

as agent for the purpose of having the question determined as to whether, in making the selection of Niaz Ali as agent for the Bank, the defendant exercised the reasonable care and caution of an ordinarily prudent man; and upon the findings being returned to him, virtually disposed of the suit as if it were one for the damages. It seems to us sufficient to say that this was not the footing upon which the Bank came into Court, nor, looking to all the circumstances, do we think it should be permitted to make such a complete change of front, and to obtain relief upon grounds, not only that it did not set up, but by the very plaint itself controverted. Some regard must be paid to the form of pleadings, and though the circumstances out here are such that it would be unwise to test them by very strict or technical rules, we cannot countenance the notion, that a plaintiff, coming into Court with one case, and hopelessly failing to prove it, should be permitted to succeed upon another, and that directly in antagonism with his primary allegations. The plaintiff Bank never claimed to make the defendant liable for the Rs. 1,000 instead of Niaz Ali, on the ground that he had been wanting in diligence and care in selecting that person as an agent: on the contrary, the terms of the plaint repudiate such a notion: yet it is on this footing that relief has been granted to the plaintiff.

We are of opinion that the agency of Niaz Ali having been abundantly established as declared by the Judge, the foundation upon which the claim of the plaintiff rested crumbled away and the suit failed. The appeal is decreed with costs and the suit must stand dismissed.

*Appeal allowed.*

*Before Mr. Justice Oldfield and Mr. Justice Tyrrell.*

BUTI BEGAM AND ANOTHER (JUDGMENT-DEBTORS) v. NIHAL CHAND AND ANOTHER (DECREE-HOLDERS).\*

1883.  
March 22.

*Execution of decree—Stay of execution—Revival of execution proceedings—Act XV of 1877 (Limitation Act), sch. ii, No. 187.*

A decree was made against B, K, and Z. On the 13th May, 1879, application was made for execution of the decree against B and K. In August, 1879, Z, who had preferred an appeal in the suit, applied on that ground for

\* Second Appeal No. 74 of 1882, from an order of H. G. Keene, Esq., Judge of Saharanpur, dated the 27th September, 1882, reversing an order of Muhammad Sayyid Khan, Munsif of Muzaffarnagar, dated the 31st July, 1882.

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the stay of execution, and on the 22nd August, 1879, the Court on the same ground ordered execution to be stayed. On the 16th December, 1879, Z's appeal was dismissed. On the 24th June, 1882, an application for execution of the decree against B and K was made. *Held* that such application might be regarded as one for revival of the proceedings in execution which had been stayed by injunction, to which No. 178, sch. ii of the Limitation Act 1877, was applicable, and such application was therefore within time.

The principle of decision in *Raghubans Gir v. Sheosaran Gir* (1) and *Kolyanbhai Dipchand v. Ghnashamlal Jadunathji* (2) followed.

ON the 28th June, 1867, Buti Begam, the mother, and Kaniz Kubra, the wife, of Mahmud Hasan, a lunatic, borrowed Rs. 700 from Nihal Chand and Behari Lal, and gave the lenders a bond for that amount, in which they hypothecated certain immoveable property belonging to the lunatic. In April, 1878, the obligees of the bond sued Buti Begam and Kaniz Kubra upon it in the Munsif's Court. Zamania Begam, daughter of Mahmud Hasan, applied to be allowed to defend the suit on his behalf. This application was granted, and Mahmud Hasan was made a defendant, and Zamania Begam was made his guardian *ad litem*. The Munsif gave the plaintiffs in this suit a decree against Buti Begam and Kaniz Kubra, and the property of the lunatic. Zamania Begam appealed on behalf of the lunatic to the District Judge, and appeal was dismissed with costs on the 1st March, 1879. On the 13th May, 1879, Nihal Chand and Behari Lal applied for execution of the Munsif's decree against Buti Begam and Kaniz Kubra. In June, 1879, Zamania Begam preferred a second appeal to the High Court on behalf of the lunatic. In August, 1879, the property of the lunatic having been proclaimed for sale, in pursuance of the application for execution of the 13th May, Zamania Begam applied to the Munsif to stay execution on the ground that she had appealed to the High Court. On her furnishing security execution was ordered to be stayed, and on 22nd August, 1879, the execution-proceedings were struck off the file. On the 16th December, 1879, the High Court dismissed Zamania Begam's appeal with costs, on the ground that Mahmud Hasan was not legally represented by her, as she was a married woman, and set aside the decrees of the lower Courts, so far as they affected Mahmud Hasan or his property. On the 24th June, 1882, Nihal Chand and Behari Lal applied for execution against Buti Begam, Kaniz Kubra and Zamania Begam, claiming

(1) I. L. R., 5 All. 243.

(2) I. L. R., 5 Bom., 29.

as against the last to recover the costs of the first and second appeals, and as against the others the amount of the decree of the Munsif. The Munsif held that the application was barred by limitation as regards Buti Begam and Kaniz Kubra. The District Judge held on appeal that the case came within the operation of art. 178, sch. ii of the Limitation Act, 1877, and limitation ran from the 16th December, 1879, when the injunction restraining execution was removed.

In second appeal Buti Begam and Kaniz Kubra contended that the application was, as regards them, barred by limitation.

Pandits *Ajudhia Nath* and *Bishambhar Nath*, for the appellants.

Munshi *Kashi Prasad*, for the respondents.

The Court (OLDFIELD and TYRRELL, JJ.) delivered the following judgment:—

OLDFIELD, J.—We are of opinion that the Judge is right. The present application may be regarded as one for revival of the proceedings in execution which had been stayed by injunction, and art. 178 of the Limitation Act is applicable. The principle is that recognised in *Raghubans Gir v. Sheosaran Gir* (1) and *Kalyanbhai Dipchand v. Ghanashamlal Jadunathji* (2). We dismiss the appeal with costs.

*Appeal dismissed.*

*Before Mr. Justice Straight and Mr. Justice Brodhurst.*

RAGHUBAR DAYAL (DEFENDANT) v. LACHMIN SHANKAR  
(PLAINTIFF).

1883  
*April 19.*

*Mortgage—Suit by mortgagee to recover mortgage-money—Suit for money charged on immoveable property—Relief against the person of mortgagor—Act XV of 1877 (Limitation Act) sch. ii, Nos. 116, 132.*

In a suit by a mortgagee to enforce the mortgage No. 132, sch. ii of the Limitation Act, 1877, is not applicable, so far as relief against the mortgagor personally is claimed. *Lallubhai v. Naran* (3) dissented from.

THIS was a suit to recover Rs. 941-13, principal and interest, under a registered bond, dated the 5th August, 1872, whereby certain immoveable property was mortgaged as collateral security for the

\* Second Appeal No. 1162 of 1882, from a decree of J. M. O. Steinbelt, Esq., Judge of Banda, dated the 2nd August, 1882, affirming a decree of Kazi Wajih-ud-din Khan, Subordinate Judge of Banda, dated the 30th May, 1882.

(1) I. L. R., 5 All. 243. (2) I. L. R., 5 Bom., 29.

(3) I. L. R., 6 Bom., 719.