FULL BENCH

Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr. Justice Rachhpal Singh and Mr. Justice Allsop

1936
September, 15

MUHAMMAD TAQI KHAN (JUDGMENT-DEBTOR) *v.* RAJA RAM AND OTHERS (DECREE-HOLDERS)*

Limitation Act (IX of 1908), article 182(5)—"Final order" passed on application for execution—"Striking off" execution on partial satisfaction, whether a final order—Intention of disposal or suspension—Revival or fresh application—Limitation Act, sections 19, 21—Acknowledgment by some of the heirs of a mortgagor—Co-heirs whether affected thereby.

Whether an order passed in an execution case is or is not a "final order" within the meaning of article 182(5) of the Limitation Act depends upon whether the court intended by that order to terminate and dispose of the execution matter which was pending before it, or intended merely to shelve or suspend the matter for the time being and it would be taken up later on by the court itself *suo motu* or at the instance of the decree-holder. The actual words of the order would not always be conclusive, e.g. the words "execution struck off" may be ambiguous and inconclusive ; but if in view of all the circumstances and the language of the order an intention to terminate and dispose of the matter can be inferred, then the order is a final order. For this purpose it is immaterial whether the order was irregular or even illegal ; if the court intended thereby to dispose of the matter altogether it is a "final order" for the computation of limitation according to article 182(5), and a subsequent application by the decree-holder must be regarded as a fresh application for the purpose of limitation and not as an application to revive the original execution case which is no longer pending.

The words "final order" in article 182(5) of the Limitation Act are not used in the sense of an order which must finally adjudicate upon the rights of the parties and dispose of the application on its merits.

Where, upon a report received from the sale officer, the execution court passed the following order, "The decree-holders having received Rs.300 have granted two months time ;

*Second Appeal No. 22 of 1934, from a decree of Gauri Prasad, District Judge of Farrukhabad, dated the 6th of October, 1933, confirming a decree of Muhammad Taqi Khan, Subordinate Judge of Farrukhabad, dated the 8th of December, 1932.

execution case struck off for partial satisfaction of the decree; costs on judgment-debtors", it was *held* that although the order striking off the case might be irregular, the order coupled with the order for payment of the costs clearly indicated that the court intended to dispose of the matter finally, and it was a "final order".

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Section 19 of the Limitation Act obviously requires that there should be a written acknowledgment signed by the persons against whom the right is claimed; and it is impossible, on the language of that section, to hold that limitation is saved, by reason of an acknowledgment signed by one debtor, even as against another co-debtor when there is no acknowledgment signed by the latter. Further, there is the specific provision in section 21 of the Act that one of several joint contractors cannot be chargeable under section 19 by reason only of an acknowledgment signed by the other or others of them. Co-mortgagors come within the scope of the words "joint contractors".

In this respect, it makes no difference whether the co-mortgagors are the original mortgagors themselves, or whether they or some of them are the heirs or transferees of the original mortgagors. If, at the time when the acknowledgment in question is made, the relation of joint contractors exists between the persons who are liable, then it is immaterial whether they are the original contractors or whether they are their legal representatives.

Roshan Lal v. *Kanhaiya Lal* (1), and *Ibrahim* v. *Jagdish Prasad* (2), overruled.

Dr. *K. N. Katju*, Messrs. *F. Owen O'Neill*, *Kaleem Jafri* and *Shah Jamil Alam*, for the appellant.

Messrs. *Jagdish Swarup* and *Babu Ram Avasthi*, for the respondents.

SULAIMAN, C.J., RACHHPAL SINGH and ALLSOP, JJ.:—The following two questions have been referred to this Full Bench for answers:

1. Whether an order passed in the following terms without notice to the parties, namely "Execution struck off for partial satisfaction of the decree; costs on the judgment-debtors", is to be construed only as a provisional order suspending the application for execution, or as a "final order passed on an application made", as

(1) (1918) I.L.R., 41 All., 111. (2) A.I.R., 1927 All., 209.

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referred to in clause (5) of article 182 of the Limitation Act.

2. Whether an acknowledgment of liability by some only of the heirs of a mortgagor, against whom a decree for sale on the basis of a mortgage has been passed, operates to save limitation as against the other heirs of the mortgagor as well as against the makers of the acknowledgment.

