Before Mr. Justice O'Kinealy and Mr. Justice Hill.

1896 *December* 9.

SUJA HOSSEIN *alias* REHAMUT DOWLAH (JUDGMENT-DEBTOR) *v.* MONOHUR DAS (DECREE-HOLDER).*

Limitation Act (XV of 1877) Schedule II, Article 180—Execution of decree —Revivor—Civil Procedure Code (Act XIV of 1882), sections 223, 230, 248 (a)—Insolvent, Adverse possession of.

A creditor obtained a decree against his debtor on the Original Side of the High Court, on the 19th December 1881. On the 11th December 1893, the judgment-creditor applied to the Court, under section 223 of the Code of Civil Procedure, for "transmission of a certified copy of the decree to the District Judge's Court of the 24-Pergunnahs, with a certificate that no portion of the decree has been satisfied by execution within the jurisdiction of the High Court," and alleging that the judgment-debtor had no property within its jurisdiction, but had property in the 24-Pergunnahs. The application was headed as an application for execution and was in a tabular form. Upon this a notice was issued under section 248 (a) of the Code, and the judgment-debtor not having shown any cause, on the 19th December 1893 a certified copy of the decree was ordered to be issued. The certified copy of the decree having been transmitted, the judgment-creditor on the 1st March 1894 applied for the execution of the decree to the District Judge. On the objections of the judgment-debtor that the execution was barred by limitation, and that he having been declared an insolvent, and the properties having vested in the Official Assignee, the attachment was contrary to law,

Held, that the execution was not barred by limitation, as the order of the 19th December of 1893 was an order for execution, and operated as a revivor of the decree within the meaning of article 180, Schedule II of the Limitation Act.

Held, also, that the judgment-debtor having been in possession of the property for more than 12 years the Official Assignee not having taken possession of it, he had a title by adverse possession which was capable of being attached.

Ashootosh Dutt v. *Doorga Churn Chatterjee* (1), and *Futteh Narain Chowdhry* v. *Chandrabati Chowdhrain* (2) followed.

THE facts of the case for the purposes of this report appear sufficiently from the judgment of the High Court.

Babu *Nil Madhub Bose* and Babu *Shib Chunder Palit* for the appellant.

* Appeal from Order No. 329 of 1894, against the decree of Baboo Purna Chundra Shome, Subordinate Judge of 24-Pergunnahs, dated the 4th of August 1894.

(1) I. L. R., 6 Calc., 504 (2) I. L. R., 20 Calc., 551.

1896

SUJA HOSSEIN v. MONOHUR DAS.

Mr. *J. T. Woodroffe* and Babu *Baidyanath Dutt* for the respondent.

Babu *Nil Madhub Bose*.—One of the questions in this case is whether the order for the issue of a certified copy of the decree is an order for execution. I submit not. That order has not the effect of reviving the decree. The correctness of the principle as laid down in the case of *Ashootosh Dutt* v. *Doorga Churn Chatterjee* (1) has been doubted by Wilson, J., in the case of *Tincowrie Dawn* v. *Debendro Nath Mookerjee* (2). In the former case, a regular application for execution of decree was made and a writ of attachment was issued; but in the present case there was no application for execution at all. Article 180, Schedule II, of the Limitation Act only protects a decree if there is a revivor; there being no revivor in this case, the execution is barred by limitation. An application for a certificate to allow execution to be taken out in another court is not an application for the execution of the decree. See the cases of *Nilmony Singh Deo* v. *Biressur Banerjee* (3). The next question is, whether the judgment-debtor having been adjudged an insolvent, and his property having vested in the Official Assignee, the decree-holder could take out execution. I submit not. The Court below was wrong in holding that the insolvent acquired a title by adverse possession, the Official Assignee not having taken possession of his property. The property having vested in the Official Assignee, the insolvent has no attachable interest in it.

Mr. *J. T. Woodroffe* for the respondent.—The order of the 19th December, for the issue of a certified copy of the decree, was an order for execution, as it was made after such notice as is required by section 248 (*a*). The notice was in accordance with rule 371 of the High Court. That order had the effect of reviving the decree within the meaning of article 180, Schedule II of the Limitation Act. The decision in *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (4) governs the present case. The certificate was issued after notice. Section 248 of the Code of Civil Procedure says that cause is to be shewn. No cause having been shown in this case, a certificate was issued, and the order of

(1) I. L. R., 6 Calc., 504. (2) I. L. R., 17 Calc., 491.
(3) I. L. R., 16 Calc., 744. (4) I. L. R., 8 Calc., 51: L. R., 8 I. A., 123.

1896

SUJA HOSSEIN v. MONOHUR DAS.

the 19th December 1893 is binding. Judgment by consent is binding by way of estoppel: See *In re South American and Mexican Company, Exparte Bank of England* (1). The decree having been transmitted the Court had full jurisdiction to deal with it. See *Leake* v. *Daniel* (2).

