APPELLATE CIVIL.

1925
July, 27.

Before Mr. Justice Boys and Mr. Justice Banerji.

SHEO PRASAD (DECREE-HOLDER) *v.* NARAINI BAI (OBJECTOR).*

Act No. IX of 1908 (Indian Limitation Act) schedule I, article 182—Application for execution—Validity of prior application in saving limitation—Necessity for good faith.

When considering whether an earlier application is effective to save limitation, the court may and should take into consideration whether the whole circumstances show that the application was made in good faith to secure execution, or to take a step in aid of execution, and was not merely colourable with a view to give a fresh starting point for the period of limitation.

The facts of the case, so far as they are necessary for the purposes of this report, are as follows :—

Lala Sheo Prasad, appellant, obtained a simple money decree against Isri Prasad, husband of Musammat Naraini Bai, respondent, in the court of the Munsif of East Budaun on the 9th of March, 1915. On the 12th of November, 1918, he applied for execution. On the 23rd of January, 1920, this application was struck off with the consent of the decree-holder. On the 4th of March, 1921, he applied again for execution to the Munsif of East Budaun. The relief asked for in that application was that certain property be attached and brought to sale.

On the 19th of April, 1921, if not before, the attention of the decree-holder was drawn to the fact that all the property, for attachment and sale of which he prayed, was outside the jurisdiction of the Munsif of East Budaun and he was ordered to explain how

* Second Appeal No. 1300 of 1924, from a decree of Rup Kishen Agha, Subordinate Judge of Budaun, dated the 8th of March, 1924, confirming a decree of Ganga Dhar Panth, Munsif of East Budaun, dated the 11th of August, 1923.

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the court had any power to proceed against it. Pending that explanation being received, the application was to remain pending. On the 29th of April, 1921, as no explanation had been given by the decree-holder, the application was dismissed and on the same date he took back all the process-fees that he had deposited. A further application was filed by the decree-holder for execution on the 12th of January, 1923. This time the property detailed was within the jurisdiction of the Munsif of East Budaun; but he dismissed the application holding that it was barred by limitation, limitation not being saved by the previous application of the 4th of March, 1921, in that that application was not in accordance with law, as the property was outside the jurisdiction of the court and no application had been made, even after opportunity had been given, to transfer the decree to the court in whose jurisdiction the property was situate. In appeal the Subordinate Judge held that the application was made to the proper court and concurred with the Munsif that it was not in accordance with law and, therefore, could not save limitation.

It was not suggested that during the twelve days prior to the dismissal of the previous application on the 23rd of January, 1920, any act was done by the decree-holder which would bring his present application of the 12th of January, 1923, within the period of limitation.

Mr. *Agha Haider*, for the appellant.

Babu *Piari Lal Banerji*, for the respondent.

The judgement of the Court (BOYS and BANERJI, JJ.), after setting out the facts as above, proceeded as follows :—

At an early stage of the case counsel for the appellant was asked whether, if it were to be held in the circumstances that the application was not made with

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any *bonâ fide* intention of proceeding to execution but merely with the intention of saving limitation, it could rightly be held to be " an application for execution " or " a step in aid of execution." Counsel very frankly admitted that it was a very common practice for decree-holders to put in a colourable application asking for execution which they did not mean seriously to prosecute, but which they allowed to be dismissed, merely with the intention of relying upon the fact that they had made such an application in order to obtain a further period of three years before execution of the decree could be held to be barred by limitation. He urged that the test of whether the application was made in good faith with a real intention to proceed to execution was never applied.

It may be true to say that this aspect of such proceedings has been to a great extent lost sight of, but it is not accurate to say that the test has never been applied.

