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HAMKUMAR AGARWALA v. RAMCHARAN HANUMAN SONAR.

FAZL ALI, J.

a question arises between the judgment-debtor and the auction-purchaser of his interests it is a question between the judgment-debtor and his representative and is consequently not a question which may be determined under that section."

Besides, as has been pointed out in *Sasi Bhusan Mookerjee* v. *Radha Nath Bose* (1) by Mookerjee, J., "it is well settled that when the purchaser is not the decree-holder, a question which may arise in the proceedings for delivery of possession between him and the judgment-debtor does not fall within the scope of section 47". The same view will also appear to be supported on a close reading of the decision in *Kailash Chandra Tarafdar* v. *Gopal Chandra Poddar* (2). This being so, it is clear that the proceeding before the learned Munsif was not a proceeding under section 47 of the Code of Civil Procedure and, therefore, no appeal lay to the Subordinate Judge. The decision of the Subordinate Judge was thus clearly without jurisdiction and must be vacated.

The appeal is, therefore, allowed with costs.

It is unnecessary to deal with the revision in view of the fact that the appeal succeeds.

MACPHERSON, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Kulwant Sahay and Wort, JJ.

1930.

January, 13, 14, February, 19.

MUSAMMAT BHAGIRATHI KUER

v.

NARSINGH NARAYAN SINGH.*

Execution—Limitation Act, 1908 (*Act IX of* 1908), *Article* 182 (4), *Schedule* 1—*executing court, whether entitled*

*Appeal from Appellate Order no. 153 of 1929, from an order of Phanindra Lal Sen, Esq., District Judge of Gaya, dated the 21st March, 1929, reversing an order of Maulvi Shaikh Ali Karim, Subordinate Judge of Gaya, dated the 17th September, 1928.

(1) (1914) 19 Cal. W. N. 835.

(2) (1926) 30 Cal. W. N. 649, F. B.

to consider the validity of amendment—application for amendment filed within 3 years of the date of decree—amendment made beyond 3 years—application for execution made within 3 years of the amendment, whether barred by limitation.

Article 182, Schedule I of the Limitation Act, 1908, provides for three years' limitation for an application for execution and, by paragraph (4) of column (3) of the article, limitation runs from the date of the amendment when the decree is amended.

Held, that in dealing with an application for execution, the executing court is not entitled to consider the validity of the amendment or whether the decree apart from the amendment was capable of execution.

Held, further, that at any rate, where the application for amendment is made within three years of the date of the decree, but the order allowing the amendment is made beyond three years, the application for execution made within three years of the date of the amendment is not barred by limitation.

Durga Prasad Das v. *Kedarnath Nayek* (1), followed.

Mohamaya Prasad Singh v. *Abdul Hamid* (2), *Raja Kalanand Singh* v. *Raj Kumar Singh* (3), *Rabiuddin* v. *Ram Kanai Sen* (4), *Maharaja Sir Rameshwar Singh Bahadur* v. *Homeshwar Singh* (5), *Sanatan Sant* v. *Dinabandhu Giri* (6), *Jhaman Lal* v. *Daulat Ram* (7), *Kali Prosunno Basu Roy* v. *Mohun Guha Roy* (8) and *Subramania Pillai* v. *Seethai Ammal* (9), distinguished.

Appeal by the decree-holder.

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

S. Dayal (with him *Dhyan Chandra* and *Ishwarinandan Prosad*), for the appellant.

Harinandan Singh, for the respondent.

(1) (1929) A. I. R. (Cal.) 650.
(2) (1913) 18 Cal. W. N. 266.
(3) (1917) 2 Pat. L. J. 286.
(4) (1920) 59 Ind. Cas. 186.
(5) (1920) 33 Cal. L. J. 109, P. C.
(6) (1921) 34 Cal. L. J. 397.
(7) (1924) A. I. R. (Lah.) 329.
(8) (1897) I. L. R. 25 Cal. 258.
(9) (1911) I. L. R. 36 Mad. 135.

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MUSAMMAT PHAGIRATHI KUER v. NARSINGH NARAYAN SINGH.

