

## APPELLATE CIVIL.

Before Bucknill and Ross, J.J.

LALA GOBIND PRASAD

v.

LALA JUGDIP SAHAY.\*

1924.

Dec., 23.

*Limitation Act, 1908 (Act IX of 1908)—Application for execution—limitation, whether runs from the date of the appellate decree—Decree-holder, disappearance of—presumption—Evidence Act, 1872 (Act I of 1872), section 108.*

Plaintiff (decree-holder) brought a suit against the defendant (judgment-debtor) for a certain declaration and for delivery of a document which purported to be a deed of relinquishment. The suit was decreed by the first Court, but on appeal the District Judge modified the decree, and being of opinion that the deed was really one of sale, ordered that if the decree-holder paid a certain amount to the judgment-debtor within two months from the date of the appellate Court's order, he (the decree-holder) was to obtain a proper conveyance of the property. The decree-holder appealed to the High Court, but the appeal was dismissed. A Letters Patent appeal followed which also was dismissed. Thereafter the decree-holder was said to have disappeared; and within two months from the date of the dismissal of the appeal under the Letters Patent, the decretal sum was deposited in Court by a pleader who purported to act on behalf of the decree-holder's son. Objection, however, was taken to the deposit on the ground that the son had no *locus standi* to be substituted for, or to take the place of his father in the proceedings as there was no presumption in law that the father was in fact dead. The objection having been allowed by all the Courts the amount was again paid into Court by a pleader on behalf of the decree-holder. Objection having been taken by the judgment-debtor, it was held by both the lower Courts that the pleader had no *locus standi*, and, secondly, that the amount was put in too late. On appeal to the High Court, held, (i) that if the decree-holder's death could not be legally presumed, he was still civilly alive and the pleader could, under

\* Appeal from Appellate Order no. 149 of 1924, from an order of J. Chattarji, Esq., District Judge of Darbhanga, dated the 8th of April, 1924, confirming an order of M. Kabiruddin Ahmed, Munsif of Samastipur, dated the 19th of January, 1924.

Order XXI, rule 11(2), file an application for execution and deposit the amount in Court on behalf of the decree-holder, (ii) that the time for putting in the amount and executing the decree ran from the date of the appellate decree and not from the date of the original order ;

*Bhup Indra Bahadur v. Bijai Bahadur*(1) and *Satwaji Balajiraw Deshmukh v. Sukharlal Atmaramshet*(2), followed.

*Ramaswami Kone v. Sundara Kone*(3), not followed.

(iii) that the payment in the first instance having been made within two months from the date of the appellate decree, there were no laches in the circumstances of the present case, by reason of the subsequent deposit having been made so late, inasmuch as the decree-holder had been endeavouring throughout to try and obtain what he believed to be his rights.

Appeal by the plaintiff.

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

*Noresh Chandra Sinha and Tribhuanath Sahay*, for the appellant.

*P. C. Roy and Janak Kishore*, for the respondent.

BUCKNILL, J.—This was an appeal from an order of the District Judge of Darbhanga dated the 8th of April last by which he confirmed an order of the Munsif of Samastipur, dated the 19th of January last. The circumstances under which this matter comes before this Court are undoubtedly far from simple and indeed peculiar. It would seem that, many years ago (it is said in 1900), a property was purchased by the appellant here in the name of the judgment-debtor who is here the respondent. In 1918 a deed, dated the 7th of May, which was regarded by the appellant as a deed of relinquishment by the judgment-debtor of whatever if any interest he had in this land, was executed by the judgment-debtor in favour of the decree-holder.

(1) (1901) I. L. R. 23 All. 152, L. R. 27 I. A. 209.

(2) (1915) I. L. R. 89 Bom. 175.

(3) (1908) I. L. R. 31 Mad. 28.

1924.

LALA GOBIND  
PRASAD  
v.  
LALA JUGDIP  
SAHAY.

1924. The judgment-debtor, however, declined to hand over this document to the decree-holder and, in consequence, on the 9th of December, 1918, the decree-holder brought a suit against the judgment-debtor for the usual declarations and for the delivery up of the document. On the 10th of September, 1919, the suit was decreed by the Munsif; but, on appeal the District Judge, on the 19th of April, 1920, modified the decree of the Munsif and, being of the opinion that the document was not a deed of relinquishment but was one really of sale, ordered that if the decree-holder paid Rs. 250 to the judgment-debtor within two months from the date of his (the District Judge's) order, he (the decree-holder) was to obtain a proper conveyance to himself of the property. From this judgment the appellant appealed to this Court. My learned colleague who heard the appeal dismissed the appeal on the 21st of March, 1922. A Letters Patent appeal followed which was dismissed on the 15th of May of the same year.

