PRIVY COUNCIL

KHALIL-UR-RAHMAN KHAN (JUDGMENT-DEBTOR) *v.* COLLECTOR OF ETAH (DECREE-HOLDER)*

J. C. 1933 *November, 24*

[On appeal from the High Court at Allahabad.]

Limitation Act (IX of 1908), article 182(5)—Execution of decree—Successive applications—Limitation—Previous application alleged not bona fide.

An application to execute a decree, or to take a step in execution, made in accordance with the Code of Civil Procedure, to the proper court, and within the time prescribed, operates under the Indian Limitation Act, 1908, article 182 (5)—if made before January 1, 1928, when Act IX of 1927 came into force—to extend the time for executing the decree, whether or not the application was made with the genuine intention to proceed to execution.

Kayastha Company, Ltd. v. *Sita Ram Dube* (1), approved; *Sheo Prasad* v. *Narain Bai* (2), disapproved.

Judgment of the High Court affirmed.

Appeal (No. 134 of 1931) from a decree of the High Court (June 24, 1930) affirming a decree of the Subordinate Judge of Etah (April 22, 1929).

On August 30, 1928, the respondent applied to the Subordinate Judge for execution of a decree, dated July 29, 1922, being a final decree upon a mortgage. Previous applications to execute the decree had been made on June 2, 1925, and July 8, 1926, and had been struck off on August 14, 1925, and September 16, 1926, respectively.

The appellant, the successor to the judgment-debtor, objected (1) that the mortgage upon which the decree had been made was invalid for reasons not material to this report; (2) that the application was barred by limitation.

The facts appear from the judgment of the Judicial Committee.

**Present*: Lord THANKERTON, Lord ALNESS, and Sir LANCELOT SANDERSON.

(1) (1929) I.L.R., 52 All., 11. (2) (1925) LL.R., 48 All., 468.

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The High Court, affirming the Subordinate Judge, held that both objections failed. The learned Judges (MUKERJI and BANERJI, JJ.) held as to the second objection (which alone was contended for upon the present appeal) that the application was not barred, having regard to the previous applications and the decision of the Full Bench in *Kayastha Company, Ltd.* v. *Sita Ram Dube* (1).

1933. November, 2. *Sir Dawson Miller, K.C.*, and *Jinnah* for the appellant: The application was more than three years after the date of the decree and therefore was barred under the Indian Limitation Act, 1908, article 182 unless the applications in 1925 extended the time. Those applications, however, were not made *bona fide* with the intention of executing the decree, but were made merely for the purpose of extending the time. They were consequently not applications to which article 182(5) applies: *Sheo Prasad* v. *Naraini Bai* (2). The judgments of the Privy Council there referred were on differently worded provisions, but the principle applied justified the decision. The Limitation Act of 1871, in the corresponding article, referred to an application "to keep in force" a decree, but that expression was omitted in the Acts of 1877 and 1908. It is conceded that the decision of the Full Bench in *Kayastha Company, Ltd.* v. *Sita Ram Dube* (1) conflicts with the appellant's contention, but it is submitted that the view adopted in *Sheo Prasad's* case (2) is to be preferred. Act IX of 1927, which amended article 182(5) as from January, 1928, does not affect the present argument, as the question still is whether the proceedings in 1925 were applications to which the article applied. [Reference was made also to *Hira Lal* v. *Badri Das* (3), and *Roy Dhunpat Singh* v. *Mudhomotee Dabia* (4).]

(1) (1929) I.L.R., 52 All., 11.
(2) (1925) I.L.R., 48 All., 468.
(3) (1880) I.L.R., 2 All., 792; L.R., 7 I.A., 167.
(4) (1872) 11 Beng. L.R. (P.C.), 23.

De Gruyther, K.C., and *Wallach*, for the respondents having referred to *Nagendra Nath De* v. *Suresh Chandra De* (1), were not further called upon.

November, 24. The judgment of their Lordships was delivered by Sir LANCELOT SANDERSON :—

This is an appeal from an order and judgment of the High Court of Judicature at Allahabad, dated the 24th of June, 1930, confirming the order of the Subordinate Judge of Etah, dated the 22nd of April, 1929, in the matter of the execution of a final decree for sale, dated the 29th of July, 1922, in a mortgage suit.

The appellant is the successor of Abdul Jalil Khan, a zamindar of Aligarh, who died on the 4th of October, 1923.

