Before Mr. Justice Rachhpal Singh and Mr. Justice Ismail

1939 *April*, 12

RISAL SINGH AND OTHERS (DECREE-HOLDERS) *v.* LAL SINGH (JUDGMENT-DEBTOR)*

Limitation Act (IX of 1908), article 182(5)—Application to take a step in aid of execution—Not essential that such application must be made in a pending execution case—Application for injunction against judgment-debtor transferring a part of the mortgaged property—Whether step in aid of execution—Limitation Act, section 19—Acknowledgment—Whether acknowledgment of a subsisting liability.

The first application for execution of a decree for sale upon a mortgage was made more than three years after the date of the decree. Within three years of the decree, however, an application had been made by the plaintiff decree-holder for an injunction against the judgment-debtor's transfer of a part of the mortgaged property, and the judgment-debtor had filed an objection in which he stated that a final decree had been passed in the mortgage suit and the court had no power after the termination of the suit to entertain an application for injunction:

Held, (1) that an application, in order to be an application to take a step in aid of execution within the meaning of article 182(5) of the Limitation Act, need not be one made in a pending execution case; (2) that the application for injunction was not an application to take a step in aid of execution, as the transfer of a portion of the mortgaged property was not in any way an obstacle to the execution of the decree; (3) that the statement contained in the objection filed by the judgment-debtor saying that a final decree for sale had been passed was a conscious admission of a subsisting decree and amounted to an acknowledgment of an existing liability, within the meaning of section 19 of the Limitation Act.

Messrs. *S. K. Dar* and *M. L. Chaturvedi*, for the appellants.

Mr. *S. B. L. Gaur*, for the respondent.

RACHHPAL SINGH and ISMAIL, JJ.:—This is an appeal by the decree-holder against an order passed by the court below dismissing his application for execution on the ground that it was not within limitation.

*First Appeal No. 11 of 1938, from a decree of C. I. David, First Civil Judge of Meerut, dated the 2nd of August, 1937.

The decree-holder obtained a mortgage decree against the judgment-debtor which was made final on 29th of April, 1933. The application for execution was made on the 8th of August, 1936. It will be seen that it was made more than three years after the date of the final decree. In his application for execution the decree-holder gave his reasons for claiming that his application was within limitation. The decree-holder stated that he went to court to make his application for execution on the 27th of April, 1936, but learnt that the judgment-debtor had made an application under section 4 of the Encumbered Estates Act on that very day. The decree-holder therefore considered it unnecessary to make an application for execution. It is alleged that later on, on the 14th of July, 1936, the judgment-debtor got his application and the proceedings under the Encumbered Estates Act dismissed. The decree-holder apparently contended that the period between the 27th of April, 1936, and the 14th of July, 1936, should be excluded and so his application would be within limitation.

The learned Judge of the court below held that the contention of the decree-holder had no force. He was of opinion that the proceedings taken by the judgment-debtor under the Encumbered Estates Act did not extend the period of limitation. He also disbelieved the story of the decree-holder that he did not come to know of the dismissal of the Encumbered Estates Act proceedings on the 14th of July, 1936. In his opinion the decree-holder learnt of the dismissal of those proceedings on the 14th of July, 1936. He, therefore, held that the decree-holder was not entitled to any benefit under section 5 of the Indian Limitation Act.

In our opinion, on the case as it was argued before the court below, the learned Judge was right in dismissing the application as being barred by time.

In this Court two new points have been taken by learned counsel for the appellant in support of his con-

1939

RISAL SINGH v. LAL SINGH

tention to the effect that the application for execution was within limitation.

The first contention urged on behalf of the appellant is that his application for an injunction was a step in aid of execution which saved limitation. If this contention is accepted, then certainly the present application would be within limitation. On behalf of the judgment-debtor it is urged that the application for injunction had been made when no application for execution was pending and so it cannot be said that any step in aid of execution had been taken. In other words, it is contended that no step by a decree-holder taken before an application for execution is put in, can be treated as a step in aid of execution. It is argued that the condition precedent is that an application for execution made in accordance with law must be pending when the step alleged to have been taken in aid of execution is taken.

After a consideration of the point we are of opinion that it is not correct to say that in no case can a step in aid of execution be taken before an application for execution of the decree has been made in court. For instance, an application to bring the deceased judgment-debtor's representatives on the record would be a step in aid of execution even though no application for execution has been made. Then, another such case may be where the decree-holder dies after obtaining the decree. It would be necessary for his legal representatives to apply for substitution of their names. Such a step would be a step in aid of execution though in both such cases an application for execution may not have been made. The Madras High Court has taken the view that an act or an application in order to be a step in aid of execution need not be in a pending execution application: See *Kannan* v. *Avvulla Haji* (1). The same view has been taken by the Patna High Court in *Jagdeo Narain Singh* v. *Bhubaneshwari Kuer* (2).

