there cited). We think, therefore, that the question of law as well as the question of fact tried out in the court below must be decided against the appellants. We dismiss these appeals, accordingly, with costs.

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BAWAN DAS v. O. M. CHIENE

Appeals dismissed.

Before Mr. Justice Piggott and Mr. Justice Walsh.

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January 9, 16.

LALTA PRASAD (DECREE-HOLDER) *v.* SURAJ KUMAR AND OTHERS (JUDGMENT-DEBTORS) *

Civil Procedure Code (1908), section 48, clause 2(a)—Execution of decree—Limitation—"Fraud"—Execution prevented by a series of frivolous objections on the part of the judgment-debtors.

Where the judgment-debtors, by means of a series of absolutely frivolous and futile objections, succeeded in preventing execution of the decree against them for more than twelve years, it was *held* that their conduct amounted to fraud within the meaning of section 48, clause 2(*a*), of the Code of Civil Procedure and the decree-holder was entitled to the benefit of the section. *Beni Prasad* v. *Kashi Nath* (1), *Mewa Lal* v *Ahmad Ali* (2), *Evans* v. *Edmonds* (3), *Jolliffe* v. *Baker* (4) and *Derry* v. *Peek* (5) referred to.

THE facts of this case were as follows:—

A decree was obtained in the court of the Subordinate Judge of Cawnpore, on the 16th of November, 1900. On appeal the decree was upheld by the High Court, on the 19th of February, 1903. The decree was against two sets of defendants. After the decree the defendants first set sued for a declaration that they were minors and were not bound by the decree because they were not properly represented. They got the declaration on the 1st of July, 1907. During all this period the execution of the decree was stayed.

In 1908 the decree-holders sought execution against the defendants second set. The latter objected that under an agreement prior to the decree the decree-holder had agreed not to execute the decree against them. The objection was disallowed.

In 1909 an application was made for the sale of immovable property of one of the judgment-debtors. Objections were put in

* First Appeal No. 171 of 1921, from a decree of Kashi Prasad, First Subordinate Judge of Cawnpore, dated the 22nd of January, 1921.

(1) (1909) 6 A. L. J., 401. (3) (1853) 13 C. B., 777.

(2) (1911) 9 A. L. J., 17. (4) (1883) 11 Q. B. D., 255.

(5) (1889) 14 A. C., 337

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by his brothers, who claimed a share in the property. The objections being allowed, a suit was brought by the decree-holder for a declaration that it was the property of the judgment-debtor alone. That suit resulted in a compromise, under which the same property was mortgaged to the decree-holder for a sum of Rs. 5,000.

An application was again made in 1915, of which the only record extant is a note in the Execution Register that it was dismissed as time-barred. An application was again made on the 22nd of May, 1918, to which also objection was taken on the ground of limitation. The Judge, however, held it within time, on the 7th of December, 1918. On the 12th of May, 1920, the present application was made. Notices were issued to the judgment-debtors, but none of them appeared. Execution was ordered to proceed *ex parte*. On the 20th of December, 1920, Suraj Kumar (one of the judgment-debtors) put in appearance and objected on the ground of limitation. The learned Subordinate Judge dismissed the decree-holder's application for execution as time-barred. The decree-holder appealed.

Munshi *Gulzari Lal* (Babu *Indu Bhushan Banerji* with him), for the appellant:—

The lower court has held my application time-barred both under the three years' rule and under the twelve years' rule as laid down in section 48 of the Code of Civil Procedure. So far as the three years' rule is concerned, my submission is that the present application was made on the 12th of May, 1920, and the one preceding it was made on the 27th of May, 1918. So it is clearly within three years of the last application. Objection was taken to the application of 1918 also on the ground of limitation but it was held to be within time. It is true that an application had been made in 1915 and in respect of that application it was held that it was beyond time. The record, however, is not available, and we find only in the Execution Register a note to the effect that it was dismissed on the ground of limitation. The position, therefore, is this that the later one of the two conflicting decisions (of 1915 and 1918) is in my favour. My submission is that the later one should prevail, and, if it does, the present application is within time.

