

whole of the amount of the decree should be realized is undoubtedly supported by a good deal of authority. This is a matter upon which there has been a conflict of judicial opinion; but in this Court what I may call the more liberal view has been taken: [see *Manindra Nath Rou v. Kanhai Ram Marwari*(¹) and *Ramsekhar Prasad Singh v. Mathura Lal*(²)]. It seems to me, when the last two clauses of the agreement are read together, that the intention of the parties was to leave it at the option of the decree-holder either to enforce the payment of the whole of the decretal amount at once or to continue to abide by the instalments. The present application is therefore, in my opinion, not out of time.

In the cross-objection the respondent contends that the view taken by the Subordinate Judge about the instalments which fell due from July to September, 1925, was the correct view. In my opinion this view rests upon a construction of paragraph 3 of the agreement which is not the correct construction.

I would, therefore, dismiss both the appeal and the cross-objection with costs.

ROWLAND, J.—I agree.

Appeal and cross-objection dismissed.

APPELLATE CIVIL.

Before Ross and Chatterjee, JJ.

DURGA PRASAD SAHU

v.

MUSAMMAT POWDHARO KUER.*

Execution—application for a relief which could not be granted under the law—application, whether one “in accordance with law”—limitation.

* Appeal from Original Orders nos. 206 and 218 of 1928 and no. 48 of 1929, from a decision of Mr. Ihtisham Ali Khan, Subordinate Judge of Saran, dated the 8th of August, 1928.

(1) (1919) C. W. N. (Pat.) 46.

(2) (1925) A. I. R. (Pat.) 557.

1930.

GANGA
BISHUN
MARWARI
v.
LALA
RAGHUNATH
PRASAD.

Ross, J.

1930.

June, 25.

1930.

DURGA
PRASAD
SAHU
v.
MUSAMMAT
POWDHARO
KUR.

When in execution of a decree certain property had been attached and a claim had been preferred, a surety bond was given to answer so much of the decree as that in respect of which the claim failed. The claim succeeded in part and there was a doubt about the extent of the liability of the surety according to the terms of the bond; but that matter was finally decided in a subsequent execution case when it was held that the surety was liable only to the extent of one-sixth of the decree which was for Rs. 7,000. Notwithstanding that decision the decree-holder applied on the 31st of March, 1924, for execution of whole of the decree for Rs. 7,000 against the surety and the judgment-debtors. There was an objection that the decree could not be executed in that way and in consequence the execution case was dismissed. The decree-holder filed the present application for execution and he now sought to rely upon the application of the 31st of March, 1924, as saving limitation under Article 182, clause (5) of the Limitation Act, 1908.

Held, that the application of the 31st of March, 1924, being one for a relief which could not be granted under the law, was not an application "in accordance with law" so as to save limitation.

Pandarinath Bapuji v. Lilachand Hatibhai(1), *Munawar Hussain v. Jani Bijai Shankar*(2), and *Purna Chandra Mandal v. Radha Nath Dass*(3), followed.

Jogendra Prasad Narayan v. Mangal Prasad Sahu(4), *Amrit Lal v. Murlidhar*(5), and *Ganeshwar Singh v. Than Mal*(6), distinguished.

Appeal nos. 48 and 218 by the judgment-debtors.

Appeal no. 206 by the decree-holder.

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

Harnarayan Prasad and *B. B. Sahay*, for the appellants in no. 206, and for the respondents in nos. 48 and 218.

(1) (1888) I. L. R. 13 Bom. 237.

(2) (1905) I. L. R. 27 All. 619.

(3) (1906) I. L. R. 33 Cal. 867.

(4) (1925) 7 Pat. L. T. 330.

(5) (1922) 3 Pat. L. T. 422.

(6) (1926) 8 Pat. L. T. 217.

Abani Bhusan Mukharji and *J. P. Sinha*, for the respondent in no. 206, and for the appellants in nos. 48 and 218.

Ross, J.—Of these three appeals two are by the judgment-debtors and one by the decree-holder. The judgment-debtors' ground of appeal is that the execution is barred by time; and if they succeed in this contention, then it is unnecessary to deal with the decree-holder's appeal which must necessarily fail.

