

date of any notice that might have been issued on the judgment-debtor upon such application. The pleader for the decree-holder relies upon an application which was made on the 31st of August 1872. This application was not made by the decree-holder then on the record. It was therefore not a petition to execute the decree, and consequently the decree-holder is not entitled to count three years from that date, and, as he is not within time from the 9th of December 1869 when a substantial application was made, the execution of the decree must be held to be barred by the Law of Limitation.

The appeal is, therefore, dismissed with costs. Pleader's fees, 1 gold mohur.

The 29th April 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges*.

Joint Decree—Application by Sharers for Execution—Addition of Purchasers—Act VIII. of 1859, s. 208.

Case No. 418 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 11th September 1874, affirming an order of the Subordinate Judge of that District, dated the 6th May 1874.

Seetaput Roy and another (Decree-holders),
Appellants,

versus

Synd Ali Hossein and others, *Respondents.*

Baboo Rajendro Nath Bose for Appellants.

Baboo Debendro Narain Bose and *Moonshee Mahomed Yusuf* for Respondents.

Where two out of several decree-holders petitioned the Court to execute their share of the decree (which was for possession and mesne-profits), and the other decree-holders, though they virtually joined in the application by signifying their consent, subsequently retracted their consent, and the original applicants declined to proceed with the execution of the decree for mesne-profits:

HELD that there was no application on the part of all the decree-holders to execute the decree for *mesne-profits*,

nor any application by some of them for execution of the whole decree, and that the Court's order directing realization of the unpaid portion of mesne-profits was passed without any proper application.

Quære:—Can the purchasers of a share in a decree be added upon the record, under Act VIII. of 1859, s. 208, as co-decree-holders?

Mitter, J.—THREE persons—namely, Begum Jan, Begoo Jan, and Ali Hossein—brought a suit to recover possession of 19 sehams of certain properties against several persons. A decree was given in their favour on the 20th August 1867, and it is alleged that that decree had been subsequently modified in favour of the two defendants, Zuhoor-ul-Huq and Mussamut Suleemun. For the purpose of deciding this miscellaneous appeal it is not necessary for us to inquire whether this was so or not. On the 24th of September 1867, the appellants now before us applied to the Court alleging that they had purchased a share in the decree. The decree-holders, by a petition of that date, signified their consent to the appellants being added as co-decree-holders. Upon that the Court ordered that the names of the appellants should be added as co-decree-holders. On the 29th of July 1873, Begoo Jan and Ali Hossein made an application asking the Court to permit them to execute their share of the decree which they alleged to amount to one-half, and their prayer was that an Ameen be deputed to make over possession of the property in respect of their share, and after ascertaining the wassilat to allow them to execute their decree for one-half of the amount that might be found due. Upon this a notice was issued upon the other two decree-holders—namely, Begoo Jan and the appellants—and, on the 3rd of September 1873, they, by petition, consented to the decree being executed in the shares mentioned in the petition of Begoo Jan and Ali Hossein of the 29th of July 1873. Accordingly, an Ameen was deputed on the 9th of March 1874, with instructions to make over the decreed property to the several decree-holders in proportion to their respective shares, and also to ascertain the respective shares of mesne-profits due to the several decree-holders. On the 23rd April 1874, two of the judgment-debtors, Zuhoor-ul-Huq and Mussamut Suleemun, made an application to the Court executing the decree, alleging that they had compromised with Ali Hossein and Begoo Jan, two of the decree-holders, whose shares amounted to 12 annas, in respect of their claim for mesne-profits, and praying that they should be released from it. Ali Hossein and Begoo Jan also, by petition,

gave their consent to the prayer of Zuhoor-ul-Huq and Mussamat Suleemun. Upon this, on the next day—the 28th of April 1874—the appellants appeared and made an application retracting their former consent, and asking the Court to put them in possession of one-half, being their share of the property, awarding to them one-half of the mesne-profits that might be found due from the judgment-debtors. On this state of things the Court of first instance made the following order: “That the decree-holders “and the purchasers be jointly put in possession. As Ali Hossein and Begoo Jan have “already realized from Chowdhry Zuhoor-ul-Huq and Mussamat Suleemun 12 annas “of the mesne-profits, and put in a petition “in order to inform the Court of it, Mussamat Suleemun and Chowdhry Zuhoor-ul-Huq cannot be held liable for the aforesaid “12 annas’ mesne-profits. If Ali Hossein “and Begoo Jan, decree-holders, have realized “more than their own shares, the purchasers “are at liberty to take steps for realization “of the same, as it may seem to them meet “and proper; but no execution can be taken “against the judgment-debtors for the 12 “annas’ wassilat already realized. The “decree-holders should realize the remaining “4 annas’ mesne-profits only by taking out “execution. The Ameen should be informed “of the above facts with directions to act in “accordance therewith.” Against this order there was an appeal by the present special appellants to the District Judge, who confirmed the order of the first Court.

In this special appeal it has been contended that the order of the first Court with reference to mesne-profits is wrong, because the compromise upon which that order is based was not certified to the Court as required by law (section 206, Act VIII. of 1859) by all the decree-holders. It was certified only by two of the decree-holders, Ali Hossein and Begoo Jan. It is not necessary to decide the question raised in this objection in this special appeal, because it seems to me that upon another ground, which I shall presently state, the order of the first Court with reference to mesne-profits cannot stand. As to that part of the order which directs that the decreed property be made over to all the joint decree-holders, there has been no objection raised against it, and we have nothing further to do with it; but, with reference to the order for mesne-profits, it appears to me that there has been no proper application for execution of that part of the decree.

The decree was originally in favour of

three persons, and the present special appellants, by application, asked the Court to be added as co-decree-holders, and that was allowed. It is doubtful whether, under section 208, Act VIII. of 1859, they could be so added upon the record as co-decree-holders. Section 208 refers to the assignment of a whole decree, not of a portion of a decree. Therefore, as I have already observed, it is doubtful whether the Court had power to place the present special appellants as co-decree-holders on the record. But, be that as it may, we think that there has been no proper application for executing the decree as far as the mesne-profits are concerned. The action which has been taken to ascertain the mesne-profits was upon a petition which was filed by Begoo Jan and Ali Hossein on the 29th of July 1873. That was a petition by two out of several decree-holders to execute their share of the decree. This could not be done under the law. It was a decree in favour of all, and therefore either all the decree-holders should have joined in the application, or, if they could not agree amongst themselves, under section 207, they should have asked the Court’s permission to execute the whole decree by passing such order as might protect the interests of the other decree-holders. It may be said that the other two decree-holders—namely, Begoo Jan and the appellants (treating the appellants as decree-holders)—virtually joined in this application, as they signified their consent to it by an application dated the 23rd December 1873; but, as they subsequently retracted their consent, and as the persons who originally made the application to execute the decree—namely, Begoo Jan and Ali Hossein—declined to proceed with the execution of the decree for wassilat against Zuhoor-ul-Huq and Mussamat Suleemun, it must be held that there has been no application on the part of all the decree-holders to execute the decree for mesne-profits, and as I have shown above, neither there has been any application for execution of the whole decree by some of the decree-holders as provided in section 207. This being so we must hold that the order regarding mesne-profits has been passed without any proper application having been made by the decree-holders for executing the decree for mesne-profits, and on that ground that part of the order of the first Court must be cancelled, and the parties must be left to proceed according to law.

Each party to bear their own costs.

Glover, J.—I concur.