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production of the wajib-ul-arz in question, without the support of a single instance in which the right has been claimed or exercised, the plaintiff has discharged the onus of proving the existence of a custom of pre-emption giving him as a proprietor of an isolated plot a right to pre-empt.

In our opinion, the evidence falls altogether short of anything of the kind, and the decision of the court below was quite correct. We accordingly dismiss the appeal with costs.

Appeal dismissed.

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Before Mr. Justice Sir George Knox and Mr. Justice Sir Henry Griffin.
GHULAM NASIR-UD-DIN AND ANOTHER (JUDGEMENT-DEBTOR) v. HARDEO PRASAD (PURCHASERS OF THE DECREE) *

Act No. XV of 1877 (Indian Limitation Act), schedule II, article 178—Act No. IX of 1908 (Indian Limitation Act), section 15—Execution of decree—Limitation—Execution stayed by injunction.

In execution of a decree certain property was attached by the decree-holder by means of an application made on the 8th of July 1904. Objection was taken to the attachment, which was disallowed on the 10th of March, 1908. This was followed up on the 5th of April, 1905, by a declaratory suit against the decree-holder. An injunction was also granted on the 6th of April, 1905, whereby the sale of the property in suit was stayed. The suit terminated on the 26th of June, 1907, but the injunction lasted until January, 1909. The next application for execution was made on the 14th of April, 1910.

Held that this last application was within time whether the Limitation Act of 1877 or that of 1908 applied. It was not relevant that the decree-holder might possibly have obtained execution of the decree against other property of his judgement-debtor. *Behari Lal Misir v. Jagannath Prasad* (1) followed.

The facts of this case were as follows :—

The North-Western Bank, Limited, of Meerut, obtained a decree against the appellants and others on the 24th of December 1897. This was confirmed in appeal by the High Court on the 7th of February, 1900.

On the 8th of July, 1904, the decree-holders made an application for execution against the judgement-debtors in the court of the Subordinate Judge at Delhi, and attached certain property. Two persons, Hafiz Khairati and Hafiz Ahmad Husain, objected to the attachment under order XXI, rule 58 (old section 278) of the Code of Civil Procedure, but their objections were disallowed.

* First Appeal No. 179 of 1911, from a decree of Soti Raghubans Lal, Subordinate Judge of Meerut, dated the 26th of January, 1911.

(1) (1906) I. L. R., 28 All., 651.

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They then brought a declaratory suit against the Bank on the 5th of April, 1905, and on the next day obtained an injunction restraining the decree-holders from proceeding further against the property. On the 29th of June, 1907, this suit was decided in favour of the plaintiffs, and the decree was confirmed in appeal by the Punjab Chief Court on the 26th of January, 1909. On the 19th of July, 1907, the Bank made an application that the case be shelved for the time being, as the property attached had been released, stating that it would try and find out other properties which could be attached. Proceedings were shelved accordingly.

On the 13th of April, 1910, the decree-holders made the present application for execution. Nasir-ud-din objected that it was barred by limitation, as more than three years had elapsed since the date of the last application of the 8th of July, 1904. He also contended that in any case as against him the present application was filed more than twelve years after the sale of the decree, the final decree, in the case being, as regards himself, the decree of the 24th of December, 1897.

The court of first instance held that the application was not time-barred, inasmuch as the application of 1904 was pending all the time its execution was stayed by the order of injunction, *i. e.* till the date of the decree, the 29th of June, 1907, from which date the present application was within time. As regards the second point, it held that limitation was saved by the fact that a warrant of arrest was issued against Nasir-ud-din in 1898, but as he avoided arrest, his avoidance amounted to fraud. The judgment-debtors appealed.

Maulvi *Muhammad Rahmat-ullah* (with him Maulvi *Ghulam Mujtaba*), for the appellants :—

Where execution has been stayed on account of any obstacle, the application cannot be revived unless and until such obstruction is decided in favour of the decree-holder; *Thakur Prasad v. Abdul Hasan* (1); *Suppa Reddiar v. Arudai Ammal* (2). The latter case cites all the rulings on the point, and follows all the other High Courts. The application of 1904 cannot be said, therefore, to have continued down to 1907. Section 15 of the new Limitation Act, IX of 1908, cannot benefit the decree-holder. The new Act came into force on the 1st of January, 1909, when

(1) (1800) I. I. R., 23 All., 19.

(2) (1904) I. L. R., 28 Mad., 50 (52).