The material facts are as follows: Abdul Jalil Khan in 1909 or 1910 borrowed money from various people, and several decrees were made against him. The decrees were simple money decrees, and the property, which was attached in execution of the decrees, being ancestral property, the execution proceedings were transferred to the Collector in accordance with the provisions of section 68 of the Code of Civil Procedure. On the 29th of August, 1911, the Collector, as he was entitled to do, granted a lease to Habib-ur-Rahman Khan of the property belonging to the judgment-debtor, Abdul Jalil Khan, for a term of seventeen years. During the pendency of the said lease, which expired on the 1st of July, 1928, Abdul Jalil Khan on the 25th of September, 1914, executed a mortgage of the said property for Rs.15,000 in favour of Rao Maharaj Singh. In this appeal Rao Maharaj Singh is represented by the respondent, the Collector of Etah, who is in charge of his estate.

On the 25th of October, 1920, the Collector of Etah filed a suit, based on the above-mentioned mortgage, against Abdul Jalil Khan, and obtained a preliminary

(1) (1932) I.L.R., 60 Cal., 1; L.R., 59 I.A., 283.

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decree on the 9th of March, 1921, which was made final on the 29th of July, 1922. Both the decrees were made *ex parte* after due notice had been served upon Abdul Jalil Khan.

In the courts in India it was argued on behalf of the appellant that the mortgage was illegal, that the decree obtained on the basis thereof was not enforceable at law, that the decree was obtained in contravention of the provisions of clause 11(1) of the Third Schedule of the Code of Civil Procedure, and that it was incapable of execution. Though these points were taken in the appellant's case, they were not relied on before the Board by the learned counsel for the appellant, and the only arguments presented to the Board were in relation to the other point, which was based upon the Limitation Act.

The appellant alleged that the application for execution, in respect of which the above-mentioned order of the Subordinate Judge, dated the 22nd of April, 1929, was made, was barred by the law of limitation inasmuch as certain previous applications, dated the 2nd of June, 1925, and the 8th of July, 1926, were not steps in aid of execution so as to save limitation.

It was further argued on behalf of the appellant that the said previous applications were not *bona fide* and were not taken with the intention of executing the said decree, but were merely for the purpose of gaining time, and that consequently the application in question was barred by the law of limitation.

The material facts in relation to this point are as follows :

On the 2nd of June, 1925, the Collector of Etah applied for execution of the decree and prayed for sale of the property. The court ordered necessary copies to be filed. Then the vakil for the decree-holder, as the order-sheet shows, stated on the 14th of July, 1925, that he simply wanted the legal representatives of the deceased judgment-debtor to be brought on the record. Accordingly

notices were issued to the proposed representatives, one of whom was Mohammad Khalil-ur-Rahman Khan. On the 14th of August, 1925, it was found that the notices were unserved and as no further step was taken by the decree-holder, the execution suit was struck off on that date. Then another application was made on the 8th of July, 1926, for sale of the property. The execution was sought against the representatives of the deceased judgment-debtor. This time again there was a report that necessary copies were not filed and it was ordered that notices of the legal representatives being brought on the record be issued and that copies be filed on the next date. On the next date, i.e. 4th of August, 1926, the notice to Mohammad Khalil-ur-Rahman Khan was returned unserved. The decree-holder took further time and again notice was issued. On the 10th of September, 1926, the notices being served, legal representatives were brought on the record. As the decree-holder took no further steps in the prosecution of the execution suit, the application was struck off on the 16th of September, 1926.

On the 30th of August, 1928, the Collector of Etah made a third application for execution in the court of the Subordinate Judge; and the appellant, Khalil-ur-Rahman Khan, filed objections under section 47 of the Code of Civil Procedure. The learned Judge dismissed the objections by the above-mentioned order of the 22nd of April, 1929.

The learned Judge in the course of his judgment said that he found no reason to question the *bona fides* of the decree-holder in the said applications for execution and held that the object of the decree-holder in this case was not simply to save limitation, but that it was to take steps in aid of execution. He decided that the previous applications were steps in aid of execution and therefore that they saved limitation.

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The High Court affirmed this decision, holding that the finding of the learned Subordinate Judge was correct. The learned Judges however further held that in view of the ruling of the Full Bench of that Court in the case of *Kayastha Company, Ltd.* v. *Sita Ram Dube* (1), the objections raised by the judgment-debtor could not now be maintained.

In the case cited the question, stated briefly, was whether under article 182(5) of the Limitation Act (No. IX of 1908) it is sufficient to show that an application was made in accordance with law to the proper court for execution or to take some steps in aid of execution or whether it is further necessary to show that such application had been made with a *bona fide* intention to execute the decree or to take such step and not merely to keep the decree alive.

