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So that this pleader was appointed to do everything on behalf of his clients, the plaintiffs, in connection with the execution case, and the defendant No. 1 in his evidence distinctly admits that up to the time of the sale he was acting as the sole pleader on behalf of the two judgment-debtors. That being the case, it seems to us that it would be acting in violation of all rules of equity and good conscience, if we were to hold that the defendant No. 1 is entitled to maintain his purchase to the detriment of the plaintiffs.

We think that the view of the facts and of the law that has been accepted in the case by the Court below is correct; and that, in the circumstances as disclosed by the record of the case, the only decree that the Subordinate Judge could have properly made was the decree that he did make, namely, that the plaintiffs should be entitled to obtain a reconveyance of the property from the defendant on certain terms, those terms being that they should repay to the defendant No. 1 the purchase-money paid by him, with 15 per cent upon that amount, as compensation within a certain time fixed.

We accordingly affirm that decree.

In regard to the costs of this appeal, we think that having regard to the fact that the plaintiffs have been unable to prove the precise contract set by them, each party should bear his own costs in this appeal; and we may mention that that was the course adopted by the Subordinate Judge in the matter of the costs in his Court.

The result is that this appeal is dismissed, but without costs.

H. W. *Appeal dismissed.*

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Rampini.

TARAK CHUNDER SEN (JUDGMENT-DEBTOR) *v.* GYANADA SUNDARI (DECREE-HOLDER.) *

1896 *March* 10.

Limitation Act (XV of 1877), Schedule II, Article 179, clause 4—Application to withdraw a pending proceeding for execution with leave to institute another—Code of Civil Procedure (Act XIV of 1882), section 373—Step in aid of execution of a decree.

An application to [illegible] for execution, with leave

* Appeal from Appellate Order No. 230 of 1895, against the order of G. K. Deb, Esq., Officiating District Judge of Dacca, dated the 25th of April 1895, affirming the order of Babu J. C. Mittor, Subordinate Judge of that District, dated the 8th of September 1894.

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to institute another at some future time, is not a step in aid of execution within the meaning of the Limitation Act, Schedule II, Article 179, clause 4. *Ram Narain Rai* v. *Bakhtu Kuar* (1), dissented from.

THE facts of this case appear sufficiently from the judgment of the High Court.

Babu *Lal Mohun Das* for the appellant.—The application of the 16th March 1891, which is the only application within three years next preceding the present one, which was made on the 16th March 1894, is not an application to take any step in aid of execution. According to the true construction of it, it is an application, not merely for an order to suspend the present proceedings, but also for an order to strike them off, though no doubt with the reservation of leave to the decree-holder under section 373 of the Code of Civil Procedure to make a fresh application for execution. The alternative prayer was not for the immediate issue of any process of attachment, but was for permission to take out process of attachment at some future period. Even if it could be construed into such an application, the prayer that was actually made before the Court, as appears from the context of the order dated 19th March 1891, was merely for permission to withdraw the execution case then pending, with liberty to take out execution on some subsequent date. Such application is not calculated to *aid* or *further* in any way the execution proceedings. The judgment of the Allahabad High Court in the case of *Ram Narain Rai* v. *Bakhtu Kuar* (1), upon which the decisions of the Courts below are based, proceeds expressly upon the ground that unless such permission were granted no future application for execution would be entertained. This view is in accordance with the previous decisions of that Court, but it is opposed to the decisions of this Court: *Wajihan* v. *Bishwanath* (2), *Radha Kishen Lall* v. *Radha Pershad Singh* (3), *Bunko Behary Gangopadhya* v. *Nil Madhub Chuttopadhya* (4). See also the recent decision of the Privy Council in the case of *Thakur Prasad* v. *Fakirullah* (5).

Babu *Harendra Narayan Mitter* for the respondent.—The circumstances under which the petition was put in show what the first

(1) I. L. R., 16 All., 75.
(2) I. L. R., 18 Calc., 462.
(3) I. L. R., 18 Calc., 515.
(4) I. L. R., 18 Calc., 635.
(5) I. L. R., 17 All., 106; L. R., 22 I. A., 44.

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prayer really was. It was to the effect that the execution proceedings then pending might be stayed with leave to apply again. Temporary suspension of the proceedings was simply asked for, and was allowed. The present application should therefore be treated as one in legal continuance of the previous petition. See *Chintamon Damodar Agashe* v. *Balshastri* (1).

The cases cited do not touch the question of limitation raised in the case. I rely upon the case of *Ram Narain Rai* v. *Bakhtu Kuar* (2). The petition contained several other prayers. In so far as it asks for issue of attachment against the property of the judgment-debtor, it is certainly an application to take a step in aid of execution. The fact that the learned Subordinate Judge thought it fit to allow only one of the prayers in the petition, *i.e.*, the first one, does not prevent the said petition from furnishing a fresh starting point. *Shankar Bisto Nadgir* v. *Narsinghrao Ramchandra* (3).

