BENODERAM SEN AND OTHERS (PLAINTIFFS) *v.* BROJENDRO NARAIN ROY (DEFENDANTS.)

P. C.* 1873 *Nov* 27.

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

Execution of decree—Act XIV of 1859, *s.* 20—*Bona fides.*

In judging of the *bona fides* of proceedings to obtain execution of a decree the whole course of those proceedings must be regarded. The fact that unexplained delays have occurred during the proceedings in execution of the decree, or that some of the proceedings were ineffectual, is not necessarily evidence of a want of *bona fides*.

APPEAL against an order of the High Court (Jackson and Markby, JJ.), dated the 20th March 1869, reversing an order made in execution proceedings by the Subordinate Judge of Beerbhoom on the 1st December 1869.

The facts of the case were as follows:—On the 5th April 1855, Benoderam Sen and others (the appellants in this case) obtained a decree in the Court of the Judge of Beerbhoom against Chundernarain Roy, the respondent's father, for Rs. 7, 460 and costs.

On the 6th August 1857, the appellants first applied for execution of this decree by attachment and sale of Chundernarain's property situate within the jurisdiction of the Court. On 17th March 1859, the sale proceeds of the attached property, *viz.*, Rs. 6,650 were paid over to the appellants in part satisfaction of their decree, and the execution case was struck off on the 26th March 1859.

On 31st December 1861, the balance of the decree being still unsatisfied, an application was made for the arrest of the judgment-debtor. His other properties were situated in other zillas, *viz.*, Moorshedabad, where he resided, and Dinagepore. Notice to Chundernarain to show cause against the execution was issued, and on 13th April 1863 was sent to the Moorshedabad Court, which on 1st May effected substituted service. On 6th May 1863, the appellant's vakeel was ordered to proceed within

* *Present* :—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, SIR R. P. COLLIER, AND SIR L. PEEL.

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three days. Nothing, however, was done, and on the 11th August following the case was struck off.

On the 23rd March 1865, Chundernarain having died in the interval, a third application was made to the Beerbhoom Court to execute the decree by attachment and sale of the Dinagepore property of the deceased debtor. On the 31st May 1866, the Principal Sudder Ameen sent the case to the Dinagepore Court, and two months afterwards struck the case off his own file. The case was subsequently struck off the file of the Dinagepore Court for default, and on 25th March 1867 an application was made by the appellants to revive it, but the respondent objecting that it was barred by limitation, the application was rejected.

On 27th June 1867 the present respondent, Raja Brojendro Narain Roy, the son and heir of the deceased debtor, objected by petition in the Beerbhoom Court to the execution of the decree, contending that it was barred by limitation, since more than three years had elapsed from 26th March 1859, the date when the case was first struck off the file. The Judge on the 29th June 1867 rejected this application, holding that the statutory period ran from 1st May 1863, the abovementioned date of service on the deceased-debtor, and that therefore the application of 23rd March 1865 was in time. No appeal was made from this decision.

On the 11th May 1868 the High Court (Loch and Glover, JJ.) set aside the ruling of the Dinagepore Court as to limitation. They held that the Dinagepore Court had no jurisdiction, and that the appellants must apply to the Beerbhoom Court. Accordingly on 18th May 1868, the appellants applied to the Subordinate Judge of Beerbhoom, to send a new certificate to the Dinagepore Court for attachment and sale of the property previously attached. Notices were sent to that Court, and on 7th August 1868, the respondent again raised the point of limitation in the Beerbhoom Court. On 1st December 1868, this plea was overruled and execution issued. The High Court (Jackson and Markby, JJ.) on 20th March 1869 reversed this decision on appeal, holding that no sufficient proceedings had been taken to keep the decree alive within s. 20 of the Limitation Act.

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From that decision the plaintiffs appealed to Her Majesty in Council.

Mr. *Doyne* for the appellants contended that, up to May 1863, there was no ground whatever for holding that there was any want of proceedings sufficient to keep alive the decree under s. 20 of Act XIV of 1859, or any suggestion of want of *bona fides* in the decree-holder. [Sir J. COLVILE.—You may take the proceeding of the 6th May 1863 as an active proceeding. Sir L. PEEL.—Then came the proceeding of March 1865, and that was within three years.] Next, the respondent was not at liberty to re-open any question as to limitation up to 23rd March 1865, no appeal ever having been brought from the Judge's decision of 29th June 1867 in which it was held that the application of 23rd March was in time. That decision and the appearance of the appellants on that occasion were *bonâ fide* proceedings to keep in force the decree. He cited *Maharaja Dhiraj Mahtab Chand Bahadur.* v. *Bulram Singh* (1), *Ram Sahai Sing* v. *Sheo Sahai Sing (2)*, and *Biprodoss Gossain* v. *Chunder Seekhur Bhuttacharjee* (3),

