 of Act VIII. of 1859, to serve the judgment-debtors with a notice, in order that they might, if they could, show cause why the decree should not be executed against them. Accordingly a notice was sent to them in a registered cover by post, they living out of the jurisdiction of the Court, but it was returned, as the judgment debtors were not found. That was on the 2nd April, 1872. The Subordinate Judge held that that was not a sufficient service upon the defendants, and ordered the case to be struck off the file of pending cases. On the 3rd May, 1872, he made an order: "That a notice be sent to the judgment-debtors by post in a registered cover, fixing the 18th day of May as the date for showing cause, and that the case be brought forward on the said date." On the 30th May, 1872, the nazír of the Court made the following report: "In this case a notice in a registered cover was sent by post to the judgment-debtors. The cover has been returned to-day

by the post, open. The cover has a slip attached thereon, in which it is written, in Hindi, that Badri Nath, treasurer (that is one of the judgment-debtors), refuses to take it. Therefore, the cover in question is submitted, with this petition." On the 3rd June, 1872, the case again came before the Subordinate Judge, upon which he made the following order: "The case having been brought forward, it appears that a notice in a registered cover was sent by post to the judgment-debtor at Indore, but, the judgment-debtors not having received the cover, it was returned. The judgment-debtors not having taken the cover containing the notice, it must be considered as having been served." It is therefore ordered: "That a report be endorsed on the decree, and made over to the decrée-holder's pleader, that he may sue out execution in a competent Court, and recover the amount of his decree, and that the case be struck off the pending file."

Afterwards, on the 24th December, 1873, upon a report of the muharrir that the record was not in the office, the Subordinate Judge made another order that the record should be sent for from the Judge's Court. Subsequently, on the 9th January, 1874, in a proceeding from which it appears that the record had been received and perused, the Subordinate Judge "ordered that the certificate prescribed by ss. 285 and 286, Act VIII. of 1859, and copy of the application for execution of decrée, be sent to the Agent at the Indore Cantonment." On the 9th April, 1874, the case was re-instituted in the Court of the Judge by petition, stating that the Subordinate Judge had not lost control of the case until 3rd June, 1872, that the decree-holders had a certificate on which they had not acted, and they prayed the Court that, under s. 237, certain 4 per cent. promissory notes for Rs. 25,000 due to the judgment-debtors in the Indore Agency Cantonment Treasury might be attached. It appears that after some demur on the part of the Assistant Political Agent to execute the decree, he was ordered to execute it; and he did execute it by attaching a sum of Rs. 13,097 belonging to the judgment-debtors, and that money was sent to the Judge at Agra by means of a bill. On the 13th May, 1876, the Judge, having received the money from the Indore Agency, ordered that the Rs. 13,097-7-9 be given over to Mir Jaffar Husain,

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pleader for the decree-holder, agreeably to a power given to him, and a receipt be taken from him. Before the money was handed over, however, an application was made to the Judge, in which the defendants made the following objection, amongst others: "(i) That the decree-holder's decree is beyond time." Thereupon the Judge on the 18th May, 1876, made the following order: "The objections are such as may be entertained, and may possibly be determined in favour of the debtors. It appears, therefore, undesirable that the decree-holder should get the money till they have been disposed of. Let payment be stayed on the debtors giving security to pay interest at eight annas per mensem per cent., in the event of the money being ultimately awarded. If the cheque received from foreign territory have been already made over to the decree-holder, an injunction may be issued to the bank on which it is drawn, not to cash it till further orders." Then comes the decision of the 31st May, 1876, by which the Judge held that the proceedings in the Court of the Subordinate Judge were *ultra vires*, and did not prevent the running of limitation. He held that the transfer of the case to the Subordinate Judge was not authorised by law, and that when the Subordinate Judge removed the case from his files he could not take it up again without a fresh transfer. He also considered that the decree-holders had not shown due diligence in the case and doubted whether any of the proceedings were *bonâ fide*. He, therefore, held that he was constrained to grant the prayer of the objectors, and to award them costs.

The execution-creditors appealed to the High Court, and that Court upheld the decision. The Judges, however, stated that they saw no reason to think that the appellants had not exerted themselves *bonâ fide* to obtain their due. In that view their Lordships concur. But the High Court considered that the transfer to the Subordinate Judge, even if the Judge had power to make it, merely authorised him to take up and dispose of the application then pending and not the subsequent applications which were made to him. They further stated that they affirmed the order of the Judge with great reluctance.

