in this section so as to embrace the chance of inheriting of a reversionary heir. It seems to us that possibly this suit was instituted by the plaintiffs with a view to obtain an equitable charge or lien upon the property which would enable them in future proceedings to sell the property or in some way deprive the widow of her life estate. For these reasons we allow the appeal. We set aside the decrees of both the lower Courts and dismiss the suit with costs in all Courts.

Appeal decreed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

1908 *July* 31.

MUJIB-ULLAH (JUDGMENT-DEBTOR) *v.* UMED BIBI, (DECREE-HOLDER).*

Execution of decree—Limitation—Application in continuation of previous proceedings in execution.

On the 7th December 1903, the sale of certain immovable property, which had been attached, was ordered. On the 30th January 1904, the amin reported that he had been unable to hold the sale, as there were no bidders. Notice of this fact was given to the decree-holder and he was allowed time till the 10th February to pay in fees for a fresh sale. On that date, no steps having been taken by the decree-holder, the case was ordered to be struck off "for the present." On the 13th January 1906, the decree-holder again applied, asking that the property, which was still under attachment, might be sold. *Held* that this was not a fresh application in execution, but merely an application to revive the former proceedings, and was not barred by limitation. *Dukhiram Srimani* v. *Jogendra Chandra Sen* (1) distinguished. *Rahim Ali Khan* v. *Phul Chand* (2) referred to.

THIS was an appeal under section 10 of the Letters Patent from a judgment of Aikman, J. The facts of the case are stated in the judgment under appeal, which was as follows:

AIKMAN, J.—This appeal arises out of an application to execute a decree for money passed upwards of a quarter of a century ago. As the learned District Judge remarks, the case "illustrates in a remarkable manner the protracted nature of proceedings in execution of a decree in those cases where the judgment debtor is not anxious to pay off the amount decreed." The decree was passed on the 14th May 1880. Various applications were made for execution, and some portion of the decretal amount was realized. On the 30th of June 1899 the decree holder presented an application to realize the balance due under

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* Appeal No. 9 of 1908, under section 10 of the Letters Patent.

(1) (1900) 5 C. W. N., 347. (2) (1896) I. L. R., 18 All., 482.

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the decree by attachment and sale of certain immovable property. The judgment-debtor pleaded that the application was barred under the provisions of section 230 of the Code of Civil Procedure. The Court of first instance overruled the objection, but on appeal, the District Judge sustained it. The decree-holder appealed to this Court which on the 20th of June 1902 reversed the order of the lower appellate court and restored that of the court of first instance, treating the then application as one in continuation of the previous application, which was within time, but which had proved abortive owing to the institution of a suit to set aside a sale. This Court accordingly remanded the case under the provisions of section 562 of the Code of Civil Procedure to the court executing the decree. When the order of this court was received in the court below, the application of the 30th June 1899 was restored to its original number in the register and a date fixed for the sale of the property. The sale did not come off on the date fixed owing to objections filed by the judgment-debtor as to the amount due under the decree. These objections were finally disposed of on the 10th of September 1903. On the 7th December 1903 the Court ordered the sale of the property which had been attached to recover the amount found to be due from the judgment-debtor. On the 30th of January 1904 the Amin reported that he had been unable to hold the sale as there were no bidders. On the 1st of February 1904 intimation of this was ordered to be given to the decree-holder. On the 3rd February 1904 the Court recorded an order to the effect that, notwithstanding intimation, the decree holder had not proceeded with the case or paid in fresh process fees for proclamation of a second sale, or deposited the costs of the Amin, and ordered the decree-holder to pay the necessary fees by the 10th February, stating in its order that no further time would be allowed. On the 10th February the Court recorded an order to the effect that, no fees having been paid, it appeared that the decree-holder did not wish to proceed with the case, which was accordingly ordered to be struck off "for the present," costs being awarded against the decree-holder. The decree-holder took no further steps until the 13th of January 1906, when he put in an application asking that the property

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which, it appears, was still under attachment and which had not been sold previously owing to the absence of bidders, might now be sold. Objection was taken by the judgment-debtor on the ground that the application was a fresh application and was beyond time. This objection was overruled by the learned Subordinate Judge, who held that it was not a fresh application but merely one to revive the preceding application. On appeal the learned District Judge took the same view, holding that the present application was merely in continuation of the former. The judgment-debtor comes here in second appeal. The case has been well argued by the learned vakil who appears to support the appeal, but after considering the authorities cited by him I see no ground for differing from the conclusion arrived at by the courts below. On behalf of the appellant reliance is placed on the decision in *Dukhiram Srimani* v. *Jogindra Chandra Sen* (1) the facts of which are somewhat similar to those of the present case. There is this material distinction, however, that in the case relied on the application under consideration was made upwards of four years after the previous application. Here there was no doubt considerable delay on the decree-holder's part, and if he had taken no steps for three years I should have held the application to be barred. The respondent here had obtained an order for the sale of certain property. That order was not carried out, but this was for no fault of the decree-holder. He now asks that the previous order for the sale of the property, which is still under attachment, should be carried out. I think therefore that the present application must be deemed to be in continuation of the previous application. This view seems to me supported by what was said in the Full Bench case of *Rahim Ali Khan* v. *Phul Chand* (2) and the observations of the Privy Council in *Raja Muhesh Narain Singh* v. *Kishanund Misr* (3) at page 337 of the judgment. For these reasons I am of opinion that the appeal fails and I dismiss it with costs.