WORT, J.—This appeal arises out of an objection petition by a judgment-debtor under section 47 of the Civil Procedure Code, objecting to the execution proceedings arising out of a rent suit.

The only point in the case is whether the decree was barred by limitation. The decree for arrears of rent was made on the 17th February, 1923, and within three years, that is to say, on the 9th of February, 1926, the plaintiff applied for an amendment of the decree. The defendants nos. 2 and 3 on the 17th of February, 1926, objected to the proposed amendment which would have entitled the plaintiff to a further sum amounting to something like Rs. 75. It was not until the 7th of August, 1926, that the Court came to a decision in the matter, allowing the amendment. On the 31st of January, 1928, an application was made in execution. It will be noticed that the order allowing the amendment was made more than three years after the date of the decree, and at that date, therefore, the decree was barred by limitation.

The question which arises is the true meaning to be placed on paragraph (4) in the third column of Article 182 of the Indian Limitation Act. Article 182 allows a period of three years' limitation for execution of a decree which by paragraph (1) of the third column is from the date of the decree; and under paragraph (4) (with which we are concerned), where the decree has been amended, the period is to run from the date of the amendment. The District Judge has held that as the decree was barred by limitation on the date of the amendment the execution proceedings are not maintainable. The substance of the contention on behalf of the appellant is that the executing court is not entitled to look into the history of the decree and it must be satisfied merely with the fact that the date of the application for execution was within three years of the date of the amendment.

A number of authorities have been relied on on both sides and these will be taken up in order. Some

of them, as will be seen, give no material assistance to the decision of this matter. The first is the case of *Kali Prosunno Basu Roy* v. *Mohun Guha Roy* (1) and the substantial question raised in that case was whether an order passed on an application for amendment of a decree was a review of judgment within the meaning of Article 179 (*3*), Schedule II of the Limitation Act, 1877. It gives us, however, no assistance as the application for review and the order passed thereon were within three years of the original decree. The case, however, of some importance is *Mohamaya Prosad Singh* v. *Abdul Hamid* (2). There the decision was given on the 23rd December, 1902, in the Court of Appeal, allowing the plaintiff's claim granting the decree for arrears of rent. In the decree there was no mention of the amount or the annual rent, or the costs. There was an appeal to the High Court in which the decision was given on the 28th April, 1905, the appeal being dismissed. Thereafter an application in execution was made in December, 1907, but this was dismissed on the ground that the decree could not be executed. An amendment was subsequently made; and the application eventually for execution was made on the 2nd of October, 1909, the decree having been amended on the 23rd of June, 1909. The point of importance is that the learned Judges decided that the case was not barred by limitation by reason of the fact that the decree ultimately passed by the High Court was incapable of execution. It is submitted by the respondent to this appeal that as the decree made by the trial Court in this case was capable of execution, the application in execution at the date on which it was made was barred by limitation. The next case is *Subramania Pillai* v. *Seethai Ammal* (3), but it gives really no assistance to either side in this case, as the only question was whether in a case where a petition in revision is dismissed a fresh starting

(1) (1897) I. L. R. 25 Cal. 258.
(2) (1913) 18 Cal. W. N. 266.
(3) (1911) I. L. R. 36 Mad. 135.

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point of limitation arises under clause (*1*) of Article 182. The case of *Raja Kalanand Singh* v. *Raj Kumar Singh* (1) was decided by this High Court and it was held that where the amendment was merely a correction in the rate of rent, that amendment in the circumstances did not give rise to a fresh starting point for limitation. If any advantage can be got by the judgment-debtor from that case it is on the assumption that that decision is based on the proposition that the decree as made in the first instance was capable of execution; but it is to be noticed in the judgment that it is distinctly stated that the Court is not prepared to say that there is any general rule applicable in every case to the effect that the amendment of a decree cannot afford a fresh period of limitation, and, of course, this must be so having regard to the wording of paragraph (*4*) of the Article. Reference has also been made to *Rabiuddin* v. *Ram Kanai Sen* (2) where it was decided that as the original decree was capable of execution, the amended decree was barred by limitation, so far as execution is concerned. There, however, it is to be noticed that the application for amendment was made after the first application for execution and that at the date of the application for amendment time had already run against the decree-holder. One of the most important decisions on this point is the case of *Maharaja Sir Rameshvar Singh Bahadur* v. *Homeshvar Singh* (3). It was a decision of the Judicial Committee of the Privy Council which was to the effect that the decree as originally framed, not being capable of execution, was not barred by limitation. Whether the converse is true, that is to say, that if a decree is capable of execution at the time it was prepared it would be barred although an amendment were made later, did not come up for decision and, therefore, was not decided. The case of *Sanatan Sant* v. *Dinabandhu Giri* (4) is a decision

