Before Sir Barnes Peacock, Kt., Chief Justice, Mr. Justice L. S. Jackson, and Mr. Justice Macpherson.

1868
Sept. 4.

RAJA SATYASARAN GHOSAL BAHADUR (DECREE HOLDER,) *v.* BHAIRAB CHANDRA BRAHMO.*

Limitation—Execution—Decree.

A decree was passed in 1850, and was in force in 1859, when Act XIV. of that year was passed. Between August 1860 and 25th April 1864, nothing effective was done in furtherance of execution. Petitions for execution were filed in May 1861 and August 1862, and the usual orders passed on them but they were struck off in default. On 25th April 1864 another petition was filed, and notice was served on the debtor. *Held* that, at that time, the petition for execution was barred by limitation. The decree was not kept alive by the petitions of May 1861 and August 1862 which were struck off in default.

THIS was an application to the Principal Sudder Ameen of Backergunge for execution of a decree.

The Principal Sudder Ameen's decision was as follows:—"The decree is dated 15th May 1850. Up to 28th August 1860, the decree-holder is found to have regularly proceeded; but from that time, up to 28th November 1864, within a period of three years, no proceeding is found on the decree-holder's part, even so far as the deposit of talabana for service of notiee on the judgment-debtor. Only petitions have been field, merely with the motive of showing that he was not altogether silent; but as the mere filing of petitions is not considered a *bona fide* proceeding on his part, the case is struck off as barred by the law of limitation."

The Judge affirmed the Principal Sudder Ameen's decision.

The decree-holder then filed a Miscellaneous Appeal to the High Court, on the grounds:—

1*st*.—That the Principal Sudder Ameen failed to take notice of section 216, which does not require service of notice, when the applications are successively made, as has been done in the

* Appeal No. 7 of 1868, under section XV. of the Letters Patent of 28th December 1865, from a judgment of Mr. Justice Loch prevailing against that of Mr. Justice Mitter, dated the 13th May 1868, in Summary Special Appeal No. 506 of 1867, from a decree of the Zilla Court of Backergunge, dated the 29th June 1867.

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present case, within one year from the date of the order passed on each of these applications.

2nd.—That when, before the present application, execution was allowed to proceed on 12th May 1866, and notice was accordingly served on the debtor, the Courts below are wrong to re-open the question of limitation again.

MITTER, J.—I am of opinion that this decree is not barred by the provisions of section 20, Act XIV. of 1859. It appears that an order was passed by the Court for restoring the execution case to the file within three years next before the date of the last application. I think that this order is a proceeding for keeping the decree in force, although it is not a proceeding for enforcing it. I think that the Legislature, when it referred to proceedings of both these descriptions, intended to draw some distinction between a warrant for the arrest of the person of the judgment-debtor, or a process of attachment issued against his property as a proceeding of the latter class; but an order for the restoration of an execution case to the file, and which thereby directs the execution to be proceeded with, is a proceeding of the first mentioned class, *i. e.*, it is a proceeding for keeping the decree in force. It has been decided that an order striking off an execution case from the file, is not a proceeding within the meaning of section 20; but the proceeding before us is of an opposite character. Nor can such a proceeding be impugned, on the ground of want of *bona fides*; for it is an act of the Court itself. It has been already ruled by a Full Bench in *Kangali Charan Ghosal* v. *Banamali Mullick* (1) that an act of the Court cannot be impugned as *Mala fide*; and I think that the same principle ought to be applied to the proceeding before us. I would, therefore, reverse the decision of the lower Courts, and remand this case to the Court of first instance. The respondent ought to pay the costs incurred by the appellant, both here and in the two lower Courts.

LOCH, J.—I cannot concur in the view taken by my colleague. There can, of course, be no question as to the *bona fides* of the order of the Court ordering the application for execution to

(1) Case No. 445 of 1866; 31st May 1867.

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be registered, and directing the party to proceed with the execution. But what we have to look to, is the *bona fides* of the party making the application. In making it, did he intend to carry out execution? Did he intend to take further steps to realise the debt due to him? If there is no valid objection to proceeding with the execution apparent on the face of the application, the Court cannot refuse to admit it in this register; but by so doing, it does not guarantee that the decree-holder is acting in good faith. Where a notice is served through the Court, or other process issued at the instance of the decree-holder, means of judging of his good faith in applying for execution are afforded; but the order of the Court merely restoring an execution case to the file, or directing a fresh application to be registered, does not, in my opinion, assist the applicant at all. The petition filed, and the order to proceed passed thereon, are merely acts to start the case; but if it be proceeded with no further, that order will be no better protection against limitation, than the petition upon which it was passed.

The decree in this case was passed in 1850, and was alive in 1859, when Act XIV. of that year was passed. Something appears to have been done in August 1860; but from that date to 25th April 1864, nothing effective in furtherance of execution was done. Petitions for execution were put in on 4th May 1861 and 14th August 1862, and the usual orders passed upon them, and they were struck off for default; no steps having been taken by the decree-holder to carry out execution. On the application of 25th April 1864, notice was served on the debtor, but by that time execution was barred by limitation; and it has been ruled by this Court that, where limitation has once operated to prevent execution, no subsequent acts of the decree-holders can restore to him the right once lost of executing his decree. Under these circumstances I would confirm the order of the lower Court, and dismiss this appeal with costs.

The decree-holder appealed, under the 15th section of the Letters Patent, against the order of Mr. Justice Loch, the senior Judge.

Baboos *Krishna Kishor Ghose, Hem Chandra Banerjee,* and *Abhaya Charan Bose* for appellant.

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Baboo *Gopal Lal Mitter* for respondent.

PEACOCK, C. J.—The question decided by the Division Bench, in respect of which this appeal has been brought, arose in a special appeal from the decision of the Principal Sudder Ameen. We agree with Mr. Justice Loch in thinking that execution was barred by limitation. Nothing was done upon the petitions of the 4th May 1861 and 14th August 1862, and they were consequently struck off for default. They did not, therefore, keep the execution alive.

The appeal is dismissed with costs.

Before Sir Barnes Peacock, Kt., Chief Justice, Mr. Justice L. S. Jackson, and Mr. Justice Macpherson.

1869 Sept. 8.

AKORA SUTH (DEFENDANT) *v.* BOREANI (PLAINTIFF.)*

Re-marriage of Hindu Widow—Act XV. of 1856, *ss.* 2, 3, 5—*Inheritance.*

A Hindu died, leaving a widow and minor son and daughter. The widow re-married after her husband's estate had vested in her son. The son subsequently died; and his step-brother took possession of the property. The widow then brought a suit against the step-brother for possession. *Held* that the suit was maintainable, and that she could properly succeed as heir, to her son, notwithstanding her second marriage.

THE plaintiff in this case sued, originally as manager and guardian of her minor daughter Dhan Mala, but was subsequently permitted to amend the plaint under section 73 of Act VIII. of 1859, by making herself a party, and suing in her own name, as well as guardian to her daughter. The suit was for obtaining possession of 19 bigas of land, and value of certain properties laid at Rs. 149-12. Peokan, the husband of the plaintiff, died possessed of 19 bigas of land in Mauza Ubeagram, and movable property valued at Rs. 133-8. At the time of his death, he left behind him his widow the plaintiff, his son Bhakat

* Appeal No. 22 of 1868 under section 15 of the Letters Patent of the 28th December 1865, against a judgment of Mr. Justice Kemp prevailing against that of Mr. Justice E. Jackson, dated the 10th June 1868, in Special Appeal No. 2704 of 1867, from a decree of the Deputy Commissioner of Nowgong, dated 6th August 1867.