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sions are enacted under the Code of Criminal Procedure and of a very stringent character, to meet the case of an absconder from a warrant of arrest. When an accused person absconds from a warrant, a proclamation is issued under section 87 and, subsequently, attachment of property under section 88 and the placing of the property at the disposal of Government under clause (7) of section 88. For these reasons I hold that Dharamdhuja did not commit an offence under section 172. As Dharamdhuja is not proved to have committed any offence, there was no breach of his bond, and consequently no breach of the bond given by his surety. I set aside the order of forfeiture passed by the Magistrate on the 4th of July, 1927, and direct that if any sum has been recovered from Sheo Jangal Prasad it shall be refunded to him.

Order set aside.

APPELLATE CIVIL.

Before Mr. Justice Boys and Mr. Justice Iqbal Ahmad.

1928 *February* 10.

MOHSIN RAZA KHAN AND OTHERS (JUDGEMENT-DEBTORS) *v.* HAIDAR BAKHSH (DECREE-HOLDER).*

Act No. IX of 1908 (*Indian Limitation Act*), *schedule I, article* 182—*Execution of decree—Purchase by decree-holder—Application by decree-holder* quâ *auction-purchaser for possession—Step in aid of execution—Limitation—Civil Procedure Code, order XXI, rule* 95.

Held that an application under order XXI, rule 95, of the Code of Civil Procedure by an auction-purchaser to recover possession of the property purchased cannot be counted as a proceeding in execution and a step in aid of execution by reason of the fact that the auction-purchaser happens to be also the decree-holder. *Bhagwati* v. *Banwari Lal* (1),

*Second Appeal No. 668 of 1927, from a decree of J. Allsop, District Judge of Aligarh, dated the 22nd of February, 1927, reversing a decree of Phul Chand Mogha, Subordinate Judge of Aligarh, dated the 27th of November, 1926.

(1) (1908) I.L.R., 31 All., 82.

followed. *Babu Ram* v. *Piari Lal* (1) and *Moti Lal* v. *Makund Singh* (2), referred to.

THE facts of the case are fully set forth in the judgement of the Court.

Mr. *A. M. Khwaja*, for the appellants.

Maulvi *Muhammad Abdul Aziz*, for the respondent.

BOYS and IQBAL AHMAD, JJ. :—This is a judgement-debtors' appeal arising out of the following circumstances. Two brothers, Ali Raza and Hasan Raza, agreed to divide their property. They had each of them incurred certain debts, and it was agreed between them that each should be responsible for discharging the debts incurred by him. The property allotted to Hasan Raza was subject to a mortgage created by Ali Raza, and this mortgage Ali Raza failed to discharge. Hasan Raza transferred his property by sale to Ismail, who paid off the mortgage, and then proceeded to sue Ali Raza. In due course he got his decree, in which was included half a *chabutra*. It may be as well to explain immediately here the nature of this *chabutra*. The northern portion of the *chabutra* was open to the air. On the southern portion there was a verandah. The *chabutra* was divided into half at the partition by a line running north and south. This left a portion of the open *chabutra* and a portion of the *chabutra* covered by the verandah to each of the brothers. The eastern half fell to Ali Raza, and the dispute has arisen out of the question whether when Ismail got his decree it covered the south-eastern portion of the *chabutra* covered by the *verandah* as well as the north-eastern portion of the *chabutra* which was open to the air. After obtaining his decree Ismail sold it to Haidar Bakhsh, the present respondent. We are not concerned with the next proceedings till we come to the 24th of May, 1923, when Haidar Bakhsh filed his second application for execution. The ensuing sale took

(1) (1919) I.L.R., 41 All., 479. (2) (1897) I.L.R., 19 All., 477.

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place on the 8th of July, 1923, when the decree-holder himself purchased. The whole decree was not thereby satisfied. On the 12th of September, 1923, Haidar Bakhsh who, though he was the decree-holder, must, in our view, be held to have been acting in his capacity as auction-purchaser, applied for possession under order XXI, rule 95, and on the 10th of October, 1923, got possession over half the *chabutra*. We have no information as to when or how trouble began to arise in regard to the south-eastern portion of the *chabutra* which was covered by the *verandah*, except such as we can obtain from the file of a suit which Haidar Bakhsh proceeded to institute. On the 19th of December, 1925, Haidar Bakhsh filed a suit against one Mohsin Raza, son of Hasan Raza, who also happened to be heir of Ali Raza. In that suit he asked for an injunction to restrain the defendant, the heir of Ali Raza, from using the south-eastern portion of the *chabutra* covered by the *verandah*. He also asked for the closing of a door on the south side of the *chabutra* through which the defendant used to come on to the south-eastern portion of the *verandah*. The date of the alleged cause of action was given as the 1st of December, 1925. The trial court gave Haidar Bakhsh an injunction restraining the defendant from using the door for going on to either the northern or the southern portions of the *chabutra* which, including the *verandah* portion, it held to belong to the plaintiff. On the 24th of June, 1926, the lower appellate court modified this decree and restricted the injunction against the defendant to restraining their use of the north-eastern or open portion of the half *chabutra*, and held that the south-eastern *verandah*-covered portion of the half *chabutra* belonged to the defendant, and was not included in the auction sale of Haidar Bakhsh. From that decision a second appeal, No. 1533 of 1926, is at present pending in this Court.

