P. C.
1894
November 7
& 24.

PRIVY COUNCIL.

THAKUR PRASAD, PETITIONER (APPELLANT) *v.* FAKIR-ULLAH, OBJECTOR, (RESPONDENT).

On appeal from the High Court at Allahabad.

Effect as regards limitation of striking off petition for execution of decree—Second application, without express leave granted when the first was struck off, ss. 373, 649, *of the Code of Civil Procedure inapplicable here—Act VI of* 1892, *ss.* 4 *and* 5.

It is clear, both from the Code of Civil Procedure itself, and from the provisions of the Limitation Act of 1877, that a succession of applications for execution is contemplated. Section 647, Civil Procedure, cannot, on its true construction, be applied to execution of decree, and was inapplicable to petitions for execution before, and independently of, the passing of Act VI of 1892, sections 4 and 5.

A first application for execution of a decree having been, on the decree-holder's petition, struck off the list of cases pending for hearing, a second application was made within the period of limitation.

Held,—That the first application, notwithstanding that the order striking it off had been made, was not annulled, but afforded a fresh starting point for limitation.

Held, also, that although the petition for execution had been withdrawn without leave to apply again having been expressly granted by the court, the petitioner's right to renew his petition, within due time, remained. The provisions of section 373, which could only have applied through the effect of section 647, had not been rendered applicable thereby to petitions for execution.

The judgment in *Sarju Prasad* v. *Sita Ram* overruled (1). That in *Bunko Behary Gangopadhya* v. *Nil Madhub Chuttopadhya* (2) approved.

Appeal from decree (7th January 1890) of the High Court (3) reversing a decree (18th December 1888) of the Subordinate Judge of Allahabad.

The effect of striking off the list of pending cases an application for execution came into question on two points in this appeal. First, as to whether a prior application had been annulled by being struck off, or still remained a fresh starting point for limitation, in respect of a renewal of the application within three years: secondly, whether or not the High Court had been right in applying the

Present: LORDS HALSBURY, HOBHOUSE, SHAND, AND DAVEY, AND SIR R. COUCH.

(1) I. L. R., 10 All., 71. (2) I. L. R., 18 Calc., 635.
(3) I. L. R., 12 All., 179.

provisions of s. 373 of the Code of Civil Procedure, on the construction that they had been rendered applicable to petitions for execution by s. 647; and in disallowing a second application where no liberty to present a fresh application had been given by the Court which struck off the first.

The appeal arose out of objections taken by the respondent, judgment-debtor, to the execution of a decree of the 11th of April, 1883, for Rs. 10,320, held by the appellant, who petitioned for execution.

On the 29th of August 1885, the decree-holder's petition was on the file of the subordinate judge, who on that date recorded the order, striking it off, which appears at pp. 180,181 and at p. 187 (as literally translated by *Mahmood, J., in his judgment*) of I.L.R., 12 All. On the 28th of August 1888, the decree-holder filed another application for execution, to which the judgment-debtors objected contending that ss. 373 and 374 of the Code of Civil Procedure, as construed in *Sarju Prasad* v. *Sita Ram* (1) operated as a bar. The Subordinate Judge disallowed the objection on the 18th of December 1888, giving his reasons thus:—

"As regards the first case of Fakir-ullah, objector, it is evident that the pleader for the decree-holder asked for striking off the case for a short time. The words 'for the present' were used by the decree-holder's pleader, and were understood by the Court in one and the same sense, and the Court, accepting the prayer of the decree-holder's pleader, struck the case off the file. This proceeding, having regard to the usage which has obtained from a long series of years, meant nothing more than this, that the Court allowed the case to be temporarily struck off, recognizing indirectly the right of the decree-holder's pleader to execute the decree further. Under these circumstances the case of Fakir-ullah is not fully governed by the precedents relied upon by the objectors."

An appeal was heard by the High Court, (STRAIGHT, and MAHMOOD, J.J.). No distinction was drawn between the facts in the case

(1) I. L. R., 10 All., 71.

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above mentioned and the present one. They decreed the appeal, and set aside the order of the Subordinate Judge. [See *Fakir-ullah* v. *Thakur Prasad*, (1).] On the 21st of July 1892, the present appeal was admitted. On the 29th of July 1892, Act VI of 1892, to amend the Indian Limitation Act, 1877, and the Code of Civil Procedure was passed with a clause rendering its enactment, in regard to s. 647, applicable hereto.

