

APPELLATE CIVIL.

1910
April 1.*Before Mr. Justice Sir George Knox and Mr. Justice Karamat Husain.*

KAUNSILLA (DECREE-HOLDER) v. ISHRI SINGH (JUDGEMENT-DEBTOR).*

Civil Procedure Code (1908), section 48—Execution of decree—Decree for sale upon mortgage passed before 1908—Retrospective effect of Statutes.

Held that, the right to enforce execution of a decree being a substantive right and not a mere matter of procedure, section 48 of the Code of Civil Procedure (1908) will not have the effect of barring the execution of decrees which were passed prior to the enactment of that Code and were, having regard to the Code of Civil Procedure of 1882 and to the Indian Limitation Act, 1877, alive at the time of its coming into force. *Smith v. Callander* (1), *Phillips v. Eyre* (2) and *Roddam v. Morley* (3) referred to.

THE facts of this case were as follows :—

Musammatt Kaunsilla, on the 24th of November, 1893, obtained a decree against one Ishri Singh. This decree she first put into execution on the 24th of January 1895. Several other applications were made by her for execution. All these were infructuous, but in each one of them apparently some step was taken in aid of execution, and the present application was instituted within three years of a previous application for execution to a proper court in accordance with law. On the 25th of February, 1909, she instituted the proceedings out of which the present appeal has arisen. The judgement-debtor at once took a plea, based upon section 48 of Act No. V of 1908, that, as more than twelve years had expired from the date of the decree, no order for execution could be made. Both the courts below accepted this plea and summarily rejected the application. They were of opinion that section 48 above mentioned did bar execution.

The decree-holder appealed.

Munshi Govind Prasad (with whom Babu Jogendra Nath Mukerji), for the appellant, contended that, having regard to section 6, clause (c), of the General Clauses Act (X of 1897), section 48 of Act V of 1908 did not have retrospective effect; that under the Civil Procedure Code of 1882 a decree other than

* Second Appeal No. 755 of 1909 from a decree of Muhammad Ishaq Khan, District Judge of Farrukhabad, dated the 27th of April, 1909, confirming a decree of Rama Das, Munsif of Kanauj, dated the 5th of March, 1909.

(1), (1901) A. C., 297. (2) (1870) L. R., 6 Q. B., 1 (23)
(3) (1857) 1 DeG. and J., 1 (23).

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one for money was not barred of not satisfied within 12 years, and, further, that the limitation of 12 years did not apply to mortgage decrees. He relied on *Jug Ram v. Jewa Ram* (1), *Thakur Prasad v. Ahsan Ali* (2), *Gokul Singh v. Birj Lal* (3), *Deb Narain Dutt v. Narendra Krishna* (4) and *Ashfaq Husain v. Kaban Das* (5).

Gulzari Lal, for the respondent, submitted that the question was one of procedure and no one had a vested right in any form of procedure. The provisions in the new Code applied. He relied on *Hajrat Akramnissa v. Vabulnissa* (6) and *Vedavalli Narasiah v. Mangamma*, (7).

KNOX, J.—The facts of this case are :—Musammatt Kaunsilla on the 24th of November, 1893, obtained a decree against one Ishri Singh. This decree she first put into execution on the 24th of January, 1895. Several other applications were made by her for execution. All these were infructuous, but in each one of them apparently some step was taken in aid of execution and the present application was instituted within three years of a previous application for execution to a proper court in accordance with law. On the 25th of February, 1909, she instituted the proceedings out of which the present appeal has arisen. The judgment-debtor at once took a plea based upon section 48 of Act No. V of 1908 that as more than twelve years had expired from the date of the decree, no order for execution could be made. Both the courts below have accepted this plea and summarily rejected the application. They were of opinion that section 48 above mentioned did bar execution.

In appeal before us it is urged that section 48 does not apply to these proceedings inasmuch as the decree was passed in 1893 and these proceedings are in regular continuation of proceedings instituted in 1895, both coming into force at a time when there was no provision of law limiting execution other than article 179 of Schedule II of Act No. XV of 1877. It may at once be conceded that if Act No. V of 1908 had not been placed upon

(1) (1909) 6 A. L. J., 647.

(4) (1889) I. L. R., 16 Calc., 267, (272).

(2) (1878) I. L. R., 1 All., 668.

(5) Weekly Notes, 1882, p. 106.

(3) Weekly Notes, 1885, p. 130.

(6) (1893) I. L. R., 18 Bom., 429.

(7) (1903) I. L. R., 27 Mad., 538.

the Statute Book and if Act No. XIV of 1882 were still in force the present proceedings would not be barred.

This Court held in *Pahalwan Singh v. Narain Das* (1) that a decree like the present in which provision is made for the enforcement of the decree against immovable property did not come within the provisions of section 230 of Act No. XIV of 1882. Section 48 of Act No. V of 1908 has been so worded as to include and govern applications for execution of all decrees save and excepting only decrees for injunctions.

The question then that arises for decision is whether Act No. XIV of 1882 having been completely repealed, Act No. V of 1908 can operate so as to bar the right which the decree-holder had before Act No. V of 1908 came into force and still would have but for its enactment if it applies.

