

APPELLATE CIVIL

Before Sir Syed Wazir Hasan, Knight, Chief Judge and
Mr. Justice E. M. Nanavutty

1933
November, 21

SURAIYA BEGAM, MUSAMMAT (OPPOSITE PARTY-APPELLANT)
v. TRILOKI NATH (APPLICANT-RESPONDENT)*

*Civil Procedure Code (Act V of 1908), Order XXI, rule 2(1)—
Limitation Act (IX of 1908), Article 182, clause (5)—Certifi-
cation by decree-holder of payment of money, whether a
step in aid of execution—Obtaining of certificate of search
or obtaining copy of settlement khewat or getting back
documents filed in previous execution of decree case, when
steps in aid of execution.*

Held, that mere certification under Order XXI, rule 2(1) of the Code of Civil Procedure by the decree-holder of a payment of money under the decree is not an application to take some step in aid of execution of a decree within the meaning of sub-clause (5) of Article 182, Limitation Act, nor is the obtaining of certificate of search or copy of settlement *khewat* or the getting back of certain documents filed in a previous execution of the decree case, unless there is oral evidence to connect these various acts of the decree-holder so as to make them appear to the Court executing the decree as being steps in aid of the execution of the decree. *Prakash Singh v. The Allahabad Bank, Limited* (1), and *Ram Bharose v. Ramman Lal* (2), followed.

Mr. *Radha Krishna*, for the appellant.

Mr. *B. K. Dhaon*, for the respondent.

HASAN, C.J. and NANAVUTTY, J.:—This is an execution of decree appeal against an order passed by the Additional Subordinate Judge of Lucknow, dated the 17th of August, 1932, reversing the order dated the 7th of November, 1931, passed by Mr. Munir-ud-din Ahmad Kirmani, Munsif, Haveli, Lucknow.

The facts which have given rise to this appeal are briefly as follows:

The decree sought to be executed was passed on the 15th of May, 1927. The first application for execution

*Execution of Decree Appeal No. 62 of 1932, against the order of Babu Gulab Chand Srimal, Additional Subordinate Judge of Lucknow, dated the 17th of August, 1932, reversing the order of Mr. Munir-ud-din Ahmad Kirmani, Munsif, Haveli, Lucknow, dated the 7th of November, 1931.

(1) (1929) I.L.R., 3 Luck., 684. (2) (1932) LL.R., 7 Luck., 560 (F.B.).

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of the decree was made on the 28th of January, 1928. It was consigned to the record-room on the 18th of April, 1928, on payment of Rs. 450 by the judgment-debtor towards part satisfaction of the decree. The present application for execution, out of which this appeal arises, was filed on the 28th of April, 1931, and it is conceded by the Counsel for the decree-holder that this application is not within time but for the certification of a payment of Rs.50, alleged to have been made by the judgment-debtor on the 14th of April, 1931. The learned Munsif held that the certification of payment of Rs.50 by the decree-holder on the 16th of April, 1931, gave a fresh start for limitation to run within the meaning of Article 182 of the Indian Limitation Act, and that, therefore, the present application for execution was within time. In appeal the learned Additional Subordinate Judge of Lucknow held, on the authority of the ruling of their Lordships of the Privy Council reported in *Prakash Singh v. The Allahabad Bank, Ltd.*, (1), that the certificate of the decree-holder under Order XXI, rule 2(1) of the Code of Civil Procedure was not an "application" within the meaning of Article 181 of the Indian Limitation Act and therefore could not possibly be said to be within the meaning of Article 182(5) of the said Act, and that there being really no application made in fact the question as to whether the decree-holder's certificate was a step in aid of execution did not arise. He also referred to the Full Bench ruling of this Court reported in *Ram. Bharose v. Ramman Lal* (2), in which it was laid down that mere certification under Order XXI, rule 2(1) of the Code of Civil Procedure by the decree-holder of a payment of money under the decree was not an application to take some step in aid of execution of a decree within the meaning of sub-clause (5) of Article 182 of the Indian Limitation Act (IX of 1908), and that to make clause (5) of Article 182 of the Indian Limitation Act (IX of 1908), as amended

(1) (1929) I.L.R., 3 Luck., 684.

(2) (1932) I.L.R., 7 Luck., 590.

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by Act IX of 1927, applicable the necessary conditions which must be satisfied were:

- (1) that the application must be in accordance with law,
- (2) that it must be made to the proper Court, and
- (3) that there must be a final order passed on the application.

It was further stated in the Full Bench ruling referred to above that it was not possible to lay down any rule of thumb which might constitute a criterion in all cases for determining whether a particular proceeding was or was not a step in aid of execution of a decree, and that the question would depend upon the circumstances of each case, and that the facts of a particular case showing that the proceedings in question had the effect of facilitating or advancing the execution to any extent or of removing some obstacle from the way of execution of a decree might well be regarded as a step in aid of execution of that decree, and that the mere recording of payment by the Court under Order XXI, rule 2(1) of the Code of Civil Procedure could not be regarded as a final order within the meaning of Article 182(5) of the Indian Limitation Act. It is therefore clear, in view of the Full Bench ruling of this Court, that the decision of the learned Munsif of Haveli, Lucknow, was incorrect and that the view taken by the learned Additional Subordinate Judge was right.

The learned Counsel for the appellant has asked us in paragraph 7 of his memorandum of appeal to reconsider the expression of opinion as regards the circumstances in which steps in aid of execution might save limitation recorded in the Full Bench decision referred to above. We see no reasons whatsoever for reconsidering the considered opinions expressed in that case.

The learned Counsel for the appellant has also asked us to take into consideration the following acts and proceedings on the part of the decree-holder which in his opinion save limitation. It is pointed out in the first

place that in February, 1931, the decree-holder obtained a certificate of search of certain documents from the office of the Sub-Registrar. The obtaining of this certificate of search cannot by any stretch of language be called a step in aid of execution. Similarly the fact that the decree-holder, Musammat Suraiya Begam, obtained a copy of the settlement *khewat* of the first regular settlement relating to village Pahiya-Azampur cannot be deemed to be a step in aid of execution of her decree. Again the fact that the decree-holder got back certain documents filed by her in the previous execution of decree case (No. 142 of 1928) can also not be looked upon as a step in aid of execution of her decree. There is no oral evidence on the record to connect these various acts of the decree-holder so as to make them appear to the Court executing the decree as being step in aid of execution of the decree.

The order of the learned Additional Subordinate Judge is very full and convincing and we need not repeat the arguments which have been fully set forth in his order under appeal. There is no force in this appeal and we accordingly dismiss it with costs.

Appeal dismissed.

APPELLATE CIVIL

Before Sir Syed Wazir Hasan, Knight, Chief Judge, Mr. Justice Muhammad Raza and Mr. Justice J. J. W. Allsop

MUSAMMAT MOOLA (PLAINTIFF-APPELLANT) *v.* BITHAL DAS AND ANOTHER, DEFENDANTS AND TWO OTHERS, PLAINTIFFS (RESPONDENTS)*

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Res judicata—Mortgage—Redemption suit—Issue whether certain trees were included in mortgaged property—Same issue raised again between the parties in a subsequent suit—Decision in the previous suit, whether operates as res judicata.

Per Full Bench (HASAN, G.J., dissenting).—On general grounds the title of the mortgagor to the mortgaged property cannot arise

*Second Civil Appeal No. 313 of 1932, against the decree of M. Humayun Mirza, Subordinate Judge of Malihabad at Lucknow, dated the 3rd of November, 1932, upholding the decree of M. Munir Uddin Ahmad Kerani, Munsif Haveli, Lucknow, dated the 1st of September, 1931.