

Before Mr. Justice Banerjee and Mr. Justice Rampini.

1889
Augt. 5.

RAGHUNANDUN PERSHAD AND ANOTHER (DEGREE-HOLDERS) v.
BHUGOO LALL (JUDGMENT-DEBTOR).*

Limitation Act (XV of 1877), Sched. ii, Art. 179, cl. 4—Suit to set aside order in a claim case—Execution of decree—Application in continuation of a previous application for execution—Steps in aid of execution.

Clause 4, Art. 179, Sched. ii of the Limitation Act, 1877, does not include a suit to set aside an order passed in a claim case.

R and L obtained a decree against B on the 7th March 1881, and in execution of that decree certain property belonging to B was attached on the 11th June 1883. Thereupon a claim was made to the attached property by third parties and a two-thirds share therein was released by the Court executing the decree. On the 22nd March 1884, R and L instituted a suit for a declaration that the entire property was liable to be sold under their decree, and obtained a decree on the 20th March 1886. This decree was reversed by the lower Appellate Court which upheld the order releasing a two-thirds share of the property, and, on 22nd July 1887, the High Court affirmed the decree of the lower Appellate Court. On the 15th August 1887, R and L applied for execution of their decree in respect of the remaining one-third share. B objected that the application was barred.

Held, that the application of the 15th August 1888 was not a continuation of the application of the 11th June 1883.

Eyaroo Tuhovildarinee v. Nazir Hossein (1), Issuree Dassee v. Abdul Khalak (2), Chandra Prodhan v. Gopi Mohun Saha (3), and Paras Ram v. Gardner (4) distinguished.

Held, also, that the institution of the suit on the 22nd March 1884, and the appeal to the High Court from the decree of the lower Appellate Court, were not steps in aid of execution.

Abbar Ganee v. Bibee Nufesun (5) distinguished.

THIS was an appeal against the order of the lower Appellate Court, disallowing an application for the execution of a decree as being barred by limitation.

* Appeal from Order No. 126 of 1889, against the order of J. Crawford, Esq., Judge of Patna, dated the 18th of February 1889, reversing the order of Babu Purno Chunder Banerjee, Munsiff of Patna, dated the 17th of December 1888.

(1) 23 W. R., 183.

(3) I. L. R., 14 Calc., 385.

(2) I. L. R., 4 Calc., 415.

(4) I. L. R., 1 All., 355.

(5) 8 W. R., 99.

On the 7th March 1881, Raghunandun Pershad and another obtained a decree on a mortgage bond against Bhugoo Lall; and, in execution of that decree, the mortgaged property was attached on the 11th June 1883. Thereupon, one Gopi Nath and others laid claim to the attached property, and the Court allowed the claim in respect of a two-thirds share of the same. The decree-holders, thereupon, on the 22nd March 1884, filed a regular suit for a declaration that the entire sixteen annas of the property was liable to be sold in execution of their decree of the 7th March 1881, and obtained a decree in the Court of First Instance on the 29th March 1886. This decree was reversed on appeal, the lower Appellate Court upholding the order releasing a two-thirds share of the property. The decree-holders then appealed to the High Court, which affirmed the decree of the lower Appellate Court on the 22th July 1887.

1889
 RAGHUNANDUN
 PERSHAD
 v.
 BHUGOO
 LALL.

On the 15th August 1888, the decree-holders applied for the execution of their decree of the 7th March 1881 against the remaining one-third share in the property. The judgment-debtor, Bhugoo Lall, objected that the application was barred by limitation. The Court of First Instance overruled the objection, holding, upon the authority of the cases of *Pyaroo Tukovildarinee v. Nazir Hossein* (1), *Paras Ram v. Gardner* (2), *Issuree Dasee v. Abdul Khalak* (3), that the present application was not altogether a fresh application for execution, but one in continuation of the previous application of the 11th June 1883, and having been made within three years from the 22nd July 1887, the date on which the High Court decree was passed, it was in time under Art. 178, sched. ii of the Limitation Act, 1877.

On appeal the lower Appellate Court allowed the objection and reversed the order of the Court of First Instance on the ground that at no time was there any bar to the decree-holders proceeding against the one-third share of the property, and that they were not entitled to claim a fresh period of limitation, under Art. 178 of the Limitation Act, from the 29th March 1886.

The decree-holders appealed to the High Court.

Baboo *Saligram Sing* for the appellants.

(1) 23 W. R., 183.

(2) I. L. R., 1 All., 355.

(3) I. L. R., 4 Calc., 415.

1889

Baboo *Lal Mohun Das* for the respondent.

RAGHU-
NANDUN
PERSHAD
v.
BHUGOO
LALL.

The judgment of the High Court (BANERJEE and RAMPINI, JJ.) was (after stating the facts) as follows:—

It is now contended in second appeal: (1) that the application of the 15th August 1888 ought to be regarded as a continuation of the application filed on the 11th June 1883; and (2), that the suit instituted by the decree-holder on the 22nd March 1884, and the appeal presented to the High Court, ought to be regarded as being in the nature of applications to take some step in aid of the execution of the decree; and that the decree-holders ought to be allowed to reckon their time either from the 22nd July 1887, or from the 29th March 1886. In support of the first of these contentions several cases have been cited, amongst which we may mention *Pyaroo Tuhovillardarinee v. Nazir Hossein* (1), *Issuree Dussee v. Abdul Khalak* (2), *Chandra Prodhan v. Gopi Mohun Saha* (3), and *Paras Ram v. Gardner* (4).

