APPELLATE CIVIL.

Before Chief Justice Farran and Mr. Justice Strachey.

VINA'YAKRA'O GOPA'L DESHMUKH (ORIGINAL JUDGMENT-DEBTOR), APPELLANT, *v.* VINA'YAK KRISHNA DHEBRI (ORIGINAL DECREE-HOLDER), RESPONDENT.*

1895. *December* 10.

Limitation Act (XV of 1877), Sch. II, Art. 179, Cl. 4—Execution of decree—Application by decree-holder for leave to bid at the auction sale—Step in aid of execution.

An application by a decree-holder for leave to bid at the sale of his judgment-debtor's immoveable property is an application to the Court to take a step in aid of execution of the decree, and falls within the words of article 179, clause 4, of the Limitation Act (XV of 1877).

SECOND appeal from the decision of F. C. O. Beaman, District Judge of Thána, reversing the order passed by Ráo Sáheb B. S. Joshi, Subordinate Judge of Pen, in an execution proceeding.

On the 21st December, 1889, Vináyak Krishna Dhebri obtained a decree against Vináyakráo Gopál Deshmukh awarding him possession of certain land and mesne profits. He obtained possession of the land on the 3rd June, 1890. On the 20th February, 1891, he applied in execution to recover the mesne profits and costs from the judgment-debtor, and on his failure to pay the same to realize them by the sale of the judgment-debtor's immoveable property; and if the proceeds of sale should be insufficient, then to realize the deficiency by sale of his moveable property. On the 6th August, 1891, he applied for permission to bid at the auction sale of the immoveable property, and the Court granted the permission. The immoveable property was accordingly sold. The proceeds of the sale being insufficient, the decree-holder paid the process fees for the attachment and sale of the moveable property, and the Court made the necessary order on the 24th November, 1891, but no further steps were taken. On the 26th February, 1894, the decree-holder again applied for the execution of the decree.

The Subordinate Judge rejected the application as barred by limitation, not being made within three years from the 20th February, 1891, the date of the last previous application.

* Second Appeal, No. 585 of 1895.

1895.

VINÁYAKRÁO GOPÁL DESHMUKH v. VINÁYAK KRISHNA.

On appeal the Judge reversed the order, holding that when the decree-holder paid the process for the attachment and sale of the moveable property there must have been made an oral application to execute the decree, and if not, such an application should be implied from the fact of the payment of the process fee.

The judgment-debtor preferred a second appeal.

Trimbak R. Kotvál for the appellant (judgment-debtor):—There is nothing on the record to show that the decree-holder made an application for execution when he paid the process fees in November, 1891. An application for execution cannot be implied, because he paid these fees. He must set the Court in motion by an application—*Dharanamma* v. *Subba*[1]; *Kunhi Mannan* v. *Seshagiri Bhakthan*[2]; *Ali Muhammad Khán* v. *Gur Prasád*[3]; *Toree Mahomed* v. *Mahomed Mabood Bux*[4]; *Rájkumár Bánerji* v. *Ráj Lakhi Dabi*[5].

Gangárám B. Rele for the respondent (decree-holder):—Our application is within time. In our first application there was a prayer that if the proceeds of the sale of the immoveable property were not sufficient, the moveable property should be sold. Our subsequent payment of the fees for the attachment and sale of moveable property was tantamount to applying for execution.

Next we contend that our application on the 6th August, 1891, for permission to bid at the sale of the immoveable property was a step in aid of execution—*Bansi* v. *Sikree Mal*[6].

FARRAN, C. J.:—It will not be necessary for us to determine whether the District Judge was correct in implying an application for sale of the moveable property of the defendant by the plaintiff when he paid the process fee on the 30th November, 1891, because it has been pointed out to us that the decree-holder made an application for leave to bid at the sale of the immoveable property on 6th August, 1891, within three years of his present application. That application, it appears to us, falls within the very words of the article 179, clause 4. It is an applica-

(1) I. L. R., 7 Mad., 306.
(2) I. L. R., 5 Mad., 141.
(3) I. L. R., 5 All., 341.
(4) I. L. R., 9 Cal., 730.
(5) I. L. R., 12 Cal., 441.

1895.

VINÁYAKRÁO GOPÁL DESHMUKH v. VISÁVAK KRISHNA.

tion to the Court to take a step in aid of execution of the decree, *viz.*, to grant leave to the decree-holder to bid.

We agree with the decision of the Allahabad High Court in *Bansi* v. *Sikree Mal*[1] on this point, which dissents from the expression of opinion of the Calcutta High Court in *Torce Mahomed* v. *Mahomed Mabood Bux*[2] on this question, and accordingly confirm the order of the lower appellate Court with costs.

Order confirmed.

(1) I. L. R., 13 All., 211. (2) I. L. R., 9 Cal., 730.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Candy.

1895.
December 10.

MA'RUTI (ORIGINAL DEFENDANT), APPELLANT, *v.* RA'MA (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Partition—Partition made under a bonâ fide mistake as to property subject to partition—Re-partition.

The parties to a partition under a *bonâ fide* mistake included in the division certain property which did not belong to the family, but was held in mortgage from a third person who subsequently brought a suit for redemption and recovered it from the party to whom it had been allotted at the partition.

Held that the party who had lost his share was entitled to claim a re-partition.

SECOND appeal from the decision of Ráo Bahádur N. G. Phadke, Joint First Class Subordinate Judge, A. P., of Sholápur, in Appeal No. 61 of 1893.

Suit for partition. The family to which the parties to this suit belonged was possessed of certain joint property consisting (*inter alia*) of two *malás* (or orchards).

At a partition made about twenty years before suit one of the *malás* was assigned to the plaintiff's predecessors in title, and the other *malá* to the defendants' predecessor. At the time this partition took place all the parties *bonâ fide* believed that the *malá* assigned to the plaintiffs' predecessors was family property, but as a matter of fact it was only held on mortgage, it having been mortgaged to the family at a very remote period.

* Second Appeal, No. 707 of 1894.