

imprisonment with hard labour, but inasmuch as the question is one of very great moment to the mercantile community, and one on which it appears to me most desirable that an authoritative ruling should be obtained, I direct that the following question be referred to the High Court, under s. 432 of the Code of Criminal Procedure, and that pending the decision of the High Court, the accused be enlarged on his own recognizance of Rs. 10 to come up for judgment when called upon.

"Whether the amendment cls. 1 and 2 of s. 243 of 17 & 18 Vic. c. 104 by Act 43 & 44 Vic. c. 16, affects the provisions of Act I of 1859 of the Indian Council, so as to do away with the liability to imprisonment in Calcutta for the offences specified in cls. 1 and 2 of s. 83, Act I of 1859?"

No one appeared for either party on the reference.

The following was the opinion of the Court (CUNNINGHAM and GHOSE, JJ.)

We agree with the Magistrate in the view he has taken of this matter. The amendment of cls. 1 and 2 of s. 243 of the Merchant Shipping Act, 1854 (17 & 18 Vic. c. 104) by 43 & 44 Vic. c. 16, does not, in our opinion, affect the liability of seamen in Calcutta, under s. 83 of Act I of 1859, to imprisonment. Had any such change been intended, it would doubtless have been expressly enacted in Act V of 1883, passed subsequent to the above Act 43 & 44 Vic. c. 16, which in ss. 35, 36 and 37 amends some portions of Act I of 1859.

T. A. P.

APPELLATE CIVIL.

Before Mr. Justice Cunningham and Mr. Justice O'Kinealy.

RAJKUMAR BANERJI AND ANOTHER (JUDGMENT-DEBTORS) v. RAJLAKHI DABI (DEGREE-HOLDER).^o

1885

December 11.

Limitation Act (XV of 1877), Sec. II, Art. 179, ol. (4)—Execution of decree—Step in aid of execution—Confirmation of Sale—Application for copy of decree.

On the 19th of March 1880 a decree for money was passed, and on the 19th of February 1881, certain property belonging to the judgment-debtor was sold in execution thereof. On the 22nd of April 1881, the Court passed

* Appeal from Appellate Order No. 260 of 1885, against the order of H. Gillon, Esq., Judge of Hooghly, dated the 30th of June 1885, affirming the order of Baboo Kristo Mohun Mukerji, Subordinate Judge of that district, dated the 17th of May 1884.

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an order confirming the sale. On the 10th of January 1882, the decree-holder applied to the Court for a copy of the decree, in order that he might make a fresh application for execution. On the 28th of March 1884 he applied for execution. The judgment-debtor appeared and pleaded that execution was barred by limitation. The Court of first instance held that execution was not barred on the ground that the passing of the order of the 22nd of April 1881 was sufficient, under the provisions of Art. 179, cl. 4 of the Limitation Act of 1877, to keep the decree alive. The lower Appellate Court also held that execution was not barred by limitation, but solely on the ground that the application of the 10th of January 1882 was sufficient to keep the decree alive. It did not appear that the order of the 19th of February 1881 was passed in consequence of any application by the decree-holder, and neither the application of the 10th of January 1882 nor any copy thereof was put in evidence on the present application.

Held, on appeal to the High Court, that the execution of the decree was barred by limitation.

IN this case the judgment appealed from is as follows :—

“This is an appeal from an order admitting an application dated the 28th of March 1884, for the execution of a decree obtained on the 19th of March 1880. On the 19th of February 1881, certain property was sold in execution of the decree. On the 22nd of April 1881, the Court passed an order confirming the sale and striking the execution case off the file. On the 29th of April 1881, the decree-holder applied to take out a sale certificate. On the 10th of January 1882, he asked the Court to return a copy of the decree filed by him, in order that he might make a fresh application for execution. The lower Court, relying on the case of *Radha Prosad Singh v. Sundur Lall* (1), held that the order confirming the sale was a step in aid of execution sufficient to give a new starting point under Art. 179, cl. 4 of the Limitation Act. The lower Court was wrong, because there was no application on the part of the decree-holder on the 22nd of April 1881 when the sale was confirmed. Art. 179, cl. 4 has reference to applications only. The case of *Toree Mahomed v. Mahomed Mabood Bux* (2) clearly conflicts with the ruling in *Radha Prosad Singh v. Sundur Lall*; and the rulings throughout the Indian Law Reports consistently support the view that there must be an application, and that a mere act or deposit of money does not suffice. The application dated the 29th of April

(1) I. L. R., 9 Calc., 644.

(2) I. L. R., 9 Calc., 730.

