1891

FAZL KARIM v. MAULA BAKSH.

that a single one of the worshippers, except the defendants who appealed to the High Court, objects to the way in which Hafiz Maula Baksh conducted the service.

Against all this evidence of the opinions of learned and devout Mahomedans, and of the actual practice of Mahomedan worshippers, what is there on the other side? The evidence is an absolute blank. No book, no opinion, no practice of any community of worshippers is cited. There is no ground given to dissent from the findings of the Subordinate Judge, nor from his conclusion that the plaintiffs were entitled to relief. In one point he has followed too closely the prayer of the plaint. Paragraph (*d*) asks for a declaration that the plaintiffs have the authority to turn out the defendants when they interfere. The Court ought not to make such a declaration. The plaintiffs must rely on the prohibitory order or injunction for which they pray, and must enforce it, as they may be advised, in each case that arises. The High Court should have varied the Subordinate Judge's decree by refusing to grant the declaration asked by paragraph (*d*), and subject to that, should have dismissed the defendants' appeal, with costs. That is the decree which their Lordships will humbly advise Her Majesty to make now, in lieu of the decree of the High Court, which should be discharged. The respondents must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

C. B.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

1891
April 14.

WAJIHAN *alias* ALIJAN (JUDGMENT-DEBTOR) *v.* BISHWANATH PERSHAD AND ANOTHER (DECREE-HOLDERS).*

Limitation—Execution of decree—Civil Procedure Code, 1882, *section* 373—*Dismissal of application to execute without obtaining leave to make a fresh application.*

Section 373 of the Civil Procedure Code does not apply to applications for execution of decrees.

* Appeal from order No. 307 of 1890, against the order of Baboo Amrita Lal Paul, Subordinate Judge of Patna, dated the 22nd of November 1890.

Turachand Magraj v. *Kashi Nath Trimbak* (1) followed. *Radha Charan* v. *Man Singh* (2) dissented from.

1891

WAJIHAN *alias* ALIJAN *v.* BISHWANATH PERSHAD.

THIS was an application made on 9th August 1890 for execution of a decree passed on the 11th March 1890 for a sum of money due on a mortgage. A former application had been made on 23rd March 1890 for execution by sale of the mortgaged property. The material facts were stated in the judgment of the Subordinate Judge made on the present application, which was as follows:—

"It appears that in the previous execution proceeding, an order was passed by my predecessor in office on 1st May 1890, calling on the decree-holder to deposit talabana for the proclamation of sale within a week. No date was fixed for taking up the case. It appears that the decree-holder failed to deposit the talabana called for within the time given by the Court, and that the case was not taken up till 4th July 1890, on which date the execution case was dismissed for the failure of the decree-holder to deposit talabana. On 9th August 1890 the present application was filed, and it is objected to, on the judgment-debtor's side, that the execution cannot proceed on this application, inasmuch as the dismissal of the previous execution case being under section 158 of the Code of Civil Procedure, this fresh application cannot be entertained, nor can there be a revival of the former proceeding, nor had the decree-holder proceeded actually to revive it; and even if the present application be considered to be a revival, it is barred, having been filed more than 30 days after the order of dismissal. I fully agree with the judgment-debtor's pleader that when time is granted to the decree-holder to deposit talabana, and he fails to do it, and the Court dismisses the case on the ground of that failure, the dismissal is under section 158 of the Code. But in the present case there is this distinction, that the Court did not comply wholly with the provisions of section 158. That section empowers the Court to decide the case forthwith. In the present case, instead of deciding it forthwith as the law prescribes, it was not decided till about two months after, and without fixing any date for hearing, and without, as it appears, giving notice to the parties that it would be taken up on the 4th July; and from aught that can be gleaned from the order-sheet, the order of my

(1) I. L. R., 10 Bom., 62. (2) I. L. R., 12 All., 392.

