

APPELLATE CIVIL

1939
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Before Mr. Justice Ziaul Hasan and Mr. Justice R. L. Yorke

RAGHUNATH SINGH AND ANOTHER (JUDGMENT-DEBTORS-
OBJECTORS APPELLANTS) v. SUBEDAR SINGH

(DECREE-HOLDER RESPONDENT)*

Limitation Act (IX of 1908), Article 182(5)—Step-in-aid of Execution—Compromise decree for partition—Applications for preparation of final decree dismissed as unnecessary—Execution of decree application filed—Application for final decree, whether step-in-aid of execution.

Where a decree was passed on compromise and the decree-holder first applied for preparation of a final decree several times and it being finally held that a final decree was not necessary in such a case he put in an application for execution of the decree, *held*, that the previous applications for final decree were steps-in-aid of execution for the decree-holder was asking the Court to make an order which was thought necessary before taking out actual execution of the decree and as the ultimate object of those petitions was to hasten the actual realization of the decree amount. *Ram Bharose v. Ramman Lal* (1) and *Kunhammad Hajee v. Chathoth Parkum Kozhuvammal* (2), relied on. *Achutan Nair v. Manavikraman* (3), *Gopal Das v. Mulchand* (4), *Sheo Prasad v. Mst. Narain Bibi* (5), *Maqbul Ahmad v. Pateshri Pratab Narain Singh* (6), and *Ratan Chand Bhal Chand v. Chandulal J. Doshi* (7), referred to.

Mr. K. N. Tandon, for the appellants.

None for the respondent.

ZIAUL HASAN and YORKE, JJ.:—This is an appeal against an order of the learned Additional Civil Judge of Hardoi dismissing the appellants' objection to execution of a decree.

The appeal was originally filed against two respondents Chet Singh and Subedar Singh. Of these Chet Singh died but no application under Order 22, rule 4 C. P. C., was made for substitution of names within the prescribed period. On the 9th November, 1937, an

*Execution of Decree Appeal No. 48 of 1936, against the order of Thakur Surendra Vikram Singh, Additional Civil Judge of Hardoi, dated the 3rd October, 1936.

(1) (1932) I.L.R., 7 Luck., 590.

(2) (1928) A.I.R., Mad., 38.

(3) (1928) I.L.R., 51 Mad., 347.

(4) (1926) A.I.R., Lah., 507.

(5) (1926) A.I.R., All., 95.

(6) (1929) A.I.R., All., 577.

(7) (1934) A.I.R., Bom., 113.

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order was passed by the Hon'ble Chief Judge declaring that the appeal had abated as regards Chet Singh and leaving the question whether the entire appeal had abated or not to be decided at the hearing of the appeal. In view of the fact that Subedar Singh son of the deceased was already a respondent in the appeal, we do not think that the appeal can be said to have abated altogether or in fact at all [*vide Achutan Nair v. Manavikraman* (1) and *Gopal Das v. Mulchand*, (2)].

The facts are that in February, 1930 the predecessor-in-interest of the respondents brought a suit for partition of joint family property against the predecessor-in-interest of the appellants. On the 25th July, 1930, the parties to the suit entered into a compromise by which it was provided that a decree would be passed in favour of the plaintiff for partition of landed property and some houses and for mesne profits the amount of which would be determined through a commissioner at the time of passing of the final decree. The plaintiff put in an application on the 25th October, 1930, for the passing of the final decree but this application was dismissed for default on the 24th January, 1931. On the 27th July, 1932, he again put in an application for getting the decree made absolute. To this application the judgment-debtors objected and the Court on the 24th November, 1932, passed the following order:

"The application for final decree is dismissed as the decree having been passed under Order 23 rule 3, C. P. C., is itself final. It can now be executed in execution department. The applicant to bear his costs."

Thereafter the present application which has given rise to the present appeal was filed on the 20th November, 1935, for execution of the decree. The judgment-debtors objected on the ground that it was barred by time. The learned Judge of the Court below has

(1) (1928) I.L.R., 51 Mad., 347.