The actual question submitted to the Full Bench was as follows :—

"If a decree-holder makes any application or takes any step mentioned in the third column of article 182 of the Limitation Act, will such step be ineffectual to keep his decree alive and to save limitation, unless he can satisfy the court that he took such step or instituted such proceedings with a genuine intention of obtaining execution of the decree, if reasonably possible, and that he did not abandon such proceedings except upon a genuine belief that it would not be reasonably possible to obtain execution?"

The Full Bench decided that the answer to the question referred was in the negative.

It is not clear, therefore, whether the High Court in this case intended to confirm the Subordinate Judge's finding of fact that the decree-holder, in making the previous applications, was acting with *bona fides*, and was intending to take steps in aid of execution.

(1) (1929) I.L.R., 52 All., 11.

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It is therefore necessary to consider the point raised by the learned counsel for the appellant, viz. that it is material to consider whether the first two applications were in accordance with law on the assumption that they were not *bona fide* applications for the purpose of obtaining execution of the decree, but were merely for the purpose of gaining time.

Article 182(5) prescribes the time for the execution of a decree or order of any civil court not provided for by article 183 or by section 48 of the Code of Civil Procedure, 1908, viz. three years (where the application next hereinafter mentioned has been made) from the date of applying in accordance with law to the proper court for execution or to take some step in aid of execution of the decree or order. This is the article which was applicable to the first and second applications for execution made on the 2nd of June, 1925, and 8th of July, 1926, respectively.

It should be noted that the terms of this article have been amended by Act IX of 1927, by the provision that in clause (5) of the entry in the third column, for the word "applying" the words "the final order passed on an application made" shall be substituted. But the Act did not come into force until the 1st day of January, 1928, and therefore the unamended form of article 182(5) is applicable, as already stated, to the first two applications.

In the case of *Sheo Prasad* v. *Narain Bai* (1) BOYS and BANERJI, JJ., held that in 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.

(1) (1925) I.L.R., 48 All., 468.

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It was the decision in that case which gave rise to the reference to the Full Bench in *Kayastha Company, Ltd.* v. *Sita Ram Dube* (1), and it was stated in the judgment of the Full Bench that the decision in *Sheo Prasad* v. *Naraini Bai* might be supported on the special facts of that case, but that some of the general observations, which were not necessary for the decision, could not be supported. It may be noted that BANERJI, J., was a party to the Full Bench decision.

The point raised on this appeal is clearly covered by the above-mentioned Full Bench decision in the Allahabad High Court, and the question is whether any ground has been shown for disagreeing with that decision.

In their Lordships' opinion no such ground has been shown, and they agree with the decision arrived at by the Full Bench. In this case all that was necessary for the respondent to show was that the applications of the 2nd of June, 1925, and the 8th of July, 1926, were made in accordance with law to the proper court for execution, or to take some step in aid of execution, of the decree. The applications were made in accordance with the provisions of the Code of Civil Procedure, and therefore in accordance with the law applicable thereto, they were made to the proper court, they were obviously steps in aid of execution, and they were made within time.

To hold that it was necessary for the court to be satisfied that the said applications were made *bona fide* and that the decree-holder had the intention of proceeding to execution in pursuance of each of the said applications would be to import words into the terms of the article which are not to be found therein and would necessitate the court embarking upon the difficult and in some cases impossible task of finding the motive of the decree-holder in making the applications.

(1) (1929) I.L.R., 52 All., 11.

It is to be noted that by the said article, before amendment, the date of the application for execution was the time from which the period of limitation was to run, and it was not until the amending Act of 1927 was passed that the result of the application, viz. the final order passed on the application, became the material time. It was, therefore, the application and not the result of the application which was contemplated as being sufficient to save limitation.

For these reasons their Lordships are of opinion that the decision of the High Court was correct.

In view of the above opinion it is not really necessary for their Lordships to embark upon the inquiry whether the finding of the Subordinate Judge, that in fact the aforesaid applications were made *bona fide* by the decree-holder, was correct. As, however, certain arguments were presented to their Lordships in respect of this point, it is sufficient to say that their Lordships are not satisfied that the decision of the Subordinate Judge in this respect was wrong.

For these reasons their Lordships are of opinion that the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *H. S. L. Polak and Co.*

Solicitor for respondent: *Solicitor, India Office.*