APPELLATE CIVIL.

Before Dawson Miller, C. J. and Kulwant Sahay, J.

BHAGWAT PRASHAD SINGH 1923.

v. June, 12,

DWARKA PRASHAD SINGH.*

Limitation Act, 1908 (*Act IX of* 1908), *Schedule I, Article* 182(5)—"*in accordance with law*"—*application for execution of decree—Court-fee on additional interest not paid —copy of record-of-rights not filed and application not verified by all the decree-holders, validity of—Code of Civil Procedure*, 1908 (*Act V of* 1908), *Order XXI, rules* 11 *to* 14, 17.

Where an application for execution is returned under Order XXI, rule 17, Code of Civil Procedure, 1908, on the ground that the requirements of rules 11 to 14 have not been complied with, and is not amended within the time fixed, it cannot be regarded as having been presented in accordance with law, but where the application conforms with the prescribed requirements and is returned for some other reason it cannot be deemed not to have been presented in accordance with law within the meaning of Article 182(5) of the Limitation Act, 1908.

Gopal Shah v. *Janki Koer*(1), not followed.

Mathura Prasad v. *Mussammat Anurajo Koer*(2), referred to.

Appeal by the judgment-debtor.

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

Siveshwar Dayal, for the appellant.

Saroshi Charan Mitter, for the respondents.

DAWSON MILLER, C.J.—The question for determination in this appeal is whether an application for execution of a decree, filed on the 9th April, 1922,

* Appeal from Appellate Order No. 19 of 1923, from an order of J. A. Sweeney, Esq., District Judge of Gaya, dated the 17th May, 1922, confirming an order of Babu Raj Narayan Additional Subordinate Judge of Gaya, dated the 17th May, 1922.

(1) (1896) I. L. R. 23 Cal. 217. (2) (1909-10) 14 Cal. W. N. 481.

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is barred by limitation. The judgment-debtor, who is the appellant before us, contended before the Additional Subordinate Judge that the decree was time barred on the ground that more than three years had passed since the last application for execution. The question depended upon whether a previous application for execution, presented on the 24th April, 1919, was duly made in accordance with law within the meaning of Article 182 (*a*) of the First Schedule of the Indian Limitation Act. It is admitted that if the application of the 24th April, 1919, was duly made in accordance with law the present application is not time barred.

The learned Subordinate Judge found that the previous application was duly made in accordance with law and dismissed the judgment-debtor's objection. His decision was affirmed on appeal to the District Judge. From that decision the judgment-debtor has preferred the present appeal to this Court.

The validity of the application of the 24th April, 1919, is challenged on three grounds: (*1*) that a copy of the record-of-rights was not filed together with the application, (*2*) that no court-fee was paid for the additional amount of interest claimed between the date of the plaint and the date of the application, and (*3*) that the application was not verified by all the decree-holders. When the previous petition for execution was presented it was endorsed by the *Sheristadar* of the Court with a note that no court-fee on the increased amount of interest was filed and that a copy of the record-of-rights was not filed but that a written translation of the verification, which was in the *mahajini* character, had been supplied. On the same day, the 24th April, 1919, the Subordinate Judge passed the following order:

"Return the execution petition for needful and to be refiled in 10 days from this date."

That order apparently meant that the decree-holders were to pay the additional court-fee and supply

a copy of the record-of-rights within ten days. The order was not complied with but the present petition was presented within three years. In my opinion it was not necessary that the previous application should be returned for the purposes mentioned. Order XXI, rules 11 to 14, of the Civil Procedure Code, give the particulars which the law requires to be stated in an application for execution. If the application conforms with those rules and is presented upon a properly stamped paper I think it must be taken to have been properly presented in accordance with law. Rule 17 of the same Order prescribes the course which the Court shall take when the application does not conform with the requirements of rules 11 to 14 and provides that the Court shall ascertain whether such of the requirements of those rules, as are applicable to the case, have been complied with. If they have not been complied with the Court is empowered either to reject the application or to allow the defect to be remedied within a time to be fixed by it. It further provides that where an application is amended under the provisions mentioned it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented. It may perhaps be inferred from this that where the application is returned on the ground that the requirements of the rules have not been complied with and is not amended within the time fixed it cannot be regarded as having been presented in accordance with law. It is nowhere stated, however, that where the application conforms with the prescribed requirements and is returned for some other reason it shall not be deemed to have been presented in accordance with law. On referring to rules 11 to 14 no provision is found for the payment of any court-fee on the amount claimed in excess of that covered by the court-fee paid together with the plaint, or for supplying a copy of the record-of-rights, and assuming these were matters which the Court might require to be done, the failure to do them cannot, in my opinion, affect the validity of

