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July 16.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Burdett.
RUDDAR SINGH AND OTHERS (JUDGMENT-DEBTORS), v. DHANPAL SINGH
(DECREE-HOLDER).*

Execution of decree—Limitation—Execution temporarily suspended by action of Court—Act No. XV of 1877 (Indian Limitation Act), Schedule II, article 178.

A decree-holder in whose favour a decree for sale on a mortgage and a subsequent order absolute for sale had been passed on the 27th May, 1891 and the 3rd of February, 1892, respectively, applied on the 24th of April, 1893, for sale of the mortgaged property.

One of the judgment-debtors instituted a suit to set aside the decree on the ground of fraud, and on the 15th of December, 1893, obtained an injunction restraining further proceedings in execution pending the decision of the suit, and ultimately a decree setting aside on the ground of fraud the decree of the 27th of May 1891.

In appeal, however, the decree of the 27th of May, 1891, was, on the 8th of April, 1895, restored, the judgment-debtor's suit being dismissed; and this judgment was affirmed by the High Court on the 4th of August, 1897. On the 23rd of June, 1899, the decree-holder again applied for execution of the decree of the 27th of May 1891.

Held that article 178 of the second schedule to the Indian Limitation Act, 1877, applied; that time began to run against the decree-holder from the 8th of April 1895, when the bar to execution which had been imposed by the injunction and subsequent decree obtained by the judgment-debtor was removed, and that the decree-holder's application for execution was time-barred.

Chunni Kumar v. Durga Prasad (1), *Shaikh Mohesooddeen v. Shaikh Ahmed Hossein* (2) and *Desraj Singh v. Karan Khan* (3), referred to.

THE facts of this case are as follows:—

On the 27th of May, 1891, Dhanpal Singh and others obtained a decree for sale on a mortgage against Ruddar Singh and others, which was followed on the 3rd of February, 1892, by an order absolute for sale. An application for execution by sale of the mortgaged property was made on the 24th of April, 1893, and was granted.

Whilst execution was in progress, Aman Singh, one of the judgment-debtors, instituted a suit to set aside the decree of the 27th of May, 1891, on the ground that it had been obtained by fraud, and on the 15th of December, 1893, obtained from the

* Second Appeal No. 652 of 1902 from an order of F. W. Brownrigg, Esq., District Judge of Aligarh, dated the 2nd of July, 1902, confirming an order of Maulvi Muhammad Ahmad Ali Khan, Subordinate Judge of Aligarh, dated the 26th of April 1902.

(1) Weekly Notes, 1887, p. 297. (2) (1870) 14 W. R., 384.
(3) (1896) 1 L. R., 19 All., 71.

Court an injunction restraining further proceedings in execution of the abovementioned decree for sale pending the decision of the suit.

In the suit filed by Aman Singh a decree was passed on the 19th of December, 1894, setting aside the decree of the 27th of May, 1891. That decree, however, was reversed on appeal by the District Judge on the 8th of April, 1895, and a second appeal to the High Court was dismissed on the 4th of August, 1897.

Upon the 23rd of June, 1899, the decree-holders again applied for execution of the decree of the 27th of May, 1891, by sale of the mortgaged property. To this application the judgment-debtors objected that it was barred by limitation. The Court of first instance (Subordinate Judge of Aligarh) disallowed the objection. The appeal of the judgment-debtors to the District Judge was disallowed, and they thereupon appealed to the High Court.

Munshi *Gobind Prasad*, for the appellants.

Pandit *Madan Mohan Malaviya* and *Munshi Jung Bahadur Lal*, for the respondent.

BURKITT, J.—This is a second appeal in execution against an order of the Subordinate Judge of Aligarh overruling the appellants' objection to the execution of a decree held against them by the respondent decree-holder.

The facts of the case are as follows :—

The decree, which was one for sale, was passed on the 27th of May, 1891, and an order absolute under section 89 of the Transfer of Property Act was made on the 3rd of February, 1892. An application for execution by sale of the mortgaged property was made on the 24th of April, 1893, and was granted.

While execution was in progress, one Aman Singh, one of the judgment-debtors, instituted a suit to set aside the decree of the 27th of May, 1891, on the ground that it had been obtained by fraud, and on the 15th of December, 1893, obtained from the Court an injunction restraining further proceedings in execution of the abovementioned decree for sale pending the decision of the suit.

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On the 19th of December, 1894, Aman Singh obtained a decree setting aside the decree of the 27th of May 1891. That decree, however, was on appeal reversed by the District Judge on the 8th of April, 1895. A second appeal to the High Court was dismissed on the 4th of August 1897.

