

which has been urged has no force. I am unable to accept this contention. In the first place, although this plaintiff is now on the record, he is only on the record as representing the respondent who has died; he is not on the record in his own capacity, and, secondly, he has been brought on the record long after the period of limitation for filing this appeal had expired. Next we have been asked to extend the period of limitation under section 5 of the Limitation Act, but in the first place no application for extension of the period of limitation has been filed although the learned Counsel for the appellants was warned some considerable time ago that if he wishes to ask for an extension of the period of limitation an application should be filed, and, in the second place, there are no grounds for extending the period in this particular case.

In these circumstances it is unnecessary to go into the merits of this case and I would dismiss this appeal with costs.

DAS, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Coutts and Das, J.J.

KAMAL NAIN SINGH

v.

MAHARAJA BAHADUR KESHO PRASAD SINGH.*

Execution of Decree—first application not in accordance with law—subsequent application, whether is in continuation of first application—Limitation Act, 1908 (Act IX of 1908),

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June, 13.

* Appeal from Appellate Order No. 245 of 1921, from an order of H. W. Williams, Esq., District Judge of Shahabad, dated the 23rd September, 1921, confirming an order of Maulavi Salyid Ghalib Hasnain, Subordinate Judge of Arrah, dated the 23rd June, 1921.

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Articles 181 and 182—*Step-in-aid of execution, application for delivery of possession, whether is—Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rule 90.*

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Where a decree-holder applied for execution of his decree against the three sons of the judgment-debtor, the latter having died, and described two of the sons as majors and the other as a minor under the guardianship of the eldest, and the execution sale was held but was subsequently set aside on the ground that only one of the sons had obtained majority and that the third was not properly represented by the eldest, *held*, that the application was void *ab initio*, and, therefore, a subsequent application against all the judgment-debtors for execution could not be considered to be an application made in continuation of the first application.

An application for delivery of possession made by the auction-purchaser is not a step-in-aid of execution whether the auction-purchaser be the decree-holder or a stranger.

Sariatoolla Molla v. Rajkumar Ray(¹), *Moti Lal v. Makund Singh*(²) and *Babu Ram v. Pearey Lal*(³), not followed.

Haji Abdul Gani v. Raja Ram(⁴), applied.

Bhagwati v. Banwari Lal(⁵), followed.

Appeal by the judgment-debtor.

The facts of the case material to this report are stated in the judgment of Courts, J.

Saroshi Charan Mitter and *N. C. Roy*, for the appellants.

Nirsu Narayan Singh, for the respondents.

COURTS, J.—This appeal arises out of an application for execution. Maharaja Bahadur Kesho Prasad Singh obtained a rent decree against one Ram Khelawan Singh on 29th October, 1914. After the decree had been obtained Ram Khelawan died and on 7th April, 1916, the decree-holder took out execution

(1) (1900) I. L. R. 27 Cal. 709.

(3) (1919) 50 Ind. Cas. 143.

(2) (1897) I. L. R. 19 All. 477.

(4) (1916) 1 Pat. L. J. 232, F.B.

(5) (1909) I. L. R. 31 All. 82, F.B.

against his three sons Dwarika Singh, Kamal Nain Singh and Murli Singh. In the execution petition Kamal Nain Singh was described as a major and Murli Singh as a minor under the guardianship of his eldest brother Dwarika Singh. The properties of the three brothers were sold on 31st October 1916 and purchased by the decree-holder, and on 5th December 1916 the sale was confirmed. On 7th September 1918 an application to set aside the sale was made by the three brothers on the ground that Kamal Nain Singh was a minor at the date of the sale and that Murli Singh was not properly represented by his brother Dwarika Singh. The application was successful and on 4th February, 1920, the sale was set aside. On 9th October, 1920, the decree-holder filed the application for execution with which we are now concerned. The execution was against Kamal Nain Singh, who was by this time admittedly major, Dwarika Singh, and Murli Singh, minor represented by Dwarika Singh. Kamal Nain filed an objection on the ground that the application for execution was barred by limitation inasmuch as the first application made on the 7th April, 1916, was not an application in accordance with law. The executing court overruled the objection finding that the application made on 9th October, 1920, was an application in continuation of the first application of 7th April, 1916, that Article 181 of the Limitation Act applied and limitation accordingly ran from the date on which the sale was set aside, namely, the 4th February, 1920. Against this decision the decree-holder appealed to the District Judge who has held that the application with which we are now concerned is an application in continuation of the previous application. He has, however, found that Article 181 of the Limitation Act does not apply but that although Article 182 applies limitation runs from the date on which the decree-holder applied for delivery of possession as this was the last step taken in aid of execution and as this application was made on the 5th February, 1918, the present application is not barred. The judgment-debtor has again appealed to this Court.

