

1929.
 SYED JAHAR ALI
 v.
 MUSAMMAT MUSHARATAN NISSABIEL.
 as to costs.

JAMES, J. COURTNEY TERRELL, C.J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

1929.
 April, 26.

Before Terrell, C. J. and James, J.

ATUL KRISHNA GHOSH

v.

BRINDABAN NAIK.*

Execution of decree—decree barred by limitation—subsequent execution proceedings—objection taken at a late stage, whether maintainable—judgment-debtor, when precluded from raising the point—duty of the court—Limitation Act, 1908 (Act IX of 1908), section 3.

It is only when the point of limitation is concluded by proceedings in a previous execution that the judgment-debtor is not allowed to raise the question of limitation in a subsequent execution of the decree. But, so long as an execution application is pending, the judgment-debtor can show at any stage that the application is barred and the court will have to dismiss the application under section 3 of the Limitation Act, 1908.

Maharaja Kesho Prasad Singh Bahadur v. Harbans Lal (1), followed.

Mungul Pershad Dichit v. Girja Kant Lahiri (2) and Raja of Ramnad v. Velusami Tevar (3), referred to.

* Miscellaneous Appeal no. 15 of 1928, from an order of H. R. Meredith, Esq., r.c.s., District Judge of Cuttack, dated the 19th July 1928, confirming an order of Babu N. C. Choudhury, Munsif of Bhadrak, dated the 22nd March, 1928.

(1) (1920) Cal. W. N. (Pat.) 109.

(2) (1882) I. L. R. 8 Cal. 51.

(3) (1920-21) 25 Cal. W. N. 581.

The decree under execution had become barred by limitation before 1925 in which year an application for execution was made on the 30th of May and was struck off on the 22nd of June. In 1926 another application for execution was filed on the 6th July and was struck off a week later. On the 27th of July, 1927, the present application for execution was made and, on the 21st of August, notice under Order XXI, rule 22, Code of Civil Procedure, 1908, was issued. On the 1st of September a writ of attachment of moveable property was obtained and the moveables were sold on the 10th of December. On the 20th of December the decree-holder applied for the sale of the judgment-debtor's moveable property of which attachment was effected on the 18th January. On the 19th of January the judgment-debtor filed an application under section 47, Code of Civil Procedure, 1908, objecting to the execution on the ground that the decree was barred by limitation.

Held, that in the absence of anything to show either that the objection on the ground of limitation was taken and disallowed in an earlier execution proceeding, or that any of the earlier execution proceedings from 1925 onwards reached a stage at which the judgment-debtor could have taken that objection, the judgment-debtor was entitled to resist the execution on the ground of limitation in the subsequent proceedings.

Appeal by the decree-holder.

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

S. N. Ray, for the appellant.

L. K. Das Gupta (with him *S. C. Bose*), for the respondent.

JAMES, J.—This is an appeal from an order of the District Judge of Cuttack affirming the decision of the Munsif of Bhadrak who held that a decree under execution was barred by limitation.

The Courts below found that the decree was barred by limitation before 1925, in which year an application for execution was made on the 30th of May which was struck off on the 22nd of June. In 1926 another application for execution was filed on

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the 6th July which was struck off a week later. The application with which we are concerned was presented on the 27th of July, 1927. On the 21st of August notice was issued under Order XXI, rule 22 of the Code of Civil Procedure. On the 1st of September a writ of attachment of moveable property was obtained and the moveables were sold on the 10th of December. On the 20th of December the decree-holder applied for sale of the judgment-debtor's immovable property, of which attachment was effected on the 18th January. On the 19th of January the judgment-debtor filed an application under section 47 of the Code of Civil Procedure objecting to the execution on the ground that the decree was barred by limitation; and this point was decided in his favour.

