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UMESHWARDHARI SINGH v. NEMAN SINGH.

MULLICK, J.

The cases having been again laid before Kulwant Sahay and Macpherson, JJ., their Lordships passed the following order:—

KULWANT SAHAY AND MACPHERSON, JJ.—The result is that the decree of the District Judge is set aside and a decree will be made in each case in favour of the plaintiffs for the produce rent as well as the nakdi rent with cesses as found by the Munsif, but no damages will be allowed. The plaintiffs will not be entitled to their costs in any Court. The defendants will be entitled to costs in the Munsif's Court as well as to costs in the District Judge's Court, but they will not be entitled to costs in this Court.

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, JJ.

JAGDEO NARAIN SINGH

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April, 13.

v.

RANI BHUBANESHWARI KUER.*

Limitation Act, 1908 (*Act IX of* 1908), *Schedule* 1, *Article* 182(5)—*Execution of decree—step-in-aid, whether must be made in course of execution proceedings—Code of Civil Procedure*, 1908 (*Act V of* 1908), *Order XXI*, *rule* 90—*application to set aside sale—hazari filed by decree-holder—application dismissed for default—application for review—objection by decreeholder—hazari filed—step-in-aid of execution.*

In order to attract the operation of clause (5) of Article 182 of Schedule I of the Limitation Act, 1908, it is not necessary that the action taken by the decree-holder should be taken in the course of execution proceedings; all that is necessary is that an application should be made to take some step-in-aid of execution.

*Miscellaneous Appeal no. 119 of 1927, from an order of Babu A. Nitya Nand Singh, Subordinate Judge of Gaya, dated 29th January, 1927.

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An application made in connection with another proceeding which, although not strictly speaking a proceeding in execution of the decree, but which affects the execution of the decree, is, therefore, a step-in-aid of execution within the meaning of the clause.

Sheo Sahay v. *Jamuna Prashad* (1), applied.

Where, therefore, in an application filed by the judgment-debtor under Order XXI, rule 90, of the Code of Civil Procedure, to set aside an execution sale, the decree-holder filed a hazari or list of witnesses in attendance, *held*, that the filing of the hazari was a step-in-aid of execution within the meaning of Article 182(5).

Trilokinath Jha v. *Bansman Jha* (2), applied.

Deonarain Singh v. *Ram Prasad* (3) and *Chaudhuri Jagdish Misser* v. *Chaudhuri Sureshar Misser* (4), referred to.

Obiter dictum. Where, on an application by the judgment-debtor for review of an order dismissing for default an application under Order XXI, rule 90, the decree-holder files an objection and, later, a list of witnesses in attendance, the filing of the objection and the filing of the list of witnesses are both steps-in-aid of execution.

The facts of the case material to this report is stated in the judgment of Kulwant Sahay, J.

Kailaspati, for the appellant.

S. N. Roy (with him *J. P. Sinha*), for the respondent.

KULWANT SAHAY, J.—This is an appeal by the judgment-debtor against the order of the Subordinate Judge of Gaya, dated the 29th January, 1927, dismissing his objection under section 47 of the Code of Civil Procedure to the execution of the decree. The objection was that the decree was barred by limitation. There were other objections as regards the incorrectness of the account given in the execution petition and the execution petition itself not being in accordance with the provisions of Order XXI, rule 11, Civil Procedure Code. The learned Subordinate

(1) (1925) I. L. R. 4 Pat. 202. (3) (1925) 90 Ind. Cas. 799.
(2) (1923) I. L. R. 2 Pat. 249. (4) (1921) 6 Pat. L. J. 258.

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Judge has overruled all the objections of the judgment-debtor. The only point pressed in the present appeal is the question of limitation.

