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SPECIAL BENCH.

Before Dawson Miller, C.J., and Jwala Prasad and Das, J.J.

ADITYA PRASAD SINGH

1925.

March, 23.

v.

RAM NARAYAN DAS.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXI, rule* 22(a)—*Scope of—Proviso, meaning of—Subsequent application for execution more than a year after the last order in previous execution—whether notice necessary.*

Order XXI, rule 22(*a*), applies to every application for execution and not merely to the first application. It follows, therefore, subject to the proviso to that rule, that whenever an application, whether it be the first or any subsequent application, is made more than one year after the date of the decree, the court is bound to issue the notice referred to in that rule to the person against whom execution is applied for.

Therefore, in every case where an application for execution is made more than a year after the last order made against the judgment-debtor in any previous application, a fresh notice must be served.

Mahadeo Singh v. *Dhobi Singh* (1), overruled.

* Appeal from Appellate Order no. 139 of 1924, from a decision of M. Ihtisham Ali Khan, Subordinate Judge of Monghyr, dated the 26th March, 1924, reversing a decision of B. Dwarka Prasad, Munsif of Begusarai, dated the 12th September, 1923.

(1) (1923) I. L. R. 2 Pat. 916.

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The facts of the case material to this report are stated in following Order.

ROSS AND KULWANT SAHAY, JJ.—The question is whether the present (the eighth) application for execution of a decree passed in 1913, which was made on the 11th of April, 1923, is barred by time. The Court of appeal below, reversing the decision of the Munsif, held that it was not barred. The question depends upon whether limitation was saved by the issue of notice under Order XXI, rule 22, in the seventh application for execution on the 9th of November, 1922.

The learned Vakil for the appellant concedes that if this notice was required to be issued by the Code of Civil Procedure of 1908, then the case is governed by Article 182, clause (*6*), of the schedule to the Limitation Act; and the present application is within time. He contends, however, that inasmuch as on the fifth application for execution notice under Order XXI, rule 22, was issued, it was no longer necessary to issue any further notice under that rule and, consequently, the issue of notice under Order XXI, rule 22, on the 9th of November, 1922, was not required by the Code of Civil Procedure and Article 182, clause (*6*), has no application. He relies in support of this contention on a decision of a Division Bench of this Court in *Mahadeo Singh* v. *Dhobi Singh* (1). In our opinion Order XXI, rule 22, is general and requires notice to issue in any case where the application for execution is made more than one year after the date of the decree, except as provided in the proviso. The proviso lays down that no such notice shall be necessary if the application is made within one year from the date of the last order against the party, against whom the execution is applied for, made on any previous application for execution. Now the seventh application for execution, in which the notice which is said to have been unnecessary was issued, was made on the 13th of May, 1922. The last order against the judgment-debtor made on a previous application for execution was passed on the 20th of February, 1920, when attachment and notice under Order XXI, rule 66, were issued; but, as that order was made more than one year before the seventh application for execution, it was, in our opinion, necessary that notice under Order XXI, rule 22, should have been given on the seventh application also. Consequently the issue of that notice was required by the Code of Civil Procedure and Article 186, clause (*6*), applies and the appeal should be dismissed. In *Mahadeo Singh* v. *Dhobi Singh* (1) the execution was against the legal representative of the judgment-debtor and notice had therefore been issued under Order XXI, rule 22(*1*)(*b*), and that notice did not need to be repeated; but the facts of the case show that if our reading of the proviso is correct and the last clause,

> "if upon a previous application for execution against the same person the Court has ordered execution to issue against him",

applies only to the clause immediately preceding, *i.e.*, to the case contemplated in clause (*b*) of the rule, then a fresh notice under clause (*a*) was necessary. Our opinion therefore differs from that decision and under the rules of the Court the case has to be referred to a Full Bench for a decision of the question whether when notice

(1) (1923) I. L. R. 2 Pat. 916.

under Order XXI, rule 22(*1*)(*a*), has once been issued it is or is not necessary to issue a fresh notice if the application for execution is made more than one year after the date of the last order against the party against whom execution is applied for, made on a previous application for execution.

Let the papers be placed before his Lordship the Chief Justice.

