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30 C. 402=7 C. W. N. 74.

his caste-men objected to it, the accused did not apologise to them for his inadvertent use of it towards them. Before this Court also the complainant has not expressed regret for his act."

It seems to us that the subsequent omission of the petitioner to apologise for the use of the caste designation in question cannot be taken as indicating that he used it at the time with a malicious intention.

It is stated by the complainant in evidence (and in his explanation, which has been submitted in showing cause against this Rule, the Deputy Magistrate has referred to the circumstance) that the petitioner endeavoured to obtain from the complainant and from his caste-fellows a payment of Rs. 100 as an inducement to describe them as they desired to be described. There is no finding in the judgment that such an attempt was in fact made by the petitioner; indeed there is no mention of the matter at all. If the Deputy Magistrate believed that that was the case, he should certainly have recorded a definite finding on the subject.

[406] On the whole we think that the conviction of the criminal offence of defamation was not justified, and that if the complainant considers himself aggrieved by the action of the petitioner his proper remedy lies in a suit in the Civil Court.

The Rule is made absolute and the conviction and sentence are set aside. The fine, if realised, or so much thereof as may have been realised, must be refunded. If the amount which was directed to be paid to the complainant by way of compensation has in fact been paid to him, he must refund it.

Rule made absolute.

30 C. 407.

[407] APPELLATE CIVIL.

ASHRAFUDDIN AHMED *v.* BEPIN BEHARI MULLICK.*

[11th December, 1902.]

Insolvency—Civil Procedure Code (Act XIV of 1882) *s.* 307*—Debt not included in the Schedule—Insolvent Debtor, discharge of—Right of creditor, not in the Schedule, against the discharged insolvent's property—Limitation Act (XV of* 1877) *Schedule II, articles* 178-179.

A creditor whose debt has not been included in the scheduled debts within the meaning of s. 357 of the Code of Civil Procedure, is entitled to proceed with the execution of his decree against the insolvent's property, notwithstanding his discharge.

Haro Pria Dabia v. *Shama Charan Sen* (1), and *Sheoraj Singh* v. *Gauri Sahai* (2) referred to.

On an application for execution of a decree having been made by the decree-holder, the salary of the judgment-debtor was attached. The judgment-debtor having represented that, as all his property had vested in a Receiver, he having taken insolvency proceedings, the execution could not be carried on, the Court released from attachment the salary of the judgment-debtor which had been attached. Subsequently the insolvency proceedings came to an end by the discharge of the Receiver. Within three years from the final discharge, the decree-holder made another application asking the Court to revive his former application for execution. The judgment-debtor objected to the execution on the ground that it was barred by limitation:

Held, that the case was governed by article 178, Schedule II of the Limitation Act, and that the present application was one in continuation of the

* Appeals from Orders Nos. 84, 138, 202, 203 and 240 of 1901, against the order of Babu Hemango Chunder Bose, Subordinate Judge of Hooghly, dated the 22nd December 1900.

(1) (1889) I. L. R. 16 Cal. 592. (2) (1899) I. L. R. 21 All. 227.

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previous application, and it having been made within three years from the time when the decree-holder became entitled to ask the Court to revive his former application by reason of the insolvency proceedings having been brought to an end by the discharge of the Receiver, was not barred by limitation.

Where a decree directed that the "plaintiff shall not be able to take out execution of decree until the disposal of petition for insolvency made by the defendants before the District Judge of Patna" and the application for [408] execution was not made until after three years from the date of the order of the first Court in the insolvency proceedings:

Held, that the limitation applicable to the execution of such decree was that provided for by article 178, Schedule II of the Limitation Act (XV of 1877), and that the application for execution was barred by limitation, it not having been made within three years from the date of the order of the first Court under s. 351 of the Civil Procedure Code, granting the petition for insolvency, when the right to make the application first accrued.

Muhammad Islam v. *Muhammad Ashan* (1) referred to.

[Ref. 9 Bom. L. R. 466; (917) Pat. 253=2 Pat. L. W. 199; Rel. 20 C. W. N. 686= 32 I. C. 931; (creditor's right to execute decree.) Fol. 26 Mad. 780=13 M. L. J. 412; Rel. 20 I. C. 439 (Limitation Act, Arts. 181 and 182.)

APPEALS Nos. 84 and 138 by the judgment-debtor Ashrafuddin Ahmed.

