

Before Mr. Justice Banerjee and Mr. Justice Gordon.

RUDRA NARAIN GURIA (DECREE-HOLDER) *v.* PACHU MAITY
(JUDGMENT-DEBTOR.) *

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January 2.

*Limitation Act (XV of 1877), Article 179, clause 4—Execution of decree—
Step in aid of execution—Suit to set aside an order in a claim case—
Continuation of previous application.*

Upon an application for execution, dated 13th March 1891, the judgment-debtor's property having been attached, a claim was preferred by a third party and allowed. The decree-holder brought a suit for a declaration that the property belonged to the judgment-debtor and the suit was decreed. The decree-holder thereupon made an application for execution on the 16th July 1894, more than three years after his previous application.

Held, that the order in the claim case operated as a temporary bar to the execution proceedings, and it was not until the removal of that bar by a suit which the decree-holder was compelled to institute that he was placed in a position to proceed with the execution. The present application made subsequently to the removal of the bar should be treated as a continuation of the previous application which was admittedly in time; and the execution was not barred by limitation. *Raghunundun Pershad v. Bhugoo Lall* (1) distinguished. *Pyaroo Tuhoildarinee v. Nazir Hossein* (2); *Paras Ram v. Gardner* (3), and *Kalyanbhai Dipchand v. Ghanashamlal Judunathji* (4) referred to.

THIS appeal arose out of proceedings in execution of decree. The original application for execution was made on the 13th March 1891 and was in time. The judgment-debtor's property being attached in pursuance of that application a claim was preferred by a third party on the 4th July 1891; the decree-holder on the same day applied for time to adduce witnesses and subsequently opposed the claim by a petition of defence, dated 25th July 1891, but he withdrew his objections and the claim was allowed. The execution case was struck off. A regular suit was then brought by the decree-holder to establish the judgment-debtor's right to the property which ter-

* Appeal from Appellate Order No. 261 of 1895, against the order of H. R. H. Coxe, Esq., District Judge of Midnapore, dated 27th of April 1895, affirming the order of Babu Prosanoo Kumar Bose, Munsif of Datun, dated the 5th of January 1895.

(1) I. L. R., 17 Calc., 268.

(2) 23 W. R., 133.

(3) I. L. R., 1 All., 355.

(4) I. L. R., 5 Bom., 29.

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minated in favour of the decree-holder. The present application for execution was filed on the 16th July 1894, more than three years after 4th July 1891 when the application for permission to adduce witnesses was presented by the decree-holder. It was contended before the lower Court of Appeal that the decree-holder was entitled to come in by reason of the suit intervening between the former application and the present, but the contention was overruled.

The decree-holder appealed to the High Court.

Baboo *Lal Mohan Doss* for the appellant.—After taking out attachment in furtherance of his previous application, the decree-holder was engaged in resisting a claim filed in respect of the property attached, and, such claim having been allowed, in establishing by means of a regular suit his judgment-debtor's right to that property. The present application, which was made soon after the final termination of that suit in the decree-holder's favour, is not an independent application, but merely a *continuation* of the previous one. It was impossible for him to sell the property until he eventually succeeded in establishing his judgment-debtor's right to it. The former application was struck off for ministerial purposes only. It did not come to an end, but remained in abeyance by reason of the interposition of the claim and the proceedings thereafter. *Pyaroo Tuhovildarinee v. Nazir Hossein* (1), *Issuree Dasse v. Abdool Khalak* (2), *Paras Ram v. Gardner* (3), *Kalyanbhai Dipchand v. Ghanashamlal Jadunathji* (4), *Chandra Prodhan v. Gupimohun Shaha* (5), *Lalu Mulji v. Kashibai* (6), *Chintaman Damular v. Balshastri* (7), *Baikant Nath Mitra v. Aghore Nath Bose* (8), *Raghunath Sahay Singh v. Lalji Singh* (9).

The Court below has misunderstood the *crux* of the decision in *Raghunandan Pershad v. Bhugoo Lall* (10). There the subsequent application for execution was directed against a share of the property attached other than that with which the claim proceedings and the subsequent regular suit were concerned. There was,

(1) 23 W. R., 183.

