

entitled to maintain the suit; and, accordingly, we dismiss this appeal with costs.

### FULL BENCH

*Before Sir John Thom, Chief Justice, Mr. Justice Allsop and Mr. Justice Ganga Nath*

1939  
December, 22

BHAN DATTA UPADHIYA AND ANOTHER (DECREE-HOLDERS)  
*v.* TULSA KUAR (JUDGMENT-DEBTOR)\*

*Execution proceedings, Application for resumption after stay of—Application for revival of stayed proceedings not necessary—Limitation—Limitation Act (IX of 1908), article 181—Civil Procedure Code, order XXI, rule 29—Staying execution and consigning record to the record room—No termination of proceedings, which remain pending.*

An application for execution of a decree for sale upon a mortgage was made, and as the property to be sold was ancestral property the application was sent by the execution court to the Collector for disposal. A stay order was, however, obtained by one of the judgment-debtors in a suit filed by her and execution of the decree was stayed till the disposal of that suit. This stay order was communicated to the Collector, who thereupon returned the record to the execution court, and that court passed an order directing that the papers be filed and consigned to the record room. More than three years after the dismissal of the judgment-debtor's suit the decree-holders presented an application praying that their original application be re-transferred to the Collector for disposal:

*Held* (1) The order of the execution court directing that the papers of the execution proceedings be filed and consigned to the record room did not terminate the execution proceedings, and the proceedings remained pending.

(2) Article 181 of the Limitation Act did not apply to an application to continue execution proceedings which had been temporarily stayed. There was no statutory provision which made it incumbent on the decree-holders to make an application, after the stay order had ceased to operate, to set in motion execution proceedings which were still pending, though temporarily stayed; it was the duty of the execution court *suo motu* to recall the execution file from the record room and

\*Second Appeal No. 999 of 1937, from a decree of D. Joshi, Additional Judge of Azamgarh, dated the 30th of January, 1937, confirming a decree of Anand Behari Lal, City Munsif of Azamgarh, dated the 26th of November, 1935.

re-transmit it to the Collector for disposal. The application was an unnecessary one and was not governed by the provisions of the Limitation Act.

Mr. *K. L. Misra*, for the appellants.

Messrs. *Shiva Prasad Sinha* and *Chaturbhuj Sahai*, for the respondent.

THOM, C.J., ALLSOP and GANGA NATH, JJ.:— This is a decree-holders' appeal in execution proceedings.

The appellants obtained a final decree under order XXXIV, rule 5, in a suit upon the basis of a mortgage. They initiated execution proceedings. These proceedings were stayed in circumstances hereinafter set forth. More than three years after the bar imposed by the stay order had ceased to operate the appellants presented an application which has been described in the courts below as an application for the revival of the execution proceedings. The application was dismissed on the ground that it was time barred.

The final decree under order XXXIV, rule 5, in favour of the mortgagees who are the appellants was passed on the 9th of August, 1928. On the 19th December, 1930, the decree-holders presented an application for execution. One of the judgment-debtors Mst. *Tulsa* preferred an objection to the application under section 47 of the Code of Civil Procedure. This objection was dismissed on the 15th August, 1931. Thereafter the execution court directed that the application be transferred to the court of the Collector for disposal.

On the 6th November, 1931, Mst. *Tulsa* filed a suit in the civil court and obtained an order on the 28th January 1932, from the court staying the execution of the mortgage decree pending the result of her suit. The court stayed the proceedings under order XXI, rule 29, of the Code of Civil Procedure "till the disposal of this suit". This stay order was communicated to the Collector who thereupon returned the re-

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cord to the execution court. On receipt of the record the learned Munsif passed an order directing that the papers be filed and consigned to the record room. This order was passed on the 3rd February, 1932.

Mst. Tulsa's suit was dismissed on the 14th June, 1932. An appeal against the order dismissing the suit was dismissed on the 14th February, 1933. On the 25th July, 1935, that is more than three years after the dismissal of Mst. Tulsa's suit on the 14th June, 1932, the appellants, the decree-holders, presented an application praying that their original application be re-transferred to the Collector for disposal. This application was dismissed by the learned Munsif in the execution court on the ground that it was barred under the provisions of article 181 of the Limitation Act. The Munsif's order has been upheld in the lower appellate court. The decree-holders have preferred a second appeal in this Court.

