

## FULL BENCH.

1911  
March, 8.

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

RAM SARUP (DECREE-HOLDER) v. DASRATH TIWARI AND ANOTHER  
(JUDGMENT-DEBTORS).\*

*Civil Procedure Code (1882), sections 230, 235—Execution of decree—Limitation—Application for execution whether a fresh application or merely a continuance of a subsisting application.*

The subsequent application to execute the same decree mentioned in section 230 of the Code of Civil Procedure, 1882, means a substantive application for execution in the form prescribed by section 235 of the Code.

Hence, where an application for execution in accordance with section 235 of the Code has been made within the period of limitation prescribed by section 230 and has been granted, that is, execution has been ordered in accordance with the prayer of the decree-holder's application, the right of the decree-holder to obtain execution will not necessarily be defeated, if, by reason of objections on the part of the judgment-debtor or action taken by the court or other cause for which the decree-holder is not responsible, final completion of the proceedings in execution initiated by the application under section 235 cannot be obtained within the period limited by section 230. Further applications of the decree-holder to the court executing the decree to go on from the point where the execution proceedings had been arrested and complete execution of his decree would be applications merely ancillary to the substantive application under section 235 and would not be obnoxious to the bar of section 230. *Rahim Ali Khan v. Phul Chand* (1) followed.

THE facts of this case were as follows :—

In a suit for possession on a mortgage and for mesne profits a decree was obtained on the 15th of September, 1893. Application for execution was made on the 3rd of June, 1905. The court struck off this application of its own motion on the 27th of September, 1905. An application for re-admission of that application was made on the 13th of August, 1906, and the application was re-admitted on the 15th of September, 1906. It was again struck off for non-payment of process fee on the 13th of November, 1907. On the 3rd of December, 1907, an application was made for restoration of the case, and, after sufficient cause being shown, it was again restored on the 14th of December, 1907.

\* Appeal No. 22 of 1910 under section 10 of the Letters Patent.

1911

BAM SARUP  
v.  
DASRAT  
TIWARI.

Objections were filed by the judgement-debtor, the main ground being that the decree was barred by 12 years' limitation. The first court disallowed the objection, but the lower appellate court reversed the decree and held the application to be barred. On appeal to the High Court, PRACOTT, J., upheld that decision in the following judgement:—

"This is a decree-holder's appeal. The decree is dated the 15th of September, 1893. It was admittedly still alive when, on the 3rd of June 1905, an application for execution was made. After giving rise to sundry proceedings in consequence of objections raised by the judgement-debtors, the application was finally dismissed on the 13th of November, 1907, for non-payment of process fees by the decree-holder. On the 3rd of December, 1907, the decree-holder applied that the application of the 3rd of June, 1905, might be restored and taken up again. He obtained an order restoring the said application to the file of the court on the 14th of December, 1907, and after this certain proceedings in execution were taken. The judgement-debtors object that these proceedings are all barred by section 230 of the Code of Civil Procedure (Act XIV of 1882). The case appears to be exactly covered by the ruling of this Court in *Ram Narain v. Ram Charan* (1). I do not see that this case has been overruled either in *Rahim Ali Khan v. Phul Chand* (2) or in *Mujibullah v. Umair Bibi* (3). The prohibition in section 230 of Act XIV of 1882 is directed to the granting of an application after the prescribed period of 12 years. I have been through the order sheet in this case, and I cannot find that in consequence of the application of the 3rd of December, 1907, the Court was asked to take proceedings against any property already under attachment, or otherwise to take any steps in continuation of any proceedings initiated under the application of the 3rd of June, 1905. I accordingly concur in the view of the case taken by learned District Judge. I dismiss the appeal with costs."

The decree-holder appealed under section 10 of the Letters Patent, and the case was subsequently referred to a Full Bench.

Munshi Govind Prasad, for the appellant, submitted that the application was within time, inasmuch as the order of the 14th of December, 1907, continued the application of the 3rd of June, 1905. He cited *Rahim Ali Khan v. Phul Chand* (2).

Babu Sital Prasad Ghosh, for the respondent, urged that the court had no statutory authority to make the order of the 14th of December, 1907. The lower court did not treat the application before it as one for review of judgement; but it was a fresh application. It could not be one for review of judgement as there was no judgement to review. An order striking off an

(1) (1895) I. L. R., 18 All., 49. (2) (1896) I. L. R., 18 All., 482.  
(3) (1908) I. L. R., 30 All., 499.

application is not a judgement within the meaning of section 2 of the Civil Procedure Code. He relied on *Ram Newaz v. Ram Charan* (1), which had not been dissented from in the Full Bench case in 18 All., 482.

