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legal representatives of Samatsang should be placed upon the record.

Under any circumstances we think that the order dismissing the appeal was wrong, and we must set it aside and remand the case to the lower appellate Court to dispose of the appeal in the light of the observations contained in this judgment. The costs of this appeal to be dealt with by the lower appellate Court at the time of passing the final decree.

Order set aside and case remanded.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Parsons.

1897. *March* 30.

TRIMBAK BAPUJI PATVARDHAN (ORIGINAL DECREE-HOLDER AND APPLICANT), APPELLANT, *v.* KASHINATH VIDYADHAR GOSAVI (ORIGINAL JUDGMENT-DEBTOR AND OPPONENT), RESPONDENT.*

Limitation Act (*XV of* 1877), *Sec.* 19 *and Sch. II, Art.* 179 (4)—*Decree—Execution—Payment of bhatta for the issue of the sale proclamation—Step in aid of execution—Payment of process fee—Limitation—Payment of part of the judgment-debt—Acknowledgment of liability by judgment-debtor's pleader.*

To satisfy the requirements of article 179 (4) of Schedule II of the Limitation Act (XV of 1877), there must be an application to the proper Court, and time runs from the date of the application and not of the order made upon it. The application need not, however, necessarily be in writing; where the law does not require a writing, an oral application satisfies its requirements. Where an order made in aid of execution is of such a nature that the Court would not have made it without an application by the judgment-creditor, it may be presumed that due application had been made for it.

Quære:—Whether the payment of *bhatta* is sufficient proof of an application to the Court to take the step in respect of which the *bhatta* is paid. Mere payment of a process-fee under circumstances from which no application can be inferred, does not satisfy the requirements of the article.

The payment of part of the judgment-debt by the judgment-debtor, with the acknowledgment of liability by his pleader, is sufficient, under the provisions of section 19 of the Limitation Act (XV of 1877), to give a fresh period of limitation.

* Second Appeal, No. 801 of 1896.

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SECOND appeal from the decision of John FitzMaurice, District Judge of Thána, reversing the order of Ráo Sáheb N. M. Samant, Subordinate Judge of Alibág.

Appeal from an order rejecting an application for execution of decree.

On 6th January, 1896, the appellant (plaintiff) applied for execution of a decree obtained by him against the respondent (defendant). The application was resisted by the defendant on the ground that it was barred by limitation under article 179 of the Limitation Act (XV of 1877).

It appeared that on the 10th August, 1892, he had made an application for execution by the attachment and sale of certain immoveable property of the defendants. Proceedings were taken on that application, and on the 17th January, 1893, an order for sale was made by the Court, and on the 19th January, 1893, the plaintiff paid *bhatta* for the issue of the proclamation sale.

On the 14th March, 1893, the defendant applied for a stay of the sale for two months, as he was trying to raise money to satisfy the decree privately, and on the 6th June, 1893, the plaintiff asked permission to withdraw his *darkhást*, as he said defendant had paid him Rs. 100 and had promised to pay the rest. On the 24th June, 1893, the Court made an order allowing the withdrawal.

The Subordinate Judge granted the present application. He held that the payment of *bhatta* by the plaintiff on the 19th January, 1893, was a step in aid of execution and that, therefore, the application was not barred by limitation. The District Judge, however, on appeal reversed the order and dismissed the appellant's application as barred by limitation.

The plaintiff preferred a second appeal.

Sadashiv R. Bakhle for the appellant (original plaintiff, decree-holder and applicant) :—The payment of the *bhatta* for issuing the proclamation of sale was a step in aid of execution. The present application was made within three years from that date and was, therefore, in time—*Norendra* v. *Bhupendra* [1]; *Bhoma Motiram* v. *Kamaji* [2]; *Radha Prosad* v.

(1) I. L. R., 23 Cal., 374, at p. 387. (2) P. J., 1884, p. 311.

