certain purposes, suits for cesses should not be treated as suits for rent, and that a second appeal lies.

No doubt the Act declares that in sections 53 to 68, both inclusive, and in sections 72 to 75, both inclusive, "rent" includes cesses, but we think that these are enabling provisions passed to extend the meaning of "rent," and it in no way interferes with the law refusing a right of appeal in suits below one hundred rupees in value, which law is made applicable to suits for cesses by section 47 of Bengal Act IX of 1880.

The appeal will be dismissed with costs.

*Appeal dismissed.*

A. F. M. A. R.

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*Before Mr. Justice Macpherson and Mr. Justice Banerjee.*

1892 *August* 10.

ABDUL HOSSEIN (DECREE-HOLDER) *v.* FAZILUN (JUDGMENT-DEBTOR).*

*Limitation Act,* 1877, *sch. II, art.* 179, *cl.* 4—*Execution of decree—Step in aid of execution.*

In execution of a decree certain property was attached and the sale proclamation issued and served. Prior to the sale the decree-holder applied to the Court executing the decree to release a portion of the property from attachment, and stating that he had, at the request of the judgment-debtor, decided not to proceed with the sale asked that the sale might be postponed and the case struck off the file, the attachment, so far as the remainder of the property was concerned, being maintained. The application was acceded to and the case struck off the file. On a subsequent application to execute the decree, *held,* that the above application was not an application to take some step in aid of execution of the decree within the meaning of clause 4, art. 179 of sch. II of the Limitation Act of 1877, as it had rather the effect of temporarily retarding the execution, and that the application to continue the attachment under the circumstances of the case, even supposing it to have been a substantive application apart from the other prayers coupled with it, had merely the effect of leaving things precisely where they were, and did not advance the execution in any respect whatsoever.

* Appeal from Order No. 268 of 1891, against the order of J. G. Charles, Esq., District Judge of Shahabad, dated the 2nd of May 1891, affirming the order of Babu Dwarka Nath Mitter, Subordinate Judge of that district, dated the 28th of January 1891.

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THE facts of the case which gave rise to this appeal were as follows.

In a suit brought by one Jalaluddin against Cherag Ali, the plaintiff on the 31st August 1881 obtained a decree for Rs. 2,104. Cherag Ali died on the 19th October 1882, being succeeded by his wife Mussamut Amiran, daughter Mussamut Mustakimini, and nephew Noorodin. It appeared that one Lal Behari Lal held a money decree of the Munsiff's Court against Jalaluddin, and in execution thereof caused the decree in the suit of Jalaluddin against Cherag Ali to be attached and sold by the Munsiff. The sale took place on the 15th February 1888 and realized only Rs. 175, and Abdul Hossein (the appellant in this appeal) and one Dwarka Pershad became the purchasers, and by virtue of that purchase they sought in these proceedings to execute the decree so obtained by Jalaluddin.

The present application to execute that decree was made on the 27th February 1890, and in the first instance a notice was issued under section 232 of the Civil Procedure Code to the legal representatives of Cherag Ali. Certain objections to the application were filed by them, but were disallowed on the 14th June 1890, owing to their non-appearance in support of them. Notice was then issued under section 248, and the legal representatives came in and filed several objections, the only one material for the purpose of this report being that execution of the decree was barred by limitation.

It appeared that the last application for execution of the decree by Jalaluddin was filed on the 11th January 1887, and the sale proclamation was served on the 6th February 1887. On the 7th March following, Jalaluddin filed an application asking the Court to release a part of the property from attachment and to strike off the case, keeping in force the attachment upon the remaining property, and on the 8th March the Court struck off the case from the file, but directed the attachment to continue.