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It is admitted by the learned Vakil for the appellant that if the present application is an application in continuation of the first application for execution limitation will run from the date of setting aside the sale and consequently the present application is within time. But he contends, first, that the present application cannot be treated as an application in continuation of the first application; and, secondly, that if this is so, the present application is barred because an application for delivery of possession is not a step in aid of execution and that limitation must run at latest from the date of the confirmation of the sale, namely, the 5th December, 1916.

With regard to the first point, in my opinion the present application for execution cannot be treated as an application made in continuation of the first application. It has been held that where a previous application for execution has been dismissed because of a successful application made under Order XXI, rule 90, a subsequent application for execution is an application in continuation of the previous application; but I can find no case in which, where an application has been made against one of several judgment-debtors and has been dismissed for this reason, a subsequent application made against the whole of the judgment-debtors has been treated as an application in continuation of the previous application. It seems to me that in the present case the first application for execution was *ab initio* a bad application and consequently the subsequent application cannot be an application made in continuation.

I now come to the second point, and the question here is whether an application for possession after confirmation of sale made by a decree-holder auction-purchaser is a step-in-aid of execution. There is much divergence of opinion in the different High Courts on this point. In Calcutta in the cases in which the question directly arose it has been decided that such an application is a step-in-aid. I may refer to the

case of *Sariatoola Molla v. Raj Kumar Roy* (1). In the Allahabad High Court the question has been directly considered in three cases *Moti Lal v. Makund Singh* (2), *Bhagwati v. Banwari Lal* (3), and the latest decision is in the case of *Babu Ram v. Pearey Lal* (4). In the case of *Moti Lal v. Makund Singh* (2) it was held that such an application was a step-in-aid. In the case of *Bhagwati v. Banwari Lal* (3) which is a Full Bench decision three Judges held that it was not a step-in-aid and two Judges that it was. But in the case of *Babu Ram v. Pearey Lal* (4) it has been held by a Division Bench of the Allahabad High Court that the question was not definitely before the Full Bench in the case of *Bhagwati v. Banwari Lal* (3) and they have confirmed the decision arrived at in the case of *Moti Lal v. Makund Singh* (2). In Bombay and Madras the decisions appear to be that such an application is a step-in-aid. So far as this court is concerned the point has never definitely been decided but the principle was considered in the case of *Haji Abdul Gani v. Raja Ram* (5), a Full Bench decision of this court, and if we accept the principle of that decision, there can be no doubt that such an application is not a step-in-aid of execution. The question in that case was whether an appeal lay from an order under Order XXI, rule 95, when the decree-holder was the auction-purchaser, and, in that case, following the majority of decisions in the Calcutta High Court, this court has held that an appeal does not lie. The reason for this is that the question is either one not relating to the execution, discharge or satisfaction of the decree or because it is not a question arising between the judgment-debtor and the decree-holder as such but between the judgment-debtor and the auction-purchaser as such. If we apply this principle to the question of whether an application made by a decree-holder auction-purchaser for delivery of possession is a step-

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(3) (1909) I. L. R. 31 All. 82, F.B.

(2) (1897) I. L. R. 19 All. 477.

(4) (1919) 50 Ind. Cas. 143.

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in-aid of execution the answer must in my opinion certainly be in the negative and this is exactly what we would expect from the wording of the section itself. Order XXI, rule 95, applies to an application made by the purchaser and an application made by the purchaser cannot in my opinion possibly be read as an application by a decree-holder to take some step-in-aid of execution, whether the purchaser be the decree-holder or an outsider. As soon as the sale is confirmed the property vests in the purchaser and any further step which it may be necessary for him to take in order to secure possession is not a step taken by a decree-holder even if he happens to be the auction-purchaser but is an application by the auction-purchaser as such and has consequently nothing to do with the execution of the decree. I have not specifically referred to the cases in the Calcutta High Court because they have all been referred to in the Full Bench decision of this Court in the case of *Haji Abdul Gani v. Raja Ram* (1).

For the reasons I have given I would set aside the order of the learned District Judge and that of the Subordinate Judge and would decree this appeal with costs.

DAS, J.—I agree.

Appeal decreed.

APPELLATE CIVIL.

Before Courts and Das, J.J.

1922.

MUSSAMMAT SURAJ JOTE KUER

v.

MUSSAMMAT ATTA KUMARI.*

June, 16.

Hindu Law—widow, remarriage of, to non-Hindu, effect of—whether right to estate inherited from the deceased husband

* Appeal from Appellate Decree No. 153 of 1921, from a decision of Ashutosh Chattarji, Esq., District Judge of Darbhanga, dated the 1st September, 1920, affirming a decision of Babu Narendra Nath Banarji, Munsif of Darbhanga, dated the 8th April, 1920.

(1) (1916) 1 Pat. L. J. 232, F.B.