APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1885. *July* 21.

TA'RA'CHAND MEGRA'J AND ANOTHER, (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* KA'SHINA'TH TRIMBAK AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Limitation—Decree—Execution—Application for execution—Withdrawal of application—Subsequent application for execution more than three years after date of last proceeding—Act XV of 1877, *Sch. II, Art.* 179, *Cl.* 4—*Civil Procedure Code (Act XIV of* 1882,) *Sec.* 374.

The plaintiff obtained a decree in 1874, and applied for its execution first on the 4th of August, 1875, then on the 6th of July, 1878, and again on the 23rd of July, 1880. The third application was withdrawn with permission to apply again. On the 30th November, 1882, the plaintiff made his present application.

Held, that the present application was not time-barred.

The rule laid down in section 374 of the Civil Procedure Code(Act XIV of 1882) —that where a suit is withdrawn with leave to bring a fresh suit, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been brought,—does not apply to applications for execution.

Pirjáde v. *Pirjáde*(1) dissented from. *Eshan Chunder Bose* v. *Prannáth Nag*(2) followed.

THIS was a second appeal from the decision of W. H. Crowe, Judge of the district of Sátára, reversing the decree of the Subordinate Judge of Talegaon.

The plaintiffs obtained in 1874 a decree against the defendants, and on the 4th of August, 1875, made an application for its execution, and realized a part of the debt. They next made another application for execution on the 6th of July, 1878, and realized a further sum. They made an application for the third time on the 23rd of July, 1880, but withdrew it at the request of the judgment-debtors with the permission of the Court to make another application. The decree not having been completely satisfied, the plaintiffs made their present application on the 30th of November, 1882. The defendants contended that this was time-barred.

The Subordinate Judge held that it was not time-barred, and ordered execution to proceed; the District Judge reversed his

* Second Appeal, No. 669 of 1886.

(1) I. L. R., 6 Bom., 681. (2) 22 Calc. W. R., 512.

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order, holding the application time-barred, relying on the ruling in *Pirjáde* v. *Pirjáde*[1].

The plaintiffs appealed to the High Court.

Shivshankar Govindrám for the appellant.—Article 179, Schedule II of Act XV of 1877 makes the date of application the starting-point, not the date of the cause of action. It has been held by the High Court of Madras in *Rámánádan Chetti* v. *Periatambe Shervai*[2], that an application for execution of a decree which does not comply in every respect with the requirements of section 235 of the Code of Civil Procedure (XIV of 1882) and which having been returned to the judgment-creditor has not been proceeded with, may still suffice, under article 179, clause 4 of Act XV of 1877, to keep the decree alive. The High Court at Calcutta have decided similarly in *Jhoti Sahu* v. *Bhubun Gir*[3]. The decision in *Pirjáde* v. *Pirjáde*[4] nullifies the effect of clause 4 of article 179 of Schedule II of Act XV of 1877, and should not be followed.

Ganesh Rámchandra Kirloskar for the respondents.—The decision in *Pirjáde* v. *Pirjáde* [5] is on all fours with this case, and, being a decision of this Court, should be followed. The High Court at Allahabad held in *Mainátli Kuari* v. *Debi Baksh Rái*[6] that an application by a decree-holder for the postponement of a sale in execution of the decree on the ground that he had allowed the judgment-debtor time, was not an application within the meaning of article 179 of Schedule II of Act XV of 1877.

SARGENT, C. J.—In this case an application for execution of a decree was made on 30th November, 1882. A previous application had been made on 23rd July, 1880, but was subsequently withdrawn, with leave of the Court, on the application of both the execution-creditor and judgment-debtor.

The last application, previous to the one so withdrawn, was on 6th July, 1878. The District Judge has held that the *darkhást* of 23rd July, 1880, became a dead letter after withdrawal, relying on *Pirjáde* v. *Pirjáde* [7], and that the present application

(1) I. L. R., 6 Bom., 681.
(2) I. L. R., 6 Mad., 250.
(3) I. L. R., 11 Calc., 143.
(4) I. L. R., 6 Bom., 681.
(5) I. L. R., 6 Bom., 681.
(6) I. L. R., 3 All., 757.
(7) I. L. R., 6 Bom., 681.

