[APPELLATE CIVIL JURISDICTION.]

Miscellaneous Special Appeal No. 23 of 1874.

1875. Dec. 6.

JIBHAI MAHIPATI AND ANOTHER (ORIGINAL OPPONENTS, APPELLANTS) *v.* PARBHU BAPU AND ANOTHER (ORIGINAL APPLICANTS, RESPONDENTS).

Limitation—Decree—Execution—Application—Act XIV. of 1859—Act IX. of 1871.

An application for execution of a decree was made in February 1868, and proceedings sufficient to bar limitation under Act XIV. of 1859 were going on till 30th September 1871. The next application for execution of the decree made in October 1872 was held to be barred under Act IX. of 1871, as more than three years had elapsed on that day from the date of the application in February 1868.

Held also, following *Gouree Sunkur* v. *Arman Ali* (21 Calc. W. R. 309 Civ. Rul.), that an informal application, made on 30th September 1871, in the nature of a petition to the Subordinate Judge to give effect to the application of February 1868 by overruling certain objections of the Collector and enforcing execution of the decree, was not an application for the execution of a decree such as could bar limitation under Act IX. of 1871.

THIS was a special appeal from the decision of W. H. Newnham, Judge of the District of Ahmedabad, reversing the order of the Subordinate Judge of Dhandhuka.

The facts of the case are these:—The special respondents on the 28th of August 1867 obtained a decree against the special appellants in the Court of the Subordinate Judge of Dhandhuka for the payment, out of the property of the second defendant's grandfather, of a principal sum of Rs. 956, together with their costs of the suit, which amounted to Rs. 134-14-0, and interest on judgment at 6 per cent. per annum payable by monthly instalments. For the execution of this decree the special respondents presented in the Court of the Subordinate Judge applications for execution in the usual form, the last of which before the application, the subject of the present appeal, was presented on the 28th of February 1868, and stated the mode in which the Court's assistance was required as follows:—"I claim in all Rs. 1,130-8-11. In respect of the same I apply as follows: about Rs. 5,700, being the amount of *hak* appertaining to the Virámgam Bandhi *watan* of the deceased Mahipatbhái is become obtainable from his honor the Collector by Jethálál Lalubhái (the second defendant). The same will, therefore, be obtained either by him or on his behalf by his guardian. But this amount of money is a part of the property

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of the deceased Mahipatbhái, and my decree is made recoverable from his property, and the defendant Jethálál is the son of the said Mahipatbhái. I, therefore, pray that, under Section 237 of the Act No. VIII. of 1859, the amount mentioned in this *darkhást*, Rs. 1,130-8-11, out of that sum be attached and sent for and paid to me." An order of the same date was made and indorsed on this application in the following words:—"In respect of this matter a notice should be drawn and sent to his honor the Collector Saheb of Ahmedabad in accordance with Section 237 of the Civil Procedure Code." A notice was accordingly issued to the Collector, but he raised various objections to complying with the notice, and a long correspondence followed between the Subordinate Judge, the Collector, and the Revenue Commissioner, the result of which was the payment to the plaintiffs, by the Collector, out of the moneys in his hands, of the principal sum, and a portion of the remainder of the moneys claimed by the plaintiffs, on the 10th of September 1872, the plaintiffs abandoning their claim to the unpaid balance. In the meantime, and while the correspondence was going on, the plaintiffs, on the 30th September 1871, had presented to the Subordinate Judge an informal application, or petition, praying him to overrule the Collector's objections, and enforce execution of their decree, in the following terms:—"Claim Rs. 956. We plaintiffs pray as follows:—There was some money lying in the Collector's treasury in respect of the deceased Mahipatrám Ranchod's *huk*, and a *darkhást* was made by us to attach it according to Section 237, Act VIII. of 1859. The Collector Saheb raised various objections to the order of the Court with regard to that money, and thereby caused delay. Finally, upon a letter from the Collector, dated the 25th of August 1871, the Court ordered us to produce a certificate to show in whose name the money was credited. Thereupon we tried to get a certificate as follows:—We made an application, dated the 7th of September 1871, on a stamped paper of the value of 8 annas, and sent it to the Collector. This application was made for obtaining certified copies of extracts from the Dhanduka and Virámgam *petta* account books for the years Samvat 1921-22-23 and 24, in which there were moneys credited in the name of the deceased Mahipatrám and his heirs. But in reply thereto the Collector wrote to us that the *petta* account books show how much the *Sarkar* owes to people, and

