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July 1.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

RAMADHAR (DECREE-HOLDER) *v.* RAM DAYAL (JUDGMENT-DEBTOR.) *

Civil Procedure Code, s. 230—Twelve years' old decree—Execution of decree—Meaning of "granted."

A decree passed in April, 1872, was kept alive by various applications for execution up to 1883. In February and December of that year two such applications were made, but the proceedings on both occasions terminated in the applications being struck off without any money being realized under the decree. In November, 1884, the decree-holder again applied for execution, the application being the first made after the decree had become twelve years old, and being made within three years from the passing of the Civil Procedure Code 1882.

Held that the application must be entertained in accordance with the ruling of the Full Bench in *Musharraf Begam* v. *Ghalib Ali* (1). *Tufail Ahmad* v. *Sadho Saran Singh* (2) dissented from. *Jokhu Ram* v. *Ram Din* (3) referred to.

Per MAHMOOD, J., that the previous execution proceedings initiated by the applications of February and December, 1883, having terminated in those applications being struck off, it could not be said that the applications were "granted" within the meaning of s 230 of the Civil Procedure Code. *Paraga Kuar* v. *Bhagwan Das* (4) referred to.

THE decree of which execution was sought in this case was passed on the 29th April, 1872, and two or three applications for execution were made before the year 1883. Then, on the 2nd February, 1883, an application for execution was made, and notice was issued and served upon the judgment-debtor, who raised objections to the execution on the 10th March, 1883, and a reply to those objections was filed by the decree-holder on the 18th April, 1883. On the 9th July, 1883, the parties asked the Court to allow time for an amicable settlement, but no such settlement having been notified to the Court, the application was struck off on the 19th July, 1883, without any money being realized under the decree. The next application for execution was made on the 10th December, 1883, and notice was issued to the judgment-debtor, but as he could not be found it was affixed to his house under the provisions of the Code; but the decree-holder took no further

* Second Appeal No. 46 of 1886, from an order of W. Blennerhassett, Esq., District Judge of Cawnpore, dated the 22nd December, 1885, affirming an order of Munshi Kulwant Prasad, Subordinate Judge of Cawnpore, dated the 15th April, 1885.

(1) I. L. R., 6 All. 189.
(2) Weekly Notes, 1886, p. 193.
(3) *Ante*, p. 419.
(4) *Ante*, p. 301.

action, and his application was again struck off on the 19th May, 1884, without any money being realized under the decree.

The next application for execution of the decree was made on the 24th November, 1884, and notice having been issued to the judgment-debtor, the latter, on the 2nd February, 1885, objected to the execution upon the ground, among others, that the decree was barred by the twelve years' rule under s. 230 of the Civil Procedure Code. This objection was allowed by the first Court on the 15th April, 1885, and the order was upheld in appeal by the lower appellate Court on the 22nd December, 1885 ; and from this order this second appeal was preferred.

It was contended for the appellant that, under the circumstances of this case, the application was not barred, being entitled to three years' grace from the passing of the present Code (17th March, 1882), under the proviso to s. 230, with reference to the Full Bench ruling of this Court in *Musharraf Begam* v. *Ghalib Ali* (1), and that neither the application of 2nd February, 1883, nor that of 10th December, 1883, having been "granted" within the meaning of s. 230 of the Code, the limitation of twelve years, contained in that section, was not applicable to the present application. In support of this last contention *Puraga Kuar* v. *Bhagwan Din* (2) was cited.

Mr. *Simeon*, for the appellant.

Mr. *Carapiet*, for the respondent.

MAHMOOD, J.—The exact effect of the Full Bench ruling was recently discussed and summarized by me in *Jokhu Ram* v. *Ram Din* (3). It is clear from the report of the Full Bench ruling that the application, which was under consideration in that case, was the first made under the present Code after the decree had become twelve years old, and in view of this circumstance the learned Judges constituting the majority of the Full Bench observed :— "In the execution proceedings to which this reference relates, the respondent-decree-holder's application to execute the decree of November, 1870, was not only the first preferred by him under s. 230 of Act XIV of 1882, but the first he had made after the expiration of

(1) I. L. R., 6 All. 189. (2) *Ante*, p. 301.
(3) *Ante*, p. 419.

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twelve years from the date of the decree, and as such was, we think, entertainable." That this was not a mere *obiter dictum*, but formed a part of the *ratio decidendi*, is apparent from the judgment itself, and the same conclusion is derivable from what Straight, Offg. C. J., one of the learned Judges of the majority of the Full Bench, has said in *Paraga Kuar* v. *Bhagwan Din* (1):—"Looking at the provisions of s. 230 of the Civil Procedure Code, it would appear that, after a decree is twelve years old, there is a prohibition against its being executed more than once; that is, an application for execution should not be granted if a previous application had been allowed under the provisions of that section." There can therefore be no doubt that, according to the opinion of the majority of the Full Bench in the case of *Musharraf Begam* (2), the holder of a decree more than twelve years old was to be allowed *only one* opportunity to execute his decree under that section, and indeed the application with which the Full Bench was dealing was the first application after the decree had become twelve years old, and also the first under the present Code.