The judgment-debtor only got a personal discharge and not a final discharge. He ought to have made over possession of the property to the Official Assignee, but instead of doing so, he retained possession of it His possession was adverse, as he was holding with the knowledge of the Official Assignee. See section 106 of the Evidence Act, and the cases of *Kristocomul Mitter* v. *Suresh Chunder Deb* (3), *Lakshman* v. *Moru* (4), and *Anand Coomari* v. *Ali Jamin* (5).

Babu *Nil Madhub Bose* in reply.

The judgment of the High Court (O'KINEALY and HILL, JJ.) was as follows :—

This is an appeal from the decision of the Subordinate Judge of the 24-Pergunnahs, dated the 24th August 1894.

The facts out of which the litigation has arisen may be shortly stated as follows : On the 11th December 1893 an application was made purporting to be one in execution of a decree by transmitting a certified copy of the decree to the Court of the District Judge of the 24-Pergunnahs, with a certificate that no portion of the decree had been satisfied within the jurisdiction of the High Court on its Original Side. On that the following order was passed : "Leave granted to verify and let notice issue (returnable four days after service) under section 248 (*a*) Civil Procedure Code. This notice was issued under the Rules of Court. Section 248 (*a*) enacts that if more than one year elapses between the date of the decree and the application for its execution a notice shall issue to the party against whom execution is applied for, requiring him to show cause why the decree should not be executed against him. The form of the notice under that section is to be found in No. 135 in the fourth schedule to the Code and runs as follows : "Whereas.....made application to this Court

(1) L. R., Ch. Div. (1895) Vol. I., p. 37. (2) B. L. R., Sup. Vol., 970.
(3) I. L. R., 8 Calc., 556. (4) I. L. R., 16 Bom., 722.
(5) I. L. R., 11 Calc., 229.

for execution of decree in Civil suit No.....of 18.....this is to give you notice that you are to appear before this Court..... on the.....day of.....18.....either in person or by a pleader of this Court or agent duly authorized and instructed to show cause, if any, why execution should not be granted." That was the notice which was served on the appellant in this Court. He showed no cause, and on the 19th December 1893 Mr. Justice Sale recorded the following order: "Let certified copy issue, no cause being shown."

We take it that the meaning of that order is that no cause was shown against the notice which had been served upon the appellants. Mr. Justice Sale then sent a certified copy of the decree with a certificate of non-satisfaction, to the District Judge of the 24-Pergunnahs. Looking, therefore, at the form of the notice, and looking at the fact that no cause was shown, we think that the question is, what is the effect of what was done before Mr. Justice Sale. It was contended by the pleader for the appellant that the order of the 19th December 1893, being an order which was passed on an application made under section 223 of the Code for transmission of the decree, was not an order for execution, and that it could not therefore be said that there was a revivor of the decree within the meaning of article 180. On the other hand it was contended by Mr. Woodroffe on behalf of the respondent that the order of the 19th December was an order for execution, inasmuch as it was made after such notice as is required by section 248 (*a*), and that it therefore had the effect of reviving the decree within the meaning of that article. We think the order of the 19th December made after notice to show cause, was, according to the rule laid down in *Ashootosh Dutt* v. *Doorga Churn Chatterjee* (1), and the case of *Futteh Narain Chowdhry* v. *Chundrabati Chowdhrain* (2), such a revivor as prevented the decree from being barred by article 180.

There was another question raised before us, and that was in regard to adverse possession. When the appellant showed cause against execution in the Court of the Subordinate Judge of 24-Pergunnahs he did not say that he had no interest that could

(1) I. L. R., 6 Calc., 504. (2) I. L. R., 20 Calc., 551.

1896

SUJA HOSSEIN v. MONOHUR DAS.

be attached. What he said was that the "property that has been put under attachment having vested in the Official Assignee under the law, the order passed in the execution proceedings for the attachment of the said property is wrong, contrary to law, and cannot remain in force." In other words, he did not say that he had no attachable interest in the property, but he pleaded the right of the Official Assignee in the property. The appellant filed a schedule as an insolvent on the 21st February 1882 in which he stated in regard to this property: "On the 1st March 1880, the insolvent deposited with these creditors as security for the payment of any balance of account that might be due to them the title deeds of the house and premises at Garden Reach (purchased in the names of the insolvent and one Ali Hossein since deceased) situate on the lands belonging to the ex-King of Oudh to which house and premises the insolvent and the heirs of the said Ali Hossein are entitled in equal shares or moieties." Again in the year 1893 we find him striving to perfect his title by a conveyance from the officiating Agent of the Governor-General in Council in favour of Dabir-ud-Dowla and Ahmed Hossein, as to one-half of this property in his own favour, and as to the other half, it was admitted at the trial that he had been in possession of the land all along. We have therefore these facts to deal with, admitted possession, striving to perfect a bad title in 1893, and not raising the question when attachment issued, that he had no title that could be attached. On all these facts we think that the Subordinate Judge was justified in coming to the conclusion that he had a title by adverse possession which was capable of being attached.

We dismiss the appeal with costs.

Appeal dismissed.

S. C. G.