

not barred by limitation, even if Joykristo being a mere benami-dar did not obtain actual possession.

The result, therefore, is, that the decision of the lower Appellate Court in this case on the question of limitation is contrary to the ruling in the Privy Council above referred to. It has been already shown that there cannot be any question as to the plaintiff's title.

The decision of the lower Appellate Court must therefore be reversed, and the plaintiff's suit decreed with costs in all the Courts.

*Appeal allowed.*

*Before Mr. Justice Markby and Mr. Justice Prinsep.*

HURRONATH BHUNJO (DECREE-HOLDER) *v.* CHUNNI LALL  
GHOSE (JUDGMENT-DEBTOR)

1878.  
*June 24*

*Execution of Decree—Partial Satisfaction under Arrangement made by Court—Limitation — Subsequent Application for Execution.*

Striking off an execution order from the file is an act which may admit of different interpretations according to the circumstances of the case, and is not conclusive proof that such execution proceedings were intended to be abandoned.

A, a judgment-debtor, being arrested in execution of a decree, applied in the year 1873, under s. 273 of Act VIII of 1859, for his discharge. The Court refused to entertain the application except on condition that A should pay into Court a certain fixed sum of money per month on behalf of the judgment-creditor. A, accepting these terms, was thereupon discharged, and the execution proceedings struck off the file. A, in compliance with the directions of the Court, made regular payments into Court until October 1876, when he discontinued payment.

*Held*, on an application made in June 1877 by the judgment-creditor for a warrant of further arrest against A, that, inasmuch as the decree-holder was not seeking to enforce by means of execution the arrangement made by the Court in 1873, but was rather attempting to execute the original decree, such application was barred, more than three years having elapsed since the date of the last application for execution of such decree.

\* Miscellaneous Regular Appeal, No. 25 of 1878, from an order of J. O'Kinealy, Esq., Additional Civil and Sessions Judge of the 24-Parganas, dated the 1st October 1877, reversing that of Baboo Brojendra Coomar Seal, Subordinate Judge of that District, dated the 16th July 1877.

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ON the 18th July 1864, one Hurronath Bhunjo obtained a decree against one Chunni Lall Ghose for the sum of Rs. 5,174-15-7. Execution of the decree was taken out in the years 1864, 1869, 1870, and 1873. In the year 1869 the decree-holder realized a sum of Rs. 959-15 by selling some of the judgment-debtor's property; and in the year 1873 the decree-holder arrested his debtor in execution of his decree. On an application made by the judgment-debtor for his discharge under s. 273 of Act VIII of 1859, the Subordinate Judge passed the following order—"Applicant must pay 10 rupees per month, or else be sent to jail. This arrangement is certainly subject to be modified on a material change in the petitioner's circumstances." The judgment-debtor agreed to pay 10 rupees per month, but appealed from the order of the Subordinate Judge. The District Judge, on the 5th of January 1874, held that the judgment-debtor had been released on promising to pay 10 rupees per month, and dismissed the appeal, stating that there could be no appeal from an order to which both parties had agreed. The execution proceedings were accordingly, on the 9th September 1873, struck off the file. The judgment-debtor continued regularly to pay the sum of 10 rupees per month up to the month of October 1876, when he discontinued payment, whereupon the decree-holder, on the 21st June 1877, applied for a warrant of arrest; the judgment-debtor in opposing the application contended, that inasmuch as the decree-holder had made no application to execute his decree since the year 1873, the application now made to execute his decree was therefore barred by art. 167, sched. i of the Limitation Act. The Subordinate Judge, on the 16th July 1877, overruled the plea of limitation, and directed a warrant of arrest to issue. The judgment-debtor then appealed to the District Judge, who reversed the Subordinate Judge's decision, holding that as the decree-holder had done nothing to keep his decree in force since the year 1873, the previous execution proceedings having been closed on the 9th September 1873; the application for execution was therefore barred by limitation.

The decree-holder appealed from this decision to the High Court.

Mr. *Palit* for the appellant.—The present application is not barred by limitation, inasmuch as it is not a fresh application, but merely a continuation of a previous application. See *Baboo Pyaroo Tuhobildarinee v. Syud Nazir Hossein* (1). It does not follow because the execution proceedings were struck off that they were abandoned—*Moharanee Indurjeet Kooer v. Luchmun Singh* (2). The order made by consent was really a decree modifying the manner and time of the execution of the original decree and as the judgment-debtor continued to pay under that order till October 1877, the suit is not barred—*Puddomonee Dcssee v. Roy Muthooranath Chowdhry* (3).

