

the defendant to show that he had suffered damage for want of notice. As a matter of fact, the defendant raised in his written statement the plea that he had received no notice, so it lay upon the plaintiff to show that the defendant could not suffer any damage for want of notice. But he has not done so.

The appeal is dismissed with costs.

Appeal dismissed.

1903
APRIL 19,
APPELLATE
CIVIL.
30 C. 977=
7 C. W. N.
878.

30 C. 979 (=7 C. W. N. 733.)

ORIGINAL CIVIL.

MONOHAR DAS v. FUTTEH CHAND.*

[13th July, 1903.]

*Revivor—Execution of Decree—Limitation Act (XV of 1877), Sch. II, Art. 180—
Notice—Civil Procedure Code (Act XIV of 1892), ss. 232, 248.*

Where a notice was issued under ss. 232 and 248 of the Civil Procedure Code for the execution of a decree and further proceedings were dropped until after the period allowed by limitation computed from the date of such decree:—

Held, that there being no order made by the Court such notice alone did not operate as a revivor of the decree within the meaning of Art. 180, Sch. II of the Limitation Act.

Ashootosh Dutt v. Doorga Churn Chatterjee (1) and *Suja Hossein v. Monohar Das* (2) discussed.

[Ref. 26 All. 361=1904 A. W. N. 51=1 A. L. J. 80; 11 I. C. 216; Dist. 9 C. L. J. 271 =36 Cal. 548; 11 C. L. J. 91=14 C. W. N. 357; 2 I. C. 675.]

THIS was an application for the execution of a decree made on the 12th of December 1889.

It appeared that the plaintiff who obtained the decree died in March 1896 without ever having applied for execution. His executrix, Dhundaye Bibi, died in March 1901, also without having applied for execution.

[1980] On the 12th of December 1901, precisely 12 years after the date of the decree, Jamna Daye Bibi, sole heiress of the said Dhundaye Bibi, obtained an order for Letters of Administration to the estate of Dhundaye Bibi, and at the same time applied for execution of the decree of the 12th of December 1889.

Notice was ordered to issue in respect of her application for execution under ss. 232 and 248 of the Code of Civil Procedure.

After the notice had issued Jamna Daye Bibi died, and further proceedings were dropped.

Mr. Dunne (Mr. Sinha with him), in support of the application contended that the order for notice to issue under ss. 232 and 248 of the Code of Civil Procedure constituted a sufficient revivor within the meaning of Article 180 of the second Schedule of the Limitation Act (XV of 1877).

Mr. Chakravarti (Mr. B. C. Mitter with him) *contra*. A notice for an order to issue is not a revivor. When followed by an order then it is a revivor, and the date of the order gives a fresh starting point from which

* Application in Original Civil Suit No. 474 of 1889.

(1) (1880) I. L. R. 6 Cal. 504.

(2) (1896) I. L. R. 24 Cal. 244.

1903
JULY 13.
—
ORIGINAL
CIVIL.
—

30 C. 979=7
C. W. N. 793.

limitation may run; see *Ashootosh Dutt v. Doorga Churn Chatterjee* (1), *Tincourie Dawn v. Debendro Nath Mookerjee* (2), *Futteh Narain Chowdhry v. Chandrabati Chowdhraim* (3). Time which has begun to run cannot be suspended by death. *Suja Hossein v. Monohar Das* (4). An application for transmission is not an application for the execution of decree within s. 230 of the Code of Civil Procedure: *Nilmoney Singh Deo v. Biressur Banerjee* (5).

Mr. Dunne in reply. The cases cited do not deal with this point which is an entirely new one. In each of the cases cited there had been an order: here there was none. An application for transmission is not one for execution, but it has been held that an application for transmission is a revivor within Art. 180 of the Limitation Act: see *Suja Hossein v. Monohar Das* (4), which shows there was no need for an order for execution. The Code does not limit revivor to an order—a notice suffices. It must be the date of my application that counts. If an order keeps the decree alive, why should not a notice?

[981] HARRINGTON, J. This is an application for the execution of a decree made on the 12th of December 1889.

The plaintiff who obtained the decree died on the 21st of March 1896, leaving Dhundaye Bibi his executrix. She died on the 21st of March 1901, leaving Jamna Daye Bibi her sole heiress.