(1) (1917) 2 Pat. L. J. 286.
(2) (1920) 59 Ind. Cas. 186.
(3) (1920) 33 Cal. L. J. 109.
(4) (1921) 34 Cal. L. J. 397.

to the same effect. A case in favour of the judgment-debtors is that of *Jhaman Lal* v. *Daulat Ram* (1). But in this case again application for amendment was made after the decree had already become barred by limitation.

A further decision, however, which is in favour of the decree-holder is relied upon, being the case of *Durga Prosad Das* v. *Kedarnath Nayek* (2). In that case a final decree in a mortgage suit was made on the 8th of May, 1924. An application was made for execution on the 7th of May, 1927. On the 28th of July, 1927, an *ex parte* application was made by the decree-holder for the present appellant being substituted in the place of deceased judgment-debtor no. 4; but on the 17th of December, 1926, an application for amendment had been made and a further application on the 10th of May, 1927. On the 6th June, 1927, the Court made its order amending the decree. The Court held that the original decree was incapable of execution. It is to be noticed, however, that when the Court made an order amending the decree on the 6th June, 1927, it refused to amend the decree by striking out the name of the judgment-debtor no. 4 who was dead at the time. The argument on behalf of the judgment-debtor was that at the time when the order substituting the present appellant in the place of his deceased predecessor was made, that is, on the 28th July, 1927, more than three years had elapsed from the date of the decree and, therefore, it was barred by limitation. It was held that the Court was not entitled to look into the question of whether the amendment was properly made or not or whether the original decree was capable of execution; that Article 182, clause (4) gave the date of the amendment of the decree for the purpose of limitation and that the Court was not entitled to introduce other considerations into the case and thus defeat the decree-holder. Now it is to be noticed in the case before us that the application

(1) (1924) A. I. R. (Lah.) 329. (2) (1929) A. I. R. (Cal.) 650.

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for amendment was made within three years of the date of the decree and it is only by the delay made by the learned Judge himself who amended the decree that the date of the amendment is outside the three years' period of limitation. It seems to me, following the decision last quoted, that it is immaterial to consider the validity of the amendment or whether the decree apart from the amendment is capable of execution. The Act sets out the time from which the period of limitation is to run as the date of amendment and, therefore, to take into consideration such matters as whether the decree was capable of execution at the time when it was made was introducing considerations which on the strict meaning of the Article are not material. I have noted the fact that the application for amendment was within time and, apart from considerations stated above, it seems to me a sufficient reason for holding that the decree-holder is within time in his application in this case. In other words, the action of the Court in delaying the making of the amended decree ought not to prejudice the decree-holder as to his rights in respect thereof.

In my judgment, therefore, the decision of the learned District Judge was wrong and it must be set aside and this appeal allowed with costs.

KULWANT SAHAY, J.—I agree.

Appeal allowed.

SPECIAL BENCH.

Before Terrell, C.J., Kulwant Sahay and James, JJ.

1930.

February, 4, 24.

GAJADHAR RAI

v.

RAM CHARAN GOPE.*

Bengal Tenancy Act, 1885 (Act VIII of 1885), Schedule III, Article 3—limitation—dispossession by landlord as

*Appeal from appellate decree no. 701 of 1927, from a decision of J. G. Shearer, Esq., I.C.S., Additional District Judge of Bhagalpur, dated the 12th March, 1927, confirming a decision of Babu Braj Bilas Prasad, Munsif of Bhagalpur, dated the 25th February, 1926.