If the order of the learned Munsif of the 3rd February, 1932, directing the record to be consigned to the record room had the effect of terminating the execution proceedings then clearly the application of the 25th July, 1935, is time barred. The application would then necessarily be a fresh application for execution and it was preferred more than three years after the bar had been removed by the dismissal of Mst. Tulsa's suit.

We are satisfied that the order of the Munsif directing that the file be consigned to the record room did not determine the execution proceedings. There is no warrant for such an order in the Code of Civil Procedure. It was in fact an administrative order by which directions were given for the custody of the file pending the result of Mst. Tulsa's suit. On the dismissal of Mst. Tulsa's suit the execution court, *suo motu*, could appropriately have recalled the application for execution from the record room and directed

that it should be sent again to the Collector for disposal. The effect of such an order as was passed on the 3rd February, 1932, has been considered in a number of cases in this Court. It is unnecessary to refer at length to the decisions in these cases. Reference may be made, however, to the cases of *Muhammad Taqi Khan v. Raja Ram* (1), *Rama Kant Malaviya v. Satya Narain Malaviya* (2), *Qamar-ud-din Ahmad v. Jawahir Lal* (3). In the judgments in these and other cases there is abundant authority for the view which we hold that an order "striking off" an application and consigning it to the record room does not terminate the proceedings in which the order is passed.

The courts below have not treated the application of the 25th July, 1935, as a fresh application for execution. They have nevertheless held that the application is one to which the provisions of the Limitation Act and in particular article 181 of the first schedule thereof applies. In other words the courts below have held that an application to set in motion execution proceedings which have been stayed by the execution court pending the disposal of a suit is an application which, if not presented within three years of the disposal of the suit, that is from the date on which the stay order has ceased to operate, is barred by limitation.

Upon general principle, judicial authority apart, we are unable to agree with this decision. It is to be observed that there is no special provision in the Code of Civil Procedure for such an application as was presented by the decree-holders to set in motion the execution proceedings which had been stayed pending the result of Mst. Tulsa's suit. The application was made in proceedings which were still pending and in our judgment in the absence of any special provision such an application cannot be barred by limitation. If such an application were subject to the provisions of article 181 of the first schedule of the Limitation Act the

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(1) I.L.R. [1937] All. 272.

(2) A.I.R. 1938 All. 552.

(3) 1905 I.L.R. 27 All. 334.

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anomalous position might result of execution proceedings remaining pending in the execution court whilst an application to continue these pending proceedings would fail. Whether the execution court could in such circumstances dismiss the execution application for want of prosecution is at least doubtful.

There is high authority of this Court, however, for the view which has been taken by the courts below. In *Ruddar Singh v. Dhanpal Singh* (1) a Bench of this Court held that article 178 of the second schedule of the Indian Limitation Act, 1877, applied to such an application as the decree-holders in the present suit have made to revive execution proceedings. In the case of *Chhattar Singh v. Kamal Singh* (2) a Bench of five Judges held that an application to revive execution proceedings which had been stayed was governed by article 181 of the schedule of the Limitation Act of 1908. This decision was followed by a Bench of this Court in *Nabban Begam v. Moti Begam* (3).

In the case of *Chhattar Singh v. Kamal Singh* (2) the facts were that the application for revival was made within the three years from the removal of the bar imposed by a stay order. The application was held therefore not to be time barred; but it is clear from the judgment in the case that the Court accepted the proposition that article 181 of the schedule of the Limitation Act applied to such an application.

There are a number of other decisions to which we do not consider it necessary to refer in detail. In none of the cases decided by this Court, however, has the question as to whether it was incumbent upon the decree-holder to make an application to set execution proceedings in motion been considered. It appears in every case to have been assumed rather than decided that it was the duty of the decree-holder to make an application after the stay order had ceased to operate and that

(1) (1903) I.L.R. 26 All. 156. (2) (1926) I.L.R. 49 All. 276  
(3) [1934] A.L.J. 363.

the provisions of the first schedule of the Limitation Act applied to such an application. As SULAIMAN, J., observed in his judgment in *Chhattar Singh v. Kamal Singh* (1): "The application for revival not being a fresh application for execution cannot be governed by article 182. There is not, however, any special article which would apply, except the omnibus article 181. It has been held in several cases that this article applies to such applications . . . . . When article 181 applies, the period of limitation is three years from the date when the bar to the execution was removed." The argument that the executing court should have acted *suo motu* and listed the execution application for disposal on the removal of the bar to the execution does not appear to have been considered. It has been assumed but never specifically decided by this Court in the past that some article of the Limitation Act must apply.