It is argued in the first place on behalf of the decree-holder appellant that the judgment-debtor's failure to take objection on the ground of limitation to the application which was made on the 6th July, 1926, should be treated as a waiver of his claim; or that it should be presumed that the Court treated the decree as alive, and that this should be regarded as a finding amounting to *res judicata* against the judgment-debtor. The proceedings of 1926 were struck off within a week of the date of application. We have no evidence to show that the judgment-debtor appeared; and it cannot be held that when the proceedings in execution had been struck off it was the duty of the judgment-debtor to come forward with an objection that they were barred by limitation. If he had come forward with such an objection the Court would not have listened to him, and his objection would not have been entertained.

It is argued in the second place that when, in the latest execution proceedings, the judgment-debtor's moveable property was attached and sold, he ought to have taken the objection that the decree was barred by limitation, and that the proceedings of the

Munsif ordering attachment and sale implicitly amounted to an adjudication that the claim under the decree was not barred. The learned Advocate for the appellant relied upon the cases of *Mungul Pershad Dichit v. Girija Kant Lahiri* (1) and *Raja of Ramnad v. Velusami Terar* (2). The appeal of Mungul Pershad Dichit was from a decision by which an application for execution filed in 1877 was dismissed on the ground that a previous petition which had been filed on the 5th September, 1874, had itself been barred because the decree was then dead. The execution proceedings of 1874 reached the stage of attachment and sale proclamation; and it was held by the Judicial Committee that the judgment-debtor ought to have taken objection that the decree was barred by limitation when attachment was issued on the 8th October, 1874; that when no such objection was taken the order that attachment should issue amounted to an adjudication that the decree was then alive; and that the matter should be regarded as *res judicata*. Similarly in the case of the *Raja of Ramnad* (2) a plea of limitation was raised in subsequent execution proceedings when it ought to have been raised in the earlier proceedings. But the present case is governed by the decision in the case of *Maharaja Kesho Prasad Singh Bahadur v. Harbans Lal* (3) wherein the case of *Mungul Pershad Dichit* (1) has been discussed and explained. After observing that it is the Court's duty at any stage of the execution proceedings to dismiss the execution if it is found to be barred by limitation, the learned Judges go on to say: "This duty is imposed by section 3 of the Limitation Act even when the ground is not taken by the judgment-debtor. It is only when the point of limitation is concluded by proceedings in a previous execution that the judgment-debtor is not allowed to take the objection of limitation in a subsequent execution of the decree. But so long as an execution application is pending the judgment-debtor can shew at any stage that the application is barred,

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(1) (1882) I. L. R. 8 Cal. 51. (2) (1920-21) 25 Cal. W. N. 581.

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and the Court will have no option but to dismiss the application under section 3 of the Limitation Act." In this case the learned Advocate for the appellant has been unable to shew either that an objection on the ground of limitation was taken and disallowed in any earlier execution proceedings, or that any of the earlier execution proceedings from 1925 onwards reached a stage at which the judgment-debtor could have taken that objection. That being so, the objection under section 47 was properly taken on the 19th January, 1928, and the decision of the Courts below must be affirmed. The appeal is dismissed with costs.

COURTNEY TERRELL, C. J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Fazl Ali and Chatterji, JJ.

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April, 30.

MAHARAJADHIRAJ SIR RAMESHWAR SINGH
BAHADUR

v.

MANGAL PRASAD SAHU.*

Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rule 89—attached properties sold in separate lots—application for setting aside sale of some of the properties—deposit of sale proceeds of some lots only—whether sufficient compliance with law—appeal—auction-purchaser, whether a necessary party.

Where in execution of a decree the properties attached were sold in separate lots and the judgment-debtor applied for setting aside the sale of the properties covered by some only of the lots by depositing in court the sale proceeds of those lots with compensation of 5 per cent. on that sum.

Held, that there was not a sufficient compliance with the provision of Order XXI, rule 89, Code of Civil Procedure, 1908, and that the sale could not be set aside.

* Appeal from Original Order no. 79 of 1928, from an order of Babu Suresh Chandra Sen, Subordinate Judge of Darbhanga, dated the 10th February, 1928.