The suit, of which we have just given the particulars, having ended in a decision that Haidar Bakhsh had not bought the south-eastern *verandah* portion of the *chabutra*, he next proceeded on the 16th of July, 1926, to apply for the sale of that portion of the *chabutra* to satisfy the balance of the decree still owing to him. It is out of this application that the present proceedings have arisen. The application as drafted covered the whole of the half *chabutra* which had been allotted to Ali Raza, whether open or *verandah*-covered, but it was admitted before the execution court that the application must be restricted, in view of prior proceedings, to the *verandah* portion at the south-east. The judgement-debtor promptly filed objections, one of which was based on the plea of limitation. For the decree-holder it was urged that his application was not barred by limitation, and he relied upon the decision in *Moti Lal* v. *Makund Singh* (1). The learned Subordinate Judge repelled this contention, holding that that decision had been overruled by the decision of a majority of the Full Bench reported in *Bhagwati* v. *Banwari Lal* (2), and, holding the application to be barred by limitation, he dismissed it. The lower appellate court's attention was drawn to the later decision in *Babu Ram* v. *Piari Lal* (3) and the court somewhat reluctantly held itself bound by the later decision, and holding that there was no bar of limitation returned the case to the Subordinate Judge to proceed with the execution. The judgement-debtor has come in second appeal to this Court, and the sole question which really finally calls for our decision is whether we are prepared to accept and follow the decision of two Judges in *Babu Ram* v. *Piari Lal* (3), and which followed the decision in *Moti Lal* v. *Makund Singh* (1), or whether we hold that we are bound by the decision of the majority of the Judges in *Bhagwati* v. *Banwari Lal* (2).

(1) (1897) I.L.R., 19 All., 477. (2) (1908) I.L.R., 31 All., 82.
(3) (1919) I.L.R., 41 All., 479.

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An application for execution was made, as we have stated above, on the 24th of May, 1923. The present application is dated the 16th of July, 1926, and it is, therefore, clear that that application is barred by limitation unless something intervened between those two dates to save the period running. For the decree-holder it is contended that the expiry of the period of limitation is saved by the application which was made on the 12th of September, 1923, under order XXI, rule 95, by Haidar Bakhsh, who at that time enjoyed the dual capacities of decree-holder and auction-purchaser. The question, then, really arises whether an application under order XXI, rule 95, by an auction-purchaser to recover possession is a proceeding in execution and a step in aid of execution when such application is made by the decree-holder, who is also the auction-purchaser. It was held in the case of *Babu Ram* v. *Piari Lal* (1), which was followed by the lower appellate court in this case, that such a proceeding was a proceeding in execution and sufficed to save limitation. As we do not ourselves see any adequate reason for departing from, or suggesting another Full Bench in regard to the decision in *Bhagwati* v. *Banwari Lal* (2), it is necessary to examine the other two cases to which we have referred with some care. As regards the later case, *Babu Ram* v. *Piari Lal*, it is only necessary to state that the learned Judges simply followed the decision in *Moti Lal* v. *Makund Singh* (3). They disposed of the decision in *Bhagwati* v. *Banwari Lal* with the single observation that the question for decision in that case was altogether different. Nothing further is set out in that judgement to indicate in what respect the decision in *Bhagwati* v. *Banwari Lal* differed from that then before the Court. We have, therefore, had to again examine that well-known decision. The case referred to the Full Bench

(1) (1919) I.L.R., 41 All., 479. (2) (1908) I.L.R., 31 All., 82.
(3) (1897) I.L.R., 19 All., 477.

does not appear to have been set out anywhere in the report in so many words; but the question very clearly was whether, when an auction-purchaser, who happens to be also the decree-holder, desires to recover possession from a judgement-debtor, the question is one which falls within the scope of section 47 of the Code of Civil Procedure or not. The auction-purchaser had in fact filed a suit, and the majority of three Judges out of the five held that the suit did lie. The most full judgement of the three Judges, and one which was fully adopted by the other two, was that of Mr. Justice BANERJI; and it is apparent from a consideration of that judgement that the three Judges held that the suit did lie and was not barred by section 47 for two reasons: that, in the first place, the question between the auction-purchaser and the judgement-debtor was not a question arising between the parties to the suit or their representatives inasmuch as the auction-purchaser was not the representative of the decree-holder, but of the judgement-debtor, and therefore the question had really only arisen between the judgement-debtor and his own representative. But the second reason for which section 47 was held to be inapplicable, and which, as it appears to us, is directly in point to the present case, is that such a proceeding as that in question, and in question in this case and in question in *Babu Ram* v. *Piari Lal* (1), was not one in relation to execution. That opinion is expressed at length and after much consideration of the authorities at page 100 of the report. In view of the remarks in *Babu Ram* v. *Piari Lal*, we have examined the opinion of the Full Bench and the facts of that case to discover, if possible, where the suggested difference lay, and we have been unable to trace any such difference.