The facts of the case are that when a decree was being executed and a property had been attached and a claim had been made, a surety bond was given to answer so much of the decree as that in respect of which the claim failed. The claim succeeded in part and there was a doubt about the extent of the liability of the surety according to the terms of the bond; but that matter was finally decided in a subsequent execution case of 1922 when it was held that the surety was liable only to the extent of one-sixth of the decree which was for Rs. 7,000. Notwithstanding that decision the decree-holder applied on the 31st of March, 1924, for execution of whole of the decree for Rs. 7,000 against the surety and the judgment-debtors. There was an objection that the decree could not be executed in that way; and the objection succeeded and the execution case was dismissed, the decision being affirmed by the High Court. It is now sought to rely upon that execution proceeding as saving limitation. If there was an application in accordance with law in that case, then it is conceded that the present application is within time; but if that application was not in accordance with law, it is also conceded that the present application is out of time. Therefore, the sole question for decision is whether the application of the 31st of March, 1924, was an application in accordance with law.

It is contended on behalf of the judgment-debtors that as that was an application which could not have been granted it was not an application in accordance

1930.

 DURGA
 PRASAD
 SARU
 v.

 MUSAMMAT
 POWDHAR
 KUER.

1930.

DURGA

PRASAD

SAHU

v.

MUSAMMAT

POWDHARO

KUER.

ROSS, J.

with law; and several cases were cited in support of the argument. In *Pindarinath Bapuji v. Lilachand Hatibhai*(1), the application was for a relief which was not given in the decree; and it was held that such an application could not be considered as an application to execute or further the execution of the decree in any way and, therefore, would not save limitation. It was pointed out that there may be cases in which an application might be incorrect in some respects and yet would be an application furthering execution; but where the application is not one which furthers execution, it is not available to save limitation. In *Munawar Hussain v. Jani Bijai Shankar*(2), the matter was put in this way that "applying in accordance with law" means applying to the Court to do something which by law that Court was competent to do. It does not mean "applying to the Court to do something which, either to the decree-holder's direct knowledge of facts or his presumed knowledge of law, he knew that the Court was incompetent to do". That was a case where the application had been for the sale of non-hypothecated property in execution of a mortgage decree before exhausting the mortgaged property and that decision was approved by the Calcutta High Court in *Purna Chandra Mandal v. Radha Nath Dass*(3). That was a case where an invalid application was made under section 90 of the Transfer of Property Act; and it was held that it did not save limitation for the execution of the decree for sale, on precisely the same ground. The cases that are cited on behalf of the respondent are all cases of defects of a more or less formal nature in the application itself, such as an application by one of two joint decree-holders as in *Jogendra Prasad Narayan v. Mangal Prasad Sahu*(4), or a case where the application referred to a decree which was not

(1) (1888) I. L. R. 13 Bom. 237.

(2) (1905) I. L. R. 27 All. 619.

(3) (1906) I. L. R. 33 Cal. 867.

(4) (1925) 7 Pat. L. T. 330.

under execution but which was connected with the decree under execution as in *Amrit Lal v. Murli-dhar*(¹), or a case where the application had been against the widow of the judgment-debtors who was not in possession of his estate and was not the right person to be proceeded against—*Ganeshwar Singh v. Than Mal*(²). These are cases in which relief could be given if a formally correct application was made. Here the application was for a relief which it had been decided by the High Court could not be given and which was entirely outside the law. This case falls, in my opinion, within the principle of the decisions which were cited by the appellants; and the application of the 31st of March, 1924, was not available to save limitation.

1930.

DURGA
PRASAD
SAHU
v.
MUSAMMAT
POWDHARO
KUER.

Ross, J.

Appeals nos. 218 of 1928 and 48 of 1929 must, therefore, be allowed and the order of the Court below set aside and the execution case dismissed with costs throughout. Appeal no. 206 of 1928 is dismissed but without costs. The cross-objection is also dismissed.

CHATTERJEE, J.—I agree.

Appeal nos. 48 and 218 allowed.

Appeal no. 206 and cross-objection dismissed.

PRIVY COUNCIL.

RAJENDRA PRASAD BOSE

v.

GOPAL PRASAD SEN.*

1930.

June, 26.

On Appeal from the High Court at Patna.

Hindu Law—Adoption—Authority to adopt—widow having authority to adopt with permission of husband's father—death of husband's father—construction—condition

*Present: Lord Thankerton, Sir George Lowndes and Sir Binod Mitter.

(1) (1922) 3 Pat. L. T. 422.

(2) (1926) 8 Pat. L. T. 217.