PRIVY COUNCIL.

ROY DHUNPUT SINGH ROY BAHADOOR (DECREE-HOLDER) *v.*

MUDHOMOTEE DABIA (JUDGMENT-DEBTOR).

P. C.*
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May 2.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Execution of Decree—Limitation—Act XIV of 1859, *s.* 20 (1).

See also 13 B L R 17

An execution-sale was stayed by consent for two months, and the execution-suit was struck off the file. During such period the execution-creditor applied to the Court to restore his execution-suit, and to pay to him certain moneys in deposit in Court to the credit of the judgment-debtor in another suit, alleging that he (the execution-creditor) had attached them; but it turned out that he had attached them in another suit. *Held*, the application being *bonâ fide*, the period of limitation began to run from the date of the disposal of the application by the Court.

THIS was an appeal from a decision of the High Court of the 11th February 1870, reversing a decision of the Subordinate Judge of Dinagepore dated the 11th August 1869.

The question was whether an application made by the appellant on the 24th April 1869 for execution of a decree obtained by him was barred by the 20th section, Act XIV of 1859.

The appellant obtained his decree on the 12th June 1865 for Rs. 8,311-8-6. On the 12th December 1865, he applied for execution, and prayed that certain property held by the respondent as a patni tenure might be sold. On the 24th February 1866, the appellant filed a petition stating that, at the earnest solicitation of the judgment-debtor, and on her promise to pay the amount due within two months, he had agreed to allow two months, and prayed that that time might be allowed, and the sale be stayed. The judgment-debtor also, on the same date, filed her petition to the like effect, and added that the amount would be paid by her with intimation to the Court within the aforesaid two months. On this it was ordered, on the 26th February, by the Principal Sudder Ameen, that the sale should be postponed, and the case struck off the file.

* *Present*:—THE RIGHT HON'BLE SIR JAMES W. COLVILE, SIR MONTAGUE E. SMITH AND SIR ROBERT P. COLLIER.

(1) See Act IX of 1871, sch. 2, cl. 167.

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On the 20th March 1866, the appellant presented a further petition stating the suing out of execution (execution suit. No. 162 of 1865,) and the allowance of two months' time, and further stating that the judgment-debtor had sued out execution against one Mooktocasse Dabia, and had caused her property to be sold, and the amount paid into Court. The petition then alleged that the appellant, while his execution was pending, caused the amount so paid into the Court to be attached, and he now prayed that his execution-suit might be restored to the file, and the attached amount paid out to him. On the same day an order was passed on this petition that it should be entered and numbered, and the record sent for. The report, in obedience to this order, was dated the 3rd May 1866, and was to the effect that no moneys had been attached in execution of this decree, but that in execution suit No. 164 of 1865, between the same parties, Rs. 551 had been attached. Thereupon it was ordered as follows :—

"Whereas no money has been attached in this suit, no orders can be passed for the payment of such money, nor can any other steps be taken. It is accordingly ordered that the case be struck off the file, and the mooktearnama be returned."

This order was dated the 12th of May 1866. No proceedings to enforce the decree appeared to have been taken from that date until the 24th of April 1869, on which day the appellant petitioned that the execution of the decree, which was struck off the file on the 12th May 1866, should be restored, and that the amount due to him might be recovered by attachment and sale of the judgment-debtor's property ; and an order was made that the petition should be entered under a new number, and the record called for.

In July 1869, the judgment-debtor filed a petition of objection, alleging that the execution of the decree was barred by the law of limitation, on the ground that the last proceeding to enforce it was made on the 26th of February 1866, and that, from thence to the 24th April 1869, a period of more than three years had elapsed. It was also asserted that the proceedings before referred to, and going on from 20th of March 1866 till the 12th May 1866, did not avail to save the time, since they

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did not execute the decree. The appellant filed his answer pointing out, among other things, that the judgment-debtor was allowed two month's time from the 26th February 1866, and that the present application for execution of decree was made within three years of the date on which those two months expired.

The case was heard before the Subordinate Judge, who decided in favor of the appellant on the latter ground, and the objections of the judgment debtor were overruled.