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the decree was already time-barred. Section 15 of the old Act applied only to suits and not to execution applications. Retrospective effect also cannot be given to the now amended section, unless expressly provided. The final decree in the case as against Nasir-ud-din was that of the 24th of December, 1897. The present application is, therefore, barred by the twelve years' rule contained in section 48 of the Code of Civil Procedure; *Ganga Kuar v. Kesar Kuar* (1); *Mashiat-un-nissa v. Rani* (2). No evidence has been produced to prove any such fraud or force as is required by section 48, clause 2 (1) of the Code of Civil Procedure. The application for arrest was made on the 4th of March, 1898. That was not within twelve years immediately before the date of the present application. Again, a subsequent application was made in 1904 after the application for arrest. That shows there was no fraud. The present application cannot be said to revive the application of 1904. It seeks different reliefs; is filed in a different court, and concerns different properties. He also referred to *Beni Prasad v. Kashi Nath* (3) and *Rahim Ati Khan v. Phul Chand* (4).

He cited, *Shivram Chintaman v. Sarasvatibai* (5) also *Raghunandun Pershad v. Bhugoo Lall* (6).

The Hon'ble Dr. *Sundar Lal*, for the respondents:—

We applied for execution on the 8th of July, 1904. An injunction was issued staying execution on the 6th of April, 1905. An application was, therefore, kept pending till the suit in which the injunction was granted was decided which was on the 29th of June, 1907, or rather when the decree was finally confirmed on appeal on the 19th of July, 1909. The present application is within three years from both these dates. The ruling in *Basant Lal v. Batul Bibi* (7) is exactly in point.

The decree-holder might have proceeded against other property of the judgement-debtors, but the whole question is whether he was bound to do so. He had attached sufficient property to cover his claim, and he was not compelled to give it up and seek something else merely because somebody had put up a claim concerning it. The case in 6 All. is exactly parallel. It

(1) (1904) 1 A. L. J., 409.

(4) (1896) I. L. R., 18 All., 482.

(2) (1889) I. L. R., 13 All., 1.

(5) (1894) I. L. R., 20 Bom., 175 (178).

(3) (1909) 6 A. L. J., 401.

(6) (1889) I. L. R., 17 Cal., 268.

(7) (1883) I. L. R., 6 All., 23.

is not stated expressly in the report whether the matter there was decided in favour of the decree-holder, but it must have been so as otherwise he would have applied for execution of the same property. An inspection of the record of that case shows that the property attached was also released there by a suit. The decree-holder there could have also gone against other property, had he chosen. The ruling in 6 All. follows an earlier case, which is also in my favour; *Paras Ram v. Gardner* (1). It has been repeatedly held that where execution proceedings cannot be continued on stay or other order obtained by some party, article 178 of the old Limitation Act applies. The application is, therefore, within time. It is not barred by the twelve years' rule of section 48, Civil Procedure Code, as against Nasir-ud-din. The latter was a party to 'a cross-appeal' filed in the High Court in 1898. The final decree in the case was that of the 7th of February, 1900. It confirmed the decree as against Nasir-ud-din and awarded some further sums as against two other defendants.

Maulvi *Muhammad Rahmat-ullah*, in reply :—

The ruling in 6 All. is not contrary to that in 23 All., 13. Again, this question was not considered in 6 All. A revival of execution proceedings cannot be said to be the same thing as the revival of an application on execution.

KNOX and GRIFFIN, JJ. :—The North-Western Bank Company, Limited, obtained a decree against four persons—Hamza Ali Khan, Khwaja Ghulam Nasir-ud-din Khan, Musammam Aghai Begam and Mogal Jan, judgement-debtors, on the 24th of December, 1897. Hamza Ali Khan died and Faiz-ud-din, Aftab Ali and the three remaining original debtors have been put on the record as his heirs. An appeal was filed to this Court and that appeal was decided on the 7th of February, 1900. The decree passed by the Subordinate Judge of Meerut, was to a certain extent modified. Execution appears to have been first taken out on the 15th of January, 1898. Several other applications in execution followed. One of these was an application for execution made in the court of the District Judge of Delhi on the 8th of July, 1904. This application was made within time, and, as a result, some property situated in Delhi was attached as the property of Aghai Begam, judgement-debtor. Upon attachment, two persons, Hafiz Khairati and Hafiz

(1) (1877) I. L. R., 1 All., 355.