The learned vakil for the appellant contended that the question before us is not merely a question of procedure, and that the right which the appellant had cannot be curtailed unless by some enactment which is expressly declared to have retrospective effect. In support of his contention he referred us to *Jug Ram v. Jewa Ram* (2), *Thakur Prasad v. Ahsan Ali* (3), *Gokul Singh v. Birj Lal* (4) and *Deb Narain Dutt v. Narendra Krishna* (5).

All of these cases except the first were cases in which the Court considered the effect of section 6 of Act No. I of 1868 upon proceedings which had been commenced before the Act under which they had commenced had been repealed, and it was held broadly that unless the 6th section of the General Clauses Act of 1868 had been excluded by the repealing Act, its effect was to leave proceedings initiated before the repealing Act came into force, to be dealt with under the provisions of the repealed Act and that retrospective effect is not ordinarily given to an enactment so as to affect substantive rights.

Section 6 of Act No. VII of 1897 has now taken the place of section 6 of Act No. I of 1868. Its terms are much wider than the terms of section 6 of Act No. I of 1868 and it enacts *inter alia* that unless a different intention appears in the repealed Act, the repeal shall not affect any right, privilege, obligation or

(1) (1900) I. L. R., 22 ALL, 401. (3) (1878) I. L. R., 1 ALL, 668.

(2) (1909) 6 A. L. J., 647.

(4) Weekly Notes, 1885, p. 130.

(5) (1869) I. L. R., 16 Calc., 267.

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liability acquired, accrued or incurred under the enactment so repealed or affect any remedy in respect of any such right.

The right to enforce execution of a decree like the present is a substantive right. It was in existence before Act No. V of 1908 came into force, and the decree-holder had the remedy to enforce his right so to speak till the end of time if he prosecuted his right with legal diligence. As neither Act No. XIV of 1882 nor any Limitation Act curtailed that right or remedies to enforce that right, it seems to me we have not to consider them or their repeal.

What we have to consider is solely whether section 48 of Act No. V of 1908 without express provision to that effect can curtail the remedy which the decree-holder had before that Act came into force, and the answer is that no Statute shall be so construed as to have a retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication. Statutes are to be construed as operating only on cases or facts which come into existence after they are passed: *Smith v. Callander* (1).

As Willes, J., pointed out in *Phillips v. Eyre* (2) :—“ Retrospective laws are, no doubt, *prima facie* of questionable policy and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law. ‘*Leges et constitutiones futuris certum est dare formam negotiis non ad facta præterita revocari; nisi nominatim et de præterito tempore et adhuc pendentibus negotiis cautum sit.*’ Accordingly, the court will not ascribe retrospective force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the Legislature.”

This is particularly to be borne in mind when a defence of limitation is set up. As was pointed out in *Roddam v. Morley* (3), limitation as a defence is the creature of positive law and

(1) (1901) A. C., 297.

(2) (1870) L. R., 6 Q. B. 1 (23).

(3) (1857) 1 DeG. & J., 1, (28).

therefore not to be extended to cases which are not strictly within the enactment.

I would therefore decree this appeal, and, setting aside the decrees of the courts below, remand the proceedings through the lower appellate court to the court of first instance with directions to re-admit the proceedings under the original number in the register of execution proceedings and to proceed to determine them. Costs here and hitherto will abide the event.

KARAMAT HUSAIN, J.—I have had the advantage of reading the judgement of my learned brother and I entirely agree with him and in the order proposed by him.

Appeal decreed and cause remanded.

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Before Mr. Justice Sir George Knox and Mr. Justice Karamat Husain.
MUHAMMAD IBRAHIM KHAN (PLAINTIFF) v. AHMAD SAID KHAN AND
ANOTHER (DEFENDANTS).*

Civil Procedure Code (1908), schedule II and section 92—Muhammadan law—*Waqf*—Public charitable trust—Dispute as to right to succeed as *mutawalli*—Arbitration.

A trust for charitable purposes being a trust of a public character, the right to succeed to the trusteeship of such a trust is not a right which can be settled by arbitration: a court therefore has no jurisdiction to entertain an application to file an award in such a matter under section 20 of the second schedule to the Code of Civil Procedure, 1908. *Mahadeo Prasad v. Bindeshri Prasad* (1) referred to.

THE facts of this case were as follows:—

One Ghulam Chishti Khan created a *waqf* and was the first *mutawalli*. After his death his second son, Abdul Karim Khan, became *mutawalli*. On the death of Abdul Karim Khan, disputes arose as to the succession between two other sons of Ghulam Chishti Khan on one side, and Ahmad Said Khan, a son of Abdul Karim Khan, on the other. The parties referred the dispute to private arbitration, and an award was made in favour of the appellant, one of the sons of Ghulam Chishti Khan. He applied to have the award filed in court. Ahmad Said Khan contested the application on the basis of various objections which he urged against the validity of the award. The

* First Appeal No. 79 of 1909, from an order of Nihal Chandra, Subordinate Judge of Moradabad, dated the 12th of June, 1909.