The present application for execution was made on the 23rd of June 1899.

The judgment-debtors object that the application is time-barred. The Subordinate Judge has overruled that objection. An appeal against the Subordinate Judge's order was dismissed by the District Judge. Hence this appeal.

In his application for execution the decree-holder, respondent here, contended that "the time between the 15th of April, (*sic*) 1893 and the 4th of August, 1897, should be excluded in computing the limitation according to law. Therefore the application for execution is within time." If the learned Subordinate Judge is right in acceding to this contention and in holding that the period between the date of the injunction and of the dismissal of the second appeal by the High Court should be excluded, then the application is not time-barred.

In my opinion the decision of the Subordinate Judge is erroneous.

There can be no doubt that the decree-holder could not have taken any step to have execution of his decree by sale of the mortgaged property as long as the injunction which had been granted on the 15th of December, 1893, remained in force. But in my opinion that injunction remained in force up to the 8th of April, 1895, and no longer, and was effectual up to that date only because the decree of the 19th of December, 1894, annulled as fraudulent the decree of the 27th of May, 1891. On that day the District Judge reversed the decree of the Court of first instance, which had set aside the decree of the 27th of May, 1891, and therefore restored the latter decree. The effect of this was that the obstruction or bar to the execution of that decree was removed. It became a decree capable of execution from the 8th of April 1895 and the decree-holder had three years within which he could apply for execution. He made no application till the 23rd of June 1899. That being so, I am of opinion that his

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application is time-barred, whether that application be considered to be an application to the Court to take up and proceed with the application of the 24th of April, 1893 (which had been stayed by injunction), or whether it be considered to be a fresh application. In either case I think it is barred by article 178 of the second schedule to the Limitation Act, 1877. That article provides a limitation period for applications for which no period of limitation is provided elsewhere. No article of the schedule provides a limitation period for an application for execution, which has been stayed by an injunction or by some bar or obstruction, after the removal of the bar or obstruction. This case cannot be brought within any of the periods mentioned in the third column of article 179 of the Act. It can come only under article 178. On the passing of the decree of the District Judge of the 8th of April, 1895, a right accrued to the decree-holder to apply within three years from that date for execution of the decree of the 27th of May 1891, by asking the execution Court to proceed with the application of the 24th of April, 1893, or by making a fresh application for execution. Unfortunately for him he did not apply for more than four years after the 8th of April, 1895.

But it is contended for the decree-holder that he had three years from the date of the decree of the High Court in second appeal (4th August, 1897) affirming the appellate decree of the District Judge within which to make his application in execution. This was the view adopted by the Subordinate Judge. I cannot accept this contention. It is founded on the assumption that the injunction of the 15th of December, 1893, remained in force up to the decree of the High Court. Unless that assumption be correct, there was no bar after the 8th of April, 1895, to the execution of the decree of the 27th of May, 1891. In my opinion that injunction was dissolved by the appellate decree of the District Judge in April, 1895, when the decree of the 19th of December, 1894, setting aside as fraudulent the decree of the 27th of May, 1891, was reversed and the suit of Aman Singh was dismissed. It is perhaps not strictly accurate to say that the injunction was dissolved by the appellate decree of the District Judge. The force of the injunction

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was exhausted when the Subordinate Judge pronounced judgment on the 19th of December, 1894, but as the decree of that date held that the previous decree was null and void, having been obtained through fraud, the effect was the same as if the injunction were in force.

It has been held by this Court in the case of *Chunni Kunwar v. Durga Prasad* (1) that when a decree had been passed in favour of the defendant (Chunni Kunwar) "in the action in which the temporary injunction was granted, that temporary injunction came to an end," and notwithstanding that the injunction had been made "till further orders," the learned Judge holding that the decree by which he (the Subordinate Judge) "dismissed the suit, operated as an order discharging the temporary injunction." So here, I hold that the appellate order of the District Judge dismissing Aman Singh's suit discharged the injunction, assuming that by reason of the nature of the decree the injunction remained in force up to the date of that order. In their judgment the learned Judges referred to the case of *Shaikh Mohecoodeen v. Shaikh Ahmed Hossein* (2) as supporting the view they took. I gather from the report in that case that the Subordinate Judge had attached and appointed a receiver of certain property in a suit pending before him. He dismissed the suit, but refused the defendant's application to have the property released from attachment and the receiver discharged. On appeal the High Court held that "the Act does not give power to the Court to attach property or maintain an injunction in respect of property until an appeal shall have been lodged, or after the appeal has been admitted during the pendency of the appeal." That power, it was pointed out, belongs to the appellate Court. The effect of those two cases is that in them, though the Subordinate Judge had deliberately refused after the dismissal of the suit to cancel an injunction and an attachment issued during the trial, the High Court in each case held the Subordinate Judge was wrong, and that the injunction or attachment was ineffectual after the dismissal of the suit. The case of *Desraj Singh v. Karam Khan* (3) is very much

(1) Weekly Notes, 1887, p. 297.