On general principles it would seem clear that the legislature when it used the phrases " application for execution " and " step in aid of execution " had in mind a *bonâ fide* intention on the part of the decree-holder to proceed with his right to have execution. It does not seem possible that the legislature should have ever contemplated an indefinite period being added to the life of a decree by permitting a decree-holder to take colourable steps in a very thinly disguised pretence of a desire to obtain execution when he really did not want execution at all, but only wanted to secure a further period of limitation during which the amount of his decree might go on increasing. It would, therefore, seem on the face of it a proper interpretation of the words " for execution " and "step in aid of execution" that the decree-holder must really be desiring execution, and that the words

cannot be read as " an application made with the sole object of extending the period of limitation " and " a step taken with the sole object of extending limitation." The words " for execution " mean " for the purposes of obtaining execution " and the words " step in aid of execution " mean " step taken for the purpose of obtaining execution." This, which appeared upon a consideration of article 182 to be a natural and proper interpretation, research has shown to have the support of weighty judicial authority, though the decisions would seem to have been to some extent lost sight of, or if we may say so, misinterpreted.

[Reference was then made to the decisions of their Lordships of the Privy Council in *Roy Dhunput Singh* v. *Mudhomotee Dabia* (1), *Hira Lal* v. *Badri Das* (2) and *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (3); and later cases of the Indian Courts up to the year 1900,—*Mahtab Kuar* v. *Sham Sundar Lal* (4), *Chattar* v. *Newal Singh* (5), *Mangal Sen* v. *Baldeo Prasad* (6), *Adhar Chandra Dass* v. *Lal Mohun Das* (7), *Gopal Chunder Manna* v. *Gossain Das Kalay* (8) and *Jahar* v. *Kamini Debi* (9); and the judgement continued :—]

The above cases suffice to show that the application of the test of *bona fides* to determine whether an application is really one for execution is not novel.

It is only necessary to note that though there are differences between the contents of section 20 of Act No. XIV of 1859 and of article 182 of schedule I of the present Act No. IX of 1908, there is no difference that is material to the matter we are considering.

(1) (1872) 11 Beng. L.R., 23.
(2) (1880) I.L.R., 2 All., 792.
(3) (1881) I.L.R., 8 Calc., 51.
(4) Weekly Notes, 1888, p. 272.
(5) (1889) I.L.R., 12 All., 64.
(6) Weekly Notes, 1892, p. 70.
(7) (1897) I.L.R., 24 Calc., 778.
(8) (1898) I.L.R., 25 Calc., 594.
(9) (1900) I.L.R., 28 Calc., 233.

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The words in section 20 were "no process of execution," the words in article 182 are "no application for execution, or to take some step in aid of execution." In neither section is there any specific mention of *bona fides*. In their Lordships held that *bona fides* was necessary to make "a process for execution" effective, it follows that the same interpretation should be put on the words "application for execution" or "step in aid of execution."

Counsel for the appellant stated that since 1871 the *bona fides* or *malla fides* of the application has been immaterial. He did not develop this proposition beyond relying on a passage that he quoted from a commentary. It is true that the author makes that statement, but we have not been able to find any real support for it in the authorities quoted by him.

The idea, in so far as it exists, would appear to have its origin in the decision of the Full Bench, *Eshan Chunder Bose* v. *Prannath Nag* (1). In that case JACKSON and MCDONELL, JJ., in their referring order, wanted to maintain the incorporation of the principle of *bona fides* to stop a succession of colourable applications.

The idea underlying both the referring judgement and that of the Full Bench was that the question was whether the later application could be refused, being held to be colourable, merely because the previous application had been colourable, i.e., *malâ fide*, as indicated by the fact that the decree-holder had allowed it to go by default.

Clearly the Full Bench was right in holding that the later application could not be refused merely for that reason. The decree-holder was entitled to make an application, and until he defaulted in prosecuting

(1) (1874) 22 W.R., 512.

it (when it would for that reason be struck off) it could not be known whether that latest application was being made wth a *bonâ fide* intention to proceed, or not. The later application might well be made with a *banâ fide* intention to proceed, though the previous one was not, and the later could not, therefore, be treated as *malâ fide* merely because the earlier was such.