In this case a mortgage decree for sale was put in execution in 1928 against several judgment-debtors who were the heirs of the original mortgagor. The property was non-ancestral, but was assessed to Government revenue; and so the executing court directed the Collector to sell the property. The Collector as the sale officer had fixed the 20th of June, 1928, for sale, when Rs.300 appear to have been paid by the judgment-debtors to the decree-holders, who allowed two months' further time to the judgment-debtors for the payment of the balance. The sale officer accordingly postponed the sale, fixing the 20th of August, 1928, for the sale of the property, and sent a report to the execution court to that effect. No notices were issued by the execution court to the parties concerned, but on receipt of the report of the sale officer the court on the 6th of July, 1928, passed the following order: "The case has come on for hearing today; the decree-holders having received Rs.300 have granted two months time. . . . Execution case struck off for partial satisfaction of the decree. Costs on judgment-debtors." The parties had apparently no knowledge of that order at that time; indeed, not perhaps till the 11th of August, when part of the mortgaged property was privately sold by the judgment-debtors to the decree-holders, leaving in their hands a sum of money for part satisfaction of the decree. On the 20th of August, 1928, the parties appeared before the sale officer, and it is an admitted fact that no sale took place on that date. It is not necessary at this stage to consider whether the parties agreed to a further adjournment or not. The fact,

however, is that no further report was sent to the execution court by the sale officer that he had adjourned the sale for a further period, and no sale in fact took place.

The present application for execution was filed on the 25th of August, 1931, shortly after the expiry of three years from the date of the order of the execution court, dated the 6th of July, 1928. On behalf of the decree-holders it was contended that the aforesaid order was not a final order and the execution case still remained pending in the court of the Subordinate Judge and can be revived, and that accordingly limitation does not come in their way. On behalf of the judgment-debtors it was contended that this order was a final order passed by the execution court and the present application must be treated as a fresh application for execution and was therefore barred by time. The second question raised in the case related to an acknowledgment of liability made by some of the heirs of the original mortgagor and not the others. The decree-holders' contention is that the acknowledgment by some of the judgment-debtors saves limitation against all, whereas the judgment-debtors who had not made the acknowledgment contend that the acknowledgment is of no avail as against them.

The question whether an execution case is still pending and has not been terminated must depend on an interpretation of the order passed by the court and the inference to be drawn as to the court's intention. If the court intends that the matter should be shelved for the time being or the record be merely consigned to the record room and be taken up later on by the court itself *suo motu* or at the instance of the decree-holders, then obviously the case is still pending and is in a state of suspended animation. On being reminded that the case has not been disposed of, the court can at any later moment take it up and deal with it. On the other hand, if the execution court had intended to finish the matter which was pending before

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it and to dispose of it, then it seems quite immaterial whether the court proceeded strictly according to the procedure laid down in the Code or whether it acted irregularly or even illegally. So long as the order is not set aside on appeal or in revision, the order must be regarded as one which has disposed of the execution proceeding, and therefore it cannot be considered that the proceeding is still pending and can be revived at any time by either of the parties.

When the Limitation Act of 1877 was in force there was no provision for the exclusion of the period during which an execution proceeding was suspended on account of any injunction issued by another court or on account of any stay order passed by an appellate court. In many cases where such orders had been issued, the courts held that the mere fact that the execution case had been struck off by the subordinate court did not amount to a termination of the proceeding, which could therefore be revived after the stay order or injunction was discharged. This difficulty was to some extent cured by the amendment of section 15 of the Limitation Act in 1908 when a special provision was made to meet it. But even then cases arose where an execution case had been pending for more than three years and then owing to some unfortunate circumstance the execution case was struck off and the decree-holders had to apply within three years of the last date of applying in accordance with the law or taking steps according to law. In several cases it was held by the courts in India that where the intention of the court was not to terminate the proceeding the matter could still be revived and there was no need for filing a fresh application. Under the amendment of article 182 as made by Act IX of 1927 the decree-holder has now three years from the date of the final order passed in his application and he is not bound to come in within three years of the date of the original application made according to law or of the last step taken in aid of execution. It follows that if there is due

diligence the decree-holder would, in the ordinary course during the period of three years after the last order, come to know that the execution case is no longer pending, and he would not be in the same unfortunate position as he would have been under the unamended article if the case, after having remained pending for more than three years, had been struck off or dismissed on account of some unfortunate circumstance.

It seems to us that the actual words used by the court would not always be conclusive. Certainly the words "struck off" are an ambiguous expression and would not show conclusively either that the court intended to keep alive the matter or intended to dispose of it finally. In the case of *Puddomonee Dossee* v. *Roy Muthooranath Chowdhry* (1), their Lordships of the Privy Council observed: "The reported cases sufficiently show that in India the striking an execution proceeding off the file is an act which may admit of different interpretations according to the circumstances under which it is done, and accordingly their Lordships do not desire to lay down any general rule which would govern all cases of that kind."