(2) (1926) A.I.R., Lah. 407.

however held that limitation has been saved by the previous applications made by the decree-holders.

The question therefore is whether or not the applications of the 25th October, 1930, and 27th July, 1932, can be said to have been steps-in-aid of execution of the decree. The learned counsel for the appellants has relied on the cases of *Sheo Prasad v. Mst. Naraini Bibi* (1), *Maqbul Ahmad v. Pateshri Pratab Narain Singh* (2), *Ratan Chand Bhal Chand v. Chandulal J. Doshi* (3) and *Ram Bharose v. Ramman Lal* (4) but the question what is a step-in-aid of execution did not arise in any of those cases in the manner and circumstances in which it arises in the case before us, so that what was held in those cases cannot strictly be applied to the facts of the present case. On the other hand the case of *Kunhammad Hajee v. Chathoth Parkum Kozhuvammal* (5) relied on by the learned Civil Judge is on all fours with the present case. There too the decree was passed on a compromise and the decree-holder first applied for preparation of a final decree several times and then put in an application for execution of the decree. It was held that the previous applications were steps-in-aid of execution for the decree-holder was asking the Court to make an order which was thought necessary before taking out actual execution of the decree and as the ultimate object of those petitions was to hasten the actual realization of the decree amount. In the case of *Ram Bharose v. Ramman Lal* (4) also relied on by the learned counsel for the appellant it was said—

“If the facts of a particular case show that the proceeding in question has the effect of facilitating or advancing the execution to any extent or removing some obstacle from the way of execution, it may well be regarded as a step-in-aid of execution.”

We think therefore that the learned Judge of the court below was right in dismissing the appellants' objection.

(1) (1926) A.I.R., All., 95.

(2) (1929) A.I.R., All., 577.

(3) (1934) A. I. R., Bom., 113.

(4) (1932) I.L.R., 7 Luck., 590.

(5) (1928) A.I.R., Mad., 38.

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We may observe that equity is also on the side of the decree-holder respondent. As the compromise itself contemplated that a final decree would have to be prepared, the decree-holders were not unjustified in applying for preparation of the final decree in the first instance. Moreover, the judgment-debtors who objected to the application for preparation of the final decree should not in our opinion be allowed now to turn round and object to the application for execution on the ground of limitation.

We therefore dismiss the appeal with *ex parte* costs as the respondent has not appeared before us.

Appeal dismissed.

REVISIONAL CIVIL

*Before Mr. Justice G. H. Thomas, Chief Judge and
 Mr. Justice R. L. Yorke*

ZAMAN KHAN (PLAINTIFF APPLICANT) v. GANGA
 AND ANOTHER (DEFENDANTS OPPOSITE-PARTIES)*

Limitation Act (IX of 1908), section 20—Payment by debtor—Endorsement of payment on bond not specifying whether it was towards principal or interest—Oral evidence to prove that payment was towards interest, admissibility of.

Where the endorsement of payment on the back of a bond does not specify whether the payment is towards principal or interest, then oral evidence to prove that the payment was towards interest is inadmissible under sections 91 and 92 of the Evidence Act. *Pearey Lal v. Muhammad Yusuf* (1), and *Hem Chandra Biswas v. Purnu Chandra Mukherji* (2), distinguished. *Udeypal Singh v. Lakshmi Chand* (3), referred to.

Mr. K. N. Tandon, for the applicant.

Mr. B. K. Dhaon, for the opposite-party.

THOMAS, C.J., and YORKE, J.:—This is an application in revision against the judgment and decree of the

*Section 25 Application No. 123 of 1936, for revision of order of Mr. G. M. Frank Agarwal, Munsif (as Judge of Small Cause Court), Bahraich, dated the 27th October, 1936.

(1) (1937) A.I.R., All., 640.

(2) (1927) I.L.R., 44 Cal., 567.

(3) (1935) All., L.J., 1029.

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