To turn next to the case of *Moti Lal* v. *Makund Singh* (2). In that case it was held that an application

(1) (1919) I.L.R., 41 All., 479. (2) (1897) I.L.R., 19 All., 477.

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by a decree-holder to be paid the proceeds of the sale is a step in aid of the execution, and, by analogy with that proposition, the learned Judges proceeded to say that they could see no difference between a decree-holder applying for his money and the case where he is himself the auction-purchaser and applies for the property which represents the money. This is a view which we do not feel ourselves able to accept. It appears that in this, and in all other such cases, it can make, broadly speaking, no difference to the auction-purchaser's rights or liabilities that he also happens to be the decree-holder, and no difference to the rights and liabilities of a decree-holder that he also happens to be the auction-purchaser. We have limited the above proposition by the word "broadly", for there may conceivably be some rare cases in which the rights or liabilities might be affected by the fact that the two characters are borne by the same person. One instance naturally suggests itself. If circumstances should arise in which there was a question of whether the decree-holder had knowledge of some act of the auction-purchaser or *vice versâ*, it is clear that where both characters are borne by the same person such knowledge could be presumed. But as we have said, broadly speaking, we hold that the fact that the decree-holder and auction-purchaser are one and the same person can have no bearing on the rights and liabilities attaching to a decree-holder as such, and the rights and liabilities attaching to an auction-purchaser as such. In a case therefore where the decree-holder is himself an auction-purchaser and the sale has been confirmed and a sale-certificate granted, we think that the decree-holder must be taken to have received from himself as auction-purchaser the sale-price, and that it is as auction-purchaser and as auction-purchaser alone that he can proceed to make an application, if necessary, under order XXI, rule 95. We are, therefore, of opinion that there is no adequate reason for distinguishing the decision of

the majority of the Judges in *Bhagwati* v. *Banwari Lal* (1), and further, as we are agreeing entirely with the view expressed on the point before us in that case, we see no reason for suggesting a reference to another Full Bench.

The result is that we hold that the plea of the judgement-debtor that the application of the 16th of July, 1926, was barred by limitation was a good plea and ought to be given effect to.

Before disposing of the appeal we may note another point taken before us on behalf of the decree-holder. He urged that he was entitled to an extension of time by virtue of the provisions of section 14 (2) of the Limitation Act. There is, in our view, absolutely no force in this contention. Counsel desired to refer us to some reported decision, but we do not consider it necessary to discuss that or any other ruling by which we are not bound, in view of the plain terms of section 14(2) and of the admission that counsel himself has to make that there is no force in his contention if the ordinary meaning be given to the very ordinary language used in that section. The relief claimed in the proceeding, of which it is desired to take advantage, must be the same relief as is asked for in the proceeding in regard to which limitation is being considered. Here manifestly, and it had to be immediately admitted, the relief sought by the application for execution was for a sale to satisfy the balance of a decree. The reliefs sought for in the suit to which we have referred have been mentioned when speaking of that suit. They were manifestly wholly different. There are possibly other reasons also why section 14 can have no application, but we need not further discuss it. Finally, counsel referred to article 181 of the Limitation Act. But it could not seriously be pressed that article 182 was not the appropriate article.

(1) (1908) I.L.R., 31 All., 82.

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The result is that, allowing the appeal, we set aside the decree of the lower appellate court and restore that of the court of first instance dismissing the application for execution. The appellant will have his costs throughout.

Appeal allowed.

Before Mr. Justice Sulaiman and Mr. Justice Kendall.

1928 *February* 14.

DEOKI (DEFENDANT) *v.* JWALA PRASAD (PLAINTIFF).*

Hindu law—Hindu widow—Suit for declaration by next male reversioner—Nearer female heir in existence—Effect of omission to implead the nearer reversionary heir—Act No. I of 1877 *(Specific Relief Act), section* 42.

Plaintiff, alleging himself to be the nearest reversionary heir of her husband, brought a suit against a Hindu widow asking, first, for a declaration of his status as presumptive reversionary heir, and, secondly, for a declaration that a will alleged to have been executed by the husband shortly before his death was a forgery.

At the time of suit there was in existence a nearer heir in the shape of a minor daughter of the defendant, who lived with her, but she was not made a party to the suit.

Held (1) that as regards the first relief sought the suit was not maintainable;

(2) that, as regards the second relief, although it is not correct to say that the existence of a nearer female heir can always be ignored by the next male reversioner, yet, even without any express proof of refusal, concurrence or collusion on her part, the court may exercise its discretion and grant the declaratory relief to the male reversioner, and without insisting upon the female heir being joined in the suit, provided that such a course is not prejudicial to her interests.

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*First Appeal No. 266 of 1925, from a decree of Mirza Nadir Husain, Second Additional Subordinate Judge of Aligarh, dated the 6th of March, 1925.