In the case of *Dhonkal Singh* v. *Phakkar Singh* (2), the question that arose for consideration was not one of limitation but one of *res judicata*, namely whether the order striking off a previous application amounted to an adjudication of the rights of the parties so as to be a complete bar against a fresh application. It was accordingly held that where the court has not adjudicated upon the rights of the parties or has not held that the application for some reason or other is not maintainable, there would be no such bar and a fresh application can be filed.

In the case of *Rattanji* v. *Hari Har Dat Dube* (3), there had apparently been a stay order passed by the District Judge which was in force when the Subordinate Judge "struck off the case" but maintained the

(1) (1873) 12 Beng. L.R., 411(422). (2) (1893) I.L.R., 15 All., 84.
(3) (1895) I.L.R., 17 All., 243.

attachment. The Bench came to the conclusion that that was a case of a mere adjournment of the proceedings and not of a final disposal of the execution application.

Their Lordships of the Privy Council in the case of *Qamar-ud-din Ahmad* v. *Jawahir Lal* (1) had to consider a case where on the 29th of November, 1889, an order had been made by the execution court to the effect that the property to be sold being ancestral the case should be struck off the file and the papers transferred to the court of the Collector for the completion of the sale proceedings. Later on there was some default on the part of the decree-holder in not depositing Re.1 within the time allowed on account of the order for sale by auction and the court ordered that in default of the prosecution on the part of the decree-holder the record be not sent to the Collector's court for taking the sale proceedings. So far as the first order was concerned, it was obviously not a case of dismissal of the execution case because the order directed that the papers should be transferred to the Collector for the completion of the sale proceedings. So far as the second order was concerned it had merely directed that the record be not sent to the Collector for taking the sale proceedings because the decree-holder had not deposited Re.1. In those circumstances their Lordships ruled that there had been no final disposal of the application, which must therefore be deemed to be still pending.

In *Prem Narain* v. *Ganga Ram* (2), decided by a Bench of which one of us was a member, before the execution court there had been a compromise arrived at between the parties that the execution proceedings should remain pending and that the application for execution should not be struck off. The matter therefore had to be taken up again after the expiry of three months which had been allowed to the judgment-debtors to pay up the amount. The court ordered that "the execution

(1) (1905) I.L.R., 27 All., 334. (2) [1931] A.L.J., 430

case be struck off for the present without payment being entered; the costs to be borne by the judgment-debtors." It was held that on a proper interpretation of the order the court did not intend to dispose of the execution matter finally, but merely shelved it for the time being as a temporary measure. The words "for the present" were particularly emphasised in support of the view that was taken in that case.

The Full Bench case of *Chhattar Singh* v. *Kamal Singh* (1) was a case where the execution had been transferred by the execution court to the Collector as the property was the ancestral property of the judgment-debtors. On account of a stay order or rather injunction obtained in another declaratory suit the proceedings before the Collector were stayed. The Collector considered that on the date fixed no steps were taken to prosecute the case and directed that the papers were to be returned to the court of the Subordinate Judge. When the papers arrived at the office of the Subordinate Judge, he ordered that the application for execution should be struck off the list of pending applications, that a note to this effect should be recorded in the appropriate register and that an entry should further be made in the register of decided cases. These orders were admittedly passed upon the statement or the opinion of the Collector that the decree-holders were taking no steps to prosecute the execution proceedings. It was held by the Full Bench that, in the circumstances of the case, by the mere fact that the papers had been returned by the Collector and an order striking off the case and consigning the record to the record room was made, the matter had not been finally disposed of and the matter would be revived on showing to the court that the proceedings had been held up on account of the injunction that had been issued previously.

In all these cases the question for consideration was whether in view of all the circumstances and the language of the order in question there was an intention to

(1) (1926) I.L.R., 49 All., 276.

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dispose of the matter finally or whether the matter was merely suspended temporarily.