As regards the twelve years' rule of limitation, the application no doubt is made after more than the period contemplated by law, but two points are to be noted in this connection. Firstly, the execution was stayed till the 1st of July, 1907, i.e., during the period when the litigation was going on between the defendants first set and the decree-holder. Secondly, the present judgment-debtor made a number of frivolous objections to all the applications with the intention of delaying and defeating the decree-holder's right. All these objections proved futile and were rejected. For instance, when in the year 1908 the decree-holder made an application for execution, the judgment-debtors said that the decree-holder had, under an agreement previous to the decree, agreed not to execute it against them. This objection was naturally dismissed. Again, in the year 1909 when an application was made for the sale of immovable property of Suraj Kumar, objections were put in by his brothers, who also claimed a share in it. The ultimate result of that litigation was that a mortgage of the same property was executed in favour of the decree-holder for a sum of Rs. 5,000. So, that objection was also a frivolous one. A number of times summonses and warrants were issued, but they could not be served and executed. All that shows that the judgment-debtors were acting in bad faith, raising hopeless and frivolous objections, and evading the process of law with the sole intention of gaining time and delaying the rights of the decree-holder. Such conduct on their part amounts to fraud within the meaning of section 48, sub-section 2 (*a*), of the Code of Civil Procedure. I am supported in this view of the law by the following authorities: *Beni Prasad* v. *Kashi Nath* (1), *Mewa Lal* v. *Ahmad Ali* (2), *Pattakara* v. *Rangasami Chetti* (3) and *Joyindra Nath Pathak* v. *Mirza Mohammad Husain* (4).

Pandit *Madan Mohan Nath Raina* (for Dr. *Kailas Nath Katju*), for the respondents:—

The application of 1915 having been made more than twelve years after the date of the decree, it was rightly dismissed as time-barred. Any subsequent application made after that was

(1) (1909) 6 A. L. J., 401.
(2) (1911) 9 A. L. J., 17.
(3) (1883) I. L. R., 6 Mad., 365.
(4) (1911) 14 Oudh Cases, 298.

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lso barred, and the court went wrong in holding that the application of 1918 was within time in spite of a prior decision which had held the application of 1915 beyond time. The applications of 1915 and 1918 being time-barred, the present application was also time-barred.

Munshi *Gulzari Lal* was not called upon to reply.

PIGGOTT, J.:—This is a decree-holder's appeal in an execution matter. On the face of it it seems not a little startling that a decree originally passed on the 16th of January, 1900 and affirmed by this Court in appeal on the 19th of February, 1903, should still be under execution. The court below has held that the decree-holder is now barred, both by the three years' rule of limitation under the Indian Limitation Act, and also by the special provisions of section 48 of the Code of Civil Procedure. Taking these points in order, we do not think the court below was right regarding the three years' period. The application now before us was made on the 12th of May, 1920, and it was well within three years of a previous application which had been disposed of in the year 1918. The court below has got round this difficulty by a process of reasoning based upon the fate of a previous application of the year 1915. For reasons which we need not enter into, the record is seriously defective; but in a general way we may accept the fact that in the year 1915 there was a decision by the execution court to the effect that the execution of the decree was then time-barred. What we do not know is whether this decision proceeded with reference to the three years' rule, or the twelve years' rule laid down in section 48 of the Code of Civil Procedure. The same question of limitation was raised again in the year 1918 and was then decided in favour of the decree-holder. That decision may have been a bad one. It is possible that if the judgment-debtors had contested it in appeal, there might have been a decision in their favour on the ground that the decision of the year 1915 could not be re-considered or set aside. As the case now stands, the later of the two decisions in respect of which either party can plead the principle of *res judicata*, is in favour of the decree-holder. The grounds, therefore, upon which the court below has applied the three years' rule of limitation, cannot be sustained.

The question regarding the application of section 48 of the Code of Civil Procedure is a more difficult one. The fact is that until the month of July, 1907, the decree-holders were being held up by a subsequent litigation, in which it was finally decided that their decree could not be executed against one set of defendants who were minors at the time it was passed. This does not affect the validity of the present execution, but merely serves as a partial explanation of the long delay which has affected those proceedings. When the decree-holders took out execution in the year 1908, an objection was raised on behalf of the brothers of one of the present respondents, that is, the party against whom the decree was admittedly capable of execution, which led to further litigation and, after a decision in this Court in favour of the decree-holder on the question of limitation, to a compromise under which a substantial portion of the decree was realized. Since then the judgment-debtors have obstructed the execution of the decree in various ways; even in connection with this present application they seem to have avoided service of the notice and to have succeeded with difficulty in obtaining a re-hearing in the court below after an *ex parte* order had been passed against them. Taking a broad view of the evidence, we think that the principles affirmed by this Court in cases like those reported in *Beni Prasad* v. *Kashi Nath* (1) and *Mewa Lal* v. *Ahmad Ali* (2) are applicable. We hold that execution of this decree has been obstructed by fraud on the part of the judgment-debtors to a sufficient extent to entitle the decree-holders to the further opportunity sought by them under this present application. We, therefore, allow this appeal, set aside the order of the court below and send the case back to that court with directions to proceed with the execution according to law. The decree holders appellants will be entitled to their costs in this matter in both courts.