But the proceedings on the earlier application having *ex hypothesi* been concluded, it would be possible to determine whether the facts showed it to have been *malâ fide*, and, if it was, then, though it could not be held to show that the later application was also *malâ fide*, it could be held not to be an application "for execution," i.e., "intended to obtain execution" and, therefore, ineffective to save limitation.

The two aspects are quite distinct. The former was clearly before the Full Bench; the latter was not; and on the principle stated in *Quinn* v. *Leathem* (1), particular phrases used by COUCH, C. J., should not be treated as governing a question not directly considered.

JACKSON, J., when reluctantly concurring, remarked that inasmuch as the legislature must be supposed to have been aware of the earlier decisions incorporating the rule of *bona fides* into section 20 of Act No. XIV of 1859 and "as I suppose it designedly omitted to incorporate in the Act (of 1871) the principle of those decisions, I think we ought now to abstain from qualifying the precise terms of the Act."

It would seem, however, that the legislature would presumably have only legislated if it disagreed with the principle already strongly affirmed judicially.

We think that it is clear from the cases later in date that we have quoted, that the principle has been

(1) (1901) A.C., 495 (506).

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frequently recognized that the *bona fides* or *mala fides* of the earlier application is an important ingredient in determining whether that application is effective to save limitation for the later application; though the *bona fides* or *mala fides* of the later application cannot be judged at the time that it is presented from anything that has gone before and, therefore, cannot at the time of presentation be entered into.

It is impossible to hold that the application of the 4th of March, 1921, was a *bonâ fide* application with the intention of obtaining execution. It was merely a colourable application intended to save limitation and with that intention only. Such applications made only with the intention of keeping the decree alive have, it may further be noted, since 1877 been dropped out of the appropriate article of the Limitation Acts.

We have been asked to remand the case. We see no reason to do so as we have the whole history of the case before us. Counsel for the appellant, who has displayed great industry on behalf of his client, has had more than a month since the question was raised at the first hearing before us, in which to consider this matter of the good or bad faith of the earlier application, and it is certainly no fault of his if he has been unable in the circumstances of the case to take up any other position than that decree-holders habitually file colourable applications merely to save limitation and allow the debt to accumulate and that the question of their *bona fides* is never challenged. As we have shown, it cannot be challenged at the time of presentation and if the application is not prosecuted it is struck off, but it can be and should be challenged when the application comes to be used to save limitation. Further, we may note that a remand could not

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in any event avail the appellant for, as we shall proceed to show, the appeal must fail on a second ground also.

This being our view of the law and of the facts, we hold that the application of the 4th of March, 1921, was not an application " for execution " or " a step in aid of execution " and that the application of the 12th of January, 1923, was barred by limitation and the appeal must be dismissed.

[Their Lordships then dealt with the second ground and dismissed the appeal.]

Appeal dismissed.

Before Mr. Justice Walsh and Mr. Justice Dalal.

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March, 2.

RAM DEVI AND OTHERS (DEFENDANTS) *v.* GANESHI LAL (PLAINTIFF) AND RAJENDRA KUMAR BHATTACHARYA AND OTHERS (DEFENDANTS).*

Civil Procedure Code, schedule II, paragraph 21—Arbitration —Reference without intervention of court—Insolvency—Matters in dispute between receiver and secured creditors —Effect of award on decrees already passed and suits pending.

During the pendency of insolvency proceedings various litigations arose between the receiver, the secured creditors and the holders under certain transfers, alleged to be fictitious, which had been made by the insolvent, with regard to the realization of assets and the payment of debts. All the parties eventually agreed to refer the whole matter to arbitration without the intervention of the court, the agreement providing " that a decree in terms of the award would be accepted by the parties and that any decree passed by the court during the pendency of the arbitration proceedings would be subject to the award and would be modified in accordance with it." The award subsequently passed directed (1) the parties to modify in accordance with the award the decrees

* First Appeal No. 64 of 1925, from an order of Nadir Husain, second Additional Subordinate Judge of Aligarh, dated the 18th of March, 1925.