In the present case what apparently happened was that the decree-holders and the judgment-debtors entered into an arrangement between themselves under which on payment of a part of the amount due, namely Rs.300. the decree-holders agreed not to execute the decree and not to proceed with the sale for a period of two months during which the judgment-debtors might be able to raise the money and satisfy the decree. Indeed they took some steps to execute a sale deed in favour of the decree-holders in part satisfaction of the decretal amount. When the sale officer informed the execution court of this arrangement the court considered that it could no longer go on with the execution case and ordered that the execution case be struck off; the judgment-debtors to pay costs. It may be that the order was wholly irregular and that in fairness to the parties the court should have inquired from them or their pleaders as to the exact state of affairs. It may also be that the order being either irregular or illegal could have been set aside on appeal or even, in a fit case, set aside on revision. But we think that the execution court did not intend to keep the matter pending on its own file so that it might in future be revived on the application of either party. The Bench who have referred this case themselves came to the conclusion that there could be no real doubt that the learned Subordinate Judge, who passed the order for costs in this case, intended finally to dispose of the proceedings which were before him. As the order striking off the case was coupled with an order for payment of costs by the judgment-debtors to the decree-holders, it was clear that the Subordinate Judge intended to dispose of the matter so far as he himself was concerned.

It has been contended on behalf of the respondents that the words "final order" in the amended article 182, clause (5) must mean an order which finally adjudicated

upon the rights of the parties and disposed of the application for execution on its merits. The words "final order" have been used in article 182(2) of the Limitation Act also. Their Lordships of the Privy Council in *Abdulla Asghar Ali* v. *Ganesh Das Vig* (1), have laid down that those words include the order passed on appeal which is final between the parties. We are unable to hold that the words "final order" must mean the order which finally adjudicates upon the rights of the decree-holder on the one hand and the rights of the judgment-debtor on the other. If that were the meaning, then it may in some cases work hardship on the decree-holders themselves. In the absence of any such order, time would still begin to run from the date of the last application made in accordance with the law or step taken in aid of execution, whereas the amended clause (5) appears to have been intended to give to the decree-holder a fresh start from the date when the last execution matter or proceeding terminated. Again there may be cases where the decree-holder may himself not like to go on with the application and may get it dismissed. It would be too much to hold that in such a case, as there has been no proper adjudication upon the rights of the parties, he cannot have a fresh start for purposes of limitation. Again, the application may be dismissed on account of want of prosecution or default or for some other reason. In all such cases the execution proceeding must be deemed to have terminated and the order passed thereon a final order, though there has been really no adjudication upon the rights of the parties and the matter can be re-agitated on a fresh application being made to the execution court. We think that where the court intends to dispose of the matter completely and no longer keep it pending on its file, and does not merely suspend the execution or consign the record to the record room for the time being, the order must be deemed to be a final order which

(1) [1933] A.L.J., 239.

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will give a fresh start for purposes of limitation, and that the proceeding not being pending, there would in such a case be no question of revival. It is unfortunate that in spite of the fact that the use of ambiguous words like "struck off" has been condemned from time to time, courts below are in the habit of using such expressions. We may also point out that it has been emphasised by the Full Bench in *Gobardhan Das* v. *Dau Dayal* (1), that the execution courts should not allow execution proceedings to remain pending in another court by entertaining a compromise for payments in instalments spread over a long period and that they should proceed with the execution and see that the proceedings are expedited. Adjournments of proceedings for unavoidable reasons stand on a different footing.

The second question is a much simpler one. No doubt there has been some conflict of opinion even in this Court on the question whether the payment made by one of the persons jointly liable would save limitation as against all such debtors. In *Roshan Lal* v. *Kanhaiya Lal* (2), and *Ibrahim* v. *Jagdish Prasad* (3), it was definitely held by two Benches of this Court that the payment made by one of the debtors would save limitation under section 20 of the Limitation Act as against all other persons who were jointly liable with him. The cases were decided on the basis of certain English rulings and some cases of other High Courts. Unfortunately the attention of the Benches was not drawn by counsel at the Bar to the provisions of section 21 of the Limitation Act. At any rate the provisions of that section were not at all considered and the views were expressed on an interpretation of the language employed in section 20 only. These cases have been followed in Madras and Calcutta, though there are also judgments holding the other view in those courts as also in Patna and Lahore. It is not necessary to review these cases.

(1) (1932) I.L.R., 54 All., 573. (2) (1918) I.L.R., 41 All., 111.
(3) A.I.R., 1927 All., 209.

It seems to us that so far as the question of acknowledgment in writing under section 19 is concerned, even that section by itself is plain enough and does not justify the view that an acknowledgment made by one debtor is good as against all joint debtors. The section provides that "an acknowledgment of liability in respect of such property or right has been *made in writing signed by the party against whom such property or right is claimed. . . . . .*" The section obviously requires that there should be a writing signed by the persons against whom the right is claimed. It is therefore impossible, on the language of that section, to hold that even though there may be no writing signed by a joint debtor, limitation is saved on account of an acknowledgment made in writing signed by another debtor.