1881 does not help the decree-holder, as it was made in his capacity of auction-purchaser. It remains to be seen whether the application, dated the 10th of January 1882, gives a new starting point under Art. 179, cl. 4. Looking at the liberal construction put on Art. 179, cl. 4, by the Calcutta High Court in many cases, I think the application dated the 11th of January 1882 must be considered as an application to take some step in aid of execution of the decree—*Kunhi Mannan v. Seshagiri Bhaktan* (1) and appeal from order No. 192 of 1884, dated 20th November 1884, decided by the Calcutta High Court (not reported). For these reasons I uphold the lower Court's order but on a different ground."

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The judgment-debtors appealed to the High Court on the grounds—(1), that the lower Appellate Court has erroneously held that the application made by the decree-holder on the 10th of January 1882, asking the Court to return a copy of the decree filed by her, in order that she might make a fresh application for execution, was sufficient within cl. 4, Art. 179 of the Limitation Act to keep alive the decree in this case; (2), that the lower Appellate Court ought to have held that the decree in this case was barred on the date the present application for execution was made, namely, 28th March 1884."

Baboo *Kristo Komul Bhuttacharjee*, for the appellants.

Baboo *Troilokhya Nath Mitter*, and Baboo *Kali Charun Banerjee*, for the respondent.

The following judgments were delivered by the Court (CUNNINGHAM and O'KINEALY, JJ.)

CUNNINGHAM, J.—The question raised in this appeal is whether the application made on the 28th March 1884 to execute the decree made on the 19th March 1880 is barred by limitation.

Two grounds are stated as grounds on which limitation should be held not to be barred. The first is that on the 29th April 1881 the sale was confirmed. No copy of the order passed or of any application to pass it, if such there was, has been produced before us. As it lies on the judgment-creditor to show us that the period of limitation has not expired, it is

(1) I. L. R., 5 Mad., 141.

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his duty, if he wishes to rely upon anything that took place, to supply the Court with proper evidence of the proceedings to enable us to be satisfied that there was any such application: as it is, we can only say that we have nothing to go upon which would justify our holding that any application was made at that time, and we do not consider that a mere order passed in execution, irrespective of any application, should be considered as an application within the meaning of Art. 179 of the schedule of the Limitation Act.

The next ground on which it is urged that limitation is not barred is that on the 10th January 1882, the decree-holder applied for a copy of the decree, in order, as the District Judge has found, that he might make a fresh application for execution. Here again the judgment-creditor has thought fit not to place on the record a copy of this application. We are therefore in the dark as to what were its terms, and as to whether it showed on the face of it anything from which we could properly infer that it was for the purpose of execution. We have, however, the fact that no execution was applied for until March 1884. Therefore, if the purpose with which the application was made was to obtain execution, it was certainly a long time before that purpose was carried into effect. Taking the mere fact of an application for a copy of the decree, we are not prepared to find that it would be fairly construed as an application to the Court to take a step in furtherance of the execution of the decree within the scope of para. 4 of Art. 179 of the schedule of the Limitation Act.

We think, therefore, that the judgment-creditor has failed on both grounds to show that there has been any such application between the making of the decree and the present application which would prevent the period of limitation from expiring.

We must, therefore, admit the appeal, reverse the decisions of both the lower Courts, and dismiss the application for execution with costs in all the Courts.

O'KINEALY, J.—I concur with the judgment which has just been delivered in holding that the application for execution is barred.

The judgment-creditor says that under cl. 4 of Art. 179

of the schedule of the Limitation Act, he has a right to execute the decree. That clause runs as follows: "(Where the application next hereinafter mentioned has been made) the date of applying in accordance with law to the proper Court for execution, or to take some step in aid of execution of the decree." His contention is that he has made an application to the Court to take a step in aid of execution. There is no such application on the record. If we were to decide the case upon such an application, we would be deciding it upon a document which has never been put before us, which we have not seen and of which we do not know anything.

Moreover, I agree in considering that a mere order of Court which requires no application does not fall within that clause. That clause evidently means that there must be some application to the Court to take some step. And where a step has been taken or an order has been passed without any application at all, it does not seem to fall within the purview of the law.

Then it is said that an application to get a copy of the decree returned which was in the record room of the Judge's Court, is an application to the Court to take a step in aid of execution.

It appears to me that an application for the return of a document in the record room is by itself an indifferent act. And there is nothing on this record to show us how or in what way it would aid execution. No copy of the decree is required by law to be filed in execution. I therefore concur in thinking that the application for execution should be dismissed.

P. O'K.

Appeal allowed.

ORIGINAL CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Wilson.

JUDAH (DEFENDANT) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (PLAINTIFF).*

1886
January 6,

Insolvent Act (11 & 12 Vict. c. 21), s. 62—Crown-debts—Judgment-debt in name of Secretary of State for India in Council.

A judgment-debt due to the Secretary of State for India in Council, arising out of transactions at a public sale of opium held by the Secretary of State

* Original Appeal No. 14 of 1885, against the order of Mr. Justice Norris, dated the 16th of February 1885.