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Sunder Lall (1). It is not necessary that the application contemplated by article 179 (4) of the Limitation Act should be in writing. An oral application would be quite sufficient—*Vellaya* v. *Jaganatha*(2); *Ali Muhammad* v. *Gur Prasad* (3); *Manekbai* v. *Nasia* (4); *Keshavlal* v. *Pitamberdas*(5). Such an application must be presumed from the fact of payment, for Courts cannot be supposed to take any steps without being moved by a party—*Bapuchand* v. *Mugalrao* (6); *Vellaya* v. *Jaganatha*(2).

Further, the present application was within time under section 19 of the Limitation Act (XV of 1877). The defendant admitted his liability under the decree on the 14th March, 1893, and by his subsequently paying Rs. 100 in June, 1893.

Narayan G. Chandavarkar for the respondent (original defendant, judgment-debtor and opponent) :—The time to be counted is from the date of the previous application. From that date the present application is clearly barred. The payment of *bhatta* or process-fee is not a step in aid of execution—*Dwarkanath* v. *Anandrao* (7). No presumption can be made that there was an application. Article 179 of the Limitation Act requires an application and it must be shown that some application was made. In *Ambica* v. *Surdhari* (8), there was an express oral application. It was for the plaintiff to prove that such application was made, and he has failed to do so.

As to the alleged acknowledgment of the defendant, such an acknowledgment must be signed by the party. The application by the judgment-creditor for withdrawing the *darkhást*, and stating that he had received Rs. 100, is not sufficient. We submit that no acknowledgment, as such, is proved in the case.

FARRAN, C. J. :—This is a second appeal from the decree of the District Court of Thána rejecting, on appeal, the *darkhást* of the plaintiff for execution of the decree in the suit. The material dates as stated to us by the pleader for the appellant and assented to by the pleader for the respondent are as follow :—

(1) I. L. R., 9 Cal., 644.
(2) I. L. R., 7 Mad., 307.
(3) I. L. R., 5 All., 344.
(4) I. L. R., 15 Bom., 405.
(5) I. L. R., 19 Bom., 261.
(6) P. J., 1896, p. 427.
(7) I. L. R., 20 Bom., 179.
(8) I. L. R., 10 Cal., 851.

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On the 10th August, 1892, the plaintiff by *darkhâst* applied to the Court for the attachment and sale of certain immoveable property of the judgment-debtor. It is not suggested that this application was not in time. On the 23rd August an order was made for attachment of the property. After this the matter was referred to the Nâzir, who made a report, which was considered on the 12th September following. A summons to the defendant to attend was issued on the 16th of September. After some postponements, the matter came on before the Court on the 21st November, when some evidence was taken. On the 2nd December a notice was issued to the mortgagee, and on the 17th January, 1893, an order for sale was made by the Court, and on the 19th of the same month the plaintiff paid the *bhatta* for the issue of the sale proclamation.

On the 14th March the defendant presented an application, asking that the sale be stayed for two months, as he was trying to raise money to satisfy the decree privately, and on the 6th June the plaintiff asked to be allowed to withdraw his *darkhâst*, as he said defendant had paid him Rs. 100, and had promised to pay the rest, but wanted time for that purpose. The order of the Court allowing its withdrawal is dated the 24th day of June, 1893.

The present application for execution was made on the 6th January, 1896. The Subordinate Judge treated the payment of *bhatta* on the 19th January, 1893, as a step taken in aid of execution and allowed the plaintiff's application as having been made within three years of that date. The District Judge dismissed the application as time-barred.

In considering the time within which the execution of a decree or order must be sought under article 179 (4) of the schedule to the Limitation Act, it is necessary to bear in mind the exact provisions of the article. It allows a period of three years from "(4) the date of applying in accordance with law to the proper Court for execution, or to take some steps in aid of execution, of the decree or order." To satisfy its requirements there must be an application to the proper Court, and time runs from the date of the application and not of the order made upon it—*Fakir*

