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conceive that the result would have been different if the regulation had been strictly complied with in the matter of notice.

We accordingly allow this appeal, set aside the decree of the court below and dismiss the plaintiffs' suit with costs in both courts.

In consequence of this decision of the appeal, Thakur Jai Indra Bahadur Singh's suit No. 1 of 1930, which was instituted in the court of the Subordinate Judge of Kheri and which we transferred to our own file for decision is also dismissed with costs.

APPELLATE CIVIL

Before Mr. Justice Wazir Hasan, Chief Judge and Mr. Justice A. G. P. Pullan.

1930 *July*, 24.

S. HASAN SHAH (DECREE-HOLDER-APPELLANT) *v.* MOHAMMAD AMIR MIRZA (JUDGMENT-DEBTOR-RESPONDENT).*

Limitation Act (*IX of* 1908), *article* 182, *clause* (5)—*Attachment of property in execution of decree—Property released on objection of third party—Execution application ordered to be "filed"—Declaratory suit by decree-holder eventually unsuccessful—Declaratory suit, if a step in aid of execution—"Plaint" in declaratory suit, if an application within clause 5 of Article* 182—*Civil Procedure Code Act* (*V of* 1908), *order XXI, rule* 63—*Suit under order XXI, rule* 63, *effect, of, on execution proceedings—Order cancelling or maintaining attachment when becomes final—Order that execution application be filed, whether a final decision.*

Where a third party filed objections to the attachment of certain properties which were allowed and the execution application was ordered to be filed but the decree-holder being dissatisfied with the order brought a suit for declaration that the property really belonged to his judgment-debtor and was liable to be sold in execution of his decree which eventually failed, *held*, that the declaratory suit was a step in aid of execution and that the plaint of that suit could be treated as an application within the meaning of clause 5 of Article 182 of

*Execution of Decree Appeal No 16 of 1930, against the order of Babu Gauri Shankar Varma, Subordinate Judge of Sitapur, dated the 24th of January, 1930.

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the Indian Limitation Act. *Sheo Ram* v. *Ram Bharosey* (1), relied on. *Murgepa Mudiyallappa Kottanhalli* v. *Basawantrao Khalilapa Desai* (2), distinguished.

In ordinary parlance the word "plaint" is not used in the sense of an "application" nor is "application" in the sense of a "plaint", and when the two terms are employed in juxtaposition each conveys a different meaning from the other. But the word "application" in clause 5 is used neither in that restricted sense nor in antithesis to a "plaint" or any other legal document such as as a "memorandum of appeal", but only means "a document containing a request." *Matuk Chand Ratan Chand* v. *Bechar Natha* (3), *Lalman Das* v. *Jagan Nath Singh* (4), *Sheodial Sahu* v. *Bhawani* (5), *Sadashiv Bin Madho Bhole* v. *Narayan Vithal Mawal* (6), *Biru Mahata* v. *Shyama Charan Khawas* (7), *Venkatakrishnama Charlu* v. *Krishna Rao* (8), *Baldeo Singh* v. *Ram Sarup* (9), and *International Financial Society* v. *City of Moscow Gas Company* (10), referred to. *Raghunandan Pershad* v. *Bhugoo Lall* (11), dissented from.

The effect of a suit under order XXI, rule 63 of the Code of Civil Procedure is to keep the execution proceedings which have given rise to it pending till the decision of the suit. If the suit succeeds proceedings continue. If the suit fails the proceedings fail simultaneously. An order cancelling or maintaining an attachment becomes final only on the date of the disposal of the suit. Hence an order that the execution application be "filed" cannot be construed as a final decision of the application.

Mr. *Ali Mohammad*, for the appellant.

Mr. *Rauf Ahmad*, for the respondent.

HASAN, C. J. and PULLAN, J. :—This is the decree holder's appeal in proceedings arising out of an application for execution of a decree from the order of the Subordinate Judge of Sitapur, dated the 24th of January, 1930.

On the 23rd of April, 1920, the appellant and another person since deceased obtained a decree for money

(1) (1922) 26 O.C., 71.
(2) (1913) I.L.R., 37 Bom., 559.
(3) (1090) I.L.R., 25 Bom., 639.
(4) (1900) I.L.R., 22 All., 376.
(5) (1907) I.L.R., 29 All., 348.
(6) (1911) I.L.R., 35 Bom., 452.
(7) (1895) I.L.R., 22 Calc., 483.
(8) (1909) I.L.R., 32 Mad., 425.
(9) (1921) 19 A.L.J., 905.
(10) (1877) L.R., 7 Ch. D., 241.
(11) (1889) I.L.R., 17 Calc., 268.

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against the respondent from the court of the Subordinate Judge of Sitapur. Several attempts were made to realize the fruits of the decree but they have all failed though more than nine years have expired from the date of the decree. The first application for execution was made in February, 1921, and the sixth and the last was made on the 7th of December, 1929. The learned Subordinate Judge has dismisesd this application as barred by limitation. The question in appeal is as to whether the judgment of the learned Subordinate Judge is correct.