It was urged on behalf of the objectors before the Subordinate Judge that the application of the 7th March 1887 was an application to take some step in aid of execution of the decree within the meaning of cl. 4, art. 179 of sch. II of the Limitation Act, 1877,

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and they relied on the case of *Ghansham* v. *Mukha* (1) as supporting that contention. Upon that contention the Subordinate Judge observed as follows:—

"In that case the judgment-debtor presented an application, showing that an adjustment had been made between him and the decree-holder, that he had paid Rs. 10, and that he promised to pay the balance thereafter. The decree-holder filed a receipt certifying payment of the Rs. 10, and the case was struck off. The Allahabad High Court held that the application was a step in aid of execution of the decree as provided by art. 179, sch. II of Act XV of 1877. The application no doubt furthers the execution to the extent of Rs. 10. In the present case the property had already been attached, sale proclamation was served, and the property was to be sold on the appointed date, when the decree-holder represented to the Court that he wanted to release from attachment a portion of the property. And as regards the rest of the property, at the verbal request of the judgment-debtors, he had decided not to proceed with the sale, and so he asked the Court to release a part of the property, postpone the sale that was to come on, and strike off the case, keeping the attachment over the rest of the property in force. I think this application, far from being a step in aid of execution, was a step just the other way, and there is no analogy between the two cases. Here not a pice was paid by the judgment-debtors. The application asking the Court to strike off the case was a step to postpone or delay execution, and the prayer to keep the attachment in force was not a step in aid of execution, for the attachment had been already made, and asking the Court to keep the attachment in force did not further execution. I therefore hold that the decree-holder cannot have a fresh start of three years from the 7th March 1887, when Jalaluddin made his last application. The case of *Nukanna* v. *Ramasami* (2) has been cited, but that turned upon the language used in cl. 4, art. 167 of the Limitation Act of 1871, whereas the language of cl. 4 of art. 179 of the present Act of 1879 is something different."

(1) I. L. R., 3 All., 320.
(2) I. L. R., 2 Mad., 218.

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The Subordinate Judge then went on to consider as to whether certain proceedings taken by the present appellants prevented the application from being barred, but as these formed no portion of the grounds relied on in the High Court, it is immaterial to notice them or the other points raised in the Court of first instance. Deciding the question of limitation in favour of the judgment-debtors, the Subordinate Judge dismissed the application.

The decree-holder appealed to the District Judge, whose judgment upon the question of limitation was as follows:—

"The point of limitation depends upon the legal effect of the application of the original decree-holder Jalaluddin, which was filed on the 7th March 1887. In this application the decree-holder prayed the Court to release a portion of the property attached, and to strike off the case from the file, keeping in force the attachment upon the remaining property. On the authority of the rulings in *Jamnadas* v. *Lalitaram* (1), *Nukanna* v. *Ramasami* (2), *Ghansham* v. *Mukha* (3), and *Chowdhry Paroosh Ram Das* v. *Kali Puddo Banerjee* (4), it has been strenuously contended that the mere application to continue the attachment is a step in aid of execution within the meaning of cl. 4, art. 179 of sch. II of the Limitation Act, 1877, and hence the present application for execution is not barred by limitation. Dr. Stokes in his Anglo-Indian Codes, vol. II, pp. 951 and 1002, doubts the correctness of the Allahabad ruling cited above, and the opinion expressed by the Subordinate Judge also receives support from *Mainath Kuari* v. *Debi Bakhsh Rai* (5) and *Fakir Muhammad* v. *Ghulam Husain* (6). As the rulings on this point do not seem to be uniform, I decline to interfere with the finding of the Subordinate Judge with regard to it, and I accordingly reject the first ground of appeal."

The District Judge having decided the other points raised in favour of the respondents, dismissed the appeal.

Against that decree Abdul Hossein, one of the decree-holders, now preferred this second appeal to the High Court.

(1) I. L. R., 2 Bom., 294.
(2) I. L. R., 2 Mad., 218.
(3) I. L. R., 3 All., 320.
(4) I. L. R., 17 Calc., 53.
(5) I. L. R., 3 All., 757.
(6) I. L. R., 1 All., 580.

Baboo *Mohini Mohan Roy* and Baboo *Romesh Chunder Bose* for the appellant.

Baboo *Hem Chunder Banerjee* and Baboo *Degumber Chatterjee* for the respondent.

The present respondent, Mussamut Fazilun, was the widow of Shaikh Nooruddin, one of the persons originally joined as representative of Cherag Ali.