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Muhammad v. *Ghulam Husain*(1). The application, moreover, must be to the proper Court in accordance with law for the execution, or to take some steps in aid of execution of the decree or order. The application need not, however, necessarily be in writing; *where the law does not require a writing*, an oral application satisfies its requirements—*Dharanamma* v. *Subba*(2); *Ali Muhammad* v. *Gur Prasad*(3); *Manektal* v. *Nusia*(4); *Keshavlal* v. *Pitamberdas*(5). And where an order made in aid of execution is of such a nature as that the Court would not have made it without an application by the judgment-creditor, it may be presumed that due application has been made for it—*Bapuchand* v. *Mugutrao*(6). Whether the payment of *bhatta* is sufficient proof of an application to the Court to take the step in respect of which the *bhatta* is paid, is doubtful according to the reported cases. The mere payment of a process-fee under circumstances from which no application can be inferred does not, of course, satisfy the requirements of the article 179 (4)—*Dwarkanath* v. *Anandrav*(7). In *Ambica* v. *Surdhari*(8) there appears to have been an oral application to issue the proclamation, but there is nothing to show this in *Norendra* v. *Bhupendra*(9). In *Bhoma Motiram* v. *Kamaji*(10) the Court appears to have presumed an application from the payment of the process fee. A similar presumption was regarded as permissible in *Vellaya* v. *Jaganatha*(11), while in *Radha Prosad* v. *Sundur Lall*(12) the mere payment of *nilami* fees was regarded in itself as sufficient to give a fresh starting point for limitation, but all the words of the clause are not noticed in the reported judgment, as observed by Jardine, J., in *Dwarkanath* v. *Anandrao* (*supra*).

We do not, however, consider it necessary to decide whether in the present case we could have presumed an application to issue a sale proclamation when the plaintiff paid the *bhatta* fees on the 19th January, 1893, or whether the case is not within the

(1) I. L. R., 1 All., 580.
(2) I. L. R., 7 Mad., 306.
(3) I. L. R., 5 All., 344.
(4) I. L. R., 15 Bom., 405.
(5) I. L. R., 19 Bom., 261.
(6) P. J., 1896, p. 427.
(7) I. L. R., 20 Bom., 179.
(8) I. L. R., 10 Cal., 851.
(9) I. L. R., 23 Cal., at p. 387.
(10) P. J., 1884, p. 311.
(11) I. L. R., 7 Mad., 307.
(12) I. L. R., 9 Cal., 644.

ruling in *Dwarkanath* v. *Anandrao* (*supra*). Nor do we consider it necessary to consider whether an application should not be presumed under the circumstances from the order of the 17th January, 1893, as we are clearly of opinion that the payment of the Rs. 100 with the acknowledgment of liability by the defendant's pleader, when he asked for time, is quite sufficient for the provisions of section 19 of the Limitation Act, to take the subsequent application out of purview of the statute. The decisions upon this point are, we believe, uniform—*Venkatrav Bapu* v. *Bijesing*[1]; *Muhammad* v. *Payag Sahu*[2]; *Toree Mahomed* v. *Mahomed Mabood*[3]; *Norendra* v. *Bhupendra*[4].

We set aside the decree of the District Judge, and restore that of the Subordinate Judge, with costs in both Courts of appeal upon the present respondent.

(1) I. L. R., 10 Bom., 108.
(2) I. L. R., 16 All., 228.
(3) I. L. R., 9 Cal., 730.
(4) I. L. R., 23 Cal., at p. 387.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Tyabji.

DUNGARSI DIPCHAND (ORIGINAL PLAINTIFF), APPLICANT, *v.* UJAMSI VELSI AND ANOTHER (ORIGINAL DEFENDANTS), OPPONENTS.*

1897. *March* 31.

Award—Decree—Consent decree—Application by creditor of defendant to be made a party to suit—Objection by creditor to filing award—Practice—Procedure—Civil Procedure Code (Act XIV of 1882), *Sec.* 484.

The plaintiff applied to file an award and for a decree in terms thereof, to which the defendant consented. K., a creditor of the defendant, thereupon applied to be made a party to the suit and objected to the filing of the award and to the decree, alleging that the award was fraudulent and fictitious and had been made in order to save the defendant's property from his creditors. The Subordinate Judge made K. a party to the suit and refused the plaintiff's application. On application to the High Court,

Held, that K. ought not to have been made a party to the suit. His remedy was to apply under section 484 of the Civil Procedure Code (Act XIV of 1882) for an attachment before judgment of the defendant's property.

* Application, No. 251 of 1896 under the Extraordinary Jurisdiction.