LALA GOBIND  
PRASAD  
v.  
LALA JUGDIP  
SAHAY.  
BUCKNILL, J.

Now up to this point the only question which would have arisen in this matter is with regard to limitation. But at this stage took place a curious occurrence which has somewhat complicated the position and added to it another matter for argument and consideration. This circumstance was that, on the 27th of May, 1922, the appellant is said to have disappeared. It is not known where he actually is; if, indeed, he is still alive. He is said to have been at that date a man of about seventy years of age, to have been in a train coming from Barh, about thirty-five miles from Patna, to this city and not to have been seen since then. Now on the 12th of July, 1922, that is, it will be observed, within two months from the date when this Court dismissed the appeal which had been presented to it under the Letters Patent, a pleader deposited in the Court of the Munsif the sum of Rs. 250 purporting to act on behalf of the decree-holder's son who was an adult. Objection, however, was taken to this deposit on the ground that the son

had no *locus standi* to be substituted for or to take the place of his father in the proceedings as there was no presumption in law that the father was in fact dead; although it was known that he had disappeared. The objection succeeded before the Munsif and an appeal to the District Judge was dismissed by the District Judge on the 21st December, 1922. From the decision of the District Judge there was again an appeal to this Court which came before Mullick, J., and myself and was unsuccessful, this Court dismissing the appeal on the 2nd of July, 1923.

1924.

LALA GOBIND  
PRASAD  
v.  
LALA JUGDIP  
SAHAY.

BUCKNILL, J.

Now no steps appear to have been taken to persuade any Court that the appellant was really dead. It is said, and I have no doubt correctly, that no evidence was forthcoming at all as to whether he was or was not alive; and, in view of section 108 of the Evidence Act, it is perhaps somewhat difficult to see how any Court could, in the absence of any evidence, have presumed at that date that the decree-holder was no longer alive. However, the next step which took place was that on the 31st of August an application for execution of his decree was made by a pleader on behalf of the decree-holder (not, it will be observed, on behalf of his son) purporting to act under the provisions of sub-section (2), rule 11 of Order XXI, of the Civil Procedure Code. On the 1st of September, 1923, the Rs. 250 was again paid into Court by a pleader on behalf of the decree-holder. Again there was an objection and the application was, on the 19th of November last, refused by the Munsif. An appeal was preferred to the District Judge who, on the 8th of April, upheld the Munsif's decision holding that on two grounds the application could not be admitted; firstly, because he was of the opinion that the pleader had no *locus standi*; and, secondly, on the ground that the amount was paid in too late.

I think that it will be convenient if I take the question of limitation first. It will be observed that, in the first instance, the sum was paid in on behalf of the decree-holder by his son within two months from

1924.

LALA GOBIND  
PRASAD

v.

LALA JUGDIE  
SAHAY.

BUCKNILL, J.

the date when the Letters Patent appeal had been dismissed by the Court. It is urged on behalf of the respondent here that the date from which the two months ran is not the date when the Letters Patent appeal was dismissed but the date of the District Judge's judgment. He points out that there are undoubtedly certain cases which are in his favour. The one upon which he principally relies is the case of *Ramaswami Kone v. Sundara Kone* (1). It certainly somewhat supports the respondent's application. In that case the decree of the lower Court provided that, on the plaintiff paying into Court the balance of consideration Rs. 10 within a month from the date of the order, the defendant should execute a sale deed in the plaintiff's favour of the land in suit. The money was not paid within the month and the defendant preferred an appeal but *after* the expiry of the month. The appellate Court simply confirmed the decree of the lower Court and dismissed the appeal. Within a month of the appellate decree the plaintiff did deposit Rs. 10 and applied for execution of his decree. It was held that he was not entitled to execute the decree as he had not made the payment within the time fixed by the original decree and that the appellate Court could not under the circumstances have held otherwise or have enlarged the time fixed by the original Court. Now, although that decision appears to lend some colour to the contention which has been put forward by the plaintiff, yet the latest and the best authority, which is based upon the Privy Council decision in *Bhup Indra Bahadur v. Bijai Bahadur* (2), is the decision of the Bombay High Court given in 1914 in the case of *Satwaji Balajirav Deshmukh v. Sakharlal Atmarramshet* (3). In that case the plaintiff brought a suit to recover possession of property as purchaser. The first Court having dismissed the suit, the appellate Court, on the plaintiff's appeal, passed

(1) (1908) I. L. R. 31 Mad. 28.

(2) (1901) I, L. R. 23 All.152; L. R. 27 I. A. 209.