Babu *Lal Mohun Das* in reply.

The judgment of the High Court (PETHERAM, C.J., and RAMPINI, J.) was as follows:—

The question we have to consider is whether an application made by the decree-holder, the respondent in this appeal, on the 16th of March 1891, was an application in accordance with law to the proper Court to take some step in aid of the execution of the decree. The application was contained in a petition, the translation of which has been made by the pleader for the appellant and verified by Mr. Justice Rampini. It is as follows:—

"Execution case No. 168 of 1890. Before Babu Parbutty Kumar Mitra, Ray Bahadur, Subordinate Judge, Zilla Dacca. Shoshi Kumar Sarkar, decree-holder *v.* Taruck Chunder Sen, judgment-debtor. Petition on behalf of decree-holder to the following effect."

"In the above execution case order has been passed upon the Nazir to proceed and attach the moveable properties of the judgment-debtor. But the judgment-debtor, having become

(1) I. L. R., 16 Bom., 294. (2) I. L. R., 16 All., 75.
(3) I. L. R., 11 Bom., 467.

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aware of this, has removed his properties. Besides no person on behalf of the decree-holder has arrived here as yet; consequently, the travelling allowance of the Nazir has not been deposited. It is, therefore, prayed that under section 373 of the Civil Procedure Code permission be given to withdraw the execution with liberty to take out execution again, or that after fixing some date after the 20th April for the hearing, an order be passed for the issue of process of attachment, or that order be passed for depositing hereafter the travelling allowance of the Nazir. Be it known that the sum of Rs. 2 is already in deposit as fee for process of attachment. It is prayed that (execution) be allowed to be withdrawn with permission to take out attachment with that fee, when execution is applied for hereafter; and the date of hearing has been fixed for the 20th March."

Upon this petition the Court on the 19th of March 1891 made this order:—

"The decree-holder has this day prayed to be allowed to withdraw the case with liberty to take out execution again. Case disposed of. The decree-holder may make a fresh application."

The present application was made on the 16th of March 1894.

It is said that even if the application to withdraw the pending proceeding for execution with leave to institute another at some future time were not an application to take a step in aid of execution, the petition of March 16th, 1891, contained other prayers; but we think that an examination of the petition itself shows that it was really nothing but a petition for leave to withdraw the pending proceeding, and even if the written petition were wide enough to enable the decree-holder to ask for some other relief under it, it is certain from the order of March 19th that the only relief which the Court was actually asked to grant was leave to withdraw the pending proceeding with leave to institute another at some future time.

The most favourable way in which the position may be described for the decree-holder is to say that the application of the 16th of March 1891 was an application for further time to proceed with the pending execution proceeding, and then the question is whether, if the Court made an order granting the further time asked, such an order is a *step in aid of the execution*,

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It is not necessary to do more than state the proposition to see that it is not under the Civil Procedure Code. Decrees are executed by the Court on the application of the parties and *a step in aid of execution* means a step taken by the Court towards executing the decree. The mere granting of further time to make an application or to deposit money cannot be said to be such a step, as the taking of it does not assist the Court in executing the decree or advance the execution proceeding in any way. For these reasons we think that the order cannot be sustained, and the appeal must be allowed, and the application of the 16th of March 1894 to execute the decree, dismissed with costs in all Courts.

We have been referred to the case of *Ram Narain Rai* v. *Bukhtu Kuar* (1), but that is not a decision of this Court, nor is it binding on us. As we are unable to agree with the reasoning of the learned Judge by whom it was decided, we are compelled to decline to follow it.

S. C. G. *Appeal allowed.*

Before Mr. Justice Beverley and Mr. Justice Jenkins.

MULLICK KEFAIT HOSSEIN AND OTHERS (PLAINTIFFS) *v.* SHEO PERSHAD SINGH AND ANOTHER (DEFENDANTS.) *

1896
May 12.

Limitation Act (XV of 1877), section 14—Defect of jurisdiction, or other cause of a like nature—Misjoinder of causes of action—Dismissal of suit—Deduction of time occupied by.

A Hindu widow alienated certain property belonging to the estate left by her husband, a moiety of it in favor of one party and a moiety in favor of another, and died on the 22nd June 1878.

The reversionary heirs sold a share of the property and the purchaser brought a suit for recovery [illegible] by the widow, on the 25th April 1890, making the [illegible].

On the 19th June 1890 the reversionary heirs were added as co-plaintiffs, and the suit was dismissed on the ground of misjoinder of causes of action on the 19th February 1891. The present suit was then brought for the moiety only of the property on the 23rd February 1891, and deduction of the time taken up by the previous proceeding was claimed.

* Appeal from Appellate Decree No. 1573 of 1894, against the decree of I. Holmwood, Esq., District Judge of Gya, dated the 2nd of July 1894 reversing the decree of Babu Brijmohan Pershad, Subordinate Judge of that District, dated the 30th of September 1893.

(1) I. L. R., 16 All., 75.