

Before Mr. Justice Mitter and Mr. Justice Maclean.

ISSURREE DASSEE (PLAINTIFF) *v.* ABDOOL KHALAK
(DEFENDANT).*

1878
Aug. 29.

*Execution of Decree—Limitation Act (IX of 1871), sched. ii., art. 167—
Reversal of Sale of lands sold in execution of decree, effect of.*

A obtained a decree against *B* on the 21st of June 1871, and applied for execution on the 10th of July following. On the 2nd of October of the same year property attached under such execution was sold, and the sale-proceeds being paid over to *A*, the execution-proceedings were struck off the file on the 28th of July 1872. On the 14th of May 1873, *B* obtained an order setting aside the sale and for refund of the sale-proceeds. *A* thereupon, on the 22nd of December 1874, again applied to execute his decree. *Held*, that such application was in substance one simply to continue the proceedings already set on foot by the first application for execution, and, therefore, the right to execute the decree was not barred by the law of limitation.

Booboo Pyaroo Tukobildarinee v. Syud Nazir Hossein (1) followed.

THE plaintiff in this suit obtained a decree against the defendant on the 21st of June 1871, and applied for execution of his decree on the 10th of July following. On the 2nd of October of the same year property belonging to the judgment-debtor was attached, and on such execution it was sold, and the sale-proceeds being paid over to the plaintiff, the execution-proceedings were, on the 28th July 1872, struck off the file. On the 14th May 1873 the defendant obtained an order setting aside the sale, and for refund of the sale-proceeds. The plaintiff thereupon, on the 22nd December 1874, again applied, to execute his decree. The defendant contended that such application was barred by limitation under art. 167, sched. ii of Act IX of 1871. The Court of first instance, on the authority of *Romanath Jha v. Roy Lutchmeeput Singh Bahadoor* (2) and *Maharajah Dhiraj Mahtab Chand v. Bulram Singh* (3), held, that

* Appeal from Appellate Order, No. 10 of 1878, against the order of H. Muspratt, Esq., Judge of Zilla Sylhet, dated the 23rd of August 1877, reversing the order of Baboo Chundra Mohun Mookerjee, Munsif of Lushkerpore, dated the 16th of April 1877.

(1) 23 W. R., 183.

(2) 19 W. R., 417.

(3) 5 B. L. R., 611; S. C., 14 W. R., P. C., 21.

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the period of limitation in respect of the present application must be computed from the 14th May 1873, the date of the order reversing the sale, and therefore overruled the defendant's objection. The lower Appellate Court reversed the order of the Court below, being of opinion that the application dated the 22nd December 1874 having been presented more than three years from the last application to execute the decree, such decree was, under art. 167, sched. ii, Act IX of 1871, incapable of execution.

The plaintiff appealed to the High Court.

Baboo *Bharat Chunder Dutt* for the appellant.

Baboo *Protap Chunder Mozoomdar* for the respondent.

The judgment of the Court was delivered by

MITTER, J. (who, after stating the facts of the case, proceeded as follows):—In special appeal the decree-holder contends that, although in form the application of the 22nd of December 1874 was an application to execute the decree, in substance, under the circumstances of the case, it should be considered as an application to continue the old proceedings. We think that this contention is valid. It is true that the Court executing the decree disposed of the application of the 10th of July 1871, after the judgment-debtor's property was sold; but the effect of the subsequent order, dated 14th of May 1873, by which the sale was set aside and the decree-holder directed to refund the money which he had withdrawn from the Court, was to nullify all the proceedings taken on the application of the 10th of July.

We think the facts of the case clearly come within the principle of the decision quoted by the learned Judge—*Booboo Nyaroo Tuhobildarinee v. Syud Nazir Hossein* (1); although, no doubt, the facts are not exactly similar: but the principle upon which that decision proceeds is applicable.

We think that, although in point of form, the petition of the 22nd of December 1874 was an application to execute the decree, in reality it was simply an application to the Court to

(1) 23 W. R., 123.

continue the proceedings already commenced by the application of July 1871. In this view it is clear that the application does not come within the provisions of s. 167 of the Limitation Act. The application to execute the decree in this case is that of the 10th July 1871. It is not disputed that that application was within time. We think, therefore, that the decree-holder's right to execute the decree is not barred by limitation. We remand the case to the Munsif to proceed with the execution of the decree. The decree-holder is entitled to the costs of this appeal.

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Case remanded.

APPELLATE CRIMINAL.

Before Mr. Justice Ainslie and Mr. Justice Maclean.

IN THE MATTER OF THE PETITION OF MOHESH CHUNDER KHAN.*

1878
 Aug. 7.

Ouster without authority of Civil Court—Peaceful Possession—Criminal Procedure Code (Act X of 1872), s. 530.

Ouster by one person of another lawfully in possession of property, confers no rights on the former which can be recognized in proceedings taken under s. 530 of the Code of Criminal Procedure. The Court should refer back to a time previous to the quarrel when such possession was peacefully enjoyed by one or other of the disputants.

Mr. A. Bose (with him Baboo *Grija Sunker Mozoomdar* and Baboo *Doorga Mohun Dass*) for the petitioner.

Baboo *Rashbehary Ghose* and Baboo *Kishori Mohun Roy* for the opposite party.

The facts of the case appear sufficiently in the judgment, which was delivered by

AINSLIE, J. (MACLEAN, J., concurring).—One Promotho-nath Sandyal, a minor, died on the 12th of Pous last, corresponding with the 1st of January of the current year. During his lifetime, Bholanath Khan was one of his guardians,

* Criminal Motion, No. 112 of 1878, against the order of Baboo Mohindra Nath Bose, Deputy Magistrate of Rajshahye, dated 21st May 1878.