Baboo *Mohini Mohan Roy* contended that the application of the 7th March 1887 was a step in aid of execution, and cited and relied on *Nukanna* v. *Ramasami* (1), *Ghansham* v. *Mukha* (2), *Sitla Din* v. *Sheo Prasad* (3), *Jamnadas* v. *Lalitaram* (4), and *Umiashankar Lakhmiram* v. *Chhotalal Vajeram* (5).

Baboo *Hem Chunder Banerjee* for the respondent pointed out that *Nukanna* v. *Ramasami* (6) was a decision on the wording of the Limitation Act of 1871, which materially differs from that of the Act of 1887, and cited *Mainath Kuari* v. *Debi Bakhsh Rai* (7), *Rajah Muhesh Narain Sing* v. *Kishanund Misr* (8), and *Dharanamma* v. *Subba* (9).

Baboo *Mohini Mohan Roy* in reply referred to *Fazal Imam* v. *Metta Singh* (10).

The judgment of the High Court (MACPHERSON and BANERJEE, JJ.) was as follows:—

The only question in this appeal is whether the appellant's application of the 7th March 1887 had the effect of keeping the decree alive. Both Courts have held that it had not, and, we think, rightly. The application in question was put in on the day on which some of the properties were to be sold under the proclamation issued. By it the appellant asked the Subordinate Judge to remove the attachment from a portion of the property which was to be sold, to continue the attachment on the remaining portion, and to strike the case off the file. We cannot regard this as an application to take a step in aid of the execution of the decree.

(1) I. L. R., 2 Mad., 218.
(2) I. L. R., 3 All., 320.
(3) I. L. R., 4 All., 60.
(4) I. L. R., 2 Bom., 294.
(5) I. L. R., 1 Bom., 19.
(6) I. L. R., 2 Mad., 218.
(7) I. L. R., 3 All., 757.
(8) 9 Moo. I. A., 324.
(9) I. L. R., 7 Mad., 306.
(10) I. L. R., 10 Calc., 549.

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It was rather an application which had the effect temporarily at all events of retarding the execution. Without going so far as to say that no case could occur in which an application which had that effect might not still be in furtherance of execution at some future period, we may say that this was not the case here. There is nothing in the nature of the application to show that it would have that effect, or that it was in any way either immediately or in the future in aid of the execution of the decree. No decision of this Court which has any bearing on the present case has been cited to us. The case of *Nukanna* v. *Ramasami* (1) at first sight seemed to be applicable. There an application to stay the sale and continue the attachment was held to be a step which would keep the decree in force. That decision was, however, under the old Limitation Act, the language of which is different from that of the present Act. Some cases have also been cited from the Allahabad series, but they do not appear to us to affect the present question. The mere continuance of the attachment in the present case, even supposing that to be a substantive application apart from the other prayers contained in it, had merely the effect of leaving things precisely as they were, and not advancing the execution in any respect whatsoever.

There is a further question whether the execution of the decree is not also barred by a compromise between the parties. In the view which we take on the question of limitation it is unnecessary to consider this. The appeal is dismissed with costs.

H. T. H. *Appeal dismissed.*

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*Before Mr. Justice Macpherson and Mr. Justice Banerjee.*

1892 *August* 24.

KRISHNA ROY (PLAINTIFF) *v.* JAWAHIR SINGH AND OTHERS (DEFENDANTS).*

*Civil Procedure Code (Act XIV of 1882), s. 244—Question in execution of decree—Parties to suit—Alteration of decree by Court executing decree.*

The plaintiff purchased a one-gunda share in estate No. 831 and obtained a decree for possession against the defendants. While the plaintiff's

* Appeal from Appellate Decree No. 1731 of 1890, against the decree of Baboo Poresh Nath Banerjee, Subordinate Judge of Bhaugulpore, dated the 9th of September 1890, reversing the decree of Baboo Shoshi Bhusun Chowdhry, Munsiff of Begusarai, dated the 10th of August 1889.

(1) I. L. R., 2 Mad., 218.