

to ascertain these properties, time would have been given, the application being of a reasonable character. The present application in execution was made on the 8th June within a reasonable time from the date on which the claim was allowed. If the decree-holder is not to be prejudiced by the illegal order dismissing the case, I think that, as the execution case was dismissed without any default on his part and the amendment (for it is virtually an amendment of the application) was made within a reasonable time from the date when amendment became necessary, the application ought to be treated as an application in continuation of the previous execution.

The appeal must be dismissed with costs.

KULWANT SAHAY, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Ross and Kulwant Sahay, J. J.

RAJA BISWAMBHAR NATH SAHI

v.

MAHESH SAHI.*

1926.

Nov., 2.

Limitation Act, 1908 (Act IX of 1908), Schedule I, Article 182(5)—Step-in-aid of execution—service of notice under Order XXI, rule 22, Code of Civil Procedure, 1908 (Act V of 1908), and attachment of judgment-debtor's properties.

Although the mere service on the judgment-debtor of a notice under Order XXI, rule 22, of the Code of Civil Procedure, 1908, is not sufficient to save an application for execution from the bar of limitation, yet, where, after such notice, an order is made for attachment of the properties of the

* Appeal from original order no. 48 of 1926, from an order of Mr. Nut Bihari Chatterji, Subordinate Judge of Shahabad, dated the 20th January, 1926.

1926. judgment-debtor and attachment is effected, a subsequent application for execution is saved thereby.

RAJA
BISWAMBHAR
NATH SAHI

Umed Ali v. Abdul Karim Chaprasi (1), distinguished.

v.
MAHESH
SAHI.

Mungul Pershad Dichit v. Girija Kant Lahiri (2) and
Sripati Charan Chowdhry v. R. Belchambers (3), referred to.

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

S. Sinha (with him *S. Dayal* and *Sajroo Prasad*), for the appellant.

P. Dayal and *Rai Tribhuan Nath Sahay*, for the respondent.

KULWANT SAHAY, J.—The only question for decision in this appeal is whether the application for execution was barred by limitation. The decree was passed on the 18th May, 1914. The second application for execution was made on the 4th October, 1920, and in that execution case the last application to take some step in aid of execution was filed on the 15th December, 1920. That execution case was dismissed and the third application for execution was made on the 18th December, 1923. The present application was made on the 20th March, 1925. The question is whether the third application was barred by limitation. If the third application was barred, then the present application would be evidently also barred. Having regard to the fact that the last step taken in the second execution was on the 15th December, 1920, the third application filed on the 18th December, 1923, would evidently be barred. But on reference to the order sheet of that execution case it appears that notice under Order XXI, rule^a 22, was served on the judgment-debtor and thereafter an order was made for attachment of the properties of the judgment-debtor and attachment was effected. In

(1) (1908) I. L. R. 35 Cal. 1060. (2) (1882) I. L. R. 8 Cal. 51, P. C.

(3) (1910-11) 15 Cal. W. N. 661.

the circumstances the principle laid down by the Privy Council in *Munqul Pershad Dichit v. Girija Kant Lahiri* (1), would apply and the present application must be considered to be within time.

It was contended on behalf of the appellant that mere service of a notice under Order XXI, rule 22, would not save the application from the bar of limitation and reliance was placed on the case of *Umed Ali v. Abdul Karim Chaprashi* (2). In that case the learned Judges referred to *Munqul Pershad Dichit's* case (1) and observed that "it was only necessary to point out that in that case an order for attachment made by the Subordinate Judge on an application, which would otherwise have been time-barred, was held to operate as a decision that the execution was not barred even though that decision was erroneous; but at the same time their Lordships of the Judicial Committee declined to differ from the rule laid down by the Full Bench in *Bisseshur Mullick v. Maharajah Mahatab Chunder Bahadoor* (3) in which it was held that the mere service of notice on the judgment-debtor after the decree was barred was not a proceeding in execution merely because the judgment-debtor did not come in and oppose it." Now, their Lordships did not interpret the decision of the Judicial Committee in *Munqul Pershad Dichit's* case (1) in the way in which the learned Counsel asks us to interpret it in the present case. Their Lordships there held that mere service of notice on the judgment-debtor would not save the application from limitation unless there was some other proceeding in relation to the execution of the decree after the service of the notice. In *Sripati Charan Choudhry v. R. Belchambers* (4), Mookerjee, J., in considering a similar case observed as follows: "It is well settled that mere service of notice upon a

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RAJA
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SAHAY, J.

(1) (1882) I. L. R. 8 Cal. 51, P. C.

(2) (1908) I. L. R. 35 Cal. 1060.

(3) (1868) 10 W. R. (F. B.) 8.

(4) (1910-11) 15 Cal. W. N. 661.

1926. judgment-debtor under section 248, Civil Procedure Code, is not by itself sufficient to debar him from urging the objection than an application is barred by limitation, when no order for execution has been made after the service of notice under section 248." In the present case we find that an order was made for attachment of the judgment-debtor's properties after the service of notice under Order XXI, rule 22. This will bring the present case within the doctrine laid down in *Mungul Pershad Dikhit's* case (1).

The present application is clearly within time. This appeal is dismissed with costs.

Let the record be sent down as soon as possible.

Ross, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Ross and Kulwant Sahay, J. J.

BALDEO THATHWARI KONHORAI

v.

LACHMAN LAL PATHAK.*

Limitation Act, 1908 (Act IX of 1908), Schedule I, Article 182 (5)—Step-in-aid of execution—appearance on an application under Order XXI, rule 90, Code of Civil Procedure, 1908 (Act V of 1908).

The mere appearance of the decree-holder in a proceeding under Order XXI, rule 90 of the Code of Civil Procedure, 1908, which is dismissed for default, does not amount to an application to take a step-in-aid of execution within the meaning of Article 182 (5), Schedule I of the Limitation Act, 1908.

(1) (1892) I. L. R. 8 Cal. 51, P. C.

* Miscellaneous Appeal no. 81 of 1926, from an order of F. F. Madan, Esqr., I.C.S., District Judge of Gaya, dated the 6th March, 1926, reversing a decision of M. Ihtisham Ali Khan, Subordinate Judge of Gaya, dated the 14th November, 1925.