Such is not exactly the case here, for both the application of the 2nd February, 1883, and that of the 10th December, 1883, were made under the present Code, but on neither of those occasions was the decree more than twelve years old. The present application, which was made on the 24th November, 1884, is, therefore, the *third* application made under the present Code, but it is the first made after the lapse of twelve years from the date of the decree. It must therefore be entertained within the principle of the ruling of the Full Bench; because the twelve years limitation provided by s. 230 of the Code of 1877 cannot, according to that ruling, be read as included in the proviso to that section. The only authority for the respondent's contention, that this decree is barred, is the ruling of Petheram, C. J., in *Tufail Ahmad* v. *Sadho Saran Singh* (3); but in the case of *Jokhu Ram* v. *Ram Din* (4), I have already stated my reasons for being unable to adopt that ruling.

Then again I agree in what Straight, Offg. C. J., has said in *Paraga Kuar* v. *Bhagwan Din* (1) as to the meaning of the word "granted" as used in s. 230 of the Civil Procedure Code. Here

(1) *Ante*, p. 301. (2) I. L. R., 6 All. 189.
(3) Weekly Notes, 1885, p. 193. (4) *Ante*, p. 419.

the previous execution proceedings under the present Code initiated by the applications of the 2nd February, 1883, and 10th December, 1883, terminated in these applications being struck off, and these results cannot be construed to mean that these applications were "granted" within the meaning of s. 230 of the Civil Procedure Code.

I would decree this appeal, and setting aside the orders of both the lower Courts, remand the case to the Court of first instance for disposal according to law, with reference to the other objections raised by the judgment-debtor. Costs to abide the result.

OLDFIELD, J.—This is an appeal from an order disallowing an application to execute a decree. The decree bears date the 20th April, 1872. Applications to execute the decree have been made and granted under Act X. of 1877 and under the present Code of Civil Procedure, and the present application is dated the 24th November, 1884. The question is, whether it is barred under the provisions of s. 230.

This application is made more than twelve years after the date mentioned in the section, and a previous application for execution has been made and granted under this Code: consequently it would be barred by time, unless it comes under the proviso in the last paragraph of the section, which is as follows :—"Notwithstanding anything herein contained, proceedings may be taken to enforce any decree within three years of the passing of this Code, unless when the period prescribed for taking such proceedings by the law in force immediately before the passing of this Code shall have expired before the completion of the said three years."

Now this application is within three years of the passing of this Code, and we have to see if the period prescribed for taking proceedings to enforce the decree by the law in force immediately before the passing of this Code has expired. The decree, no doubt, has become time-barred under the provisions of s. 230, Act X of 1877; but it has been held by the majority of the Full Bench of this Court that the law referred to in the proviso is not s. 230, Act X of 1877, but the Limitation Act; and with reference alone to the Limitation Act the decree cannot be held to be time-barred.

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I dissented from the majority of the Full Bench in the ruling referred to, but I am bound to decide this case in accordance with it. A decision of a Division Bench of this Court has been cited to the effect that "that the proviso in s. 230 applies to those decrees which would be barred on the date of the Code coming into force, and does not apply to those decrees which were not barred by the twelve years' rule when the Code came into force, and which could have been executed on the Code coming into force by reason of the fact that the period of twelve years had not expired from the date mentioned in s. 230"—[*Tufail Ahmad* v. *Sadho Saran Singh* (1)].

According to this ruling, the decree we are dealing with would not be saved by the proviso, which would not apply to it.

But I am unable to concur in the interpretation of the proviso taken by the learned Judges in that case.

I would set aside the orders and remand the case for execution. Appellant will have costs in all Courts.

Case remanded.

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July 2.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.

RAM AUTAR (PLAINTIFF) *v.* DHANAURI AND OTHERS (DEFENDANTS).*

Mortgage—First and second mortgages—Registered and unregistered documents—Act III of 1877 (*Registration Act*), *s.* 50—*Fraudulent transfer—Act IV. of* 1882 (*Transfer of Property Act*), *s.* 53.

Apart from any question of equitable estoppel, such as described by Lord Cairns in the *Agra Bank* v. *Barry* (2), where one person takes a possessory mortgage of property with full knowledge and notice that another is already in possession of such property under an earlier instrument of a similar kind, he cannot be said to be acting in good faith, and the principle of s. 53 of the Transfer of Property Act (IV. of 1882) is applicable to such a transaction. In such a condition of circumstances, *quoad* the prior title, though created by an unregistered instrument, the *status* of the second mortgagee under his registered document is affected by his own *mala fides*; and as, on the one hand, the first mortgagee might avoid it on the ground that it was executed in fraud of him, so, on the other, the second mortgagee cannot, on the strength of his own fraud, pray in aid the provisions of the Registration Law to give preference to an instrument which records a

* Second Appeal No. 1629 of 1885, from a decree of C. Donovan, Esq., District Judge of Benares, dated the 28th July, 1885, confirming a decree of Pandit Rajnath, Munsif of Benares, dated the 19th February, 1885.

(1) Weekly Notes, 1885, p. 193. (2) L. R., 7 H. L. 135.