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with this view, as it overlooks the provisions of section 70 of the Indian Penal Code, to which I have already referred. The question whether the sentence has been enhanced by the appellate Court, is a question of fact in each particular case, and must be determined with reference to the facts of the case. This was held in *Rakhal Raja* v. *Kirode Pershad Dutt* (1), and this appears to have been the opinion of Brodhurst, J., in *Empress* v. *Meda* (2). In this case, if the alternative sentence of imprisonment in default of payment of fine be undergone by the accused, he would serve out the full term of imprisonment imposed by the Magistrate, and he would still be liable to have his property seized and sold for realization of the fine. The alteration of the sentence by the appellate Court therefore amounted to an enhancement of the sentence, and was consequently illegal. I allow the application, and alter the sentence to that of a fine of Rs. 20, in addition to the sentence of four months' rigorous imprisonment. As I am informed that the fine has already been realized, it is not necessary to pass an alternative sentence in default of payment.

APPELLATE CIVIL.

1901
July 13.

Before Mr. Justice Burkitt and Mr. Justice Chamier.

MURARI LAL (JUDGMENT-DEBTOR) v. UMRAO SINGH (DECREE-HOLDER).*

Civil Procedure Code, sections 36 *and* 37—*Act No. XV of* 1877 *(Indian Limitation Act), Sch. ii, Art.* 179(4)—*Execution of decree—Limitation—Application not in accordance with law—Application made by general attorney, decree-holder being at the time within the jurisdiction of the Court.*

Held, that an application in execution of a decree was not an application "in accordance with law" within the meaning of article 179 of the second schedule of the Indian Limitation Act, 1877, when it was made by a general attorney of the decree-holder at a time when the decree-holder himself was resident within the local limits of the jurisdiction of the Court executing the decree.

THE facts of this case sufficiently appear from the judgment of the Court.

* Second Appeal No. 156 of 1900 from a decree of Munshi Shankar Lal, Additional Subordinate Judge of Saharanpur, dated the 27th November 1899, reversing a decree of Pandit Kunwar Bahadur, Munsif of Muzaffarnagar, dated the 25th February 1899.

(1) (1899) I. L. R., 27 Calc., 175. (2) Weekly Notes, 1887, p. 100.

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Pandit *Moti Lal Nehru* (for whom Pandit *Mohan Lal Nehru*), for the appellant.

Pandit *Sundar Lal* and Pandit *Madan Mohan Malaviya*, for the respondent.

BURKITT and CHAMIER, JJ.—The appeal arises out of proceedings in execution of a decree. The only question which we have to decide is, whether the present application for execution was within time or not.

The decree is dated January 31st, 1894. The present application for execution is dated September 19th, 1898.

The decree-holder relies upon an application dated January 9th, 1896, for the payment out of Court of the proceeds of certain property sold in execution of the decree, as being an application made in "accordance with law," asking the Court to take some step in aid of execution. The judgment-debtor does not deny that the application in question was made to the proper Court, and was one asking it to take a step in aid of execution, but he contends that the application was not made "in accordance with law."

The application was presented by a person holding a general power-of-attorney from the decree-holder, but it is found as a fact that the decree-holder, at the time when the application was made, was resident within the local limits of the jurisdiction of the Court. Consequently the person who presented the application was not a person who, with reference to sections 36 and 37 of the Code of Civil Procedure, was entitled to make any application to the Court on behalf of the decree-holder.

His power-of-attorney authorized him to grant receipts for money; the Court concerned allowed him to act and apply on behalf of the decree-holder, and the decree-holder has given credit for the sum received from the Court.

The question is whether, under such circumstances, the application should be held to have been made "in accordance with law" within the meaning of clause 4 of article 179 of Schedule II of the Limitation Act. Pandit *Sundar Lal*, on behalf of the decree-holder, relied upon section 578 of the Code of Civil Procedure, but we think that that section applies only to errors or defects or irregularities in the suit or proceedings out of which

the appeal then being heard arises, and not to previous suits or proceedings which have come to an end. He also relied upon the circumstances that the person who made the application had power to give a receipt for the money, that credit had been given for the money received from the Court, and that the judgment-debtor had not only not been damnified by the proceeding, but had actually benefited thereby. These circumstances, if established, entitle the decree-holder to our sympathy, but on consideration we have come to the conclusion that it would be a dangerous extension of the rule that defects of form do not prevent an application for execution from being one "made in accordance with law" if we were to hold that an application made by a person who was not entitled to make it at all was an application made "in accordance with law."

