

Before Mr. Justice Banerji and Mr. Justice Aikman.

BIHARI LAL MISR (JUDGMENT-DEBTOR) v. JAGARNATH PRASAD  
(DECREE-HOLDER).\*

1906  
May 5.

Act No. XV of 1877 (*Indian Limitation Act*), schedule II, articles 172, 178  
— Execution of decree — Limitation — Application to revive former  
application for execution.

Where a decree-holder applied for the sale in execution of shares in five villages and shares in two villages were sold and the decree satisfied, but subsequently the sale was held to be a nullity, and the decree-holder made an application to revive the previous application, held that this was not an application coming under article 179 of the second schedule of the Limitation Act, but an application to which article 178 applied, the right to apply accruing on the date when the sale was held to be a nullity. *Khair-un-nissa v. Gauri Shankar* (1), and *Virasami v. Athi* (2), distinguished.

THE respondent on July 28th, 1896, obtained a decree for sale on a mortgage and shortly afterwards caused a portion of the property to be sold.

On January 17th, 1899, he applied for sale of the remainder, *i.e.* shares in five villages.

The sale of the shares in two villages was sufficient to satisfy the decree. The decree-holder himself purchased.

Subsequently on May 3rd, 1902, the High Court declared the sale as to these villages a nullity, the shares in these two villages having been already brought to sale in execution of a simple money decree.

On July 23rd, 1904, the decree-holder asked the lower Court (Subordinate Judge of Jaunpur) to proceed with the previous application of January 17th, 1899, *i.e.* to sell the remaining items.

This application was struck off on April 27th, 1905, owing to the failure of the decree-holder to pay process fees.

On May 1st, 1905, the decree-holder applied again praying that the decree might be executed or "if in the opinion of the Court, there be anything to operate as a bar to a fresh application for execution, execution proceedings in continuation of those commenced on the application, dated 17th January, 1899, may be taken in respect of the remaining property mentioned in the application dated 17th January, 1899."

\* First Appeal No. 271 of 1905, from a decree of Maulvi Syed Zain-ul-Abdin, Subordinate Judge of Jaunpur, dated the 18th of August, 1905.

(1) (1881) I. L. R., 3 All., 484. (2) (1884) I. L. R., 7 Mad., 595.

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The judgment-debtor's objection was disallowed. Hence this appeal.

Munshi *Lakshmi Narain*, for the appellant.

Munshi *Gokul Prasad*, for whom Dr. *Satish Chandra Banerji*, for the respondent.

BANERJI and AIKMAN, JJ.—The facts out of which this appeal has arisen are these. The respondent, Jagarnath Prasad, obtained a decree for sale on a mortgage on the 28th of July, 1896. He applied for the execution of that decree and caused a portion of the mortgaged property to be sold by auction and thus realized a portion of the decretal amount. On the 17th of January, 1899, he applied for sale of the remainder of the mortgaged property, consisting of shares in five villages, to realize the balance. The shares in two villages were sold and were purchased by the decree-holder himself. The amount for which he purchased those shares was sufficient to discharge the decree. Satisfaction was accordingly entered up. It appears that before the auction sale one Madho Prasad had purchased the shares in those two villages in execution of a simple decree for money. He brought a suit for a declaration that the villages sold in execution of the respondent's decree were not liable to sale inasmuch as he (Madho Prasad) had not been joined as a party to the suit on the mortgage and that the sale was null and void. The prayer in his plaint was that "the sale be set aside and declared void." This claim was decreed by this Court on the 3rd of May, 1902. The decree-holder having thus been deprived of the property purchased by him made an application to the Court asking it to proceed with his previous application of the 17th January, 1899, and to sell the remaining items of the property mentioned in that application. This application, which had been presented on the 23rd of July, 1904, was allowed by the Court by its order, dated the 7th October, 1904, which was passed *ex parte*. The judgment-debtor made an application to have the order set aside; but that application was dismissed, and the Court issued a proclamation of sale at the instance of the decree-holder. The judgment-debtor again presented an application objecting to the sale, and thereupon the sale was postponed pending the disposal of the application and a fresh proclamation of sale was ordered to issue. Process fees for

the issue of the fresh proclamation not having been paid by the decree-holder, his application was struck off the files on the 27th of April, 1905. On the 1st of May, 1905, he made the application out of which this appeal has arisen. In that application he prayed that the decree might be executed, or if the Court did not accede to that prayer, the proceedings on his application of 1899 should be revived and the remainder of the property mentioned in that application should be sold.

The objection raised by the judgment-debtor in regard to this application having been overruled, this appeal has been brought. The first contention was that the application was not maintainable as the judgment-debtor had still a saleable interest in the property. This contention has no force. The mortgagee decree-holder having obtained a decree for sale of several items of property is entitled to proceed against any of those items which he chooses. As the sale which took place in regard to two items of property has been declared to be a nullity, the balance of the decretal amount, in satisfaction of which he purchased those two items, is still due, and for the realization of this balance he is entitled to proceed against the remainder of the mortgaged property. No question relating to the applicability of section 315 of the Code of Civil Procedure arises in this case. The question which at first raised a difficulty in our minds was that of limitation. Had this application been a fresh application for execution, the plea of limitation might have had considerable weight. As we have already said, the application of the 1st May, 1905, is an application to revive the previous application of the 17th January 1899. By that application the decree-holder had asked for the sale of shares in five villages. He now prays that as the sale of two of these villages has been declared to be a nullity, the application should be proceeded with, and the villages which it was not then necessary to sell, by reason of the proceeds of the sale of the other two villages being sufficient to satisfy the decree, should now be sold. This is in substance as it is in terms an application to take proceedings in continuation of the previous application of 1899. Therefore it is not an application under article 179 of the second schedule of the Limitation Act, but an application to which article 178 applies.

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The decree-holder's right to apply accrued when by the decree of this Court the sale of shares in two villages was set aside on the 3rd of May, 1902. The present application was made within three years of that date and is therefore within time. Two cases are relied on by the learned vakil for the appellant. One of these, *Khair-un-nissa v. Garwi Shankar* (1), is clearly distinguishable. There the decree-holder purchased the rights and interests of his judgment-debtor, Musammat Khair-un-nissa, in execution of his decree. It turned out that Khair-un-nissa's interest in the property did not extend to the whole of it, and upon suits being brought by the persons entitled to portions of the property, the decree-holder had to compensate them for the value of those portions. That was a case in which the decree was satisfied by the purchase made by the decree-holder of Khair-un-nissa's interests, although those interests were not so large as the decree-holder supposed them to be. In the present case the decree-holder has got nothing at all by his purchase and this distinguishes the present case from that relied upon. The second case cited is that of *Virasami v. Athi* (2). In that case the subsequent application was to take steps for which the decree-holder had not applied in the previous application. The learned Judges say :—  
“ In this case the respondent has made an application, not for execution by the attachment and sale of properties to which his former application applied, but by arrest of the judgment-debtor. It is a fresh application, and the rule of limitation applies to it which would apply to any second or subsequent application, namely, that it must be made within three years from the date of the last application to the Court executing the decree to execute the decree or to take some step in aid of execution.” This distinguishes that case from the present. The appeal therefore fails and is dismissed with costs.

*Appeal dismissed.*

(1) (1881) L. R., 3 All. 484.

(2) (1884) L. R., 7 Mad., 695.