## APPELLATE CIVIL.

*Before Adami and Scroope, JJ.*

FATEH BAHADUR SINGH

1927.

*v.*

*Feb. 15.*

PARMESHWAR PRASAD SAHU.*

*Execution of Decree—Limitation—step-in-aid—Order to file written processes and identifier's affidavit—written processes not filed—filing of affidavit alone not a step-in-aid—Limitation Act*, 1908 (*Act IX of* 1908), *Schedule* 1, *Article* 182(5).

An application for execution of a decree was made on the 1st August, 1921, and on the 5th January, 1922 the court directed the decree-holder to file written processes and the identifier's affidavit as to service of notice under Order XXI, rule 22, of the Code of Civil Procedure, 1908, by the 12th January. On the latter date the affidavit was filed but not the written processes. The application for execution was dismissed. On the 2nd January, 1925, the decree-holder again applied for execution.

*Held*, that in the circumstances of the case the filing of the affidavit did not amount to a step-in-aid of execution and, therefore, that the second application for execution was barred by limitation.

*Thakur Singh* v. *Sheo Bhajan Singh*(1) and *Pran Kishun Das* v. *Pratap Chandra Daloi*(2), distinguished.

*Annapurna Thakurani* v. *Dhirendra Nath Chakravarti*(3), referred.

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

*Baldeo Sahay* and *C. P. Singh*, for the appellant.

*Sambhu Saran*, for the respondent.

*Appeal from Appellate Order no. 190 of 1926, from a decision of H. Ll. L. Allanson, Esq., I.C.S., District Judge of Gaya, dated the 9th April, 1926, affirming the decision of M. Ihtsham Ali Khan, Subordinate Judge of Gaya, dated the 16th January, 1926.

(1) (1919) 4 Pat. L. J. 521. (2) (1916-17) 21 Cal. W. N. 423.

(3) (1919-20) 24 Cal. W. N. 55.

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SCROOPE, J.—The final decree in the suit out of which this execution arose was passed on the 31st August, 1919, and the first execution case started on the 1st August, 1921, and on the 5th January, 1922 the decree-holder was directed by the Court to file written processes and identifier's affidavit as to service of notice under Order XXI, rule 22, by the 12th January. On the latter date affidavit is alleged to have been filed but the written processes were not filed and the case was dismissed for default. The execution case out of which the present application arises was filed on the 2nd January, 1925, and admittedly it would be barred by limitation unless the decree-holder can refer to some application to the Court to take a step in aid of execution within three years prior to 2nd January, 1925. The decree-holder refers to the filing of the identifier's affidavit as such a step. The Subordinate Judge accepted the contention and held that the application was not time-barred and the District Judge of Gaya upheld this decision in appeal. The judgment-debtor has now appealed to this Court.

The first point taken in appeal is that as a matter of fact the identifier's affidavit was not filed on the 12th January, 1922, that is, before the execution case was dismissed but both the Courts have found against him on this point and that is a finding of fact which is conclusive so far as this Court is concerned. It cannot be argued that such a finding is not based on any evidence as it is a fair inference from the order-sheet in the Subordinate Judge's Court, dated the 12th January, 1922, which refers only to the failure to file written processes; there is no reference to any failure to file the affidavit. The stamp on the affidavit is faint; but its condition is not inconsistent with its having been filed on the 12th January. The affidavit in question must be taken as having been filed on the 12th January, 1922.

The next point then is whether the filing of this affidavit amounts to a step in aid of execution and the learned Vakil for the petitioner judgment-debtor

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relies on the case of *Annapurna Thakurani* v. *Dhirendra Nath Chakravarti*(1) in which it was held that the mere filing by the decree-holder's identifier of an affidavit of service unaccompanied by any application, oral or written, does not give a fresh start to limitation The contrary view is taken in a case of this Court *Thakur Singh* v. *Sheo Bhajan Singh*(2) which following a previous Calcutta decision in the case of *Pram Kishun Das* v. *Pratap Chandra Daloi*(3) lays down that filing of an affidavit in proof of service of a notice of attachment is a step-in-aid of execution. There is undoubtedly a conflict of authority on the point and this Court would be bound to follow the previous Patna decision were it not that the present case is not on all fours with it. Whether there has been an application to the Court to take a step in aid of execution is a question of fact as is laid down in the first of the cases cited above and in this case the Court had on the 5th January, 1921, in effect laid down as a condition of taking a further step-in-aid of execution that the decree-holder was to file written processes and the identifier's affidavit. He only performed the latter act and it is not even contended that any oral, much less written application, was made or that any explanation was furnished regarding the failure to file written processes. The decree-holder contended himself with filing the affidavit and this really remained passive so far as relates to getting the Court to take any further step-in-aid of execution. Accordingly the Court dismissed the execution case for default. In my opinion then the mere filing of the affidavit did not in the circumstances of this particular case amount to an application to the Court to take a step-in-aid of execution. In the case relied on by the respondent, which is referred to above, it would appear that all that was required was that the identifier's affidavit should be filed, whereas here there was the further condition requiring written processes.

(1) (1919-20) 24 Cal. W. N. 55. (2) (1919) 4 Pat. L. J. 521.

(3) (1916-17) 21 Cal. W. N. 423.

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It is then argued that there was no necessity to file written processes: that is a point which cannot be gone into now. Apparently the processes related to settling the terms of the sale proclamation under Order XXI, rule 66. If the Subordinate Judge acted wrongly in dismissing the execution case, the decree-holder had his remedy in a fresh application within the period of limitation or in resort to the provisions of Order XLVII of the Code of Civil Procedure for review. But he has taken neither course.

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The fourth contention is that even assuming that no application was made within the same period to the Court to take a step-in-aid of execution, the present execution application should be treated as one in continuance of the former. But as the previous application was dismissed for default, I fail to see how the present application can be treated as one in continuance of it. To accept this contention would really make Article 182 of the Limitation Act meaningless as in successive execution cases the bar of limitation could always be lifted in this way. The case relied on by the learned Vakil for the petitioner, namely, *Mussammat Kaniz Zohra* v. *Boondi Sahu*(1) is palpably different from the present case. That was a case which was struck off in the executing Court as soon as ever the order of the High Court setting aside the sale was received. The order striking off the execution case was consequential on the order of the Appellate Court. There was no laches on the part of the decree-holder. Here there has been a distinct dismissal of the execution case owing to his laches and I therefore cannot accept the argument now put forward on this point.

Holding as I do that no application was made to the Court on the 12th January to take a step-in-aid of execution the present execution proceedings are barred by limitation, and the appeal must succeed and is allowed with costs.

ADAMI, J.—I agree.

*Appeal allowed.*

(1) (1917) 2 Pat. L. J. 115.