Mr. *J. Cutler* for the respondent contended that the proceedings taken by the appellant were not *bonâ fide*. His object never was to execute the decree, but to keep it alive for an ulterior purpose. [Sir M. E. SMITH.—What ulterior motive do you say that the appellant had in keeping the decree alive?] The proceedings of 1861 were utterly frivolous. Instead of an application for attachment, a warrant of arrest was applied for, but no arrest was effected. Unexplained delay occurred while there is no evidence that the respondent or his father was keeping out of the way. [Sir J. COLVILE.—He was not caught, and that is presumptive evidence that he was keeping out of the way.] There was a hiatus of nearly three years from 26th March 1859 to 1861. [Mr. *Doyne*.—We then had twelve years; the Act of 1859 only came into force in 1862.] The proceedings were allowed to be struck off, and no explanation is given;

(1) 5 B. L. R., 611; S. C., 13 Moore's I. A., 79.

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

(3) *Id.*, 718.

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the appellants having all along from the year 1859 been aware of the property in the other zillas.

The judgment of their LORDSHIPS was delivered by

Sir MONTAGUE E. SMITH.—This appeal arises out of execution proceedings which were taken to obtain execution of a judgment obtained by the appellants against Chundernarain Roy, the father of the respondent.

The original judgment is dated on the 5th April 1855, and was obtained in the Civil Court of Zilla Beerbhoom for Rs. 7,460 and costs.

The only question which arises is whether the proceedings in execution which were commenced on the 18th May 1868 are barred by the operation of the 20th section of the Limitation Act, XIV of 1859. The ground on which it is urged that limitation is a bar is that no proceeding had been taken to enforce the judgment within three years next preceeding the application for execution in 1868 within the meaning of the Act.

Now, unfortunately for the appellant in this case, he has been obliged to resort to no less than four different attempts to obtain execution of his judgment. The first effort he made was to a certain extent fruitful and successful, for he obtained a sum of Rs. 6,650, in part satisfaction of this judgment. The proceedings in which that sum was realized commenced on the 6th August 1857, and it appears from the schedule to the petition to obtain execution in that year that he sought to attach three estates, one in Zilla Beerbhoom and two in Zilla Moorshedabad. The Court, rightly or wrongly, put him to his election whether he would take out execution first against the estate in Zilla Beerbhoom, or in the other zilla. It appears that he elected to attach the estate in Zilla Beerbhoom; and having attached it, proceedings were taken by the defendant to obstruct that execution,—proceedings which went to the High Court. Those proceeding were undoubtedly prosecuted by the plaintiff in a vigorous manner and with success, for he obtained ultimately the sale of the estate and under that sale obtained payment of the sum already adverted to. But it appears that the obstruction opposed by the defendant delayed that payment until the

17th March 1859. The execution proceeding was then at an end, so far as that estate was concerned, and on the 26th March of that year it was struck off the file.

The next proceeding is on the 31st December 1861. That was, undoubtedly, within three years of the former. The execution was commenced by petition, praying for the arrest of the defendant. It appears there was then remaining due on the judgment for principal and interest a sum of upwards of Rs. 5,000. The application being more than a year after the date of the last order in execution, the Court required that notice should be served upon the defendant in pursuance of s. 216 of Act VIII of 1859, and it appears that a formal notice was issued by the Court on the 13th April 1863, which was sent to Moorshedabad for service. It was put into the hands of the regular officer of the Court, and the Nazir made a report to the Court that he had in vain endeavoured to effect personal service of it, but had affixed it to the front door of the defendant's house. That report was in May 1863. It seems that no arrest was made. Why it was not made does not certainly appear, but the plaintiff apparently desired to effect the arrest. If he did not mean to arrest the defendant, why did he obtain the order, get it transferred to Moorshedabad, and go to the expense of paying the fees of the officer for executing it? It may be that there is not sufficient to show that the defendant was absconding, but there is nothing to show that he was in the way; and when the charge is made of want of *bona fides*, it certainly lies upon the party making that charge to substantiate it by evidence satisfactory to those who have to decide the question.