These appeals arose out of certain execution proceedings. The petitioner was one Bepin Behary Mullick, who obtained a decree for money against one Syed Ashrafuddin Ahmed Khan Bahadur on the 1st May 1895. The decree-holder then applied to the Subordinate Judge of Hooghly for execution of his decree and the salary of the judgment-debtor was attached. The judgment-debtor, who was declared an insolvent, filed a petition of objection, stating that as all his attachable properties had vested in the Receiver appointed by Court, proceedings in execution of the decree could not be carried on. Accordingly, on the 12th December 1896, the Court released from attachment the salary of the judgment-debtor. Against that order the petitioner appealed to the High Court and the said appeal was dismissed on the 14th March 1898. The name of the decree-holder, Bepin Behary, was not included in the schedule of the creditors filed by the judgment-debtor in the insolvency proceedings. The insolvent judgment-debtor obtained his final discharge in the month of June 1899, and the Receiver's duties came to an end. Thus the legal bar having come to an end, the decree-holder presented a petition on the 20th November 1900 in the Second Court of the Subordinate Judge at Hooghly, and prayed that the Court might be pleased, after service of notice on the judgment-debtor, to hold this petition to be a continuation of the previous execution proceedings, and that the salary of the judgment-debtor might be attached. The defence of the judgment-debtor was that, he having been declared an insolvent, the decree-holder had no right to execute the decree, and that the application for execution was barred by limitation. [409] The learned Subordinate Judge of Hooghly, Babu Hemango Chunder Bose, having overruled the objections of the judgment-debtors, allowed the decree-holder's application.

Babu *Saligram Singh* and Dr. *Ashutosh Mukerjee* for the appellant.

Dr. *Rash Behary Ghose* and Babu *Jadunath Kanjilal* for the respondent.

APPEALS Nos. 202 and 203 by the decree-holder Bepin Behary Mullick; and appeal No. 240 by the judgment-debtor No. 1, Ashrafuddin Ahmed.

(1) (1894) I. L. R. 16 All. 237.

These appeals also arose out of applications for execution of decrees. The decree-holder obtained two decrees for money against one Syed Ashrafuddin Ahmed and his brother Mr. A. Ahmed. One was dated 28th May 1896 and the other 30th June 1896. As at the time, when these decrees were passed, the judgment-debtors instituted insolvency proceedings in the decree dated the 28th May 1896, it was directed that "the plaintiff may refrain from taking out execution of decree until the disposal of the insolvency petition made by the defendants or until such time as may be required for that purpose;" and in the decree dated the 30th June 1896 it was directed that "the plaintiff shall not be able to take out execution of his decree until the disposal of the petition for insolvency made by the defendants before the District Judge of Patna." The decree-holder in the year 1896 took out execution of his decrees, and in his application he prayed for apportionment of the then attached salary of the judgment-debtor No. 1, Ashrafuddin Ahmed. The judgment-debtors were declared insolvents and a Receiver was appointed on the 1st December 1896 and the attachment was removed. The judgment-debtors obtained their final discharge on the 3rd June 1899. Thus the legal bar having come to an end, the decree-holder made these applications for execution (one was dated 12th January 1901, and the other 9th January 1901) not only against judgment-debtor No. 1, but also against the other judgment-debtor. The defence mainly was that the applications for execution were barred by limitation. The Court below held that the application dated the 12th January 1901 was barred as against [410] judgment-debtor No. 2, Mr. A. Ahmed, but it was not barred against judgment-debtor No. 1, and he also held that the application dated the 9th January 1901 was barred against all the judgment-debtors.

Dr. *Rash Behary Ghosh* and Babu *Jadunath Kanjilal* for the appellant.

Babu *Ram Charan Mitter*, Babu *Saligram Singh* and Dr. *Ashutosh Mukerjee* for the respondent.

In appeal No. 240, Babu *Saligram Singh* and Dr. *Ashutosh Mookerjee* for the appellant.

Babu *Jadunath Kanjilal* for the respondent.

BANERJEE AND GEIDT, JJ. These five appeals, Nos. 84, 138, 102, 203 and 240, arise out of certain execution proceedings.

Appeals Nos. 84 and 138 are on behalf of the judgment-debtor, and raise the following questions, namely, *first* whether the Court below is right in holding that the decree-holders are entitled to execute their decree notwithstanding certain insolvency proceedings, which resulted in the judgment-debtor being declared insolvent and his property being rateably distributed amongst certain of his creditors; and *second* whether the Court below is right in holding that execution is not barred by limitation.

