

1892.

S. v. B.

ant admitted to them abundant potency as to other women: in other respects the evidence resembles that given in *Greenstreet v. Cumyns*⁽¹⁾. I put these admissions *literatim* before the delegates, and left it to them to say, whether, to use the words of Archbishop of Canterbury, the *non potuit* was for lack of love, or lack of ability. I think I am bound by their finding on the fact; and that section 28 of the Act includes the physical defect found.

I, therefore, pronounce sentence of nullity: the decree to be settled according to law and precedent.

Each party to pay her and his own costs.

Attorneys for the plaintiff:—Messrs. *Ardasir, Hormasji and Dinshá*.

Pleader for the defendant:—Mr. *Máneckshá J. Tuloyarkhún*.

(1) 2 Phillimore 10.

APPELLATE CIVIL.

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

1891.

September 10.

ISHVARDA'S JAGJIVANDA'S AND ANOTHER, LIQUIDATORS OF THE NAWAB OF BAILA MILL, (ORIGINAL DEFENDANTS), APPELLANTS, v. DHANJISHA NASARV'ANJI, (ORIGINAL PLAINTIFF), RESPONDENT.*

Indian Companies' Act (VI of 1882), Sec. 136—Winding up—Proceeding with suit—Proceeding to enforce execution of decree—Sanction of the Court—Suit or other proceeding.

The language of section 136 of the Indian Companies' Act (VI of 1882) shows that proceedings in execution are regarded as distinct from the suit for the purpose of that section: therefore the leave given to proceed with a suit is not authority for proceedings taken in execution of the decree in the suit authorized.

THIS was an appeal from an order passed by Khán Bahádur M. N. Nánávati, First Class Subordinate Judge of Surat, in execution of a decree.

Dhanjisha Nasarvánji (respondent) had filed a suit against Ishvardás Jagjivandás and another (appellants), who were the liquidators of the Nawáb of Baila Mill. After the suit was filed the mill went into liquidation, and, therefore, Dhanjisha proceed-

* Appeal No. 62 of 1891.

ed with the suit with the sanction of the Court, under section 136 of the Indian Companies' Act (VI of 1882), and obtained a decree. Subsequently he presented an application for execution of the decree, and wanted to proceed only against the property of the mill in the hands of the liquidators, and not against them personally. The liquidators objected to the execution of the decree, on the ground that, no separate sanction for proceeding in execution having been taken, the decree could not be executed, and that the previous sanction covered only the suit and not the proceeding in execution.

The Subordinate Judge held that separate sanction was not necessary for proceeding with execution against the property of the mill in the hands of the liquidators, and granted the application.

The liquidators appealed to the High Court.

Ganpat Sadāshiv Rāo for the appellants:—We opposed the application on the ground that no sanction was taken by the respondent for the purpose of proceeding in execution. The sanction which he had taken for the suit would not cover execution proceedings. The language of sections 136 and 212 of the Indian Companies' Act (VI of 1882) is quite clear, and those sections contemplate that sanction of the Court should be taken for each and every step. Sections 85 and 87 of the English Companies' Act of 1862 differ from the above sections, which, we submit, mean that leave of the Court must be obtained for proceeding with execution. There can be no valid attachment without the Court's sanction.

Māneksha Jehāngirsha Taleyārkhān for the respondent:—The objection raised by the appellants with respect to the want of sanction is merely technical, and has no merit in it. As sanction was already taken by us for the suit, it was not necessary for us to take a separate sanction to proceed with execution. The Privy Council has held that an application for execution of a decree is an application in the suit.

[SARGENT, C. J.:—That is *Mungul Pershad's case*⁽¹⁾ in which the point was one of limitation.]

(1) L. R., 8 I. A., 123.

1891.

ISHVARDAS
JAGJIVANDAS
?
DHANJISHA
NABARYANJI.

1891.

ISHVARDÁS
JAGJIVANDÁS
v.
DHANJISHA
NASARVANJÍ.

We submit that the lower Court's order is correct and legal under the original sanction.

SARGENT, C. J. :—We cannot agree with the Subordinate Judge that the sanction of the Court to the respondent's proceeding with his suit included a sanction to execute the decree when passed in the suit. The execution of a decree is included in the term "proceedings," as Sir G. Jessel says in *In re Artistic Colour Printing Company*⁽¹⁾ when construing the word "proceedings" in the corresponding sections 85 and 87 of the English Companies' Act of 1862; and the language of section 87 and of section 136 of the Indian Act of 1882 shows that the proceeding with a "proceeding" is regarded as distinct from the proceeding with a suit for the purpose of that section. Moreover, it is obvious that there is an important practical distinction between the proceeding with a suit and the proceeding to enforce execution of the decree as regards the effect on the winding up of a company. We must, therefore, discharge the order of the Court below and reject the application, with costs throughout on respondent.

Order discharged.

(1) 14 Ch. D., 502, at p. 505.

APPELLATE CIVIL.

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

1891.

November 30.

KA'LIDA'S LA'LDA'S AND OTHERS, (ORIGINAL PLAINTIFFS), APPELLANTS,
v. BHA'LJI NA'RĀN, (ORIGINAL DEFENDANT NO. 3), RESPONDENT.

The Land Revenue Code (Bombay Act V of 1879), Sec. 83—Tenancy not more than forty years old—Tenancy not permanent.

Section 83 of the Land Revenue Code (Bombay Act V of 1879) is applicable only when the evidence as to the commencement and duration of the tenancy is not forthcoming, by reason of its antiquity, which, in the case of a tenancy at most only forty years old, there is no reason for presuming will be the case.

THIS was a second appeal from the decision of Venkatráo R. Inámdár, Acting Joint Judge, Ahmedabad.

THIS action was instituted by the plaintiffs to recover possession of a three-fourths share in a certain field, with mesne profits, alleg-

* Second Appeal, No. 720 of 1890