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*Baboo Srinath Doss*, *Baboo Gopal Lal Mitter*, and *Baboo Anund Gopal Palit* for the respondent were not called upon.

The following judgments were delivered:—

MARKBY, J.—I think that there is no ground upon which we can say in special appeal that the judgment of the lower Appellate Court was wrong. The decree is dated the 18th July 1864. By some reason or other the decree was kept in force until the years 1873, when the defendant was arrested. He applied for his discharge under s. 273 of Act VIII of 1859; and upon that application, an arrangement was come to that he should not be sent to jail provided that he would undertake to pay the sum of 10 rupees a month towards the liquidation of the decree. That arrangement having been come to, execution proceedings were struck off in September 1873. The judgment-debtor paid 10 rupees a month as agreed upon up to October 1876. Subsequently, on the 21st June 1877, an application was made by the decree-holder to execute the decree of the 18th July 1864 by arrest.

The District Judge of the 24-Parganas has held, that that application must be refused, on the ground that by the law of limitation applicable to this case, execution of the decree dated the 18th July 1864 is barred. The District Judge has entered

(1) 23 W. R., 183.

(2) 24 W. R., 56.

(3) 12 B. L. R., 411.

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into a question whether the arrangement made in 1873 was a substitution of a new arrangement between the parties, for the old decree. It appears to me, that no question of that kind arises in this case, because the decree-holder is not now seeking to enforce by means of execution the new arrangement; but he is seeking to enforce his old decree. We must, therefore, see whether execution of the old decree, dated the 18th July 1864, is barred. Article 167, sched. ii of the Limitation Act (IX of 1871) provides, so far as it applies to this case, that an application for execution shall be made within three years from the date of the decree, or of issuing notice under s. 216 of Act VIII of 1859, or from the last application to enforce, or to keep in force, the decree. Now, the last application to enforce the decree was made on the 25th January 1873, and this present application was made on the 21st June 1877. *Primâ fugiē*, therefore, this application is too late. But the decree-holder contends that this is really not a new application for execution at all; that the proceedings, although struck off the file, were really only in suspense; and that he has a right to treat this present application as a continuation of the old proceedings, upon the same principle as that on which the case of *Pyaroo Tuhobildarinee v. Syud Nazir Hossein* (1) was decided. I quite admit that the mere striking off the case from the file is not conclusive upon this question; and it is now settled by numerous cases that we must look to all the circumstances of the case and consider whether the execution proceedings were really brought to an end. But it must be borne in mind that this question is in a great measure, if not entirely, a question of fact. When the matter was before this Court in the case of *Pyaroo Tuhobildarinee v. Syud Nazir Hossein* (1), we were dealing with it as a Court of Regular Appeal; and, therefore, we were entitled to go into the facts, and I think, as appears from the report in that case, that we dealt with the question there as a question of fact.

In this case the District Judge has found, as a fact, that the previous execution proceedings closed on the 9th September

(1) 23 W. R., 183.

1873; and the only ground upon which we, as a Court of special appeal, can say that he was wrong in coming to that conclusion is, by saying that he has misunderstood the nature of this arrangement. I am not prepared to go to that length. The District Judge says, that he understands this arrangement to have been that the decree-holder would not execute his decree against the judgment-debtor by putting him into jail so long as he would pay him 10 rupees a month; and he does not understand it to have been any part of that arrangement that execution proceedings should be kept pending. Whether the parties could make an arrangement to keep the execution proceedings pending, I need not consider. I see no sufficient reason to differ from the opinion of the District Judge, who has considered this case very carefully. I think, therefore, that there is no ground of special appeal whereon we can say that the District Judge was wrong. The appeal must be dismissed with costs.

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PRINSEP, J.—I am also of opinion that execution of this decree is barred by limitation, because more than three years have elapsed from the date of the last application to the Court to enforce, or to keep in force, the decree. So far as the facts appear from the judgment of the District Judge, it seems that the last application to execute this decree was in January 1873. The present application is now made in June 1877. It is true that in the interval the judgment-debtor was arrested on that application of 1873, and that an arrangement was come to by which he was to pay 10 rupees per month, which he ceased to do in October 1876; but so far as the execution of this decree went, it ceased on his release from arrest, and more than three years have elapsed since the last application was made. On the first objection taken in special appeal, I entirely agree with the judgment which has just been delivered.

*Appeal dismissed.*