(2) (1870) 14 W. R., 384.

(3) (1896) I. L. R., 19 All., 71.

on all fours with this case. In it a decree for sale had been obtained on the 26th of March, 1885, and an application for execution was made on the 6th of January 1887. The wife of the judgment-debtor intervened under section 278 of the Code of Civil Procedure, claiming as her own the property advertised for sale. Her objection was allowed on the 17th of January, 1888. A suit was then instituted under section 283 by the decree-holder, and on 5th June, 1888, he obtained a decree declaring the property to be liable to sale under his decree. An appeal to the District Judge was dismissed on the 3rd of August, 1888, and a second appeal to the High Court was dismissed on the 28th of May, 1892. An application for execution of the decree of the 26th of March, 1885, was made by the decree-holders on the 27th of April, 1892. The High Court affirming the decision of the two lower Courts, held that the application was time-barred as having been made more than three years from the 5th of June, 1888, the date of the decree by which the property was declared liable to be sold under the decree of the 26th of March, 1885. The learned Judges, referring to a Full Bench case reported in I. L. R., 1 All., 355, held that "it shows that the decree-holders had a right to apply for execution or to proceed with their application immediately on the passing of the decree of the 5th of June 1888, declaring that the property was liable to be sold." And again:—"In our opinion article 178 of the second schedule of the Indian Limitation Act applies, and, more than three years having elapsed after the 5th of June, 1888, before the present application was made, the application was time-barred." The learned Judges made no allowance for the periods between the 5th of June, 1888, and the date of the appeal to the District Judge and the High Court. Indeed the application for execution seems to have been made before the date of the decree of the High Court in second appeal. Adopting the language of the learned Judges cited above, I hold that article 178 applies to this case, and more than three years having elapsed, after the 8th of April, 1895, before the present application of the 23rd of June, 1899, was made, that application was time-barred when made.

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Then lastly, it is contended that if the decree-holder had made any application for execution before the decree of the High Court, the judgment-debtor would certainly have had execution stayed pending the decision of the High Court. To that I would reply that no such application was in fact made. I decline to speculate as to what might have happened under other circumstances.

For the above reasons I would allow this appeal, and, setting aside the decrees of the two lower Courts, I would direct that the application for execution be rejected with costs in all Courts.

STANLEY, C. J.—I concur.

Appeal decreed.

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July 20.

Before Mr. Justice Knox and Mr. Justice Atkman.

GOPAL DEI AND ANOTHER (PLAINTIFFS) v. KANNO DEI AND OTHERS
(DEFENDANTS).*

Civil Procedure Code, section 539—Trust—Suit relating to a public charity—Sanction granted to prospective plaintiff “and another”—Sanction, a condition precedent to institution of suit.

Held that the “consent in writing” of the Advocate General or other officer appointed by the Local Government for the purpose required by section 539 of the Code of Civil Procedure must be a specific permission given to two or more persons by name: a permission given to one applicant by name “and another” is not a sufficient compliance with the terms of the section.

Held also the “consent in writing” required by this section is a condition precedent to the institution of the suit to which such consent relates. If therefore no valid consent is given before the institution of the suit, the mistake cannot subsequently be rectified, unless by means of withdrawal of the suit with permission to institute a fresh suit. *Ramagyangar v. Krishnayangar* (1) dissented from. *Rendell v. Blair* (2) distinguished.

In the present case where the suit had not been instituted until eight or more years after the consent of the Legal Remembrancer had been obtained, permission to withdraw the suit with liberty to sue again was in the discretion of the Court refused.

IN September, 1892, one Musammat Gopal Dei, widow of Babu Damodar Das, the son of Rai Joti Prasad of Agra, obtained

* First Appeal No. 77 of 1902, from a decree of W. F. Wells, Esq., District Judge of Agra, dated the 17th of December 1901.

(1) (1886) I. L. R., 10 Mad., 185.

(2) (1890) L. R., 45 Ch. D., 139.