

## APPELLATE CIVIL.

Before Dhaole and Chatterji, JJ.

1940.

HARNARAIN

Jan, 4.  
April, 11.

v.

DAYABHAI HIRA CHAND.\*

*Limitation Act, 1908 (Act IX of 1908), Article 183—“revivor”, what constitutes—decree of the High Court on the original side—execution against one partner of judgment-debtor firm, whether operates as revivor against another partner—Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rule 50(2)—proceedings under the rule, whether operate as revivor.*

To constitute a revivor of a decree within the meaning of Article 183, Limitation Act, 1908, there must be expressly or by implication a determination that the decree is still capable of execution and the decree-holder is entitled to enforce it. In other words, there must be an order for execution which amounts to a decision that the decree is capable of execution.

*Chutterput Singh v. Sait Sumari Mall*(1) and *Banku Behari Chatterji v. Naraindas Dutt*(2), followed.

*Jogendra Chandra Roy v. Shyam Das*(3), referred to.

Where the decree is against a firm an order for the arrest of one of the partners of the firm does not operate as a revivor against another partner.

Where, in an execution case, notice under Order XXI, rule 22, Code of Civil Procedure, 1908, was issued, but it could not be served, and the execution case was dismissed for

\* Appeal from Original Order no. 335 of 1938, from an order of Rai Bahadur Naresh Chandra Ray, Subordinate Judge of Motihari, dated the 15th November, 1938.

(1) (1916) I. L. R. 43 Cal. 903, F. B.

(2) (1927) I. L. R. 54 Cal. 500, P. C.

(3) (1909) I. L. R. 36 Cal. 543,

1940.

HARNARAIN  
v.  
DAYABHAI  
HIRA  
CHAND.

default, held, that there was no order for execution passed and the proceedings in the execution case, therefore, did not constitute a revivor within the meaning of Article 183.

*Amulya Ratan Banerjee v. Banku Behari Chatterjee*(1), followed.

In 1924 the respondent obtained a decree against the appellant firm from the original side of the Bombay High Court. In 1925 execution was taken out against *M*, one of the partners of the judgment-debtor firm, and an order for arrest of *M* was passed. The execution case, however, proved infructuous. In 1936 the decree was transferred to a Court in Bihar and leave was obtained under Order XXI, rule 50(2), Code of Civil Procedure, 1908, to execute the decree against *H*, another partner of the judgment-debtor firm, and thereafter the execution case was dismissed for default. In 1937 another application for execution was filed against *H*,

Held, (i) that the proceedings for obtaining leave to execute the decree against *H* under Order XXI, rule 50(2), did not operate as a revivor within the meaning of Article 183;

(ii) that the order for execution against *M* did not operate as a revivor against *H* and the execution against *H* in 1937 was, therefore, time-barred.

*James Russel McLaren v. V. Vecriah Naidu*(2) and *V. Krishnaiyah v. C. Gajendra Naidu*(3), followed.

Query: Whether there can be a "revivor" in a case where no notice is required to be issued to the judgment-debtor before any order for execution can be made?

*Chutterput Singh v. Sait Sumari Mall*(4), referred to.

Appeal by the judgment-debtor

The facts of the case material to this report are set out in the judgment of Chatterji, J.

(1) (1924) 41 Cal. L. J. 159.

(2) (1915) I. L. R. 38 Mad. 1102.

(3) (1917) I. L. R. 40 Mad. 1127.

(4) (1916) I. L. R. 43 Cal. 908, F. B.

*B. N. Mitter* (with him *A. K. Mitter, K. N. Moitra* and *Raj Kishore Prasad*), for the appellant.

1940.

HARNARAYAN  
v.  
DAYABHAI  
HIRA  
CHAND.

No one for the respondent.

