

Before Mr. Justice Aikman.

1895
March 6.

LAKHMI CHAND (DECREE-HOLDER) v. BALLAM DAS (JUDGMENT-DEBTOR). *

Execution of decree - Limitation - Execution stayed by reason of an injunction for more than three years - Revival of previous application for execution.

A decree-holder in execution of his decree attached a decree held by his judgment-debtor. On the 3rd of July 1888 the decree-holder applied for execution of his decree by enforcement of the second decree, and in pursuance of this application obtained attachment of certain property as belonging to the judgment-debtor under the second decree. Subsequently a suit was filed by the son of such judgment-debtor claiming the property as his own, and in that suit an injunction was granted staying execution under the application of the 3rd of July 1888 until the suit was decided. The application for execution was thereupon struck off, but the attachment was maintained. On the 19th of March 1892 the suit was dismissed and the injunction came to an end. On the 29th of October 1892 a fresh application was made for execution.

Held that this second application was not barred by limitation, but was to be regarded as an application to renew the proceedings commenced by the former application, which had been suspended by the act of the Court and not by anything for which the decree-holder was responsible. *Peary Mohun Chowdhry v. Romesh Chunder Nundy* (1); *Kalyanbai Dipchand v. Ghanashamlal Jadunathji* (2) and *Paras Ram v. Gardner* (3) referred to.

THE facts of this case are fully stated in the judgment of Aikman, J.

Mr. *Abdul Majid* for the appellant.

Maulvi *Muhammad Ishaq* for the respondent.

AIKMAN, J.—On the 18th of May 1887 Lakhmi Chand, the appellant in the case, got a decree against certain persons, amongst whom were two men named Sham Chand and Shiam Sundar Lal. These two judgment-debtors had, on the 24th of December 1884, got a decree against one Ballam Das, the respondent in this appeal. On Babu Lakhmi Chand's application that decree of the 24th of December 1884 was attached on the 15th of June 1887, under the provisions of s. 273 of the Code of Civil Procedure, in execution of his decree. Both decrees were passed by the same Court. The law

Second Appeal No. 693 of 1894, from an order of J. Denman, Esq., District Judge of Benares, dated the 25th April 1894, confirming an order of Babu Nil Madhub Roy, Subordinate Judge of Benares, dated the 24th June 1893.

(1) I. L. R., 15 Calc., 371.

(2) I. L. R., 5 Bom., 29.

(3) I. L. R., 1 All., 355.

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is not quite clear as to what should be done by an attaching decree-holder in such a case, but it has been held in *Peary Mohun Chowdhry v. Romesh Chunder Nundy* (1) that a person attaching a decree is a representative of the decree-holder within the meaning of s. 244, cl. (c) of the Code of Civil Procedure, and is entitled to have execution of the attached decree enforced on his application, and with this opinion I entirely concur.

On the 3rd of July 1888, Lakhmi Chand applied for the execution of his own decree by enforcement of the decree of 1884 against the property of Ballam Das and by crediting the sale-proceeds to the applicant's decree. Notice was issued to Ballam Das under the provisions of s. 248 of the Code. He showed no cause against the execution, and accordingly certain property belonging to him was attached on the 31st of July 1888, and ordered to be sold on the 17th of January 1889. In the meanwhile Manni Lal, the son of Ballam Das, brought a regular suit to have it declared that the property attached as belonging to Ballam Das was in reality his (that is, Manni Lal's) property. An injunction was issued by the Court in which this suit was filed staying the execution against Ballam Das which was then in progress. On the 30th of January 1889, on the motion of the decree-holder's pleader, the execution case was filed with liberty to him to proceed with it when the injunction was taken off, the attachment of Ballam Das' property being maintained. On the 19th of March 1892 Manni Lal's suit was dismissed, and with the dismissal of this suit the injunction came to an end after having been in force for upwards of three years. On the 29th of October 1892 the present application was made asking that the decree of 1884 should be executed and the money realized by its execution should be applied in satisfaction of the decree of the attaching creditor. The judgment-debtor, Ballam Das, objected that the attached decree had become barred by limitation. Both the Subordinate Judge and the District Judge have sustained the plea and dismissed the appellant's application. Hence the appeal to this Court.