So far as section 20 stood alone there was certainly room for the view that the payment of a joint debt by one of joint debtors may amount to a payment of the debt within the meaning of that section so as to save limitation as against all the debtors, but the Indian law is in this respect different from the old English law. We have a specific provision in section 21 of the Limitation Act which applies to both acknowledgments under section 19 and to payment of interest and principal under section 20. That section provides that "nothing in the said sections renders one of several joint contractors, partners, executors, or mortgagees chargeable by reason only of a written acknowledgment signed or of a payment made by, or by the agent of, any other or others of them." A Full Bench of the Madras High Court in *Narayana Ayyar* v. *Venkataramana Ayyar* (1) held that co-mortgagors come within the scope of the words "joint contractors" and that this section is applicable to co-mortgagors as well.

The learned advocate for the respondent on the strength of the views expressed in some cases in

(1) (1902) I.L.R., 25 Mad., 220.

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Madras and Calcutta has urged before us that this section would be applicable only to the case where the original parties to the transaction are alive and the acknowledgment or payment has been made by one of them, and that the section has no application to a case where some transferees have come in or one of them has died and the acknowledgment or the payment has been made by one of his heirs. It seems to us that what the court has to see is the relation which subsists between the various persons at the time when the acknowledgment is made or the payment is made, and not the relation which existed at the time of the original transaction. If the respondents' contention were accepted, the result would be that where *A* and *B* are jointly liable to pay a debt, if *B* were to make an acknowledgment, *A* would still be protected; but if *B* were to transfer a part of the property or if one of *B's* heirs were to make an acknowledgment *A* would lose his protection. Such a position is in our opinion untenable. At the time when the acknowledgment is made or the debt is paid the relation of joint contractors between the persons who are liable exists, and it matters little whether they are the original contractors or whether they are their legal representatives for the time being. If this were not the correct interpretation, then when the original partners died and their heirs became new partners the section would have no application. Again on that interpretation co-mortgagors would on payment of the entire debt lose their right of contribution or right of subrogation under the Transfer of Property Act. We think that the proper interpretation to put on section 21 is that if at the time when the acknowledgment is made or the payment is made there are more than one person in existence who stand in relationship to each other as joint contractors, partners, executors or mortgagors, then the acknowledgment or payment made by one would save limitation as against that person and would be of no avail against the others.

So far as the provisions of section 19 are concerned there is a direct authority of this Court in *Gaya Prasad* v. *Babu Ram* (1), decided by a Bench of which one of us was a member. In that case it was held that the acknowledgment signed by one co-mortgagor Gaya Prasad was of no avail to the plaintiff and had the effect of saving limitation against Gaya Prasad himself, though not as against his other co-debtors. The observations made in the case of *Collector of Jaunpur* v. *Jamna Prasad* (2), as well as the case of *Abraham Servai* v. *Raphial Muthirian* (3) were quoted in support of that view. The case of *Collector of Jaunpur* v. *Jamna Prasad* was in fact a case of Muhammadan co-heirs of the original debtor. In this view the cases of *Roshan Lal* v. *Kanhaiya Lal* (4) and *Ibrahim* v. *Jagdish Prasad* (5), are not good law.

Our answer to the first question referred to us is that the order should be considered as the final order passed on the application for execution within the meaning of article 182, clause (5) of the Limitation Act.

Our answer to the second question is in the negative.

APPELLATE CIVIL

Before Mr. Justice Niamat-ullah and Mr. Justice Rachhpal Singh

KULSUM BIBI (OBJECTOR) *v.* BASHIR AHMAD AND OTHERS (DECREE-HOLDERS)*

1936
September, 15

Muhammadan law—Gift—Hiba-bil-ewaz—Nature of—Gift of property by husband and gift of dower by wife—Mutual gifts and not a sale or exchange—Oral transaction valid—Registered instrument not necessary.

If a transaction called "*hiba-bil-ewaz*" has all the attributes of a true *hiba-bil-ewaz* as known to the Muhammadan

*First Appeal No. 319 of 1934, from a decree of K. N. Joshi, Subordinate Judge of Jhansi, dated the 24th of February, 1934.

(1) (1928) 26 A.L.J., 722. (2) (1922) I.L.R., 44 All., 360(367).
(3) (1914) I.L.R., 39 Mad., 288. (4) (1918) I.L.R., 41 All., 111.
(5) A.I.R., 1927 All., 209.