The Subordinate Judge gave the following reasons for his decree :—

"I do not think the execution of this decree is barred by the statute of limitations; first, in execution of the decree, sale proclamations were issued against the property of the judgment-debtor; and on the date fixed for the sale, *viz.*, on the 26th February 1866, the judgment-debtor took two months' extension of time from the judgment-holder, within which time she promised to pay off the entire amount due to him, and on this both parties applied for stay of the sale, which the Court sanctioned, and ordered that the case be struck off the file; and it was accordingly struck off. When the execution-proceedings were stayed for two months at the instance of the judgment-debtor, she having applied for two months' time, the decree-holder was under legal disability to use any measure during that period of two months for recovering his money through the Court by execution of decree. The pleader for the judgment-debtor argues that s. 20, Act XIV of 1859, applies to execution of decrees alone; and it lays down that, unless some proceeding shall have been taken to enforce the decree within three years, such decree shall not be executed. So that before this application for the execution of the decree had been filed, no proceeding for the enforcement of the decree had been taken within three years, and consequently that decree has been barred by lapse of time. On this point I would remark that the judgment-debtor having applied for and obtained two months' time and thus stayed all proceedings in Court for that period, and the decree-holder having consented thereto, the Court stayed execution-proceedings; so that such stay of proceedings can by no means be taken to be neglect or laches on the part of the decree-holder. On the contrary, it may be maintained that the decree-holder was engaged in execution-proceedings during those two months in the manner prayed for by the judgment-debtor. Under such circumstances, how can it be said that

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the decree-holder took no measures during three years to enforce his decree? This decree can, therefore, undoubtedly be executed.

"The second plea taken by the judgment-debtor is that the decree holder, after consenting to give time for those two months, broke the covenant by applying for execution within that period, *viz.*, on the 20th March, and praying that the money under attachment be paid over to him. Consequently he is not entitled to any benefit arising out of that contract. That this argument is useless, is perfectly clear. The decree-holder has in no way committed a breach of that former agreement; he only applied that the money under attachment belonging to the judgment-debtor may be paid over to him. This is not an act against the terms of the agreement. Secondly, should we take it for granted that there has been a breach of that agreement on the date in question, then this application for execution has been made within three years. For all these reasons, the objections raised by the judgment-debtor appear to be groundless."

On the 17th September 1869, the respondent appealed to the High Court against that order of the Subordinate Judge.

On the 11th February 1870, that appeal having come on for hearing, the High Court (Glover and Hobhouse, JJ.) reversed the decision with costs; and held that the appellant was barred from proceeding with the execution of his decree; and that the costs of the present application, and of the Court below, should be paid to the judgment debtor.

The following was the judgment:—

The question before us is simply this, whether the decree-holder' respondent, was, with reference to the provisions of s. 20. Act XIV of 1859, in time, when, on the 24th April 1869, he applied for execution of his decree?

Mr. Paul, for the appellant, contends that the last application for execution was on the 26th February 1866. But without saying it being unnecessary in our view of the case to say, whether it was so or not, we will take it upon the contention of Mr. Allan, for the respondent, that the last application for execution was made on the 20th March 1866. Starting from the 25th April 1869, and going back as the law requires, a period of three years from this date, it is manifest that this application of the 20th March 1866, standing alone, was not an application in the words of the law within three years next preceding the application now before us. But Mr. Allan points out that, acting upon

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this application, the Court entered into certain proceedings which did not terminate until the 3rd May 1866; and he contends that the act of the Court in these proceedings must be taken as an act on his part, and that therefore he may take the date of these proceedings, namely, the 3rd May 1866, as the date which represents the last proceeding taken by his client. He relies for this contention on the ruling case of *Ram Sahaye Sing* v. *Degun Sing* (1). He also relies on the case to be found at page 211 of Mr. Thomson's edition of the Limitation Law of the edition of 1866. These two precedents taken together, and even it may be said separately, seem to say that the time from which a decree-holder may date his last application is the last date of any proceeding, either of himself or of the Court put in motion by him in furtherance of the application, provided only such proceeding be taken in good faith, that is, as we understand it, with the intention on the part of the decree-holder to arrive at the fulfilment of the decree. It is therefore necessary to consider what was the application made on the part of the decree-holder on the 20th March 1866, and what was in the words of the decision at page 211 of Thomson's Limitation Act, "that substantial act done in furtherance of such application by the Court on which the decree-holder is entitled to rely."

The application of the 20th March was to this effect:—The decree-holder said that in another Court there was a certain sum of money standing to the credit of the judgment-debtor, and he prayed that a proceeding might issue from the execution Court to that other Court directing that the said money should be paid over to his mookhtar Upon this application, and upon the date of this application, the Court directed that the record should be sent for, and the application, *i. e.*, the execution-application, be restored to the file. After that, we may presume, the records arrived, and on their arrival the usual report was submitted upon them by an officer of the Court, and the Court then, on the 3rd May 1866, passed judgment somewhat in these terms:—It said that, inasmuch as the money in question was under attachment by this very decree-holder in another Court, so the Court could not make an order directing payment of that money to the mookhtar of the decree-holder; and that inasmuch as the decree-holder had taken no further steps in the matter, that is, no steps apparently since the date of the application of the 20th March, to prosecute his decree, so the Court rejected the prayer, and ordered that the execution-proceedings should be struck off the file.

