APPELLATE CIVIL.

Before Das and Adami, JJ.

1926.

Dec. 31.

MUSAMMAT BIBI AISHA

v.

MAHABIR PRASAD.*

Execution of Decree, application for,—Succession certificate not filed—whether is a step-in-aid of execution—Limitation Act, 1908 (*Act IX of* 1908), *Schedule I, Article* 182(5)—*Code of Civil Procedure,* 1908 (*Act V of* 1908), *Order XXI, rules* 11 *to* 14.

An application for execution was dismissed on the ground that some of the original decree-holders had died and their heirs, who were substituted in their place, had not produced the succession certificate.

Held, that the application was nevertheless a step-in-aid of execution and, therefore, that another application made within three years of the former application was within time.

Hafizuddin Chowdhury v. *Abdool Aziz* (1), followed.

Where an application for execution contains all the particulars required by Order XXI, rules 11 to 14, it is a step-in-aid of execution even though it is otherwise defective.

An application for execution which satisfies the requirements of the Order XXI, rules 11 to 14, but which is not accompanied by a succession certificate, where that is required, is in order, but no relief can be granted until the certificate is filed.

Appeal by the plaintiffs.

The facts of the case are stated in the judgment of Das, J.

Syed Noorul Hosain (with him *A. H. Fakhrûddin*) for the appellant: The court below is wrong in

* Appeal from Appellate Order no. 288 of 1926, from a decision of A. C. Davies, Esqr., District Judge of Patna, dated the 6th September, 1926, reversing a decision of Babu Brajendra Prasad, officiating Subordinate Judge of Patna, dated the 15th February, 1926.

(1) (1898) I. L. R. 20 Cal. 755.

holding that the previous application for execution was not in accordance with law on the ground that it was not accompanied with the succession certificate. In order that an application for execution may be in accordance with law within the meaning of Schedule I, Article 182(*5*), Limitation Act, 1908, it need only comply with the requirements of Order XXI, rules 11 to 14. The law does not require any other condition to be fulfilled. See *Jogendra Prasad Narain Singh* v. *Mangal Prasad Sahu* (1). The filing of a succession certificate along with the application for execution not being one of the essential requirements laid down in the Code, the previous application was one in accordance with law. I rely on *Hafizuddin Chowdhury* v. *Abdool Aziz* (2) which lays down that although, for want of a succession certificate, the court may not be able to proceed with the application, it is nevertheless maintainable in law. Want of succession certificate may be a defect sufficient to prevent the decree-holder from proceeding with his application or getting any relief, but it is not such a defect as can by itself make the execution application not in accordance with law.

My second contention is that as a notice under Order XXI, rule 22, had been issued by the court in the previous execution case, it was a step-in-aid of execution within the meaning of Article 182(*6*) which will give a fresh start to limitation. This view is supported by the case of *Jogendra Prasad Narain Singh* v. *Mangal Prasad Sahu* (1).

The previous application, therefore, being either in accordance with law or a step-in-aid of execution, the present execution is not barred by limitation.

Anand Prasad, for the respondent: The previous execution petition cannot be regarded as an application in accordance with law, inasmuch as no step was taken by the decree-holder to comply with the order of the court to supply the succession certificate.

(1) (1927) 7 P. L. T. 330. (2) (1893) I. L. R. 20 Cal. 755.

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Without a succession certificate an execution petition cannot proceed and is infructuous. It cannot, therefore, be regarded as an application in accordance with law.

[*Das, J.*—The Act provides that an application cannot proceed without a succession certificate but it does not say that such an application will not be maintainable in law.]

The previous execution petition was not a bona fide petition and it was put in simply for the purpose of saving the bar of limitation. See *Jogendra Prasad Narain Singh* v. *Mangal Prasad Sahu* (1) and *Sheo Prasad* v. *Mussammat Naraini Bai* (2).

DAS, J.—I am unable to agree with the view taken by the learned District Judge. The first execution was taken on the 27th June, 1922. Some of the decree-holders had died and their heirs, who were substituted, did not produce the succession certificate. On an objection being taken by the judgment-debtor the application for execution was dismissed. The present application for execution was filed on the 13th June, 1925. The question is whether this application was presented within time. Now, it is not open to doubt that if the application of the 27th June, 1922, was an application to take some step-in-aid of execution, then the present application must be regarded as having been filed within time. The learned District Judge has taken the view that because the succession certificate was not produced, the court could not possibly entertain that application and therefore that application could not be regarded as a proper application. I am unable to accept this view as correct. The Civil Procedure Code has authoritatively laid down what are the particulars which must be contained in an application for execution of a decree. It has been held in this court in the case of *Jogendra Prashad Narain Singh* v. *Mangal Prasad Sahu* (1) that an execution application is one made in accordance with

(1) (1927) 7 Pat. L. T. 330. (2) (1926) A. I. R. (All). 95.

law within the meaning of Article 182 (5) of Schedule I of the Limitation Act if the particulars required by rules 11 to 14 of Order XXI of the Civil Procedure Code are mentioned in the application. It is not disputed that all these particulars required by law were given in the application of the 27th June, 1922. Precisely the same question was debated in the Calcutta High Court in the case of *Hafizuddin Choudhury* v. *Abdool Aziz* (1). In that case the decree-holders applied for execution of a decree without having taken out a certificate under Act VII of 1889. The application was dismissed. Within three years from the date of the first mentioned application the decree-holders again applied for execution of the decree and it was contended that that application was barred by limitation. It was held that the first mentioned application was made in accordance with law within the meaning of Article 179 (4) of the Limitation Act and that therefore the second application was within time. Those cases are distinct authorities against the view which has been taken by the learned District Judge.

The second question is whether the court executing the decree should have summarily rejected the application for execution when it was presented for the second time on the 13th June, 1925, because from the former proceedings the decree-holders must have known that an application without a succession certificate could not be good in law. Now, in my opinion this is not a correct way of stating the position. An application without a succession certificate is perfectly in order; only no relief can be granted until the succession certificate is produced. This being the position, the order of the learned District Judge must be set aside and the execution must be allowed to proceed. The decree-holder is entitled to the costs of this appeal.

SCROOPE, J.—I agree.

Order set aside.

(1) (1893) I. L. R. 20 Cal. 755.