On this appeal Mr. *G. E. A. Ross*, for the appellant, argued that the High Court had been in error in holding that by reason of the order passed on the first application for execution, the decree-holder was precluded from making the second application for execution. He was not barred by limitation, for the filing of the first application, though his petition was struck off, gave a fresh starting point for limitation, and the second application was within time. The reason assigned by the High Court was that the first application had been withdrawn, without leave given by the Court, which struck the petition off its file, to renew it, whereby a second application was precluded under s. 373 of the Code of Civil Procedure, that section having been rendered applicable, in their opinion, to executions by the effect of s. 647. But s. 373 was not applicable, and *Sarju Prasad* v. *Sita Ram* (2) had been wrongly decided. Even if, however, this had been a right construction of s. 647, the proceeding and order of the 5th January 1886, were not a withdrawal of the application for execution of decree, but a petition for permission to stay proceedings for the present time. The explanation given by the Subordinate Judge of the practice before, and down to 1885, with regard to the temporary withdrawal of applications for execution, justified his finding that the facts of this case were not the same as those in the case cited.

Reference was made to Act VI of 1892, enacting that an explanation should be added to s. 647, Criminal Procedure, that it does not apply to applications for execution of decrees and there were cited:—*Tara Chand Megraj* v. *Kashinath Trimbak* (3); *Eshan*

(1) I. L. R., 12 All., 179. (2) I. L. R., 10 All., 71.
(3) I. L. R., 10 Bom., 62.

Chunder Bose v. *Prannath Nag* (1); *Ramanadan Chetti* v. *Periatambi Shervai* (2); *Bunko Behary Gangopadhya* v. *Nil Madhub Chuttopadhya* (3); *Radha Charan* v. *Man Singh* (4).

The respondent did not appear.

Afterwards (24th November), their Lordships' judgment was delivered by LORD HOBHOUSE :—

In this appeal the appellant complains that the High Court of Allahabad has erred in refusing to entertain his application to execute a decree obtained by him against the respondents on the 11th of April 1883.

The mode in which the question arises is as follows :—

The appellant first applied for execution on the 20th of August 1885. He did not actively prosecute that application, and on the 5th of January 1886, his pleader stated that the case might be struck off the list of pending cases "for the present." An order was accordingly made striking the case off the list "for default."

On the 24th of August 1888, the appellant made a second application. This was within three years from the date of his first application, and was in good time if the period of limitation was to be reckoned from that date; but out of time if the first application was to be treated as a nullity because it had been struck off the list. The respondents put in a written objection opposing the appellant's second application on two grounds; one was that his first application did become a nullity. The Subordinate Judge treated it as affording a fresh starting point of time within the terms of the Limitation Act XV of 1877, and made an order dated the 18th of December 1888 disallowing the respondents' objection. His opinion on this point appears to be in accordance with many decided cases, and the High Court have not expressed any adverse opinion. This appeal is argued *ex parte*, and their Lordships have to look carefully at the contentions of the appellant; but they have no hesitation in agreeing with the Subordinate Judge that the application was not barred by lapse of time. The point on which

(1) 22 W. R., 512; 14 B. L. R., 148.
(2) I. L. R., 6 Mad., 250.
(3) I. L. R., 18 Calc., 635.
(4) I. L. R., 13 All., 392.

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the High Court dismissed it is quite a different one, which their Lordships go on to state.

By the Civil Procedure Code of 1882 it is enacted in s. 373 that if the plaintiff withdraws from the suit or abandons part of the claim without the permission of the Court to bring a fresh suit, he shall be precluded from bringing a fresh suit for the same matter or in respect of the same part. By s. 647 of the same Code it is enacted that the procedure therein prescribed shall be followed as far as it can be made applicable in all proceedings in any Court of Civil Jurisdiction other than suits and appeals.

Some short time ago, in the case of *Sarju Prasád* v. *Sita Ram* (1) a decision was passed by the High Court of Allahabad, the effect of which is stated by Mr. Justice Straight in the present case thus:—"That where the circumstances and the facts in regard to an application for execution show that it was withdrawn at the instance of the pleader for the decree-holder, and that no sanction was given to its withdrawal with liberty to present a fresh application, any subsequent application made by that decree-holder was prohibited by the rule of s. 373 of the Civil Procedure Code read with the s. 647 of the same Act." And again he says that the principle of s. 373 is properly applicable to execution proceedings, and that a decree-holder who is not desirous to proceed with an application for execution is in the same position as a plaintiff who desires to withdraw from a suit. That principle has been since adhered to in Allahabad.