(1) (1926) I.L.R. 50 Mad. 403. (2) (1928) I.L.R. 7 Pat. 708.

Learned counsel for the respondent relied on *Krishna Patter* v. *Seetharama Patter* (1). But it appears to us that so far as the point under discussion is concerned this case is of no help. Their Lordships in their judgment refer to the contention raised before them to the effect that the step in aid must be made in a pending application. They say that the question did not require consideration in view of the case before them. In our judgment an application to take a step in aid of execution need not be in a pending execution case. As held in *Jagdeo Narain Singh* v. *Bhubaneshwari Kuer* (2), an application made in any other proceeding which affects the execution of decree may be treated as a step in aid of execution. Our own High Court in *Baldeo Singh* v. *Ram Swarup* (3) held that the filing of an appeal in order to remove the impediment of a prior charge in the way of executing the decree unconditionally was a step in aid of execution. For the reasons given above we hold that an application made before an execution application has been made may be a step in aid of execution.

The next question which we have to consider is whether the application for injunction which the decree-holder made can be said to be a step in aid of execution. On this point, our opinion is against the decree-holder. The decree-holder had obtained a mortgage decree which had been made final. The mortgaged property included a grove. The judgment-debtor sold his rights in the grove. The decree-holder's contention is that the grove was included in the mortgage. On the other hand, the judgment-debtor contended that the grove had not been mortgaged by him and was not included in the decree passed in favour of the decree-holder. In our opinion, there was nothing to prevent the decree-holder from executing his mortgage decree. The transfer by the judgment-debtor of the grove did not have the effect of throwing any obstacle to the execution of

(1) (1926) I.L.R. 50 Mad. 49. (2) (1928) I.L.R. 7 Pat. 708.
(3) (1921) 19 A.L.J. 905.

1939

RISAL SINGH v. LAL SINGH

the decree. It was open to the decree-holder to ask for the execution of his decree. The transfer made by the judgment-debtor of a portion of the mortgaged property (the grove) cannot be treated as an obstacle in the way of the decree-holder so far as his remedy to execute his decree was concerned. If the grove which the judgment-debtor transferred was a part of the mortgaged property then the executing court would have executed the decree ignoring the subsequent transfer by the judgment-debtor. The decree-holder applied for an injunction not because there was any impediment in the matter of execution but because he was afraid that a part of the mortgaged property might be wasted. His application may have been necessary so far as the question of waste of a part of mortgaged property was concerned but it cannot be said that it was a step in aid of execution. We hold that the transfer of a portion of the mortgaged property was not an obstacle in the way of execution of decree and therefore it cannot be said that the application for injunction was a step in aid of execution.

The second plea urged on behalf of the appellants is that the application for execution is within limitation because of the acknowledgments made by the judgment-debtor. The position stands thus. When the decree-holder made his application for an injunction, the judgment-debtor filed objections and also made a statement in the case. In his application of objection he stated: "The mortgage suit No. 26 of 1930 has come to an end after the passing of the final decree. The plaintiff now cannot legally move an application for injunction in the case." In his statement before the court he said: "I had mortgaged my share. . ." The contention raised on behalf of the decree-holder is that these statements amount to acknowledgment within the meaning of section 19 of the Indian Limitation Act which would save limitation. The above mentioned statement in

the objection application means that the judgment-debtor stated that there was a mortgage decree which had been passed against him in suit No. 26 of 1930.

In the case before us the above mentioned statements were made before expiry of the period of limitation for making an application. If the statements amount to an acknowledgment then the present application is certainly within limitation. So, the question which we have to determine is whether there has been any acknowledgment by the judgment-debtor which would bring the case of the decree-holder within limitation. Section 19 of the Indian Limitation Act enacts that "Where...any 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 . . . a fresh period of limitation shall be computed . . ." Explanation I which is very important runs as follows: "For the purposes of this section an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right . . . . . ." If we keep this explanation in view then it will be clear that the statement of the judgment-debtor in his objection application does come within the definition of acknowledgment. The judgment-debtor admits that in suit No. 26 of 1930 a mortgage decree has been passed against him. In other words he admits that there is a mortgage decree outstanding against him. An acknowledgment of liability under section 19 only means this that the judgment-debtor admits that he is liable. The admission may be express or implied. It appears to us that an acknowledgment must show a definite and conscious acknowledgment of subsisting liability. Whether a particular document does or does not amount to acknowledgment of subsisting liability is a matter for construction which the courts will place on it.