(1) B. L. R., Sup. Vol., 492.

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Now it seems to me upon these proceedings that the utmost that could be said as to any act done by the Court in furtherance of the plaintiff's application to execute his decree, was that act by which the Court sent for the record of the case, in order to pass some order upon the application of the decree-holder. If, therefore, the date of any act done by the Court is to be taken as the date from which the decree holder is to reckon his last application to execute, that application must date from the order of the Court calling for the record; an order which appears to bear exactly the same date as the application, *i. e.*, the 20th March 1866, and so the decree-holder is still out of time. But even if this were not so, I should be quite prepared to hold that the act of making the application was not in itself a *bonâ fide* act in furtherance of the decree. I say this for two reasons, first of all, because I think that when, upon the facts disclosed in the order, the decree-holder was himself the person who was preventing the property that is, the money in question, from being paid out of the Judge's Court, he must have known that he could not, in another execution-case, have got that money paid over to him by the order of another Court. Again, if there had been any real intention, as evidenced by this act of the decree-holder, to execute the decree, we should undoubtedly have seen him following out this act in some practical manner, or we should at least have had some explanation from him as to what he did in the matter of the decree between the 20th March 1866, or putting it at the best, between the 3rd May 1866 and 24th April 1869. Sitting here as a Court of Regular Appeal, we have to determine whether the act of the decree-holder, of March 1866, was done with the real intention of realizing his decree. When, therefore, we find that the act itself was one in which he could not in reason have expected success, and was one with reference to which no explanation has since been offered, and was one not followed up by any other proceeding on his own part for more than three years after the first application, it is impossible, in my judgment, to say that the act was one done in good faith for the purpose of obtaining satisfaction of his decree. This being so, I think that the decree-holder was barred by the application of the statute of limitation when the present application was made to execute it.

I am reminded by Mr. Paul for the appellant that the ground on which the lower Court has passed its judgment has not been touched upon by this Court, and no doubt that is so. I was, however, under the impression that Mr. Allan, for the respondent, was not prepared to

support this decision on that ground, because, as I understood and understand him to admit, the Full Bench Ruling in the case of *Krishna Kamal Sing* v. *Hiru Sirdar* (1), is conclusive upon the point. The point arose on these facts:—The decree-holder on the 26th February 1866 applied for execution, then on that very day both he and the judgment-debtor filed applications to the effect that proceedings might be stayed for a period of two months. This, therefore, took the case down to the 26th April 1866, and the Court below held that this agreement between the parties to postpone execution of the decree was a proceeding on the part of the decree-holder which brought his last application for execution down to 26th April 1866, and so brought it in time from the next application on the 24th April 1869. If the words of the law were not in themselves, as I think they are, quite conclusive against any such contention, the Full Bench Ruling, which I have quoted, is obviously so conclusive.

The order is that the decree of the lower Court be reversed, and that the decree-holder be barred from proceeding with execution, and that he do pay costs in the Court below and in this Court."

The execution-creditor then appealed to Her Majesty in Council.

Sir *R. Palmer*, Q. C., and *Mr. Mortimer*, for the appellant.—The decision of the Subordinate Judge was right. The second petition was not intended to affect the arrangement as to the patni talook, and there was in fact only a prorogation of the sale for two months. The case of *Krishna Kamal Sing* v. *Hiru Sirdar* (1) was very different; there the execution was in fact given up. The effect of holding the present case barred by limitation would prevent a *bonâ fide* postponement for a debtor's benefit being made.

Mr. *J. D. Bell* for the respondent.—The case comes clearly within the principle of the Full Bench decision: the petition agrees to two months time being allowed and the staying of the sale, and the case is then struck off the file. The time must run from that date, or from the 20th March 1866, when he applied to have the execution-case "restored to the file."

(1) 4 B. L. R., F., B., 101

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The last *bonâ fide* proceeding was on the 20th March 1866—*Maharaja of Burdwan* v. *Bulram Sing Baboo* (1) and *Ram Sahaye Sing* v. *Degun Sing* (2).

Sir. *R. Palmer*, Q. C., in reply.