therefore, a copy of an extract thereof will not be given to you. The petition, having been thus indorsed, was returned to us. An application was made by us to the Mámlatdár Saheb of Dhandhuka for obtaining copies of extracts from the *petta* account books, and on supplying stamped paper we obtained copies of extracts from account books for the years Samvat 1921-22-23 and 24. Look, Saheb, it will be clear to you from the particulars of this case and from the correspondence of the Collector Saheb, which is every time new, that the contentions and objections which the Collector raises are unlawful. Finally, we attempted to get copies in the aforesaid manner, but copies were not given to us. Therefore you are to judge from this that the Collector wishes to raise unnecessary objections, and nothing else. It is not proper for the Collector to raise such objections. He ought to have lawfully sent the money attached, in compliance with the order of the Court, and if the Collector does not himself claim this money, then the person having a claim thereto is at liberty to use lawful means to recover the money. Therefore you are at liberty to remove these unlawful objections which he raises." The Subordinate Judge apparently made no order on this application, but, after the payment of the principal sum on the 10th September 1872, a further order of that date was made and indorsed on the formal application of February 1868 in the following terms :—"Agreeably to the above order (*i. e.*, the first order on the application directing the despatch of a notice to the Collector) a notice was sent. In this matter of sending for the money a correspondence went on till, at last, a *varát* for Rs. 1,117-5-8 came with an indorsement by the Mámlatdár of Viráṅgam, dated the 23rd of July 1872. The same order was presented at the treasury of the Mámlatdár of Dhandhuka, and the amount mentioned therein was sent for, and the same being received was this day paid to the heirs of the plaintiff Bapu in satisfaction of the decree, and a receipt, No. 130, was taken in the account book of this Court. Rs. 13-3-3, the balance of this *darkhást*, and Rs. 7-8-0, miscellaneous costs, making together Rs. 20-11-3, remain yet due. This amount the Collector Saheb by his indorsement No. 6, dated the 6th of April 1872, objected to send, as being an item due prior to the *watan* settlement. But the heirs of the deceased plaintiff have put in an application giving up the right to contend for the sending

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for of that amount. Hence nothing remains to be enforced under this decree. Therefore this *darkhást* is recorded as disposed of." The application of April 1868 being thus finally disposed of, and the plaintiffs being desirous to recover interest on the judgment-debt awarded to them by the decree, but not included in that application as having accrued due since its date, a fresh application for the enforcement of the decree in respect of the recovery of this interest was presented to the Subordinate Judge of Dhandhuka by the plaintiffs on the 19th of October 1872, which application was the subject of the present appeal.

The judgment-debtors objected that the application was time-barred, and the Subordinate Judge, allowing the objection, rejected it.

In appeal the decree-holders urged that there was no laches on their part, that they were *bonâ fide* and diligently prosecuting their claim, and that Act IX. of 1871 did not apply to their case, but Act XIV. of 1859, Section 20. The Judge was of opinion that the former Act should be applied to the case; but he held that the application of the decree-holders on 30th September 1871, praying for the removal of the Collector's objection, though not in the form prescribed by the Code of Civil Procedure, was substantially one for enforcement of the decree. He, therefore, reversed the order of the Subordinate Judge and decreed execution.

The special appeal was heard by WEST and NA'NA'BHA'I HARIDA's, JJ.

Gokáldás Kilándás for *Dhirajlál Mathurádás*, Government Pleader, for the appellants, the judgment-debtors.—The application of 30th September 1871 was not such as is contemplated by Article 4 of Act IX. of 1871, and was itself barred, the last previous application having been made in February 1868. Section 212 of the Civil Procedure Code settles what the application is to be which will bar limitation.