CHATTERJI, J.—This appeal arises out of a proceeding in execution of a money decree. The decree was obtained on the 7th November, 1924, by the respondent against the firm of Chunilal Madan Lal in original suit no. 4849 of 1922 of the Bombay High Court. On the 24th September, 1925, the decree-holder applied for execution in the Bombay High Court praying for arrest of Madan Lal Srinivas, one of the partners in the firm of Chunilal Madan Lal. On that petition an order was passed by the Court on the 14th October, 1925, for the arrest of Madan Lal Srinivas. The execution case, however, proved infructuous. In 1936 the decree-holder got the decree transferred to the Court of the Subordinate Judge of Motihari and filed an application in that Court on the 23rd April, 1936, for execution of the decree against Har Narayan Chuni Lal, alleged to be one of the partners of the firm Chunilal Madan Lal. The execution case no. 120 of 1936 which was started on that application was dismissed for default on the 9th February, 1937. The present application for execution was filed on the 19th February, 1937, in the same court against the same judgment-debtor, namely, Har Narayan Chuni Lal. The latter opposed the application mainly on the ground that it was barred by limitation. This objection has been overruled and the execution case has been ordered to proceed. Hence this appeal by the judgment-debtor Har Narayan Chuni Lal.

The only question raised in this appeal is that of limitation. The decree under execution being passed by the Bombay High Court on its Original Side, the case will be governed by Article 183 of the

1940. Indian Limitation Act. That Article runs as follows:—

HARNARAIN

v.

DAYABHAI

HIRA

CHAND.

CHATTERJI,

J.

" Description of application.	Period of limitation.	Time from which period begins to run.
To enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction, or an order of His Majesty in Council.	Twelve years.	When a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right:

Provided that when the judgment, decree or order has been revived, some part of the principal money secured thereby, or some interest on such money has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person liable to pay such principal or interest, or his agent, to the person entitled thereto or his agent, the twelve years shall be computed from the date of such revivor, payment or acknowledgment or the latest of such revivors, payments or acknowledgments, as the case may be."

The decree was passed on the 7th November, 1924, and the present execution was filed on the 19th February, 1937, that is to say, beyond 12 years. The learned Subordinate Judge has held that the orders passed in the previous execution proceedings in 1925 and 1936 operate as "revivor" within the meaning of Article 183. The term "revivor" has not been anywhere defined or explained in the Limitation Act, but judicial decisions have laid down that "to constitute a revivor of the decree there must be expressly or by implication a determination that the decree is still capable of execution and the decree-holder is entitled to enforce it." In other words, there must be an order for execution which amounts to a decision that the decree is capable of execution. It will be enough to refer here to the Full Bench decision of the Calcutta High Court in *Chutterput Singh v. Sait Sumari Mall*<sup>(1)</sup> which was approved by

(1) (1916) I. L. R. 43 Cal. 908, F. B.

the Privy Council in *Banku Behari Chatterji v. Naraindas Dutt*(1).

So far as the execution case no. 123 of 1936 is concerned, it appears from the order-sheet of that case, of which the record was called for by us, that notice under Order XXI, rule 22, of the Civil Procedure Code was issued, but it could not be served and as the decree-holder did not take any further steps the case was dismissed for default. Thus there was no order for execution passed in that case. The issue of a notice under Order XXI, rule 22, must be distinguished from an order for issue of execution. It cannot be said that in that case there was any decision, express or implied, that the decree was capable of execution. The proceedings in that execution case, therefore, do not constitute a "revivor" within the meaning of Article 183 of the Limitation Act. This view is supported by the decision of the Calcutta High Court in *Amulya Ratan Banerjee v. Banku Behari Chatterjee*(2).

It appears that before the decree was transferred for execution to the Motihari Court leave was obtained under Order XXI, rule 50(2), of the Civil Procedure Code from the Prothonotary and Senior Master of the Bombay High Court to execute the decree against the appellant Har Narayan Chuni Lal as a partner in the judgment-debtor firm. The effect of the leave so granted is that Har Narayan Chuni Lal is liable under the decree. In other words, he must be deemed to be a judgment-debtor. The proceeding for obtaining leave under Order XXI, rule 50, is not an application for execution, nor does the leave granted amount to any order for execution.