Their LORDSHIPS gave the following judgment:—

In this appeal the only question which arises is whether within three years preceding the application for execution made in the Court below, any proceeding had been taken to keep the original decree in force; the question depending on the 20th section of Act XIV of 1859. The precise date of the original decree has not been stated, but that date is immaterial, because the question is, whether there was any proceeding within three years preceding the application for execution which was made on the 24th April 1869; and undoubtedly it must be shown that, within three years of that date, some proceeding was taken to keep the original decree in force.

The first proceeding relied on is a former application or suit for execution, the petition in which bore date the 12th December 1865, under which there was an order for the sale of a patni-talook, which was to take place on the 26th February following. On the day of the sale, by agreement, an order was made for the postponement of the sale for two months; and upon that order being made, it was further ordered that the case be struck off the file. It was contended for the appellant that this execution suit must be considered to have continued in living force, although by the suspensory order, no proceedings were to be taken by way of sale for two months, and that the three years did not commence to run until the end of these two months. Their Lordships do not think it necessary to decide that question; they desire to give no opinion judicially upon it; having come to the clear opinion that the proceedings which were founded by the subsequent petition of the 20th March 1866 are sufficient to take the case out of the operation of the Limitation Act.

The petition of the 20th March 1866, which was filed before

(1) 5 B. L. R., 611. (2) B. L. R., Sup. Vol, 492.

the above-mentioned period of two months had expired, after referring to the decree, and to the execution and the postponement of the sale, alleges that the judgment-debtor had subsequently taken out a decree against a debtor of his own, and sued out execution, and caused some property to be sold, and that the purchase money, an amount of Rs. 551, was received on deposit, and then the petitioner proceeds:—"While my execution was pending, I caused that amount belonging to the judgment-debtor to be attached, and file this petition, and pray that my execution-suit may be restored to the file, and that the aforesaid attached amount, Rs. 551, be paid to my mookhtar." This petition, if *bonâ fide*, would clearly be a proceeding to enforce the judgment, its object being to obtain execution of the money attached. It was referred to the officer of the Court, and the officer upon that reference found that no moneys were attached in execution of the decree in which the petition was filed, that is, the decree in the present suit, but that certain moneys had been attached in another suit between the appellant and the respondents. The report is dated on the 3rd of May. On the 12th of May, on order of the Court is made upon it, which has the following preamble:—"Whereas no money has been attached, no orders can be passed for the payment of such money, nor can other steps be taken. It is accordingly ordered that the case be struck off the file, and the mookhtarnama be returned." It seems to result from the report of the officer of the Court, and the order made upon that report, that no execution could issue upon the petition in consequence of the money not having been attached in this suit, and that there was another suit between the same parties, in which that sum of money had been attached.

It is said that this proceeding cannot be held to be one to keep the judgment in force, because it was a petition to obtain execution of a sum of money which it was not possible that the execution could reach, and that that must have been so to the knowledge of the decree-holder. It seems to their Lordships that these circumstances really affect only the *bona fides* of the proceeding. Their Lordships could infer from these facts that the petition was a colorable one, not really with a view to

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obtain the money; if they could come to that conclusion, in point of fact, the proceeding would not be one contemplated by the statute; but their Lordships cannot come to that conclusion.

It appears that the decree-holder really desired to obtain execution of this money, and the fair inference is that he had mistaken the suit in which he could apply for execution, and having the attachment in another suit, he, by mistake, applied for execution in the present one, in which he had not obtained the previous attachment which is necessary to ground execution.

Then, assuming it to be a *bonâ fide* proceeding, which failed in consequence of that mistake, their Lordships think that the original petition was a proceeding to enforce the judgment, and to have execution of it; that it was a continuing proceeding duly prosecuted by the appellant, up to the time of the report, and further up to the time when the judgment was finally given, and that during the whole of such pendency, the decree-holder must be considered as going on with one and the same proceeding. Their Lordships do not consider that the fact that it was in the end abortive, takes from it the character of a proceeding to enforce the decree. The consequence will be that the 12th May 1866, when the petition was dismissed, is the date from which the three years ought to commence to run. This decision is entirely in accordance with the judgment of this committee in the case of *Maharaja of Burdwan* v. *Bulram Sing Baboo* (1) and does not conflict with any case to which their Lordships have been referred.

The result is that their Lordships will humbly advise Her Majesty to allow this appeal, and to order that the judgment under appeal be reversed, and that in lieu thereof the appeal to the High Court be dismissed, and the judgment of the first Judge be affirmed with costs. The appellant will have the costs of this appeal.

Appeal allowed.

Agent for appellant: Mr. *Mortimer*.

Agents for respondent: Messrs. *Watkins* and *Lattey*.

(1) 5 B. L. R., 611.