Learned counsel for the appellants has relied on two cases of the Oudh Chief Court They are *Thakur*

1939

RISAL SINGH v. LAL SINGH

Balbhaddar Singh v. *Sheo Piarey Lal* (1) and *Ram Bilas* v. *Lachmi Narain* (2). In both these cases the learned Judges came to the conclusion that having regard to the terms of the documents set up as acknowledgments they were of opinion that they amounted to acknowledgments. In one case the mortgagor (the debtor) had executed a second mortgage deed to pay off the prior debt and in that there was a statement that the property had been put to sale and that it was necessary to raise a loan in order to satisfy the mortgage. That was a very clear case of an admission of liability. In the other case also there was a clear admission of the existence. The debtors of that case had filed a written statement in another suit in which they had admitted the existence of the mortgage set up by the plaintiff. In *Thakur Balbhaddar Singh* v. *Sheo Piarey Lal* the learned Judges remarked: "Section 19 of the Limitation Act does not prescribe that an acknowledgment should be express. It may therefore be implied, . . .nor is it necessary that an acknowledgment should specify the exact nature of the right . . . The question as to whether there is or there is not such an acknowledgment as is required by section 19 must always be a question of construction of documents in which the alleged acknowledgment is contained and to construe the document is clearly the function of the court."

Another ruling on which the decree-holder relied is *Daia Chand* v. *Sarfaraz* (3). It is a Full Bench case. The question in that case was whether a suit by the plaintiff on a mortgage was within limitation. At the time of the old settlement defendants attested the record of rights in which they were described as mortgagees. The Full Bench held that this admission was an acknowledgment of the mortgagor's title.

On behalf of the respondent his learned counsel has cited before us *Anup Singh* v. *Fateh Chand* (4) and *Lallu Mal* v. *Reoti Ram* (5).

(1) (1929) I.L.R. 5 Luck. 446. (2) A.I.R. 1931 Oudh 295.
(3) (1875) I.L.R. 1 All. 117. (4) (1920) I.L.R. 42 All. 575(582).
(5) (1923) I.L.R. 45 All. 679.

It appears that the rulings cited before us on both sides as regards the question of acknowledgment do not give much help in deciding the point. As we have already pointed out, the question has to be decided with reference to the facts of each case. In each case the facts as well as circumstances are bound to be different. We think that the real point which we have to decide is whether the allegations of the judgment-debtor in his application of objections do or do not amount to an admission of subsisting liability. After a consideration of the question we have arrived at the conclusion that the statement does amount to an acknowledgment of subsisting liability. The circumstances under which this admission was made were these. The decree-holder had obtained a mortgage decree which had been made absolute. The decree-holder's allegations were that one grove was included in the mortgaged property. The judgment-debtor denied this fact and made a transfer of the grove after the passing of the final decree. The decree-holder in order to protect his interest in the trees mortgaged made an application for injunction. The judgment-debtor resisted this application. He asserted that as the mortgage suit had already been decreed so the court had no power after the termination of the suit to hear an application for injunction. For that purpose it was necessary for him to state that a decree had already been obtained. The judgment-debtor admitted the existence of a mortgage decree against him. It means that he made a conscious admission of a subsisting decree because such an admission suited his purpose. We are of opinion that this was an admission made consciously of an existing liability. Section 19 of the Indian Limitation Act does not enjoin that the admission which would save limitation should be made in a particular form. All that it enacts is that there must be an admission of liability. Explanation 1 says that for the purpose of this section an acknowledgment may be sufficient though it omits to specify the exact nature of the property or

1939

RISAL SINGH v. LAL SINGH

right. For the reasons given above we hold that the statement made by the judgment-debtor in his objection application amounts to an admission of subsisting liability which was made within limitation. Therefore, in our opinion, the present application was within limitation.

For the reasons given above we allow this appeal, set aside the order of the court below and direct that execution proceedings should proceed. The decree-holder will get his costs in this Court from the respondent.

REVISIONAL CRIMINAL

Before Mr. Justice Rachhpal Singh

EMPEROR *v.* BHOLA NATH*

1939
April, 12

Criminal Procedure Code, section 337—Tender of pardon—Not illegal if ultimately charge is one triable by a Magistrate—Approver's statement not rendered inadmissible in evidence thereby—Criminal Procedure Code, section 288—Approver's statement in Magistrate's court deliberately varied in Sessions court—Statement in Magistrate's court can properly be acted upon—Evidence Act (I of 1872), section 10—Evidence of conspiracy—"In reference to" the common intention.

All that the Magistrate who can grant a pardon under section 337 of the Criminal Procedure Code has to see is whether on the information at his disposal there is a *prima facie* case of an offence which is triable exclusively by the High Court or court of session, and if that is so he is competent to grant a pardon, although it may eventually turn out at the trial that on the proved facts the offence committed was not one of that kind but was one which could have been tried by a Magistrate. It would be wrong in a case of this description to say that the pardon tendered to the approver was incompetent and that therefore the statement of the approver should not be taken into consideration. It is no part of the duty of the Magistrate to take upon himself the task of making a thorough and searching inquiry in order to find out whether the offence committed is one which will be triable by a court of session or by a Magistrate; as soon as he is informed that the offence is one which

*Criminal Revision No. 554 of 1938, from an order of B. R. James, Sessions Judge of Saharanpur, dated the 25th of April, 1938.