The execution case of 1925, however, stands on a different footing. In that case an order was passed on the 14th October, 1925, for the arrest of Madan Lal, one of the partners of the judgment-debtor firm. This order amounted to a determination that the

1940.

HARNARAIN

vs.

DAYABHAI

HIRA

CHAND.

CHATTERJI,

J.

(1) (1927) I. L. R. 54 Cal. 500, P. C.

(2) (1924) 41 Cal. L. J. 159.

1940.

HARNARAIN

v.

DAYABHAI

HIRA

CHAND.

CHATTERJI,

J.

decree was capable of execution. Prima facie, this order would operate as a "revivor".

But it is contended by Mr. B. N. Mitter for the appellant that the execution of 1925 being taken out against Madan Lal and the order for execution being passed against him, it may operate as a "revivor" as against him but not against the present appellant Har Narayan Chuni Lal who was not a party to that proceeding. The fact that in 1936 leave had to be obtained under Order XXI, rule 50(2), to execute the decree against Har Narayan Chuni Lal makes it obvious that he was not a party to the execution proceeding of 1925. The question then arises whether as against him the order dated the 14th October, 1925, passed in the execution proceeding of 1925 operates as a "revivor". The execution was taken out against Madan Lal and the order was passed for his arrest. The present appellant was not a party to the proceeding. He cannot be bound by any order for execution passed in that proceeding. The order dated the 14th October, 1925, therefore, cannot be said to operate as a "revivor" so far as he is concerned. But it may be said that the decree being against the firm, the order dated the 14th October, 1925, which was passed against one of the partners will operate as against the other partners as well, whether they were named in the proceeding or not. Mr. B. N. Mitter's answer to this argument is that the position of the different partners being that of joint judgment-debtors, execution against one of them will not operate as a "revivor" within the meaning of Article 183 of the Limitation Act. He relies on the decision in *V. Krishnairiyh v. C. Gajendra Naidu*<sup>(1)</sup> in which it was held that "an order of revivor..... of a decree against two persons jointly, when made on an application for execution against only one of them, does not keep the decree alive as against the other". That was a decision upholding in appeal the judgment of Bakewell, J. in

(1) (1917) I. L. R. 40 Mad. 1127.

*James Russel McLaren v. V. Veeriah Naidu*(<sup>1</sup>). In the latter case Bakewell, J., pointing out the distinction between Articles 182 and 183 of the Limitation Act, observed as follows: "The fact that the Legislature has expressly provided for one case of joint debtors and omitted to make the same provision for another case appears to me to show an intention to place the two cases on a different footing". In Article 182 there is a distinct provision that

"where the decree or order has been passed, jointly against more persons than one, the application, if made against any one or more of them, or against his or their representatives, shall take effect against them all."

But Article 183 makes no such provision. As a general rule, nobody can be prejudicially affected by any judicial order to which he is not a party. The above-stated provision in Article 182 is an exception to this general rule. A similar exception cannot be imported into Article 183 when it is silent about it. I agree with the view taken in *James Russel McLaren v. V. Veeriah Naidu*(<sup>1</sup>) and *V. Krishnaiyah v. C. Gajendra Naidu*(<sup>2</sup>) and I think the principle will equally apply where the decree is against a firm. It, therefore, follows that the order passed in the execution proceeding of 1925 does not operate as a "revivor" as against the present appellant.

It must be observed that the execution of 1925 was taken out within one year after the passing of the decree. A notice under Order XXI, rule 22, was, therefore, not necessary, nor does it appear to have been issued. Now, from the judicial decisions bearing on the interpretation of the term "revivor" it appears that it had its origin in the old practice prevailing in the Supreme Court according to which execution could not issue upon judgments more than a year old without issuing a writ of *scire facias* against the defendant. The idea seemed to have been that a judgment not enforced within one year became

1940:

---

HARNARAIN  
v.  
DAYABHAI  
HIRA  
CHAND.  
CHATTERJI,  
J.