(3) I. L. R., 1 All., 355.

(5) I. L. R., 14 Calc., 385.

(7) I. L. R., 16 Bom., 294.

(9) *Ante* p 397.

(2) I. L. R., 4 Calc., 415.

(4) I. L. R., 5 Bom., 29.

(6) I. L. R., 10 Bom., 400.

(8) I. L. R., 21 Calc., 387.

(10) I. L. R., 17 Calc., 268.

therefore, nothing to prevent the decree-holder from prosecuting his former application with regard to that share.

Babu *Debendra Nath Ghose* for the respondent.—The application of 16th July 1894 was not a continuation of the previous application of 13th March 1891. The execution case was struck off and the application ceased to continue after the order striking it off. The order in the claim case was also the result of the withdrawal of objection by the decree-holder. Nor can it be said that the intervening suit was a step in aid of execution within the meaning of clause 4, Art. 179 of the Limitation Act. *Raghunandun Pershad v. Bhugoo Lal* (1) is an authority in support of my contention. In that case the entire mortgaged property was attached and the claim as regards the whole was allowed, and the suit was brought to set aside the order as regards the entire sixteen annas, and the first Court's decree which was passed in 1886 covered the entire property. The circumstances of the present case are substantially similar. The argument on the ground of continuation of the former application is a mere fiction; it could equally apply to the facts of that case. There is also no apparent reservation in that case as regards the general rule that a suit to set aside an order allowing a claim is not a "step in aid." The decree-holder, moreover, does not show that the execution was pending. If there was no execution pending there could be no step in aid or continuation thereof. In the cases of *Baikant Nath Mitra v. Aughore Nath Bose* (2), *Lalu Mulji v. Kashibai* (3), and *Ohintaman Damodar v. Balshastri* (4) the facts were different. I contend that the case of *Raghunandun Pershad v. Bhugoo Lal* (1) should be followed.

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

The only question that arises in this case is whether the application of the decree-holder, the appellant before us, for execution of his decree is barred by limitation.

The Courts below have held that the application is barred, and

(1) I. L. R., 17 Cal., 268.

(2) I. L. R., 21 Cal., 387.

(3) I. L. R., 10 Bom., 400.

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the lower Appellate Court bases its judgment chiefly upon the case of *Raghunandun Pershad v. Bhugoo Lal* (1).

Now the ground upon which the decree-holder claims exemption from the operation of the law of limitation is this, namely, that the order of the Court allowing the claim of certain parties in respect of the properties which he now asks the Court to attach and sell in execution of his decree, operated as a temporary bar to the execution proceeding to attachment and sale of those properties; that it was not until after the removal of that bar by the decision of a civil suit which he was obliged to institute that he was placed in a position to proceed with the execution; and that his present application, which was made subsequent to the removal of the bar, ought to be treated as a continuation of his former application which admittedly was in time.

We are of opinion that the contention of the appellant is amply supported by the authority of decided cases of which we need only refer to *Pyaroo Tuhovildarinee v. Nazir Hossein* (2), *Paras Ram v. Gardner* (3), and *Kalyanbhai Dipchand v. Ghanashamlal Jadunathji* (4). The case relied upon in the judgment of the lower Appellate Court is clearly distinguishable from the present. There the property sought to be attached and sold in execution upon the subsequent application was that in respect of which no claim had been allowed and in respect of which therefore the decree-holder was quite competent to proceed with his execution notwithstanding the adverse order of the Court in regard to other properties as to which a claim had been allowed. That being so, we are of opinion that the Courts below were wrong in law in holding that execution was barred in this case, and we must therefore allow this appeal and send the case back in order that execution may proceed. The appellant is entitled to his costs.

S. C. C.

Appeal allowed.

(1) I. L. R., 17 Calc., 268.

(2) 23 W. R., 133.

(3) I. L. R., 1 All., 355.

(4) I. L. R., 5 Bom., 29.