(1) I. L. R., 15 Calc., 371.

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In my opinion the lower Courts were clearly wrong in refusing the application. At the time when the application of the 3rd of July 1888 was made the decree against the respondent was alive. It is true that upwards of three years had elapsed between the date of that and the date of the present application; but this is due to no fault or laches of the attaching creditor, but to this fact that the proceedings in execution were stayed by an order of Court. Section 15 of the Indian Limitation Act provides for the exclusion from the period of limitation of the time during which an injunction has continued in force, but this provision applies only to suits and does not extend to applications. I think it is unfortunate that the Legislature did not make clear provision in the Limitation Act for a case like the present. In a case somewhat similar to the present case—*Kalyanbai Dipchand v. Ghunashambal Jadrnathji* (1)—Melville, J., commented on the “monstrous injustice” that would ensue if art. 179 of Act No. XV of 1877, which governs the execution of decrees, were applied strictly to cases like the present. Courts in this country have frequently been struck by the difficulty caused by the defect in the Limitation Act adverted to above. Sometimes the difficulty has been got over by holding that art. 178 of the Act applies. That article allows a period of three years’ limitation for “applications for which no period of limitation is provided elsewhere in the schedule or by the Code of Civil Procedure, s. 230.” This period runs from the time when the right to apply accrues. Other Courts, and amongst them a Full Bench of this Court in *Paras Ram v. Gardner* (2), have held that a renewed application for execution is not a fresh application, but a continuance or revival of the previous application which had been interrupted owing to a cause for which the appellant was not responsible. Looking to the terms of the order of the 30th of January 1889, which was passed in this case, I prefer to regard the present application as an application to renew the previous proceeding which was in abeyance owing to the injunction. In this view the decree-holder’s application was not in any way barred. I am unable to follow the lower Courts in

(1) I. L. R., 5 Bom., 29.

(2) I. L. R., 1 All., 355.

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their opinion that no application was ever made to execute the attached decree of the attaching creditor. Not only was the application of the 3rd of July 1888 an application to execute the attached decree, but the application was granted. It was objected by the learned vakil for the respondent that the application of the 3rd of July 1888 was defective, inasmuch as it did not give all the particulars required by s. 235 of the Code of Civil Procedure in regard to the attached decree. In my opinion the particulars which the application gives were sufficient, and in any case the judgment-debtor, by neglecting to show any cause against the execution when opportunity was given him, has, I hold, lost his right to rely on any objection of this nature. For the above reasons I decree the appeal with costs in all Courts, and, setting aside the orders of the lower Courts, remand the case under the provisions of s. 562 of the Code of Civil Procedure with directions to readmit the application under its original number in the register and proceed to dispose of it according to law.

Appeal decreed and cause remanded.

Before Mr. Justice Knox and Mr. Justice Burkitt.

MANOHAR SINGH (PLAINTIFF) v. SUMIRTA KUAR (DEFENDANT).*

Burden of proof—Mortgage deed—Recitals in instrument—Act No. III of 1877 (Indian Registration Act), ss. 59, 60—Evidence.

In a suit brought by a mortgagee upon a mortgage by conditional sale for payment of the mortgage-debt or in default for foreclosure, one of the defendants, not being one of the original mortgagees, but a purchaser at auction-sale under a Rent Court decree, resisted the suit and put the plaintiff to proof on the document under which he claimed. *Held* that the mere production of the deed of mortgage which had been thus questioned and the fact that that deed of mortgage contained an endorsement certificate by the Registrar in the usual manner under s. 59 of Act No. III of 1877, were not sufficient to shift the burden of proof on to the defendants.

Recitals in an instrument may be conclusive and are always evidence against the parties who make them, but they are not evidence against third parties. *Brajeshware Peshakar v. Budhanuddi* (1) referred to.

*Second Appeal No. 915 of 1893, from a decree of J. J. McLean, Esq., District Judge of Cawnpore, dated the 15th May 1893, confirming a decree of Saiyid Akbar Husain, Subordinate Judge of Cawnpore, dated the 4th April 1892.