Upon the first question it is found, and that finding has not been successfully impugned, that the moneys for which the decree-holders, respondents, have taken out execution are not included in the scheduled debts within the meaning of section 357 of the Code of Civil Procedure. That being so, the insolvency proceedings cannot, in our opinion, be a bar to the present execution. The view we take is in accordance with that taken by this Court in the case of *Haro Pria Debia* v. *Shama*

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Charan Sen (1); and no reason is shown for our saying that that case was wrongly decided, and that the question now raised should be referred to a Full Bench. On the other hand, we may observe that that case has been followed by the Allahabad High Court in the case of *Sheoraj Singh* v. *Gouri Sahai* (2).

[411] As to the second point the facts are these: after the decree-holders had applied for execution of the decree, the judgment-debtor represented that, as all his property had vested in a Receiver, proceedings in execution could not be carried on, and thereupon the Court released from attachment the salary of the judgment-debtor, which had been attached at the instance of the decree-holders. What the decree-holders now ask the Court to do is to re-attach the salary of the judgment-debtor, and to allow them to proceed with the execution case originally instituted by them from the point which it had reached, and at which it was stopped by the order of the Court. That being so, the present application has rightly been held to be no fresh application for execution, but a mere continuation of the previous application; and the period of limitation applicable to it is that prescribed by article 178 of the second schedule of the Limitation Act, and not by article 179. If that is so, the application is made within three years from the time when the decree-holders became entitled to ask the Court to revive the former application by reason of the insolvency proceedings having been brought to an end by the discharge of the Receiver.

The view we take is amply supported by the cases of *Raghunath Sahay Singh* v. *Lalji Singh* (3) and *Rudra Narain Guria* v. *Pachu Maity* (4).

Appeals Nos. 84 and 138 must therefore be dismissed with costs.

The next appeal is No. 202 of 1901. That is an appeal on behalf of the decree-holder, and the point raised in that appeal is whether the Court below was right in holding that execution was barred as against the judgment-debtor No. 2. It is conceded that the present application, as against the judgment-debtor No. 2, must be treated as a fresh application, as no relief was asked for as against him in the previous proceedings. That being so, it must be shown, either that it is made within three years from any of the dates mentioned or referred to in article 179, or that it comes within article 178 for some reason other than that of its being a continuation of the previous application. Now it is not shown that it is made within three years from any of the dates [412] mentioned in article 179. It is faintly suggested that it may come under clause (6) of that article by reason of the clause in the decree which runs in these words * * * "the plaintiff may refrain from taking out execution of the decree until the disposal of the insolvency petition made by the defendants or until such time as may be required for that purpose." But it would be difficult to say that this brings the case within clause (6), which provides for a case "where the application is to enforce any payment which the decree or order directs to be made at a certain date. There is no direction in the decree that any payment is to be made at the date of the disposal of the insolvency petition, or on any other date.

It was next contended that the case comes within article 178, as being a case not provided for by article 179 or by any other article, by

(1) (1889) I. L. R. 16 Cal. 592.
(2) (1899) I. L. R. 21 All. 227.
(3) (1895) I. L. R. 23 Cal. 397.
(4) (1896) I. L. R. 23 Cal. 437.

reason of the clause in the decree just mentioned. This raises the question whether that clause can at all have any operative effect. We are of opinion that this question must be answered in the negative. The clause in terms does not restrain the decree-holder from executing his decree until a certain date. It only gives him the liberty to refrain from taking out execution until a certain event, or a date not very certain—a liberty which he always had without any such clause in the decree. It was intended, no doubt, to be in the nature of a recommendation to the decree-holder. Nor can the decree-holder say, that as between him and the judgment-debtor who allowed the decree to contain this clause, he was at all misled by it, because we find from his own showing that he took out execution before the contingency contemplated by the clause happened, notwithstanding the existence of the clause. Appeal No. 202 of 1901 must therefore be dismissed with costs.

The next appeal, No. 203 of 1901, is also an appeal by the decree-holder, and in this appeal, too, the same question is raised, namely, Whether the Court of Appeal below was right in holding that execution was barred. The clause in the decree that is here relied upon runs thus * * * " the plaintiff shall not be able to take out execution of the decree until the disposal of the petition for insolvency made by the defendants before the District Judge of Patna." Here no doubt the prohibition is imperative. **[413]** And as for the reasons stated in our judgment in appeal No. 202 just disposed of, the application cannot come under article 179, it comes under article 178 of the Second Schedule of Limitation Act.