WALSH, J.:—I agree. I propose to add a few words upon the question of fraud dealt with by the learned judge. It is clear to my mind that he has taken much too narrow a view of his function. He says that the mere filing of frivolous objections

(1) (1909) 6 A. L. J., 401. (2) (1911) 9 A. L. J., 17

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was not a fraud as it did not prevent execution and that the fraud must be such as to prevent execution. This is a clear misdirection and a total misunderstanding of the section. The "fraud" dealt with by the section is such as prevents the execution of the decree within twelve years, and, to my mind, judges ought to take a broad view of conduct deliberately adopted by judgment-debtors with a view to defeating and delaying the just payment of their debts by frivolous and futile objections which are dishonest upon the face of them. It is the duty of a court, and if a court of law does not perform the duty nobody will ever perform it, to preserve a strict standard of moral conduct. Fraud is merely moral turpitude, and if judges set a low standard of moral conduct by their decisions in court, it naturally follows that a low view is taken by the profession, and by the public, and the only way to preserve a standard of conduct for the public in matters of litigation is for the courts to set a strict and proper standard themselves. The word "fraud" in this section should not be narrowly interpreted. Nobody can doubt that the object of its insertion in this section was to prevent the tricks which are constantly played by judgment-debtors, and I propose to cite two or three simple illustrations of the meaning of "fraud," because nobody can say in anticipation exactly what conduct would in a particular case amount to fraud or the kind of conduct which has always been held to be fraudulent.

Mr. Justice MAULE in *Evans* v *Edmonds* (1) said as follows:—"I conceive if a man having no knowledge whatever of a subject takes upon himself to represent a certain state of facts to exist, he does so at his peril, and if it be done either with a view to secure some benefit to himself or to deceive a third person, he is guilty of fraud."

Mr. Justice WATKIN WILLIAMS in *Joliffe* v. *Baker* (2) said:—"Ever since 1845 it has been clear and established law that the term "fraud" must be used and understood in the common meaning of the word as it is ordinarily used in the English language and as implying some base conduct and moral turpitude."

(1) (1853) 13 C. B., 777. (2) (1883) 11 Q. B. D., 255.

Lord Justice COTTON in *Derry* v. *Peek* (1) quoted at page 360 in 14 Appeal Cases, said:—"What in my opinion is a correct statement of the law is this that where a man makes a statement to be acted upon by others which is false and which is known by him to be false or is made by him recklessly or without care whether it is true or false, that is fraud."

This principle ought to be strictly applied in execution cases just as in any ordinary suit for decision.

Appeal allowed.

REVISIONAL CIVIL.

1922
January, 2.

Before Mr. Justice Piggott.

H. BEVIS AND CO. (APPLICANT) *v.* RAM PRASAD (OPPOSITE PARTY).*

Practice—Subordinate courts—Rules of High Court prescribing hours of sitting for subordinate courts—Case taken up after 5 p.m.—Material irregularity.

Where a court subordinate to the High Court, in contravention of a rule of the court prescribing certain usual hours of sitting for subordinate courts, took up a fresh case after 5 p.m., and dismissed it on account of the absence of the plaintiff, it was *held* that this amounted to a material irregularity justifying the intervention of the High Court.

THE facts of this case are sufficiently stated in the judgment of the Court.

Dr. *Kailas Nath Katju*, for the applicant.

Pandit *Uma Shankar Bajpai*, for the opposite party.

PIGGOTT, J.:—This is an application in revision against an order of the Judge of the Court of Small Causes at Cawnpore rejecting an application to have a suit restored, which had been dismissed for non-appearance on the part of the plaintiff when the suit was called on for hearing. The facts alleged by the plaintiff have not been controverted, either by affidavit of the opposite party, or by anything placed on record by the presiding Judge himself. I am entitled, therefore, to assume that those facts are admitted. The suit in question was down for hearing on the 3rd of March, 1921. The plaintiff was personally present in court up to 5 p.m. At that hour the court was still

*Civil Revision No. 85 of 1921.

(1) (1889) 14 A. C., 337 (360).