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was, therefore, too late. In the Calcutta Full Bench decision, *Eshan Chunder Bose* v. *Pránnáth Nág*[1], it was held that, under clause 167 of the Limitation Act IX of 1871, a decree-holder is entitled to execute his decree upon his merely showing that he had applied for execution not more than three years before, although he had taken no proceedings on that application. It is true that Sir R. Couch, who delivered the judgment of the Full Bench, expressed the opinion that it was not a satisfactory state of the law, as "it might enable a decree-holder to keep the decree alive for very many years, which he ought not to be allowed to do." However, no change was introduced into the subsequent Limitation Act XV of 1877, where the language of clause 179 is (if anything) even more favourable to the judgment-creditor, the starting-point being the date of "applying for execution" of the decree, by which presumably is meant of making the application, as contemplated by sections 230 and 235 of the Code of Civil Procedure (XIV of 1882). But if this be the true construction of the clauses 167 and 179 of Schedule II in the Limitation Acts of 1871 and 1877, it is difficult to see why the subsequent withdrawal of an application for execution should render the *darkhást* a dead letter. The above decision proceeds on the ground that the application to execute has its effect for the purpose of limitation as soon as it is admitted; and, whether it is subsequently withdrawn or allowed to remain dormant, is immaterial. Nor is there any reason to infer that the judgment-creditor in consenting, as was the case here, to withdraw his application, at the desire of the judgment-debtor, intended to place himself in a worse position as regards the question of limitation than he would otherwise have occupied.

The District Judge, however, relies on the case of *Pirjáde* v. *Pirjáde*[2], where it was held that "clause 4, article 179 of Act XV of 1877 must be read subject to the rules contained in sections 374 and 647 of the Code of Civil Procedure (XIV of 1882)." We feel, however, a difficulty in coming to the conclusion that section 374 is applicable to execution proceedings. That section must, as its very terms express, be taken in connexion with

(1) 22 Calc. W. R., 512. (2) I. L. R., 6 Bom., at p. 683.

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the previous section 373, which determines the consequences of the withdrawal of a suit with or without the consent of the Court. But there is no analogy between the withdrawal of suits and execution proceedings. The withdrawal of the latter is an indulgence to the judgment-debtor, and does not require the sanction of the Court to enable fresh proceedings in execution to be taken. Moreover, the application of the section to execution proceedings would be in direct conflict with clause 179 of Schedule II of the Limitation Act (XV of 1877) as construed by the case above cited. These considerations do not appear to have been brought to the notice of the Court which decided *Pirjáde* v. *Pirjáde* (1).

We must hold, therefore, that the application did not become a dead letter for the purpose of limitation, and reverse the order of the District Court, rejecting the plaintiffs' application for execution as barred by the Statute of Limitation, and remand the case for disposal on the merits. Costs of this appeal to follow the result.

Order reversed and case remanded.

(1) I. L. R., 6 Bom., 681.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1885. *July* 6.

KASTURSHET JAVERSHET, PLAINTIFF, *v.* RA'MA' KA'NHOJI, DEFENDANT.*

Practice—Procedure—Decree—Execution—Decree of Small Cause Court sent for execution to Court of Subordinate Judge—Latter Court not competent to question validity of such decree—Mofussil Small Cause Court Act XI of 1865, *Sec.* 20, *certificate under—Civil Procedure Code (Act XIV of* 1882), *Sec.* 239.

The plaintiff having obtained a decree against the defendant in the Court of Small Causes at Poona, applied, under section 20 of Act XI of 1865, to the Court of the Subordinate Judge at the same place for execution against the immoveable property of the defendant. Notice having been issued to the defendant under section 248 of the Civil Procedure Code (Act XIV of 1882) calling upon him to show cause why execution should not issue against him, he appeared and applied to be allowed to pay the judgment-debt by instalments, alleging that he was an agriculturist,

* Civil Reference, No. 23 of 1885.