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Narain. The prosecution examined three witnesses in support of the charge and the accused gave evidence to show that he bore a good character. The jury returned a unanimous verdict of not guilty. The learned Sessions Judge, being of opinion that the verdict of the jury was flagrantly in opposition to the evidence in the case and was perverse, did not accept it and has submitted the case to this Court under section 307, clause (1), of the Code of Criminal Procedure. We find on a perusal of the record that, after the first two witnesses for the prosecution had been examined, it was discovered that one of the jurors was deaf and had not followed the trial at all. He was discharged and another juror was added. The learned Sessions Judge did not commence anew the trial of Narain, but called up the first two witnesses for the prosecution and had their statements read out to them and they admitted that their evidence which they had heard was correct. The trial then proceeded and other witnesses were examined for prosecution and for the defence. Apart from the question whether the verdict of the jury is perverse or not, we find that the trial before the learned Sessions Judge has been defective in view of the provisions of section 282 of the Code of Criminal Procedure. It was not open to the learned Sessions Judge to merely read over the statements of the first two witnesses and obtain their admissions to validate the trial where one of the jurors had been discharged and replaced by a new juror. We therefore direct that Narain be retried before another jury according to law.

Retrial ordered.

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Piggott.

1914
May, 18.

MUHAMMAD HUSAIN (DECREE-HOLDER) *v.* INAYAT HUSAIN AND ANOTHER (JUDGEMENT-DEBTORS).*

Execution of decree—Limitation—Act No. IX of 1908 *(Indian Limitation Act), schedule I, article* 182*—Application in accordance with law—Judgement-debtor missing.*

A decree for sale on a mortgage executed by A was passed against A (who was reported to be missing at the time) and against B, C, D and E, who were

*Second Appeal No. 1293 of 1913 from a decree of Rama Das, officiating first Additional Subordinate Judge of Agra, dated the 2nd of July, 1913, confirming a decree of Kaulashwar Nath Rae, Munsif of Bulandshahr, dated the 3rd of April, 1913.

in possession of the mortgaged property and were the heirs presumptive of A, jointly. *Held* that, in the absence of any evidence that A was dead, an application for execution of this decree against A alone was an application in accordance with law within the meaning of article 182 of the first schedule to the Indian Limitation Act, 1908.

THE facts of this case were briefly as follows:—

One Mahmud Husain obtained a decree for sale upon a mortgage executed by Ewaz Husain, against the mortgagor, and, inasmuch as the mortgagor was missing at the time of suit, against four other persons who were his heirs presumptive and were in possession of the mortgaged property. The decree was a joint decree against all five defendants. The decree-holder applied for execution as against Ewaz Husain alone and brought part of the mortgaged property to sale. But the other defendants filed objections and in appeal their objections were allowed and the execution proceedings set aside. On a second application for execution being made by the decree-holder, it was found by the Court of first instance, and this finding was upheld on appeal, that the application was time-barred because the first application was not an "application in accordance with law" and also because the decision on that application was *res judicata*. The decree-holder appealed to the High Court.

Maulvi *Shafi-uz-zaman*, for the appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondents.

TUDBALL and PIGGOTT JJ.—This is a second appeal arising out of execution proceedings. The decree-holder Mahmud Husain, on the 5th of April, 1909, obtained a preliminary decree for sale against five persons. These five persons were Ewaz Husain, Inayat Husain, Farzand Husain, Hadi Husain and Mahmud Husain. The mortgage deed, the basis of his claim, had been executed by Ewaz Husain alone. The suit originally was instituted against him alone, but apparently, as his whereabouts could not be traced, and as the other four persons were actually holding possession of the property and moreover were his heirs, the decree-holder made them parties to the suit, and his claim was decreed *ex parte* as against Ewaz Husain and on contest as against the other four defendants. On the 18th of December, 1909, the final decree for sale was passed. On the 14th of January, 1910, i.e., within one year of the final decree, the decree-holder applied for execution of his decree, and in the necessary column he

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entered all the names of the judgement-debtors and he asked to have his decree executed as against Ewaz Husain. For some reason which we are unable to understand, the court directed notice to issue to Ewaz Husain. That was returned by the serving officer with a report to the effect that Ewaz Husain refused to accept service. Part of the property was put up to auction, sold, and purchased by the decree-holder. Thereupon some of the other judgement-debtors filed objections to the sale and asked to have it set aside. Their application was first rejected, but on appeal the learned District Judge accepted the application and set aside the sale on the ground that the notice of the application for execution had not been given to the appellants before him. On the 10th of January, 1913, the present application for execution was made and that application has been rejected by both the courts below on the ground that it is barred by limitation. Both the courts have held that the application of the 14th of January, 1910, i.e., the first application for execution as against Ewaz Husain, was not an application made in accordance with law and therefore did not operate to save the bar of limitation, and as the present application has been made more than three years from the date of the final decree, it is barred by limitation. The two grounds on which the courts below have come to this conclusion are, first of all that the application of the 14th of January, 1910, was not in accordance with law, in that it had been made against a man who was missing at the date of the application, and, secondly, they have held that it is *res judicata* between the parties, that the first application for execution was not in accordance with law by reason of the decision of the District Judge mentioned above in that he set aside the sale of the property. The courts below have not found that Ewaz Husain was dead on the 14th of January, 1910. They have come to the conclusion that he has been missing for a large number of years, but there is no evidence on the record to show that he is dead or that he was dead on the date of the former application. Our attention has been called to a decision of this Court in which it has been held that an application for execution made as against a deceased person is not an application in accordance with law. It is argued that, equally so, an application for execution made against a man whose whereabouts are unknown

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is bad in law. With this argument we find it impossible to agree. Until a judgement-debtor is dead it is impossible to bring upon the record his heirs. The bare fact that a man's whereabouts are not known is not sufficient to deprive the decree-holder of the fruits of his decree, and we know of nothing in law which would make an application for execution as against him an invalid application.

With regard to the plea of *res judicata* an examination of the District Judge's judgement will show that he nowhere held as between the parties that the application of the 14th of January, 1910, was not in accordance with law. The basis of his judgement setting aside the sale was the fact that no notice was issued to the appellant before him. The point is clearly not *res judicata* between the parties. In view also of the first portion of explanation No. 2 attached to article 182 of the Limitation Act, the decree having been a joint one against Ewaz Husain and the other judgement-debtors, the application of the 14th of January, 1910, was a good application and was made in accordance with law. The present application is made within three years of that date and is therefore not barred by limitation. We allow the appeal, set aside the orders of the courts below, and remand the case through the lower appellate court to the first court with directions to restore the case to its original number and to proceed to dispose of it according to law. The appellants will have their costs in this Court and in the courts below.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Mr. Justice Piggott.

EMPEROR *v.* MEHAR CHAND AND ANOTHER.*

1914
May, 19.

Criminal Procedure Code, section 423—Sentence—Alteration of sentence whether amounting to an enhancement or not.

A Magistrate on a conviction under section 379 of the Indian Penal Code sentenced the accused to one month's rigorous imprisonment and a fine of Rs. 5 each and in case of default in payment of the fine, to one week's further imprisonment. The District Magistrate on appeal by the accused altered the sentence to one of three days' imprisonment and a fine of Rs. 100, and in default of payment of fine, to a further imprisonment of one month. *Held* that in the

* Criminal Reference No. 321 of 1914.