(1) (1915) I. L. R. 88 Mad. 1102.

(2) (1917) I. L. R. 40 Mad. 1127.

1940.

HARNARAIN

v.

DAYABHAI

HIRA

CHAND.

CHATTERJI,

J.

dormant and a proceeding was necessary to revive it. The procedure for revivor of judgment was to issue the writ of *scire facias* which, as explained in *Jogendra Chandra Roy v. Shyam Das*<sup>(1)</sup>, "was a judicial writ issued for the purpose of substantiating and carrying into effect an antecedent judgment". An analogous procedure for revivor of judgment was introduced into the Original Side of Chartered High Courts in India. This procedure was subsequently embodied in sections 215 and 216 of Act VIII of 1859 which were replaced by sections 248 and 249 of the Civil Procedure Code of 1882 (now Order XXI, rules 22 and 23, of the Code of 1908). Under these provisions where an application for execution of a decree more than one year old is made a notice is required to issue to the person against whom execution is applied for calling upon him to show cause why the decree should not be executed against him. If he does not appear or does not show cause to the satisfaction of the Court, the Court orders the decree to be executed. The order for execution thus made operates as a "revivor". Primarily, therefore, the term "revivor" applies to a case where the order of revivor was made in a proceeding for execution of a decree more than a year old. But upon an examination of the reported decisions it seems to me that the procedure for "revivor" would include all cases where notice is required to be issued against the judgment-debtor before any order for execution can be made. "Revivor", to quote the words of Woodroffe, J. from the above-cited case of *Chatterput Singh v. Sait Sumari Mall*<sup>(2)</sup>, means "a decision holding that the decree is still capable of execution". This implies that the decision must be given after notice to the judgment-debtor. Where, therefore, there is no provision for the issue of any notice before an order for execution can be made, there can hardly be a 'revivor'. No such notice was necessary in the

(1) (1909) I. L. R. 36 Cal. 543.

(2) (1916) I. L. R. 43 Cal. 903, F. B.

execution proceeding of 1925. No doubt Order XXI, rule 37, of the Civil Procedure Code, as amended by the rules of this Court, provides for the issue of notice before issuing a warrant of arrest, but under the rule as it stood in 1925—and this was the rule under which the Bombay High Court passed the order for arrest dated the 14th October, 1925—the issue of notice was discretionary. There is also nothing to show that such notice was issued in the proceeding of 1925. In the circumstances, I do not think the order for arrest passed in that proceeding can be regarded as a “revivor”. However this is a point which is not free from difficulty and in the view which I take of the case it is unnecessary to pronounce any definite opinion on it. I have proceeded on the assumption that the order dated the 14th October, 1925, would operate as a “revivor” so far as Madan Lal is concerned.

In my view the present execution is barred by limitation. I would accordingly allow the appeal and dismiss the execution case as barred by limitation. As there is no appearance on behalf of the respondent, I would make no order as to costs.

DHAVLE, J.—I agree.

*Appeal allowed.*

K. D.

### APPELLATE CIVIL.

*Before Agarwala and Rowland, JJ.*

SHYAM JHULAN PRASAD SINGH

v.

SATRUHAN PRASAD SAHI.\*

*Bihar Tenancy Act, 1885 (Act VIII of 1885), sections 155 and 188—notice under section 155, requirements of—notice on behalf of sixteen-anna's landlord through Court—notice not*

\* Appeal from Appellate Decree no. 992 of 1938, from a decision of Babu Jatindranath Das Gupta, Subordinate Judge of Muzaffarpur, dated the 27th June, 1938, reversing a decision of Babu Anurup Chandra Banerji, Munsif at Hajipur, dated the 18th January, 1937.

1940.

HARNARAIN

v.

DAYABHAI

HIRA

CHAND.

CHATTERJI,

J.

1940.

April. 12,  
15.