The necessary facts, out of which the point for decision arises, are as follows :—

Under his 5th application of the 13th of October, 1924, the decree-holder attached certain immoveable property for the purpose of its being sold in satisfaction of the decree. One Ahmad Mirza Beg objected on the ground that the attached property did not belong to the judgment-debtor but that he was the owner of it. The objection was upheld and the execution application was ordered to be "filed" on the 24th of August, 1926. The decree-holder was dissatisfied with the order and as permitted by law he filed a suit on the 31st of May, 1927, challenging the propriety of the order of the 24th of August, 1926 and to obtain a declaration that the property which he had attached was his judgment-debtor's property and was liable to be sold in execution of the decree. The suit failed on merits in the court of first instance and an appeal from the decree of that court was finally dismissed by the Chief Court of Oudh on the 30th of July, 1929.

The decree-holder's case is that the suit, which eventually failed, was a step in aid of execution and therefore his present application is in time. It is agreed that if that suit be treated as an application in accordance with law to take a step in aid of execution of a decree the present application is not barred by limitation. We have therefore to decide as to whether the suit can be so treated.

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One of us had occasion to consider this matter somewhat exhaustively in *Sheo Ram* v. *Ram Bharosey* (1), decided in the late Court of the Judicial Commissioner of Oudh and at the hearing of this appeal we have both come to the conclusion that the view then taken should be adhered to. Our judgment in this case therefore can be only a reiteration of what was said in the case just now mentioned.

The learned Counsel for the parties before us are agreed that an application for execution is governed by Article 182, clause 5, of the Indian Limitation Act. To elucidate the points of argument it is advisable to give an analysis of the terms of clause 5 of Article 182 :—

Application ... (*a*) in accordance with law
(*b*) to the proper Court,
(*c*) for execution of the decree, or
(*d*) to take a step in aid of execution of the decree.

The learned Advocate for the judgment-debtor contends that the suit of May, 1927, was lacking in the following particulars :—

(1) the plaint was not an application, and

(2) it was not in accordance with law.

In support of the first line of attack reliance was placed upon *Murgepa Mudiwallappa Kottanhalli* v. *Basawantrao Khalilapa Desai* (2) and *Raghunandan Pershad* v. *Bhugoo Lall* (3).

Murgepa Mudiwallappa Kottanhalli v. *Basawantrao Khaliapa Desai* (2). On the death of the original judgment-creditor his representative applied to obtain a succession certificate and in computing the period of

(1) (1922) 26 O.C., 71. (2) (1913) I.L.R., 37 Bom., 559.
(3) (1889) I.L.R., 17 Calc., 268.

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limitation for the application to execute the decree he claimed the deduction of the period occupied by him in getting the succession certificate. The court said :—

"It appears to us that an application to the court to obtain a succession certificate is a perfectly independent thing, and although the ultimate object of it may be to use the certificate when obtained in order to further execution of the decree, nonetheless we think it impossible to say that the application to get the certificate is an application to the proper court to take some step in aid. We think also that the occurence of the words "proper Court" also tends to support this conclusion. An application to obtain a succession certificate may be made in one of several courts. Obviously it could not be such an application as clause 5 contemplates unless it were made to the proper court which is defined as meaning the court whose duty it is to execute the decree. If, therefore, Mr. Ockhale's arguments were sound the question whether such an application would or would not save time, would depend upon the mere accident whether it was filed in the court whose duty it was to execute the decree, or in some other court. It appears to us that it could not have been the intention of the Legislature that such a question as this should be decided on a mere accident of that sort."

It will be seen that the learned Judges said that an application to obtain a succession certificate may be made in one of several courts and it would be a mere matter of accident if it happens to be made to the court whose duty it was to execute the decree. In the first

place, the report does not show in what court the application for the succession certificate was as a matter of fact filed; whether in the court whose duty it was to execute the decree or in a different court possessed of jurisdiction superior or inferior to or co-ordinate with the former court. Secondly, we are of opinion that it would not be consistent with sound principles of construction to treat an act done in a particular manner as an act that might have been done differently or otherwise. The question according to our judgment is not in what other courts the application might have been filed. The only question which arises for determination is: in what court was it actually filed? In the present case the suit of May, 1927, was admittedly instituted in the same court in which the decree under execution was passed, and that court under the conditions of the law of procedure had the primary duty to execute its own decree. Thirdly, the suit, as framed with reference to the value and the territorial situation of the property involved, could not be instituted in any court other than the court in which it was actually instituted. It was therefore not a mere accident that the second suit was filed in the same court in which the decree in the first suit was passed. Further an application for a succession certificate has no relation whatsoever to the execution of a decree which the applicant may be holding against a determinate individual who is no party to the application. But the suit of a nature brought by the decree-holder in the present case stands on an entirely different footing. The judgment-debtor was a party defendant to that suit, the relief asked for therein was not independent of the decree and the execution thereof: on the other hand, it expressly and directly involved the determination of the judgment-creditor's right to execute his decree as against certain specified property of his debtor. The case therefore does not support the argument that a plaint of a suit can in no circumstances be treated as an application for execution within the meaning of the Article. In

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this particular case we think that the plaint of the 31st of May, 1927, can be treated as an application within the meaning of clause 5 of Article 182 of the Indian Limitation Act.