This view is in accordance with that taken by the Allahabad High Court in the case of *Muhammad Islam* v. *Muhammad Ahsan* (1). But although that is so, the question still remains whether the present application was made within three years from the time when the right to make the application first accrued.

It is argued for the decree-holder (appellant) that, that date ought to be taken to be the date of the discharge of the Receiver in the insolvency proceedings, or at any rate of the final decision of the Appellate Court in the insolvency case.

On the other hand, it is argued for the respondent that the view taken by the Court below is right, and that that date is the date of the order of the first Court under section 351 granting the petition for insolvency.

We are of opinion that the view taken by the Court below is right. The terms of the clause in the decree relate to the disposal of the petition for insolvency. That petition was under section 351, Civil Procedure Code. If the clause was intended to stop execution until the final decision of the insolvency matter, it would have said so. The learned subordinate Judge who inserted that clause in his decree had his view, so far as we can see from the terms of the clause, limited to the disposal of the case by the Court in which it was pending, and which is expressly referred to in the clause though more directly for another purpose.

We were asked to take a liberal view of the clause, as it is a clause which is connected with the limitation of the right of the decree-holder to take out execution; but we cannot shut our eyes to another view. If the decree holder had applied for execution after the disposal of the application by the first Court, and the judgment-debtor had urged the

(1) (1894) I. L. R. 16 All. 237.

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objection that he was not competent to do so until the period of appeal had expired, it would certainly have been a sound argument on behalf of the decree-holder to say that his right to take out execution should not be [414] construed to be restrained longer than was necessary under the strict terms of the clause in the decree. Then again, looking to the reason of the thing, we are of opinion that the stay of execution which the order as construed by the Court below would allow, was sufficient for all purposes. If the application for insolvency was refused, there could be no objection to execution being taken out immediately. If it was granted and further stay of execution was necessary, the subsequent proceedings that were followed by the vesting of the property in Receiver would insure such further stay as might be necessary. So that there is no reason to suppose that the Court which inserted that clause in its decree had any reason for giving to that clause any longer operation than the Court below has construed it to have.

For these reasons appeal No. 203 of 1901 must also be dismissed with costs.

Appeal No. 240 of 1901 has been disposed of by the decision in appeal No. 84 of 1901, the only point involved being whether the present application for execution is barred by limitation. That appeal must, therefore, also be dismissed with costs.

Appeals dismissed.

30 C. 415.

[415] CRIMINAL REVISION.

JAGOBUNDHOO KARMAKAR *v.* EMPEROR.*

[27th May, 1902.]

Complaint—Petition to Collector against subordinate officer of Court of Wards—Dismissal of petition—Witnesses, opportunity to call,—Sanction to prosecute—False charge—Penal Code (Act XLV of 1860) s. 211—Code of Criminal Procedure (Act V of 1898) ss. 4 (h) and 195.

A petition to the Collector as the superior officer of the Court of Wards directed against one of his official inferiors, a subordinate officer of the Court of Wards *cutchery*, askingthe Collector, as the head of the department, to redress the grievances of the petitioner, is not a complaint within s. 4, cl. (*h*) of the Code of Criminal Procedure.

Where on such a petition being presented, the Collector saw the petitioner and got him to repeat the statement made in the petition on oath and dealing with it judicially as if it were a complaint dismissed it, without giving the petitioner an opportunity of calling his witnesses, and ordered his prosecution under s. 211 of the Penal Code:

Held, that the order for the prosecution of the petitioner under s. 211 of the Penal Code should be set aside, as the Collector was not justified in arbitrarily turning a departmental complaint into a criminal complaint, and that if he had been justified in taking the course that he did, he should have given the petitioner an opportunity of calling his witnesses and proving his allegations.

[Fol. 30 Cal. 910 (F. B.)=8 C. W. N. 17; 109 P. L. R. 1904; Ref. 8 A. L. J. 1106=12 Cr. L. J. 433=11 I. C. 617]

RULE granted to the petitioner, Jagobundhoo Karmakar.

This was a Rule calling on the District Magistrate of Backergunge to show cause why his order of the 23rd January 1902, sanctioning the prosecution of the petitioner under s. 211 of the Penal Code, should not be set aside on the grounds (1) that the petition addressed to the

*Criminal Revision No. 214 of 1902, made against the order passed by D. Weston, Esq., District Magistrate of Backergunge, dated the 23rd January 1902.