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the application as such. It was contended, however, that the failure to supply the additional court-fee was a fatal defect in the application. The application was presented with an 8-annas stamp which is admittedly in accordance with the requirements of Schedule II of the Court-Fees Act, then in force, for applications of this nature. The authorities are not uniform on the question whether additional court-fee is payable on interest which has accrued on the decretal amount since the date of the suit and for which no court-fee has been paid with the plaint. But assuming, without deciding, that it was within the competency of the Court to require payment of the additional court-fee before it would order execution to proceed in respect of the additional amount claimed, such a fee was in no sense a court-fee payable on an application for execution. It was, if payable at all, a court-fee payable on the plaint in respect of a part of the subject-matter in dispute which could not be estimated at the time when the plaint was presented, and which it is not usual to expect at that time. The failure to pay this fee would, at the most, entitle the Court to hold its hand and refuse to allow execution to proceed or to dismiss the application if the fee should not be paid within the time ordered, but its non-payment cannot invalidate an application for execution properly stamped in accordance with the requirements of the Court-Fees Act and containing the particulars required by the provisions of Order XXI, rules 11 to 14. But it was further contended that once the application was returned for amendment it could not be regarded as an application in accordance with law within the meaning of Article 182 of the Limitation Act unless the amendment was made within the time ordered and the application again presented. In support of this argument the case of *Gopal Sah* v. *Janki Koer* (1) was relied on, but in that case the original application did not contain all the particulars required by

(1) (1896) I. L. R. 23 Cal. 217.

section 235 of the Code of 1882 (now Order XXI, rule 11) and it was returned for amendment within a specified time. The order requiring amendment was not complied with and it cannot be said that the application was ever properly presented in accordance with law. In the present case the application was not returned on account of any defect in supplying proper particulars. In the case relied on it is true a broad proposition was laid down that once the application is returned for amendment of any kind, even though the defects had not vitiated the application, it could not be regarded subsequently as made in accordance with law unless the defects had been cured within the time allowed. It was not necessary, on the facts of that case, to lay down any such broad proposition, and the judgment in that respect was criticized and not followed in the later case of *Mathura Prasad* v. *Mussammat Anurajo Koer*(1) decided by the same High Court in 1910. In my opinion the broad proposition there stated cannot be supported upon a proper interpretation of the rules of Order XXI or upon general principles and should not be followed.

The only other question which was raised was that the application was not verified by all the decree-holders. The application was signed by all the decree-holders and was verified by all except one. Order XXI, rule 11 (2) provides that save as otherwise provided by sub-rule (1) every application for the execution of a decree shall be in writing signed and verified by the applicant or by some other person proved, to the satisfaction of the Court, to be acquainted with the facts of the case. The verification in the present case was clearly signed by persons acquainted with the facts of the case and as they were themselves the decree-holders it may be presumed that the Court was satisfied that they were acquainted with the facts of the case. It does not appear to me that the application need be verified by all the applicants. It may well be that

(1) (1909-10) 14 Cal. W. N. 481.

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where there are a number of decree-holders some of them are not acquainted with the facts of the case, and all the law requires is that the application should be verified by some person proved, to the satisfaction of the Court, to be acquainted with the facts of the case. I think it would be straining the language of the rule too far to say that where there are more applicants than one the verification should be signed even by those who are not acquainted with the facts of the case or that where one or more are acquainted with the facts of the case their verification is not sufficient. In my opinion this appeal fails and should be dismissed with costs.

KULWANT SAHAY, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Dawson Miller, C. J. and Kulwant Sahay, J.

1923.

June, 18.

CHAND RAY

v.

BHAGWATI CHARAN GOSWAMI.*

Record-of-rights—Presumption as to correctness of, rebuttal of—Evidence of rebuttal, whether proceedings which led up to the final record are admissible—draft record-of-rights, admissibility of—Chota Nagpur Tenancy Act, 1908 (*Ben. Act VI of* 1908), *section* 83—*Bengal Tenancy Act*, 1885 (*Act VIII of* 1885), *section* 103B.

For the purpose of rebutting the presumption arising from an entry in a finally published record-of-rights the proceedings which led up to the finally-published record are admissible in evidence.

Where an entry in the record-of-rights is challenged the Court is entitled to take into consideration what took place

* Second Appeal No. 7979 of 1921, from a decision of H. Foster, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 16th March, 1921, modifying a decision of Babu Pramatha Nath Bhattacharji, Additional Subordinate Judge of Hazaribagh, dated the 8th December, 1919.