1891

WAJIHAN *alias* ALIJAN *v.* BISHWANATH PERSHAD.

predecessor in office was passed in the absence of the decree-holder. Under such circumstances I am of opinion that the case comes under no other section but section 98, and section 99 gives the decree-holder power to institute a fresh proceeding for enforcing the decree. I am not induced to hold with the learned pleader of the judgment-debtor that the failure of the decree-holder should be considered as an abandonment of the case on his part, and that, therefore, no permission having been taken, no fresh proceeding can be instituted under section 373 of the Code. There was no application for withdrawal or abandonment on the decree-holder's part, and therefore the case cannot come under the provisions of section 373."

The Subordinate Judge therefore allowed the execution to proceed.

From this decision the judgment-debtor appealed to the High Court.

Mr. *Garth* and Moulvi *Serajul Islam* for the appellant.

Baboo *Saligram Singh* for the respondents.

The arguments and cases cited are sufficiently stated in the judgment of the Court (PRINSEP and BANERJEE, JJ.), which was as follows:—

A decree was passed for a sum of money under a mortgage, which was made absolute under section 88 of the Transfer of Property Act on 11th March 1890, but no further order for sale was made under section 86 of the Act. On the 23rd March application for execution was made by sale of the mortgaged property, and an order was passed on 1st May for putting in affidavits and for the deposit of the necessary fees within one week. This was not done, nor did the case come on for hearing in due course after expiry of the term so fixed or on any other day appointed for that purpose, but it apparently was taken up on 4th July, and the application was dismissed. A fresh application for execution was made on 9th August, and objections taken by the judgment-debtor were overruled.

The debtor now appeals, contending that execution cannot proceed.

1891

WAJIHAN *alias* ALIJAN *v.* BISHWANATH PERSHAD.

It is first objected by Mr. Garth, for the appellant judgment-debtor, that this application is informal and cannot be acted upon, inasmuch as it does not expressly state in what manner the decree is to be executed, and we are referred to the recent decision of a Full Bench of this Court in the case of *Asgar Ali* v. *Troilokhya Nath Ghose* (1). We find, however, that though the application for execution before us is not complete in itself so as to show in what manner execution is to be taken out, still it is capable of being acted upon, for it refers to the former application in which the mortgaged properties were set out, and it prays that the decree may be executed by sale of those properties. We think, therefore, that this objection at most is regarding only a technical irregularity, in form rather than in substance, and that the Court was competent to proceed, taking the former application which is on the record of the suit as part of the application then before it, so as to indicate how the decree should be executed.

It is next objected that execution is barred in consequence of the dismissal of the former application to execute without leave to make a fresh application, and in support of this the case of *Radha Charan* v. *Man Singh* (2), decided by a Full Bench of the Allahabad High Court, is cited. The practice there laid down is certainly not what has been in force in the Courts of this Province, which has been that described in the judgment of a Full Bench of this Court in the case of *Eshan Chunder Bose* v. *Pran Nath Nag* (3). The Code of 1882 and the Law of Limitation of 1877 have made no alteration in the law to affect that practice, although the view of one of the learned Judges in that case in unmistakeable terms strongly advocated an alteration in the law so as to introduce the practice now prescribed by the High Court at Allahabad. It was not indeed expressly laid down in that case that the rule regarding the effect of the abandonment or withdrawal of a suit without leave to institute a fresh suit does not apply to an application for execution of a decree, but it was held that the permission of the Court to a second application to execute the same decree was unnecessary, which is practically the same in its result; and this has been the practice of our Courts in such matters. We

(1) I. L. R., 17 Calc., 631. (2) I. L. R., 12 All., 392.
(3) 14 B. L. R., 143; 22 W. R., 512.