STANLEY, C. J.—This appeal arises out of proceedings taken in execution of a decree under section 230 of the Code of Civil Procedure of 1882. The decree is dated the 15th of September, 1893, and was a decree for possession of immovable property and for mesne profits. On the 3rd of June, 1905, the decree-holder applied for execution of his decree. On the 27th of September, 1905, the application was struck off by the court on its own motion. Consequent on this an application for the re-admission of the application was made on the 30th of August, 1906, and on the 15th of September, 1906, the application was re-admitted. On the 13th of November, 1907, the application was again struck off on the ground that insufficient process fee had been deposited by the decree-holder. He, on the 3rd of December, 1907, applied to the court for restoration of the application, setting out the circumstances under which he failed to pay the requisite amount of process fee. The court was satisfied with his explanation, and accordingly, on the 14th of December, 1907, restored the application to the file. This application, it is to be noted, was not in the nature of a fresh application for execution. It was simply an application for restoration of the previous application of 1905, and rightly or wrongly the court revised its previous order and passed the order for restoration. In proceedings in execution taken on the application of the 3rd of June, 1905, which had been so restored, objection was taken by the judgement-debtor that the proceedings were barred by limitation, the application of the 3rd of December, 1907, having been made after the lapse of twelve years from the date of the decree. The court of first instance held that limitation did not bar the proceedings, but the decision of this court was reversed on appeal and the appellate court's decree was affirmed by a learned Judge of this Court in second appeal. Hence this appeal under the Letters Patent.

1911

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RAM SARUP  
v.  
DASHRATH  
TIWARI.

1911

RAM SARUP

v.

DASRATH  
TIWARI.

Stanley, C- J.

The contention on behalf of the appellant is that the order of the 14th of December, 1907, had the effect of restoring the prior application of the 3rd of June, 1905, and was not a fresh application for execution either in form or substance. It appears to me that this contention is well founded. It was open to the court to review the order which it had passed striking off the application for non-payment of a sufficient process fee: it was open to the court to reinstate this application. I am unable to find any substantial difference in the facts of this case from those which were the subject of consideration by a Full Bench of this Court in the case of *Rahim Ali Khan v. Phul Chand* (1). In that case it was held that the subsequent application to execute the same decree mentioned in section 230 of the Code of Civil Procedure means a substantive application for execution in the form prescribed by section 235 of the Code; hence that where an application for execution in accordance with section 235 of the Code has been made within the period of limitation prescribed by section 230 and has been granted, that is, execution has been ordered in accordance with the prayer of the decree-holder's application, the right of the decree-holder to obtain execution will not necessarily be defeated, if by reason of objections on the part of the judgement-debtor, or action taken by the court, or other causes for which the decree-holder is not responsible, final completion of the proceedings in execution initiated by the application under section 235 cannot be obtained within the period limited by section 230. In the judgement of my brother Knox I find this passage, in which I entirely concur. Referring to section 235 of the Code he observes:—"That section lays down in great detail the form which an application to execute a decree must take, the matters which it must contain, and the mode in which the court is asked to grant its assistance. Section 245 requires that such applications shall on receipt be examined, and, if found in accordance with the law, admitted on a register. The court is after such admission to order execution of the decree according to the nature of

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

the application. So long as that order or any further order according to the nature of the application is in progress, provided it be an order which has been evolved from the application so registered, I would hold that the application for execution is in progress. If from some obstacle imposed by the judgement-debtor, or by the court, that obstacle not being a final determination of the application, the progress of the order, or subsequent orders, to maturity is delayed and such obstacle is removed by an application of the decree-holder, I do not consider such latter application, unless it expressly takes the form of a new application under section 235 and be registered, as a subsequent application, any more than I would consider a petition by a plaintiff in the course of a suit asking the court to re-consider an order to be a fresh plaint."

It is contended on behalf of the respondent that in this case the striking off of the application of the 13th of November, 1907, was due to the default of the decree-holder in not paying sufficient process fee. Whether or not he was in fault in this respect, the court which passed the order for restoration had all the facts before it and came to the conclusion that there was justifying cause for re-admitting the execution proceedings. We ought, I think, in view of this order, to regard the temporary default on the part of the decree-holder as satisfactorily explained and condoned.

For these reasons I would allow the appeal and set aside the decrees of this Court and also of the lower appellate court and restore the decree of the court of first instance.

BANERJI, J.—I agree. The question is whether the application of the 3rd of December, 1907, was an application for execution of the decree within the meaning of section 230 of Act XIV of 1882. If it can be deemed to be an application for execution, it having been presented after the expiry of 12 years from the date of the decree, would be time-barred. I agree with the learned Chief Justice that it was neither in form nor in substance an application for execution within the meaning of that section. It was an application to proceed with the execution proceedings which had been put an end to

1911

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RAM SARUP  
v.  
DASRATH  
TIWARI.

1911

RAM SARUP  
v.  
DASRATH  
TIWARI.

by the order of the 13th of November, 1907. Those proceedings were initiated by the application of the 3rd of June, 1905, which was within 12 years from the date of the decree. By reason of the decree-holder's delay in depositing the requisite amount of process fee the court put in abeyance the carrying out of the execution proceedings. The decree-holder satisfied the court that he had sufficient reasons for not depositing the requisite amount of process fees and asked the court to set aside its order of the 13th of November, 1907, and to proceed with the execution proceedings. The last application was clearly one for a continuation of the execution proceedings already instituted and was not a fresh application for execution. I find it difficult to distinguish this case from the case of *Rahim Ali Khan v. Phool Chand*, (1) decided by a Full Bench of this Court. I agree in the order proposed.

GRIFFIN, J.—I have nothing to add to what has been said by the learned Chief Justice, and I would allow the appeal.

By THE COURT.—The order of the Court is that the appeal be allowed, the decrees of the learned Judge of this Court and of the lower appellate court set aside and that of the court of first instance restored with costs in all courts.

*Appeal allowed.*

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