(3) (1915) I. L. R. 39 Bom. 175.

a decree directing that the plaintiff could recover possession on payment of a certain sum within six months from the date of his decree and that if the plaintiff failed to pay this sum within such period he should forfeit his right to recover possession. An appeal was preferred to the High Court. The High Court confirmed the decree and within six months from the High Court's decree the plaintiff deposited in Court the amount payable by him and applied for execution. It was contended that he could not do so, because he should have paid the money within six months from the date of the order of the lower appellate Court. Both the lower Courts upheld this objection but, on appeal to the High Court, it was held (reversing their decision) that the time for executing a decree for possession ran from the date of the High Court's decree confirming a decree of the lower Court. This case appears to me to be in point here. I am content to rest on that authority although numerous subsidiary authorities, both for and against this argument, have been put before us. It seems to me that in this case, in the first place, on the analogy of section 14 of the Limitation Act of 1908, we see that the plaintiff has been endeavouring throughout to try and obtain what he believed to be his rights. The first payment into Court was made really on behalf of the decree-holder, though coupled it is true, with the desire that the son should be substituted in the litigation for him. This was certainly paid in within two months from the date of the dismissal of the Letters Patent appeal. The first endeavour was met with objection and was carried from Court to Court, the plaintiff throughout fighting for what he conceived to be his proper remedy. The second application was lodged before the expiration of two months from the decree of this Court of the 2nd of July, 1923, in which this Court held that the sum could not be deposited on behalf of the decree-holder's son, that is to say, that the son could not be substituted for the father who had disappeared; owing to the fact that there was no presumption of death. I think that in such circumstances

1924.

LALA GOBIND  
PRASAD

v.

LALA JUGDIP  
SAHAY.

BUGENILL, J.

1924.

LALA GOBIND  
PRASAD

v.

LALA JUGDIP  
SAHAY.

it cannot be said that there have been any laches of any kind on behalf of the appellant and that the decision of the lower Courts on that ground must be reversed.

BUCKNILL, J.

There then arises the question of *locus standi*. Now this Court has already held that it was impossible for the son of the decree-holder to be legally substituted in the place of his father whilst in law the father was still alive. I have already explained that no steps were taken with a view to obtaining the presumption of the decree-holder's death being legally ratified; and there can be no doubt that the difficulty does arise that no person can legally be substituted for the decree-holder until his death is presumed. At the same time it is not possible for the objector to have the argument both ways in his favour; and, if the decree-holder's death cannot be yet legally presumed, he is still civilly alive and, in these circumstances, there seems no reason whatever why under sub-section (2), rule 11 of Order XXI of the Civil Procedure Code, the pleader should not file an application for execution and deposit the money on behalf of this decree-holder who is in law still alive. The application may be and is signed and verified in this case by the son of the decree-holder who is thoroughly acquainted with the facts of the whole of the case. Although, therefore, I am quite in agreement with the argument of the learned vakil who has appeared for the respondent that it is impossible for the son or any one else to be legally substituted in the proceedings for the decree-holder (which is an argument which is based upon what was said by my learned colleague when he dismissed the first appeal in this Court), yet I am unable to see that it can be suggested seriously that if the law does not regard the appellant as dead it must not regard him as alive or that his affairs are not still subject to the ordinary rules of the Civil Procedure Code. I think, therefore, on this ground also that the decision of the lower Courts must be reversed and the appeal must be allowed.

There is one word which I should like to say in conclusion and that is that it has been represented that there is some serious difficulty in knowing what should be done under such peculiar circumstances as these where one has to face an unexplained disappearance of a person about whose death nothing is known. It seems to me that there are two possible alternative courses which might be utilized: One might be that if the circumstances were such as would justify a prudent person in coming to the conclusion that death was extremely probable, an application might be made to the proper Court upon affidavit showing the circumstances and asking leave to presume the death; or, in the alternative, if the Court did not think that the evidence produced before it was sufficient upon which it could prudently be said that death could be presumed, then in such cases the Court could and should appoint some person to look after the affairs of the individual who had disappeared until his return or until his death can properly be presumed. These two courses—and I have known both adopted—seem to me to be remedies for or rather solutions of the very practical difficulty which has arisen in this case.

The appeal therefore will be allowed with costs in both the Courts. The case will now go back to the Munsif to be dealt with according to law.

Ross, J.—I agree.

*Appeal allowed.*

## REFERENCE UNDER THE INCOME-TAX ACT, 1922.

*Before Ross and Kulwant Sahay, J.J.*

JAGARNATH THERANI

v.

COMMISSIONER OF INCOME-TAX.\*

1924.

Jan., 5, 13.

*Income-Tax Act, 1922 (Act XI of 1922), sections 10, 22, 23, 30, 31 and 34—Assistant Income-Tax Commissioner,*

\* Miscellaneous Judicial Cases nos. 64 and 66 of 1924.

1924.  
LALA GOBIND  
PRASAD  
v.  
LALA JUGDIP  
SAHAY.  
BUCKNILL, J.