This last proceeding was, undoubtedly, abortive, but within three years of the report of the Nazir, that is, on the 23rd March 1865 the defendant having died in the interval, a fresh petition to execute the decree by an attachment and sale of some property in Zilla Dinagpore was presented. It was presented to the Judge of Beerbhoom who made an order, of the date of the 31st July 1866, that copies of the decree and the application for execution should be sent to Dinagepore, in order that the Judge there might execute it. It seems that the decree was taken there, and then began proceedings, which emanated

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from the defendant, to set aside the execution, on the ground that it was barred by limitation. The Judge at Dinagepore decided that limitation was a bar. There was an appeal to the High Court by the present appellant, and he was successful in that appeal. The High Court reversed the order below, on the ground that the Judge at Dinagepore had no authority to make it. In the mean time, pending that appeal, the defendant presented a petition to the Judge of Beerbhoom, praying that the proceedings might be dismissed on the ground that they were barred by limitation. The Judge of Beerbhoom decided, upon the issue raised on that petition and the petition in answer, that the proceedings were not barred by limitation. His order rejecting the objection was made on the 29th June 1867, and in May 1868 the present proceedings were commenced.

Now it was not contended by Mr. Cutler that there was an interval of three years between the proceedings which have been narrated, and which were taken on the part of the appellant; but his sole contention before their Lordships to-day was that these proceedings were not *bonâ fide*, and when pressed during the argument to show in what respect they were not *bonâ fide*, and to what particular proceedings he alluded as open to that charge, he referred to those of 1861, which were commenced by the petition praying for the arrest. He says that those proceedings were not *bonâ fide*, first, because there was delay to take them after 1859; next that the defendant was not arrested; thirdly, that the plaintiff petitioned for an arrest instead of an attachment.

The delay may have been caused by the plaintiff making inquiries about the defendant's property before applying for an arrest. Probably, though he had inserted in his schedule estates in Moorshedabad, of which he had some knowledge, there was difficulty in reaching them, and he may have thought that if he arrested the defendant, he might obtain payment under the compulsion of that arrest. At all events it is a probable solution of the delay. He may have thought that, instead of incurring the difficulty of following the estates, perhaps in other names, it would be a more cogent mode of obtaining the money to arrest the defendant.

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Their Lordships, in considering whether these proceedings were *bonâ fide* or not, cannot be confined to this particular attempt to revive the execution in 1861, but must look at the whole course of the proceedings; and when they find that the first proceeding to obtain execution was not only prosecuted, but prosecuted with effect, and a large sum obtained; when they find also that in the third attempt, when the defendant set up the defence of limitation and attempted to bar the proceeding, the appellant opposed him, and successfully opposed him, in two Courts, going up to the High Court; they think the case affords strong evidence of a *bonâ fide* desire to execute his decree, which was thwarted and baffled by the defendant.

Their Lordships are unable to concur in the view taken by Markby, J., that these proceedings appear to have been taken merely to keep the decree alive for some ulterior purpose. The learned Judge does not explain what ulterior purpose he supposes the plaintiff had in view, nor does he suggest any. There is no doubt it would be, what he calls, a "nefarious practice" for plaintiffs having decrees to keep them for some wrong motive hanging over the heads of defendants; but there is not the slightest evidence that any such motive existed in this case.

Their Lordships, therefore, think, that upon the facts there is not only an entire want of proof of *mala fides*, but strong evidence of a real and in some respects (though there are delays which are not quite accounted for) a strenuous prosecution of these proceedings.

Their Lordships find that Jackson, J., gave as one of his reasons for thinking the statute was a bar, that "no steps of an effectual kind were taken." Now it is perfectly clear that the inquiry, whether the steps taken were in fact effectual, can only be material, provided the proceeding be in its nature one to enforce the judgment, so far as it may be an element in considering the question of *bona fides*.

It constantly happens in these executions that proceedings are taken which are ineffectual, because of some mistake in the particular step which has been advised. The point was before this Committee last year in a case of *Roy Dhunput Singh Roy*

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Bahadoor v. *Mudhomotee Dabia* (1); the judgment was delivered on the 2nd May 1872. In that case the plaintiff had obtained two decrees. He had attached some money under decree A, and then he filed a petition by mistake in suit B, praying to have the attached amount paid out to him. When it came before the Court, the defect was pointed out, and the petition was of course abortive and ineffectual. In a subsequent execution suit under decree B, it became necessary for the plaintiff to establish that he had taken a proceeding within three years of the proceeding in execution which he was then prosecuting, and to rely upon the former abortive petition as a step to enforce the decree. This Committee held that, although it had been of no avail by reason of a mistake, it was a step which the plaintiff had taken to enforce his decree, and therefore that it did protect him from the operation of the Statute of Limitations.

For these reasons their Lordships will humbly advise Her Majesty to reverse the decree of the High Court, to affirm the decree of the Principal Sudder Ameen, and to order that the respondent do pay the costs of this appeal and the costs in the High Court.

Appeal allowed.

Agents for the appellants: Messrs. *Bailey, Shaw, Smith,* and *Bailey.*

Agents for the respondent: Messrs. *Barrow* and *Barton.*

(1) 11. B. L. R., 23.