All applications are not governed by the provisions of the Limitation Act. An application to expedite the hearing of an appeal for example is not governed by the provisions of the Limitation Act. An application to set in motion an execution application which has already been made within time and is still pending is in our judgment an application of a similar nature. In the present case so far as the execution application was concerned the decree-holders had done everything that was required of them. They had presented their application for execution within time. They had taken all the necessary steps in the execution court. That court had sent the application to the Collector for disposal since the property to be sold in execution of the decree was ancestral property. Nothing more was left for the decree-holders to do. It was for the Collector to have acted in accordance with the rules of chapter XL of the Revenue Manual promulgated by the Local Government under section 68 of the Code of Civil Procedure. Before the Collector could

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act in accordance with the provisions of these rules, however, he was directed by the execution court to stay proceedings. He accordingly did so and returned the file to the execution court. When the stay order ceased to operate it clearly was the duty of the execution court to re-transmit the file to the Collector. If this had been done the Collector would have proceeded to dispose of the application in accordance with the aforementioned rules. It was in fact unnecessary for the decree-holders to have moved in the matter at all. No doubt in their own interests the decree-holders might have brought the fact that Mst. Tulsa's suit had been disposed of to the notice of the execution court by means of a minute, but there is no statutory provision under which it was incumbent on them to make an application and if therefore they did make an application clearly it was not governed by the provisions of the Limitation Act.

It is true that this view is not in accordance with the opinions expressed in the decisions of this Court above referred to. But as we have already remarked the question as to whether it was incumbent upon the decree-holders to move when the bar imposed by the stay order had been removed and whether therefore the provisions of the Limitation Act applied at all to an application to set in motion proceedings which had been suspended was never considered by the Court. We do not consider therefore that the Court is bound to follow these decisions in an appeal where the question has been definitely and specially raised for the first time.

It is no doubt true that if the provisions of the Limitation Act do not apply to an application to set suspended execution proceedings in motion the disposal of these proceedings, it is possible, may be indefinitely delayed. This contingency however can be avoided if the execution court refuses to stay proceedings *sine die*.

The view which we take that article 181 of the schedule of the Limitation Act does not apply to an application to continue execution proceedings which have been stayed has been accepted by the High Courts of Madras, Calcutta, Bombay, Patna and the Chief Court of Oudh. In this connection we refer to the cases of *Pattannayya v. Pattayya* (1); *Krishnakaminee Debee v. Gireeshchandra Mandal* (2); *Thana Zalaji v. Dhana Jawhrji* (3); *Benarsi Prasad Chaudhury v. Kirtayanand Singh* (4) and *Narain Bakhsh Singh v. Shiva Bhik* (5).

In the result we hold that the appellants' application is not time barred.

The appeal is accordingly allowed and the order of the lower appellate court is set aside. The appellants' application will be returned to the execution court for disposal according to law.

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### REVISIONAL CIVIL

*Before Justice Sir Edward Bennet and Mr. Justice Verma*

MAHADEO DAS AND OTHERS (DEFENDANTS) v. BISHWANATH DAS AND OTHERS (PLAINTIFFS)\*

1939  
December, 22

*Civil Procedure Code, order XXXIII, rule 15—Pauper suit—Bar to a second application arises only where the previous application was refused under rule 7—Rejection under rule 5 for non-compliance with rules 2 and 3 does not bar a second application.*

Order XXXIII, rule 15, which provides that an order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue, contemplates that the "refusal" was one falling under rule 7. The rejection of the application under rule 5 on the ground that the application was not framed and presented in the manner prescribed by rules 2 and 3 does not bar a subsequent application.

Mr. K. L. Misra, for the applicants.

\*Civil Revision No. 223 of 1938.

(1) A.I.R. 1926 Mad. 453.

(2) (1935) I.L.R. 63 Cal. 57.

(3) A.I.R. 1923 Bom. 268.

(4) A.I.R. 1934 Pat. 532.

(5) (1936) I.L.R. 12 Luck. 743.