The decree under execution was passed on the 24th March, 1922. The first application for execution was made on the 6th of June, 1922. Some property belonging to the judgment-debtor was sold on the 19th of September, 1922, and purchased by the decree-holder herself. The decree, however, was not realised in full, there being a balance of Rs. 9,840-8-6 still to be satisfied. The sale held on the 19th September, 1922, was confirmed on the 26th of May, 1923, and the present application for execution was filed on the 15th May, 1926. This application for execution is *prima facie* barred inasmuch as it was made beyond three years from the date of the first application for execution unless the bar of limitation is saved on account of any application made by the decree-holder which can be treated as a step-in-aid of execution.

It is contended on behalf of the decree-holder that applications to take some steps-in-aid of execution were made by her on the 26th May, 1923, on the 14th December, 1923, and on the 12th January, 1924, and that, therefore, the present application was not barred by limitation. The three applications which the decree-holder seeks to treat as applications to take some steps-in-aid of execution were made under the following circumstances.

After the sale of the property on the 19th September, 1922, the judgment-debtor made an application for setting aside the sale under Order XXI, rule 90, and this application was made on the 23rd of October, 1922. The date fixed for hearing this application under Order XXI, rule 90, appears to have been the 26th of May, 1923. On that date the decree-holder filed a hazari or list of witnesses in attendance. This is the first step-in-aid of execution

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relied upon by the decree-holder to save the present application for execution from limitation. The application under Order XXI, rule 90, however, was dismissed for default on the same day, i.e., 26th May, 1923, and the sale was confirmed. On the 29th May, 1923, the judgment-debtor made an application for re-hearing under Order IX, rule 9, Civil Procedure Code, which was dismissed for default on the 4th of July, 1923. On the 6th of July, 1923, the judgment-debtor made an application for review of the order of the 26th May, 1923, dismissing his application for setting aside the sale for default. This application for review was dismissed for default on the 27th of July, 1923. On the 7th September, 1923, the judgment-debtor made a second application for review, and in the course of the trial of this application the decree-holder filed a list of witnesses on the 14th of December, 1923, and a petition of objection to the review on the 12th of January, 1924. The filing of the list of witnesses and the petition of objection are relied upon by the decree-holder as further steps-in-aid of execution. The application for review, however, was dismissed by the Court on the 19th of January, 1924, and the present application for execution for the balance of the amount left after part satisfaction in the first execution case was filed on the 15th of May, 1926.

The point for consideration, therefore, is whether the hazari filed by the decree-holder in the Miscellaneous Case relating to the setting aside of the sale, and the petition of objection to the second application for review, and the list of witnesses filed by the decree-holder in connection therewith can be treated as applications to take some step-in-aid of execution so as to save the present application from the bar of limitation.

The learned Subordinate Judge was of opinion that they were steps-in-aid of execution, and I am inclined to agree with him.

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It is contended on behalf of the judgment-debtor that the hazari filed by the decree-holder on the 26th of May, 1923, was in connection with an application under Order XXI, rule 90, Civil Procedure Code, and it cannot be treated as an application to take some step-in-aid of execution. On the authority of *Chaudhuri Jagdish Misser* v. *Chaudhuri Sureshar Misser* (1) it is contended on behalf of the judgment-debtor that an application to set aside a sale under Order XXI, rule 90, is not an application under section 47 of the Code, and the proceedings taken thereupon are not proceedings in execution of a decree and that, therefore, any step taken by the decree-holder in the proceeding taken upon the application under Order XXI, rule 90, cannot be treated as a step-in-aid of execution.

Clause (5) of Article 182 of the First Schedule to the Indian Limitation Act, however, does not require that the application to take some step-in-aid of execution of the decree should be made in the course of execution proceedings; all that it requires is that an application should be made to take some step-in-aid of the execution of the decree. That application may be made in connection with any other proceeding which may not strictly speaking be proceedings in execution of the decree but which affects the execution of the decree. As was held by this Court in *Sheo Sahay* v. *Jamuna Prashad Singh* (2) any step taken by the decree-holder to remove an obstacle thrown by the judgment-debtor in the way of the execution of the decree is a step-in-aid of execution. It is not necessary that the step must be taken in the execution proceedings : the step may be taken in any proceeding which has the effect of throwing an obstacle to the execution of the decree. In the present case the application under Order XXI, rule 90, did throw an obstacle in the way of the decree-holder's taking out execution. Only a part of the decree had been satisfied by sale of the property, and the objection taken

(1) (1921) 6 Pat. L. J. 258. (2) (1925) I. L. R. 4 Pat. 202.