It may be that if the defects in the application had been brought to notice in 1896 when it was made, the Court might have allowed it to be amended by the addition of the signature of the decree-holder, or some authorized person. It may also be that a judgment-debtor can waive such a defect, or that if proceedings are taken on such an application, a Court of appeal would, by reason of section 578 of the Code of Civil Procedure, in an appeal arising out of those proceedings, decline to reverse orders passed therein. But in the present case there was no amendment: such proceedings as took place on the application were held behind the back of the judgment-debtor, and, as we have said, section 578 cannot now be made use of.

If we were to hold that the application now in question was an application made "in accordance with law," we see no reason why an application made by a person holding no power-of-attorney, or even by the "man in the street," should not be held to be an application made in accordance with law.

For these reasons we think that the present application for execution is not saved from the bar of limitation by the application of January 9th, 1896.

We have also considered the question referred to, but not decided by, the lower appellate Court, namely, whether the decree-holder is entitled to deduct the time spent in the proceeding held by the Collector. We find that it is unnecessary to

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decide this question, for even if the fourteen months claimed by the decree-holder be deducted, the present application will still be barred by limitation. For these reasons we accept this appeal, set aside the decree of the lower appellate Court, and dismiss this application for execution with costs in all three Courts.

Appeal decreed.

1901
July 9.

Before Mr. Justice Burkitt and Mr. Justice Chamier.

GANGA PRASAD (PLAINTIFF) *v.* RAM DAYAL (DEFENDANT).*

Suit for balance of account—Evidence—Account stated—Acknowledgment—Act No XV of 1877 *(Indian Limitation Act), Sch. ii, Art.* 64.

A mere acknowledgment signed by a debtor in the account-book of his creditor showing a balance standing against the debtor on an account, which is not a mutual account, is neither an account stated, to which article 64 of the second schedule to the Indian Limitation Act, 1877, applies, nor is it evidence of a new contract which can be the basis of a suit. *Jamun* v. *Nand Lal* (1), and *Shankar* v. *Mukta* (2) followed. *Nand Ram* v. *Ram Prasad* (3), *Thakurya* v. *Sheo Singh Rai* (4), *Zulfikar Husain* v. *Munna Lal* (5), *Sital Prasad* v. *Imam Bakhsh* (6), *Kanhaya Lal* v. *Stowell* (7), *Ghasita* v. *Panchore* (8), *Kunhaya Lall* v. *Bunsee* (9), *Hirada* v. *Gadigi* (10) and *Dukhi Sahu* v. *Mahomed Bikhu* (11) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Maulvi *Muhammad Ishaq*, for the appellant.

The respondent was not represented.

BURKITT and CHAMIER, JJ.—The plaintiff's case, as stated in the plaint, is that on July 20th, 1897, the defendant having examined his account acknowledged a balance of Rs. 549-11 to be due by him, and affixed his signature to the plaintiff's account-book. Allowing for sums since received and adding interest to the balance, the plaintiff claims Rs. 508-11, stating that the cause of action accrued on July 21st, 1897. The defendant denied all the allegations made in the plaint, and the parties went to trial on the single issue whether or not the defendant had signed

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* Second Appeal No. 696 of 1899 from a decree of Babu Prag Das, Subordinate Judge of Saharanpur, dated the 31st May 1899, reversing a decree of Munshi Shiva Sahai, Munsif of Kairana, dated the 16th August 1898.

(1) (1892) I. L. R., 15 All., 1.
(2) (1896) I. L. R., 22 Bom., 513.
(3) (1880) I. L. R., 2 All., 641.
(4) (1880) I. L. R., 2 All., 872.
(5) (1880) I. L. R., 3 All., 148.
(6) Weekly Notes, 1883, p. 47.
(7) (1881) I. L. R., 3 All., 581.
(8) Weekly Notes, 1881, p. 65.
(9) (1867) Agra F. B., p. 94.
(10) (1871) 6 Mad. H. C. Rep., 197.
(11) (1883) I. L. R., 10 Calc., 284.