In ordinary parlance the word "plaint" is not used in the sense of an "application" nor is "application" in the sense of a "plaint", and when the two terms are employed in juxtaposition, each conveys a different meaning from the other. But the word "application" in clause 5 is used neither in that restricted sense nor in antithesis to a "plaint" or any other legal document such as a "memorandum of appeal." According to our judgment the word " application " in clause 5 means "a document containing a request". The decision in *Matuk Chand Ratan Chand* v. *Bechar Natha* (1) suggests that the application may be an oral one. In the present case, however, we are not called upon to pronounce any opinion on that point.

Proceedings under section 47 of the Code of Civil Procedure (Act V of 1908), corresponding to section 244 of the repealed Code, are proceedings in execution and are initiated by an application and not by a suit Clause 2 of secton 47 was no part of section 244 of the old Code. But the rule of procedure adopted by all the High Courts in India was the same under section 244 as is now given a legislative sanction by clause (2) of section 47. In a proper case a plaint in a suit could be treated as an application under section 244 and what is of more importance is the fact that the Article of the Limitation Act made applicable to a plaint treated as such was not one which would govern a suit but the one which is provided by the Act for an application. See the cases of *Lalman Das* v. *Jagan Nath Singh* (2); *Sheodial Sahu* v. *Bhawani* (3); *Sadashiv Bin Madho Bhole* v. *Narayan Vithal Mawal* (4); *Biru*

(1) (1901) I.L.R., 25 Bom., 639.
(2) (1900) I.L.R. 22 All., 376.
(3) (1907) I.L.R., 29 All., 348.
(4) (1911) I.L.R., 35 Bom., 452.

Mahata v. *Shyama Charan Khawas* (1) and *Venkata Krishnama Chrlu* v. *Krishn Rao* (2).

In the case of *Baldeo Singh* v. *Ram Sarup* (3) an appeal was construed to be an application for the purpose of the Article under consideration.

In the case of *International Financial Society* v. *City of Moscow Gas Company* (4), the bill in the suit sought to impeach the validity of an indenture of mortgage. The bill was dismissed. The question which arose for decision related to the period of limitation for an appeal from the decree-dismissing the suit as provided for by order LVIII, rule 15, of the Rules of the Supreme Court. The decision turned upon the interpretation of the word "application" accruing in that rule THESIGER, L. J., said: "The words used in the rule, refusal of an application, are certainly not very happily chosen to express the dismissal of a bill. But at the same time it seems to me that they are wide enough to include it and that they are equally wide enough while they become appropriate to the refusal of relief claimed for in the statement of claim . . . " Referring to the bill in the suit JAMES, L. J. said: "In this case there was an application made to the court as every bill used to be drawn—praying that a certain deed might be set aside, or certain relief granted, and that application was refused." We are of opinion that the plaint of May, 1917, may be treated as an application for the purposes of clause 5 of Article 182 of the Indian Limitation Act.

Raghunandan Pershad v. *Bhugoo Lall* (5). This decision so far as it goes supports the argument of the learned Advocate but we think that the learned Judges omitted, if we may respectfully say so, to consider the effect of a declaratory suit brought under the provisions of order XXI, rule 63 of the Code of Civil Procedure. We are of opinion that the effect of such a suit

(1) (1895) I.L.R., 22 Calc., 483. (2) (1909) I.L.R., 32 Mad., 425.
(3) (1921) 19 A.L.J., 905. (4) (1877) L.R., 7 Ch. D., 241.
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is to keep the execution proceedings which have given rise to it pending till the decision of the suit. If the suit succeeds, proceedings continue. If the suit fails, the proceedings fail simultaneously. The order cancelling or maintaining an attachment is liable to be affected by the result of the suit. This is clear from the terms of rule 63 itself. If that is so it follows that an order cancelling or maintaining an attachment becomes final only on the date of the disposal of the suit. In this particular case what the court did was that it ordered the application to be "filed". This we are unable to construe as a final decision of the application.

As to the second line of defence, the learned Advocate for the judgment-debtor has argued that this particular plaint cannot be treated as an application in accordance with law because it was not made in the form prescribed for an application for execution by order XXI, rule 11, of the Code of Civil Procedure. We are of opinion that having regard to the contents of the plaint in question there is no substance in this argument. Every material particular which is required by sub-rule (2) of rule 11 to be stated in the written application was stated in the plaint. Only such of the particulars were omitted as had no foundation in facts.

We accordingly allow this appeal with costs, set aside the order of the learned Subordinate Judge, dated the 24th of January, 1930, and remand the case under order XLI, rule 23 of the Code of Civil Procedure with directions that it may be proceeded with and determined according to law.

Appeal allowed.