There can be no doubt that the applications to and orders of the Subordinate Judge if he had had jurisdiction would have been suffi-

cient to prevent the operation of the Statute of Limitations, and their Lordships are of opinion that, under the circumstances of the case, they had that effect, even if he had no jurisdiction. S. 14 of Act XIV. of 1859 enacts: "In computing any period of limitation prescribed by this Act, the time during which the claimant, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the *same* cause of action against the same defendant, or some person whom he represents, *bonâ fide* and with due diligence, in any Court of Judicature which, from defect of jurisdiction or other cause, shall have been unable to decide upon it, or shall have passed a decision which, on appeal, shall have been annulled for any such cause, including the time during which such appeal, if any, has been pending, shall be excluded from such computation." It was, therefore, the object of the Legislature, at least with regard to the limitation for the commencement of a suit, to exclude the time during which a party to the suit may have been litigating, *bonâ fide* and with due diligence, before a Judge whom he may suppose to have had jurisdiction, but who yet may not have had jurisdiction. The question is, whether the same principle may not be applied to the construction of s. 20 of Act XIV. of 1859, with regard to executions. S. 20 says: "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 proceeding 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 such execution." The Act does not say some proceeding in a Court having jurisdiction, and their Lordships are of opinion that a proceeding taken *bonâ fide* and with due diligence before a Judge whom the party *bonâ fide* believes, though erroneously, to have jurisdiction, especially when the Judge himself also supposes that he has jurisdiction, and deals with the case accordingly, is a proceeding to enforce the decree within the meaning of s. 20.

In this case the Subordinate Judge did believe he had jurisdiction. Applications were made to him, and he made orders which would, if he had had jurisdiction, have been proceedings within the period of limitation. If the judgment-debtors had appeared before

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the Subordinate Judge, and had objected to his jurisdiction, he must have decided whether he had jurisdiction or not; and if he had decided that he had jurisdiction, even though he had not, the proceedings would have been proceedings within the meaning of s. 20. They ought equally to be so, though the judgment-debtors did not appear or object to the jurisdiction.

There is one case which should be referred to, and that is the case of *Dhunput Singh Roy* v. *Mudhomotee Dabia* (1) reported in the 11th Bengal Law Reports, page 23. There, "An execution sale was stayed by consent for two months, and the execution-suit was struck off the file. During that period the execution-creditor applied to the Court to restore the execution-suit, and to pay to him certain moneys in deposit in Court to the credit of the judgment-debtor in another suit, alleging that he (the executing creditor) had attached them; but it turned out that he had attached them in another suit. *Held*,—the application being *bonâ fide*, that the period of limitation began to run from the date of the disposal of the application by the Court." In delivering their judgment at page 31, the Judicial Committee said: "It is said that this proceeding cannot be held to be one to keep the judgment in force, because it was a petition to obtain execution of a sum of money which it was not possible that the execution could reach, and that that must have been so to the knowledge of the decree-holder. It seems to their Lordships that these circumstances really affect only the *bonâ fides* of the proceeding. If their Lordships could infer from these facts that the petition was a colorable one, not really with a view to obtain the money; if they could come to that conclusion, in point of fact, the proceeding would not be one contemplated by the statute; but their Lordships cannot come to that conclusion." They therefore came to the conclusion that the proceeding, although abortive, was a proceeding within the meaning of the 20th section of Act XIV of 1859.

On the whole, therefore, their Lordships have arrived at the conclusion, and will humbly advise Her Majesty, that the decree of the High Court was erroneous, and that it be reversed; that in lieu

(1) 11 B. L. R., P. C., 23.

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thereof an order be made reversing the order of the Judge of Agra of the 31st May, 1876, and ordering that the Rs. 13,097-7-9, with such interest as they may be entitled to under the order of the 18th May, 1876, be paid to the decree-holder; and that the appellants have the costs in all the lower Courts subsequent to the petition of objection of the 18th May, 1876, and the costs of this appeal.

Solicitors for the Appellant: Messrs *Watkins* and *Lattey*.

APPELLATE CIVIL.

1880
April 22.

Before Mr. Justice Oldfield and Mr. Justice Straight.

GULZARI LAL (DEFENDANT) *v.* JADAUN RAI (PLAINTIFF).*

Suit to establish Right to Attached Property—Jurisdiction.

Held that, in the case where a person has preferred a claim to property attached in the execution of a decree, on the ground that such property is not liable to such attachment, and an order is passed against him, and he sues to establish his right to such property, the value of the subject-matter in dispute in such suit, for the purposes of jurisdiction, will be the amount of such decree. Second Appeal No. 320 of 1876, decided the 16th May, 1876 (1), followed.

THE plaintiff in this suit claimed a declaration of his proprietary right to certain wheat and *gram* valued at Rs. 1,200, and the cancelment of an order made by the Munsif of the city of Moradabad on the 17th May, 1876, disallowing his claim to the same. This grain had been attached by the defendant, when in the possession of the plaintiff, as the property of the defendant's judgment-debtor, in execution of a decree for Rs. 222-13-6. The suit was instituted in the Court of the Subordinate Judge of Moradabad, by whom the suit was dismissed. On appeal by the plaintiff the District Judge gave him a decree in respect of the wheat.

On appeal by the defendant to the High Court it was contended that the suit should have been instituted in the Munsif's Court, the value of the subject-matter in dispute being the amount of the decree

* Second Appeal, No. 526 of 1879, from a decree of W. Young, Esq., Judge of Moradabad, dated the 6th February, 1879, modifying a decree of Maulvi Wajih-ullah Khan, Subordinate Judge of Moradabad, dated the 11th April, 1877.

(1) Unreported.