The Subordinate Judge was of course bound by the ruling of the High Court, but he construed his order of the 5th January 1886 in combination with the statement then made by the appellant's pleader and showed therefrom that further proceedings were contemplated, and that the order ought to be read as giving permission for such proceedings. Incidentally, and by way of showing what hardship would be worked by construing the exact terms of his order as if they amounted to an absolute dismissal of the case, he mentions that the universal practice was to treat orders of

(1) I. L. R., 10 All. 71.

that kind as not constituting any bar to future application by decree-holders.

On the respondents' appeal the High Court refused to construe the order of the 5th of January 1886, according to the interpretation of the Subordinate Judge. They considered themselves bound by the order as recorded. They do not deny the practice as stated by the Subordinate Judge; on the contrary, Mr. Justice Straight refers to it as very loose and as requiring the greater strictness enforced by the ruling in *Sarju Prasad's* case. On this point their Lordships have only to say that they think the Subordinate Judge right in reciting the whole of the record of the 5th of January 1886, which embodied the pleader's statement, in order to get at the true meaning of the order; and that he has given a very reasonable account of its meaning. But they do not further examine that question, because their decision must be rested on the more general ground that the ruling in *Sarju Prasad's* case is erroneous.

It is not suggested that s. 373 of the Civil Procedure Code would of its own force apply to execution proceedings. The suggestion is that it is applied by force of s. 647. But the whole of Chapter XIX of the Code, consisting of 121 sections, is devoted to the procedure in executions, and it would be surprising if the framers of the Code had intended to apply another procedure, mostly unsuitable, by saying in general terms that the procedure for suit should be followed as far as applicable. Their Lordships think that the proceedings spoken of in s. 647 include original matters in the nature of suits such as proceedings in probates, guardianships, and so forth, and do not include executions. That is the view taken by the High Court of Calcutta, after consideration of the Allahabad decisions, in the case of *Bunko Behary Gangopadhya* v. *Nil Madhub Chuttopadhya* (1).

On this construction of s. 647 the reasoning of the High Court in *Sarju Prasad's* case falls to the ground. And it is clear, both from the Code itself and from the provisions of the Limitation Act of 1877, that the Legislature contemplated that there might

(1) I. L. R., 18 Calc. 635.

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be a succession of applications for execution. Under these enactments a course of practice has grown up all over India. Whether it is an injurious practice, as intimated by the High Court in this case, is not a question for their Lordships. It appears to be allowed by the law, and it has never been successfully impugned except in Allahabad. The High Court of Bombay after one contrary decision, and the High Courts of Calcutta and Madras, have repeatedly affirmed the legality of the procedure which is struck at by the ruling in *Surju Prasad's* case.

Their Lordships' attention has been called to the recent Act VI of 1892, which would appear to have been passed in order to avoid the disturbance of practice caused by the Allahabad rulings. That Act is framed so as to apply to the present appeal, and would have controlled their Lordships' opinion had it been the other way. But having regard to the controversies which have arisen, and the difference of opinion between the various High Courts, their Lordships have thought it right to state their opinion that the Act of 1892 does nothing more than express the true meaning of the Civil Procedure Code.

The result is that the High Court ought to have dismissed the respondents' appeal with costs. Their Lordships will humbly advise Her Majesty to make that order, thereby restoring the Subordinate Judge's decree of the 18th of December 1888. The respondents must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: *Messrs. Barrow and Rogers.*

P.C. 1894 *November* 24. *December* 8.

SAIYID MUZHAR HOSSEIN (PETITIONER) AND MUSSAMAT BODHA BIBI AND ANOTHER (OBJECTORS).

On petition for special leave to appeal from the High Court at Allahabad.

Finality of an order with reference to the admission of an appeal to Her Majesty in Council—Civil Procedure Code, Chapter XLV—Refusal of a certificate, ss. 600, 601—*Remand order, ss.* 562 *and* 565.

An order comprising the decision of the Appellate High Court upon a cardinal issue in a suit, that issue being one that goes to the foundation of the suit, and one

Present: LORDS HOBHOUSE and MACNAGHTEN, and SIR R. COUCH.