On this appeal

Dr. *Satish Chandra Banerji*, for the appellant.

(1) (1900) 5 C. W. N., 347 (2) (1896) I. L. R., 18 All., 482.
(3) (1862) 9 Moo., I A., 324.

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Maulvi *Muhammad Ishaq* (for whom Babu *Sital Prasad Ghosh*), for the respondent.

STANLEY, C.J.—The question in this appeal is whether an application for execution made on the 13th of January 1906, is barred by the provisions of section 230 of the Code of Civil Procedure. Both the lower Courts, as also a learned Judge of this Court, have held that it is not so barred. The circumstances of the case are somewhat peculiar. It is an order of the 10th of February 1904, upon which the real question in my opinion turns. It appears that an application for execution was made by the decree-holder, and the property was attached and directed to be sold. A proclamation for sale was issued, but the sale proved abortive owing to the absence of bidders. Thereupon the decree-holder was required to pay amin's fees and also the fees for a further sale notification. It seems to me that this was not a proper order in view of Rule 388 of the Rules of Court of the 4th April 1894. That rule provides, amongst other things, that no fee shall be chargeable for serving or executing any process issued a second time in consequence of an adjournment made otherwise than at the instance of a party. Now the adjournment in this case was not at the instance of the decree-holder. It was rendered necessary by the fact that no bidders attended at the sale, and therefore, in the absence of authority to the contrary, I should be prepared to hold that the Court was not justified in requiring the decree-holder to pay further fees. The decree-holder did not pay further fees within the time fixed, notwithstanding that several opportunities were given him for the purpose of making such payment. In consequence of his default the order of the 10th of February 1904 was passed. By that order, after stating that the decree-holder had not deposited auction fees in spite of demands, it was directed that the execution case should be for the present struck off the list of pending cases, the decree-holder to pay the costs of execution. It seems to me upon the language of this order that it amounted to nothing more than a direction that the proceedings should remain in abeyance for the time being. It was not a final order disposing of the execution application. If this was not so, the words 'for the present' would be meaningless. In this view it appears

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to me that the case is not similar to that of *Dhukiram Srimani* v. *Jogindra Chandra Sen* (1), which has been relied upon by Dr. *Satish Chandra Banerji*, in which it was held that a subsequent application was not a continuation of a previous application for execution "inasmuch as there was a clear break in the continuity by reason of the decree-holder's omission to deposit the costs for service of a fresh sale proclamation and thereby the previous proceeding came to an end." Here the previous proceeding did not come to an end, but was kept in abeyance. It appears to me that the case more nearly resembles that of *Rahim Ali Khan* v. *Phul Chand* (2). For these reasons I think that the application of the 13th of January 1906, was a proper application and was rightly granted. For these reasons I would dismiss the appeal.

BANERJI, J.—I also would dismiss the appeal. The decree in this case was passed on the 20th of May 1880. The application made on the 13th of January 1906 would therefore be barred under the provisions of section 230 of the Code of Civil Procedure, if it could be treated as an application for execution within the meaning of that section. A previous application for execution had been made within 12 years from the date of the decree, and if the proceedings which took place in pursuance of that application were not determined by reason of the Court dismissing the application, the present application might properly be regarded as an application in continuation of the previous application. The question whether the present application is a fresh application for execution turns on the meaning and effect of the order of the 10th of February 1904, by which the proceedings in execution under the previous applications were terminated. That order directs the execution case to be removed from the list of pending cases "for the present." The Court must have used the words "for the present" with some purpose. It did not order the property which had been attached to be released from attachment. The use, therefore, of the words "for the present," seems to indicate that what the Court intended was only to keep the execution proceedings in abeyance to be renewed again. Under these circumstances the application of the 13th

(1) (1900) 5 C. W. N., 347. (2) (1896) I. L. R., 18 All., 482

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of January 1906, may be reasonably assumed to be an application for the revival of the proceedings which had been kept in abeyance by the order of the 10th of February 1904. In the Full Bench case of *Rahim Khan* v. *Phul Chand* (1) it was held that a subsequent application will not necessarily be deemed to be a fresh application for execution, if by reason of objections on the part of the judgment-debtors or action taken by the Court or other cause for which the decree-holder is not responsible, final completion of the proceedings in execution could not be obtained. In the present instance, it seems, the decree-holder was not bound, having regard to Rule 388 of the Rules of the 4th of April 1894, to pay fresh fees for the issue of a proclamation of sale a second time. There was therefore no default on his part and the proceedings were not terminated in consequence of his omission to do something which he was bound to do. That, in my opinion, is another reason why the subsequent application of the 13th of January 1906, should not be treated as a fresh application for execution. It should be held to be, as it purported to be, an application in continuation of the previous application for execution. For these reasons I agree with the learned Judge of this Court from whose judgment this appeal has been preferred in holding that the application for execution is not barred.

BY THE COURT.—The order is that the appeal be dismissed with costs.

Appeal dismissed.

(1) (1896) I. L. R., 18 All., 482