We have heard the learned Vakil for the appellant at some length on the point, and we think that all that it was possible to urge in furtherance of the appeal has been urged before us; but we are unable to give effect to his contention. The cases cited are all distinguishable from the present in this respect, namely that in those cases the execution-proceedings were either interrupted by an intermediate order, which was afterwards set aside, or were rendered infructuous, so as to make a fresh application necessary, as was the case in *Issuree Dassce v. Abdul Khalak* (2), and in these cases, the second application could not have been made for a time by reason of the state of things that intervened, though in not making the second application earlier, no blame attached to the decree-holder. That this was the reason for the rule laid down in those cases will appear from the observations of Markby, J., in the case of *Pyaroo Tuhovillardarinee v. Nazir Hossein* (1). In that case, the learned Judge observes: "Whatever may be the form of the last application, dated the 5th December 1873, in substance it was an application to the Court for the continuation of the former proceedings on the

(1) 23 W. R., 183.

(3) I. L. R., 14 Calc., 385.

(2) I. L. R., 4 Calc., 415.

(4) I. L. R., 1 All., 355.

ground that the bar that was set up by reason of the adverse order under s. 246 had been removed by the decision in the subsequent regular suit." And in the case of *Paras Ram v. Gardner* (1), Stuart, C.J., observes: "The interruption to the execution of his decree was not occasioned by any fault or laches of his own, but was caused by the illegal intervention of Dabi Das. Paras Ram's procedure, therefore, under his decree, must be held to have been legally continuous, and he may proceed to its execution." Now, it is clear that in the present case those considerations have no application. It is clear that the decree-holders could, notwithstanding the order in the claim case, have prosecuted their application for execution against the one-third share which was not released then quite as well as they can do so now. Their present application is for the sale of that third share of the property; there was no bar then to their enforcing the execution of the decree, and there has been no subsequent removal of that bar. The reason of the decisions not applying to the present case, they cannot afford any ground for holding that the present application is a continuation of the application of the 11th June 1883.

Then, as regards the second ground, no doubt the case cited in the argument, *Akbar Gazeer v. Bibee Nufeezun* (2), lends some support to it, but that was a case under the old Limitation Law (Act XIV of 1859), the language of which was very different from that of the present law. Clause 4, Art. 179 of the second schedule of the Limitation Act provides, that the three years may be reckoned from the date of applying, in accordance with law, to the proper Court for execution, or to take some steps in aid of execution of any decree or order," &c. Now, seeing that the Limitation Act XV of 1877 draws a clear distinction between suits and applications, it would be difficult to construe these words to include a suit for setting aside an order in a claim case. "Proper Court," again, as defined by Explanation II of that article, means the Court whose duty it is (whether under s. 226 or s. 227 of the Code of Civil Procedure or otherwise) to execute the decree or order." Therefore, evidently the provision of law just referred to contemplates an application made in the course

1889

 RAGHU-
NANDUN
PRESHAD
v.
BIRUGOO
LALL.

(1) I. L. R., 1 All., 355.

(2) 8 W. R., 99.

1889 of execution to the Court whose duty it was to execute the decree, and cannot be taken to include a suit to have an order in a claim case set aside.

RAGHU-
NANDUN
PEREZHAD
v.
BHUGOO
LALL.

We therefore think that the lower Appellate Court was right, and that this appeal must be dismissed with costs.

C. D. P.

Appeal dismissed.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Ghose.

1889
Augt. 21.

KRISHNA KINKUR ROY AND ANOTHER, ADMINISTRATOR TO THE ESTATE OF THE LATE HURRO CHUNDER ROY (PLAINTIFFS) v. PANCHURAM MUNDUL AND ANOTHER (DEFENDANTS).*

Succession Act (X of 1865), s. 187—Hindu Wills Act (XXI of 1870), s. 2—Probate and Administration Act (V of 1881), Chaps. II to XII—Probate or administration to wills of Hindus executed before 1st September 1870—Limitation Act, 1877, Art. 140—Adverse possession.

Section 187 of the Succession Act, which, by s. 2 of the Hindu Wills Act, was made applicable to wills executed subsequent to the 1st September 1870, has not been incorporated in Act V of 1881; and although it is competent to a Court to grant probate or letters of administration in respect of wills antecedent to the 1st September 1870, still it is not obligatory upon executors or persons claiming probate or administration to obtain such probate or letters of administration before they can establish their right in respect to any property subject to such wills.

THE facts of this case were as follows:—One Hurro Chunder Roy, who was originally the owner of the properties which are the subject-matter of this suit, executed a will on the 16th Magh 1273 (February 1867), by which he bequeathed his estate to his grandsons, being the sons of his two sons, Kissory Mohun and Rai Mohun; the sons of Kissory Mohun getting among themselves an eight-annas share, and the sons of Rai Mohun getting the other eight-annas. It was provided in this will that, until the grandsons attained the age of thirty, the properties bequeathed should remain under the management of his wife, and, on her death, of certain other persons mentioned therein; and that during this time the legatees should be maintained out of the proceeds, and that they should be entitled to any surplus that might remain after their necessary expenses.

* Appeal from Original Decree No. 58 of 1888, against the decree of Baboo Nobin Chunder Ganguly, Subordinate Judge of Moorshedabad, dated the 30th of November 1887.