Nagindás Tulsidás, for the decree-holders.—The principal sum was paid in September 1872. There was no laches on the part of the decree-holders, who did all they could till the new Law of Limitation of 1871 came into force. This should not be applied to this case.

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WEST, J.—The application in this case was presented for execution of a decree, the last prior application for execution of which had been made in February 1868. Upon that earlier order, partial execution had been obtained and proceedings sufficient apparently to bar limitation under the Act of 1859 had been going on till 30th September 1871. The application made to the Court on that day was not one which, according to the case of *Gouree Sunkur Tribedee* v. *Arman Ali Chowdhry* (1), could bar limitation under Act IX. of 1871. It was, indeed, merely a request or suggestion that the Collector should be directed to carry out a direction sent to him in 1868 in a particular way; but if it had been an application of a kind which in itself could serve as a bar to limitation, it was then already too late on the day when it was made, which was more than three years after February 1868, and, being thus inadmissible, could not mark a point of time from which a fresh period of limitation could be counted extending over October 1872, when the application was presented, with which we have now to deal. It has been urged that, as execution was in a manner going on, and interest was accruing due under the decree, the time when each instalment should have been paid ought to be reckoned as the day when the decree became operative, and that the period of limitation would thus be counted from a time within three years of October 1872; but we do not think that because interest may be awarded, it was intended by Act IX. of 1871 to keep a decree perpetually in force without renewed applications. It may be rather hard upon the judgment-creditor in this case that, although he was doing all that the old law required until the new law came into force, and, indeed, for some time afterwards, he should suddenly find himself barred by a provision of a much more stringent character than that of the old law; but the change was no doubt made advisedly, and in an analogous case, *Abel* v. *Lee* (2), Willes, J., said:—"I utterly repudiate the notion that it is competent to a Judge to modify the language of an Act of Parliament in order to bring it into accordance with his views as to what is right or reasonable" (3). We must give effect to the law as we find it, and the law barred the application in this case.

(1) 21 Calc. W. R. 309 Civ. Rul.

(2) L. R. 6 C. P. 365. (3) *Id. ib.* 371.

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We may observe that, if the order made on the previous application of the respondent is still unexhausted by there being matter to which its terms apply in particulars as to which these terms have not yet been satisfied, it is apparently open to the Court to give effect to that order, notwithstanding that any new application for execution is barred.

The order of the District Judge is reversed, and that of the Subordinate Judge restored, but we make no order as to costs of this appeal.

Order accordingly.

[APPELLATE CRIMINAL JURISDICTION.]

Reference No. 138 *of* 1875.

REG. *v.* DEVA'MA' AND SOMSHEKHAR.

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The Code of Criminal Procedure (Act X. of 1872), *Sections* 215 *and* 296—*Compounding of offences—Revival of Prosecution—"Dismissal" of a warrant case—Practice—Counsel.*

A warrant case of a nature not compoundable under Section 214 of the Indian Penal Code was "dismissed" on the parties coming to an amicable settlement.

Held that the "dismissal" was equivalent to a discharge under Section 215 of the Code of Criminal Procedure, and the composition did not affect the revival of the prosecution, if that should otherwise be thought necessary or expedient.

Counsel cannot claim as of right to be heard on a reference to the High Court under Section 296 of the Criminal Procedure Code.

THIS was a reference from A. R. Macdonald under Section 296 of the Code of Criminal Procedure for the orders of the High Court.

The facts of the case are briefly as follows :—

Some time in 1874, Subhadrá, widow of the late Rája of Bilgi, in the district of North Kanara, complained to Mr. Middleton, Magistrate, F.C., that her residence had been broken into, and her ornaments, valued at about Rs. 7,000, abstracted by one Devámá and her son Somshekhar. The latter asserted that, having been adopted by the complainant, he was the owner both of the palace and the property, which he admitted he had removed. After the inquiry had proceeded a certain length, Mr. Middleton disposed of the case by the following order :—