Shiv Narain Bose, for the appellant: No notice of subsequent applications for execution was necessary under Order XXI, rule 22, so as to save limitation under Article 182(*v*). When once a notice has been issued the rule exhausts itself and no fresh notice of any subsequent application is required by law. The only object of giving a notice under Order XXI, rule 22, is to protect the judgment-debtor or his representative from being lulled into a sense of a security [see *Mahadeo Singh* v. *Dhobi Singh* (1). *Mungal Prasad Dichit* v. *Girija Kant Lahiri*(2) was also referred to]. I rely on *Erava* v. *Sidram Appa Pasare*(3) in support of the proposition that the intention of the legislature in enacting the rule was to give the judgment-debtor an opportunity to pay up and when once a notice has been issued, the object is served.

Satyendra Nath Banerjee, for the respondent.

DAWSON MILLER, C. J.—This case has been referred to the Full Bench because the learned Judges before whom it came took a different view from that expressed in the earlier case of *Mahadeo Singh* v. *Dhobi Singh*(1).

The question for determination is whether a petition for execution filed on the 11th April 1923, is time-barred or not. The facts which it is necessary to refer to in order to appreciate the question in dispute are shortly as follows:

The decree which is the subject of the present application for execution was passed in favour of the

(1) (1923) I. L. R. 2 Pat. 916.

(2) (1882) I. L. R. 8 Cal. 51; L. R. 8 I. A. 123.

(3) (1897) I. L. R. 21 Bom. 424 (432), F. B.

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respondents in the year 1913. After five applications for execution which left the decree unsatisfied a sixth execution petition was filed on the 1st December, 1919. An order for attachment of some of the judgement debtor's property was made in those proceedings on the 26th February, 1920, and in April the property was sold. The sale, however, was set aside on the 28th August following and that execution case then came to an end. It should be noted that the last order passed against the judgment-debtor in that execution case was the order for attachment of the 26th February, 1920. That is the only date which is of any importance in that execution case in considering the present question. A seventh application for execution was filed on the 13th May, 1922, and in that case a notice was issued under Order XXI, rule 22, on the 9th November, 1922. That notice appears to have been served on or before the 29th November of the same year. An objection was afterwards taken in that execution case by the judgment-debtor to the effect that the petition for execution was not in accordance with law. The objection was sustained and the case was dismissed on the 10th February, 1923. The present execution case which is the eighth was filed on the 11th April, 1923. That application was made within three years of the previous one but more than three years from the date of applying to take any step-in-aid of execution in the sixth execution case.

The learned Munsif decided that as the seventh application for execution was not according to law, it did not create a fresh starting point for limitation. He accordingly dismissed the present application.

The learned Subordinate Judge on appeal came to the conclusion that although the application itself in the seventh case may not have been according to law still an order had been passed in those proceedings on the 9th November, 1922, as required by Order XXI, rule 22, and, therefore, under clause (*6*) of article 182 of the Limitation Act a fresh period of limitation of three years began to run from that date. From that

decision there was an appeal to this Court. The appeal was heard by a Bench of two judges who came to the conclusion that the order of the 9th November, 1922, passed in the seventh application for execution was an order required by the Code of Civil Procedure within the meaning of Article 182 of the Limitation Act, and, therefore, the present application, which was within three years, in fact within one year from that order, was in time. As, however, there was a previous decision of this Court to which I have referred, which too took a different view, the case was referred to this Bench.

The only question for determination in this appeal is whether in the circumstances which I have stated the order passed on the 9th November, 1922, ordering notice to issue under Order XXI, rule 22, was a notice required by the Code within the meaning of the sixth clause of Article 182. I perhaps ought to mention that it is no longer contended that that notice if required by the Code is bad merely on the ground that the seventh execution petition filed on the 13th May, 1922, was not in accordance with law.

Order XXI, rule 22, provides as follows:

"Where an application for execution is made—

(*a*) more than one year from the date of the decree, or

(*b*) against the legal representative of a party to the decree, the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause on a date to be fixed, why the decree should not be executed against him."

There is a proviso to that rule which makes it unnecessary that a notice should be issued in certain cases but before dealing with that it is necessary to see what is included under the rule itself apart from the proviso.