On the 12th of December 1901, precisely 12 years after the date of the making of the decree, Jamna Daye applied for execution. She had not obtained Letters of Administration; her application was therefore refused, but she applied for Letters of Administration on the same day, and the order was made that Letters of Administration should issue to her, whereupon she renewed the application for execution of the decree of the 12th of December 1889, and notice was ordered to issue under sections 232 and 248 of the Civil Procedure Code.

After notices had issued she died, and no order was made for the execution of the decree. Owing to her death, proceedings were dropped.

On behalf of the judgment-debtor it is urged that this application is barred by limitation.

By Article 180 of the Limitation Act it is provided that the decree must be enforced within 12 years of the making of it, unless there has been a revivor or part payment of interest or principal due under the decree or an acknowledgment by the person liable under the decree.

On the part of the applicant it is contended that there has been a revivor created by the application made on the 12th of December 1901, and by the notice issued thereunder.

The case of *Ashootosh Dutt v. Doorga Churn Chatterjee* (1) and several cases were cited in support of the proposition that an order for execution operates as a revivor, but it is unnecessary to examine these cases because in the present case there is no order for execution. There is no authority for the proposition that the fact that an application has been made and notices have been issued to the judgment-debtor under sections 232 and 248 of the Civil Procedure Code, creates a revivor of the decree.

The principle on which an order for execution operates as a revivor is found in the judgment delivered in the case of *Suja* [982]

(1) (1880) I. L. R. 6 Cal. 504.

(2) (1890) I. L. R. 17 Cal. 491.

(3) (1892) I. L. R. 20 Cal. 551.

(4) (1896) I. L. R. 24 Cal. 244.

(5) (1889) I. L. R. 16 Cal. 744.

Hossein v. Monohar Das (1), which is based on the ground that the order is made after notice on the judgment-debtor to show cause, and after hearing both parties if they desired to be heard. The order made gives a right to execute the decree, and from that fresh starting point the time must run. It thus operates as a revivor of the right to execute the decree.

In the present case the Court has made no order between the parties deciding the question whether there is a right to execute the decree, as the proceedings were dropped before any order was made.

There being no order, there is no revivor.

The applicant has failed to shew that the time to execute the decree has been extended by revivor but he has alleged an acknowledgment in writing which has been denied by the judgment-debtor.

The case will be set down, if the parties so desire it, for the trial of the issue as to whether an acknowledgment sufficient to take the case out of the Limitation Act has or has not been given.

I reserve the costs.

Attorney for the plaintiff: *H. H. Remfry.*

Attorney for the defendant: *Subodh Chunder Mitter.*

30 C. 983 (=7 C. W. N. 808.)

[983] TESTAMENTARY JURISDICTION.

KADAMBINI DASSI v. KUMUDINI DASSI.*

[16th July, 1903.]

Evidence—Relevant fact—Evidence Act (X of 1872), s. 10—Conspiracy, evidence of—Statements by an alleged conspirator to a third party, relevancy of.

Statements made by an alleged conspirator to a third party suggesting that there had been a conspiracy between the plaintiff and others in connection with the forgery of an alleged will, are not relevant when such statements are used to prove (a) the existence of a conspiracy as to which there is no issue, or (b) that the plaintiff was a party to it.

On the 25th May 1902 Gopal Lal Seal, a wealthy inhabitant of Calcutta, died at Chandernagore, leaving him surviving his two widows, Kumudini Dassi and Nayan Manjari Dassi, and his mother, Kadambini Dassi. Two months after Gopal Lal Seal's death, his mother Kadambini and one Nogendra Nath Mitter applied to the High Court for grant of probate of a will alleged to have been executed by the said Gopal Lal Seal. To this application both the widows of the deceased entered caveats, alleging that the deceased died intestate, and that the will propounded was a forgery. Subsequently, and prior to the hearing of this suit, Kadambini died, and the suit was proceeded with on behalf of the surviving plaintiff, Nogendra Nath Mitter.

At the hearing of this suit, and while one Shoshi Shekhar Banerjee, a witness on behalf of the younger widow Nayan Manjari, was under examination, it was proposed by her counsel to tender in evidence two statements alleged to have been made to the witness, Shoshi Shekhar, by a third party named Satish Chunder Mukerjee.

The Offg. Advocate-General (Mr. Pugh), Mr. J. G. Woodroffe and Mr. J. N. Banerjee for Nayan Manjari. We are entitled to [984] tender

* Original Suit No. 11 of 1902.

(1) (1896) I. L. R. 24 Cal. 244.

1903
JULY 13.
ORIGINAL
CIVIL.

80 C. 979=7
C. W. N. 798.