1891

WAJIHAN *alias* ALIJAN *v.* BISHWANATH PERSHAD.

observe that the High Court of Bombay in two cases—*Tara Chand Megraj* v. *Kashi Nath Trimbak* (1) and *Shankar Bisto Nadgir* v. *Narsingh Rao Ram Chandra* (2)—has prescribed a similar procedure, overruling the previous case of *Pirjade* v. *Pirjade* (3) to the contrary, and in the former of these cases it was expressly held that sections 373 and 374 do not apply to applications for execution. In this view it seems unnecessary for us to state our reasons at length for declining to follow the opinion of the Full Bench of the Allahabad Court beyond stating that in numerous instances the Code itself, as well as the terms of the Limitation Act, show that the procedure of the Code in regard to suits cannot be strictly applied to matters of execution, and in no instance is this more evident than with regard to sections 373 and 374.

On general grounds, therefore, we should not be disposed to hold that this application to execute was barred. But in the present instance there is another fatal objection. The order of the 4th of July was not passed after notice to the party concerned. The case was apparently taken up accidentally at some time convenient to the Court itself, which is not in accordance with the regular procedure of our Courts. The Code contemplates that on the adjournment of a suit or other proceeding a day shall be fixed for its hearing. No order therefore passed on any other day, except in the presence of the parties and without objection raised, can be binding on them. We cannot agree with the learned counsel that because the decree-holder did not comply with the order of the Court of the 1st May to file the necessary affidavits and deposit the necessary fees within one week his application stood dismissed, because if the case had been regularly brought on, it is not improbable that some cause might have been shown for an extension of that time, and the order was not peremptory in its terms. The order passed on 4th July without any notice to the decree-holder, and in his absence, seems to us to be open to serious objection, and should not, in any view of the matter, be regarded as precluding him from further proceedings.

We accordingly dismiss this appeal with costs.

(1) I. L. R., 10 Bom., 62.
(2) I. L. R., 11 Bom., 467.
(3) I. L. R., 6 Bom., 681.

We should remind the Subordinate Judge that in cases under section 88, Transfer of Property Act, he should be careful to draw up the order strictly in accordance with the law.

Appeal dismissed.

J. V. W.

1891

WAJIHAN *alias* ALIJAN *v.* BISHWANATH PERSHAD.

Before Mr. Justice Trevelyan and Mr. Justice Banerjee.

CHOWDHRY RAGHU NATH SARUN SINGH AND OTHERS (PLAINTIFFS) *v.* DHODHA ROY AND OTHERS (DEFENDANTS).*

1891 *April* 29.

Bengal Tenancy Act (VIII of 1885), s. 40, cl. 5—Order commuting bhowli rent to nagdi rent—Omission to state time when order is to take effect.

The provisions of clause 5, section 40 of the Bengal Tenancy Act, are imperative, and should be strictly complied with. Where, therefore, an order under that clause omitted to state the time from which it was to take effect, it was held to be inoperative.

THIS was a suit for the recovery of Rs. 725-13, being both *bhowli* and *nagdi* rent for the years 1293 to 1295 (1886—1888). It was alleged that the defendants held 36 bighas 3 cottahs and 10½ dhurs, bearing an annual jama of Rs. 96-13-3, under a *nagdi* contract, and 6 bighas 13 cottahs under a *bhowli* contract, giving the plaintiffs, their landlords, half the actual produce of such lands.

The further material facts were stated as follows in the judgment of the Subordinate Judge:—

"The only important question for determination in this appeal is whether the zemindar plaintiffs are entitled to *bhowli* rent or to the money rent fixed by the Collector under section 40 of the Bengal Tenancy Act. The facts are that the defendant applied to the Collector under the provisions of the aforesaid section to convert his rent in kind to money rent; and the Collector by an order in writing, dated 17th April 1886, fixed the money rent at Rs. 3 per bigha. The plaintiff appealed to the Commissioner, who, by his order dated 25th September 1886, remanded the case to the

* Appeal from Appellate Decree No. 381 of 1890, against the decree of Baboo Rakhal Chunder Bose, Subordinate Judge of Shahabad, dated the 16th of January 1890, reversing the decree of Baboo Rajani Kant Mukerjee, Munsif of Arrah, dated the 11th of May 1889.