The argument of the learned Vakil who appears on behalf of the appellant is that under the rule which I have just quoted it is necessary to issue notice in execution proceedings once, and once only, and when that has been done no further notice is required to be

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issued even if the subsequent execution proceedings should have been more than a year or even up to three years from the date when any order was passed against the judgment-debtor in any previous execution, and the issue of such a notice therefore did not come within clause (*6*) of Article 182 so as to save limitation. Now, so to interpret the rule is, in my opinion, to introduce words into it which do not exist. The rule applies to an application for execution and that to my mind must include, unless the contrary should appear, every application for execution and not merely the first application. It follows, therefore, in my opinion, that wherever an application for execution, whether it be the first or any subsequent application, is made more than one year after the date of the decree, the Court is bound to issue the notice referred to, to the person against whom execution is applied for, unless the proviso makes it unnecessary. The present case therefore appears to come directly within the wording of the rule. It is not contended in this case that there is anything in the proviso which would make it unnecessary for the Court to issue the notice but we are asked to say that the intention of the Legislature must have been to require only one notice to be issued and no more. If that was in fact the intention of the Legislature, and I see no reason why it should be so, they have expressed that intention in every unhappy language, for there is nothing in the language of the rule to limit its operation to the first or any other application. But a reference to the proviso seems to me to make it clear that a fresh notice was contemplated as necessary even in subsequent applications except in so far as the proviso renders that course unnecessary. The proviso to the rule reads thus:

"Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for made on any previous application for execution or in consequence of the application being made against the

legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him."

But for that proviso it would be necessary to issue the notice in every case whether it be the first, second, or third or later application where it is made more than a year after the decree. The Legislature has considered, however, that if the party has had notice by some order being made against him in some previous execution case, then within a year of that order no further notice should be required. That seems to me to be the intention and object of the rule as a whole. Again, with regard to the legal representative, it is provided in his case that notice to him need not be given solely because he is the illegal representative, if upon a previous application for execution against him the Court has ordered execution to issue. But even although he is a legal representative he may still come under clause (*a*) of the rule subject to the proviso relating to that part of the rule.

The learned Judges in the previous case [*Mahadeo Singh* v. *Dhobi Singh* (1)] appear to me, with great respect, to have taken somewhat too narrow a view of the meaning of Order XXI, rule 22 They stated "The object of the rule is merely to protect the judgment-debtor or his legal representative from being lulled into a sense of security by the decree-holder's delay in executing his decree; but once the original decree has been put into execution and a notice has been served under rule 22 indicating his intention to proceed to execution it does not seem to me that it is contemplated by rule 22 that a fresh notice must be served for every execution application made more than one year after the last order against the judgment-debtor". With great respect to the learned Judges who decided that case I find myself unable to agree and I think that the proper interpretation of Order XXI, rule 22, is that which I have already indicated, namely, that in every case

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where an application is made more than a year after the last order made against the judgment-debtor in any previous execution, then a fresh notice must be served.

In my opinion this appeal should be dismissed with costs to the respondents to be paid by the appellant.

JWALA PRASAD, J.—I agree.

DAS, J.—I also agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Das and Ross, J.J.

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June, 2.

SUBEDAR RAI

v.

RAMBILAS RAI.*

Estates Partition Act, 1897 (*Ben. Act V of* 1897), *section* 119—*suit by a tenant contesting an order made under Chapter VI—whether section* 119 *a bar.*

In a partition proceeding the Deputy Collector recorded certain land as the plaintiffs' kasht land but on appeal the Collector ordered that the land should be recorded in the khasra as zerait, and the partition was made accordingly. The plaintiffs, therefore, brought the present suit on the allegation that the disputed land was their ancestral guzashta kasht land from before the time when their ancestor acquired a share in the proprietary interest in the village. The defence was *inter alia* that the suit was barred by the provisions of section 119, Estates Partition Act, 1897.

Held, that the suit was maintainable as section 119, Estates Partition Act, does not bar a suit contesting an order made under Chapter VI of the Act.

* Appeal from Appellate Decree no. 1062 of 1922, from a decision of J. F. W. James, Esq., I.C.S., District Judge of Shahabad, dated the 22nd May, 1922, reversing a decision of M. Saiyid Hasan, Additional Subordinate Judge of Shahabad, dated the 21st July, 1921.