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by the judgment-debtor was that the property had been sold for an inadequate price on account of irregularities in the conduct of the sale. If the application had succeeded, and the sale had been set aside, it was possible that the amount realised by a second sale of the same properties might have been larger than the amount fetched at the first sale, and in that case the balance due under the decree might have been less than the amount left after the first sale, or the entire decree might have been satisfied and there would have been no need for taking out a fresh execution. The decree-holder therefore was under a serious difficulty in applying for a fresh execution inasmuch as it was not known what would be the amount for which execution was to be taken, or whether there would be any need to take out a fresh execution at all. There was thus an obstacle thrown in the way of the decree-holder to her making any application for further execution of the decree, and any step taken by her in the proceeding relating to the setting aside of the sale would, in my opinion, be a step-in-aid of execution of the decree. It has not been contended on behalf of the judgment-debtor that the filing of the hazari on the 26th of May, 1923, cannot be treated as a step-in-aid of execution. What has been contended is that such step in the course of a proceeding for setting aside the sale is not a step which can save a subsequent application for execution. There can be no doubt that if the application for setting aside the sale had succeeded, and the sale had been set aside, the decree-holder would have been entitled to make a fresh application for execution; and it was held in *Deonarain Singh* v. *Ram Prasad* (1) that in case of the sale in the execution of the decree having been set aside, the decree-holder's right to execute the decree revived and the second application if made within three years of the date on which the sale had been set aside would not be barred by limitation. In *Trilokinath Jha* v. *Banamali Jha* (2) the question considered

(1) (1925) 90 Ind. Cas. 799. (2) (1923) I. L. R. 2 Pat. 249.

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was whether an application for confirmation of sale is an application to take a step-in-aid of execution and the learned Judges in the course of their judgment observed as follows: "A useful test to apply would be this: supposing the decree-holder purchaser is unable to obtain possession, would it entitle him to take out further execution for that portion of the money which is represented by the property purchased by him of which he is unable to obtain possession? If the fact that he is unable to obtain possession would reopen the execution proceedings, then there might be something to be said in favour of the view that execution was not complete until he obtains possession of the property," and their Lordships were evidently of opinion that in such a case the application for confirmation of the sale would be a step-in-aid of execution. Applying this test to the present case, it is clear that if the application under Order XXI, rule 90, had succeeded, it would have re-opened the execution proceedings and in that case the step taken by the decree-holder in the course of the proceeding under Order XXI, rule 90, would be a step-in-aid of execution. I am, therefore, of opinion that the filing of the hazari by the decree-holder in the course of the proceeding under Order XXI, rule 90, on the 26th of May, 1923, was an application to take a step-in-aid of execution and it gave a fresh start to the period of limitation. The present application having been filed on the 15th of May, 1926, is within three years from that date and is therefore not barred by limitation.

In this view of the case it is not necessary to consider whether the objection filed by the decree-holder on the 12th of January, 1924, in the course of the proceeding for review of the order of the 26th of May, 1923, or the list of witnesses filed by her in the same proceeding on the 14th of December, 1923, would amount to an application to take some step-in-aid of execution. I am, however, inclined to hold that they would amount to steps-in-aid of execution inasmuch

as the proceedings were obstacles thrown in the way of the decree-holder to further execution of the decree for the balance of the decretal amount. Any step taken to remove such obstacle would amount to taking some step-in-aid of execution of the decree.

The result is that the order made by the learned Subordinate Judge appears to be sound and must be affirmed. This appeal is dismissed with costs.

MACPHERSON, J.—I agree.

Appeal dismissed.