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Ahmad Husain, objected. The objection filed by them was rejected on the 10th of March, 1905. They followed up the objection by a declaratory suit against the Bank, decree-holder. They also applied for an injunction. This was granted by the District Judge of Delhi, and under this injunction the sale of the property in suit was stayed until the decision of the suit. On the 29th of June, 1907, the Delhi court gave its decision in the declaratory suit, and on the 9th of July, 1907, the pleader for the Bank, decree-holder, put in an application in this Court, stating that as the attached property has now been released, the Bank will find out new property and then apply for execution, and meanwhile the case might be shelved, and an order was passed sending it to the record-room. On the 14th of April, 1910, Hardeo Prasad, who had in the interim purchased the decree from the Bank and had got his name entered on the record as decree-holder, instituted proceedings for attachment and sale of certain movable and immovable property said to belong to the judgement-debtors. Khwaja Ghulam Nasir-ud-din Khan and Musammat Aghai Begam, judgement-debtors, took objections. They urged, that as no application had been made by the decree-holder since the 8th of July, 1904, the present application must be considered as out of time and barred by limitation. They also took objection that section 15 of Act No. IX of 1908 could not be utilized by the decree-holder in computing the period of limitation. They raised other objections, but it is unnecessary to go into them so far as the present appeal is concerned. The lower court held that if the Act of 1877 applied to the case, (1) the decree-holder's application for execution made to the court of Delhi and the injunction which was issued by that court brought the case within article 178 of the Limitation Act of 1877, and (2), as the present application was within three years from the date of the final decision of that suit, it was within time. If the new Act governed the case, then the Court held that the period from the 6th of April, 1905, to the 26th of January, 1909, must be excluded from computation. In either case the present application was well within time. The Subordinate Judge rejected the objections of the judgement-debtors. The judgement-debtors have now come in appeal to this Court, and they contend that the application is time-barred and that the court was wrong

in holding that the injunction issued on the 6th of April, 1905, could be utilized by the decree-holder in saving limitation.

We are of opinion that the application for execution instituted on the 14th of April, 1910, may justly be reckoned as within time. The date of the decree sought to be executed and the time from which the period of limitation began to run in this case was the 7th of February, 1900. At that time Act XV of 1887 was the Act governing limitation of suits and applications, and the article applying to the present proceeding would be article 179 of the second schedule of that Act. No question has ever arisen regarding the application made to the court of Delhi on the 8th of July, 1904, as being an application which was time-barred. The flow of limitation was obstructed by the objection decided on the 3rd of December, 1904. It is true that that objection was rejected on the 10th of March, 1905, but the objection was followed up by a declaratory suit, also the act of Hafiz Khairati and Hafiz Ahmad Husain. Next in order came the injunction which was granted on the 6th of April, 1905. This was also an act of the persons above mentioned and not an act of the decree-holder. It was not until the 29th of June, 1907, that the obstructions thus caused were removed and the period of limitation began to run freely again. This Court, in *Behari Lal Misir v. Jagannath Prasad* (1), under similar circumstances, held that the article which in such a case applies is article 178 of the second schedule of the Limitation Act, and that the decree-holder's right to apply accrued, when by the decree the sale of a share of two villages in that case was set aside. "The present appeal," the learned Judges went on to say, "having been made within three years from that day was therefore within time." Following the precedent therein laid down, the present proceeding instituted on the 14th of April, 1910, was well within three years of the 29th of June, 1907. On the 1st of January, 1909, Act No. IX of 1908 came into force, *vide* section 1, clause 3 of Act No. IX of 1908, and it has been contended that the present case should be governed by article 182 of the first schedule of the Act. Even if so, it appears to us that the lower court was quite right in holding that section 15 of the Act saves the decree-holder from limitation being set up against him under Act No. IX of 1908. Section 14, which corresponded with section 15

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of the present Act, made provisions for suits only, and the present Act in computing the period of limitation prescribed for either suits or applications for execution of a decree where execution has been stayed by injunction, the time of the continuance of the injunction shall be excluded in favour of the decree-holder. It will be remembered that in this case, an injunction was granted on the 6th of April, 1905, and lasted until the 26th of January, 1909. If this period be excluded in computing the period of limitation, the present application is well within the time granted by article 182 of Act IX of 1908. It was contended that the injunction issued by the Delhi court simply prohibited the sale of the property by Hafiz Muhammad Khairati and Hafiz Ahmad Husain, that it did not stay the execution of the decree altogether. In our opinion there is no force in this contention. A decree-holder is not bound to search out and to proceed against all property of which his judgement-debtor may stand possessed. This would only encourage the setting up of 60 years' claim to each property as attached. If he is executing his decree against property which he *bona fide* believed to be the property of his judgement-debtor, he is executing his decree within the meaning of the law. For this reason we hold that the application made by the decree-holder is not time-barred. It is unnecessary to consider the other pleas taken in this appeal, and we dismiss this appeal with costs.

Appeal dismissed.

REVISIONAL CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

THE ALLAHABAD BANK, LIMITED, CANNINGPORE (APPLICANT) v.

MURLIDHAR AND OTHERS (OPPOSITE PARTIES) *

Act No. III of 1907 (Provincial Insolvency Act), sections 24 and 26—Insolvency—Application by a creditor to have his name entered in the schedule of creditors—Right of the scheduled creditors to make objections—Revision.

Creditors whose names are already in the schedule prepared under section 24 of the Provincial Insolvency Act, 1907, are entitled to be heard before the debt of a creditor who comes in at the last minute under section 24 (3) of the Act is entered in the schedule.

The facts of this case were as follows :—

Harish Chandar and others, proprietors of a shop called Sukhdeo Das Lachmi Narain, applied to be adjudicated insolvent, to

* Civil Revision No. 78 of 1911.