

*Before Mr. Justice Kemp and Mr. Justice Morris.*

1878  
March 7.

RAMSOONDER SANDYAL (JUDGMENT-DEBTOR) *v.* GOPESSUR  
MOSTOFEE AND OTHERS (DECREE-HOLDERS).\*

*Execution—Claim—Suit—Limitation—Act VIII of 1859, ss. 212, 246—  
Act IX of 1871, Sched. II, art. 167.*

Within three years of his first application in execution of a rent-decree, *A*, the judgment-creditor, made a second application to sell certain lands, the alleged property of *B*, the judgment-debtor. Third parties intervened, who established their claim to the land. *A* thereupon brought a regular suit, and succeeded in obtaining a decree, declaring the lands in suit to be the property of *B*. Within a year of the date of this decree, but more than three years after his first application for execution, *A* filed a third application for attachment of *other lands* belonging to *B*. *Held*, the application was barred by limitation.

*Baboo Pyaroo Tuhobildarinee v. Syud Nazir Hossein* (1) distinguished.

ON the 1st August 1864 the plaintiff obtained a decree in a suit for rent against the defendant (afterwards confirmed by the High Court), and on the 2nd of January 1869 applied for execution of his decree under s. 212 of Act VIII of 1859. On the 22nd November 1870 the decree-holder made a second application to sell the right, title, and interest of the judgment-debtor in a certain decree and certain lands were specified in such application. Third parties intervened under s. 246 of Act VIII of 1859, and on this claim the properties were released from attachment. On the 6th December 1871 the decree-holder instituted a regular suit to establish the right of his judgment-debtor to the lands previously attached and obtained a decree on the 22nd April 1872. This decree was upheld by the High Court on the 16th July 1874. Before the final order, the decree-holder made a third application on the 6th September 1873, asking that a certificate might be sent to the Munsif of Nattore in order that proceedings in execution

\* Miscellaneous Special Appeal, No. 252 of 1877, against the decree of H. Beveridge, Esq., Officiating Judge of Zilla Rungpore, dated 12th May 1877, reversing the order of Baboo Shamchand Dhur, Munsif of Bograh, dated 19th January 1876.

might be taken against property belonging to the judgment-debtor in that district other than the property the subject of the regular suit. The application contained no reference to the properties which were the subject of the regular suit. The only paper filed with the application was the original decree of the 1st of August 1864 for rent, and the subsequent orders of the Judge and of the High Court confirming that decree. The Court of first instance rejected the application as barred by limitation, on the ground that the judgment-creditor had not shown due diligence in filing his regular suit after the successful issue of the claim made by the intervenors under s. 246 of Act VIII of 1859. The lower Appellate Court, on the authority of *Baboo Pyaroo Tuhobildarinee v. Syud Nazir Hossein* (1) reversed the decision of the Court below. The judgment-debtor appealed to the High Court.

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*Baboo Mohini Mohun Roy* for the appellant.

*Baboo Rash Behari Ghose* for the respondents.

*Baboo Mohini Mohun Roy.*—*Baboo Pyaroo Tuhobildarinee v. Syud Nazir Hossein* (1), the case quoted by the Court below, does not apply to the present case. Here there was a fresh application for attachment of different lands; the application was silent upon, and therefore must be taken to have purposely ignored, all the proceedings under the regular suit. It must, therefore, stand or fall on its own merits; and being admittedly made beyond time, is barred by limitation. Nor can the application be brought within art. 167, Sched. II of Act IX of 1871, as it was not made to keep in force a previous execution proceeding.

*Baboo Rash Behari Ghose.*—The last application made by the judgment-creditor may be said to have been one to “keep in force” a previous decree or order of the Court—see *Chunder Coomar Roy v. Bhuggobutty Prosonno Roy* (2); and having been made within three years of the previous application of

(1) 23 W. R., 183.

(2) I. L. R., 3 Calc., 235; S. C., 1 C. L. R., 23.

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the 22nd November 1870, is within time. Again, the decree-holder was obstructed in obtaining execution of his decree; the time occupied in removing these obstructions cannot be included in the period of limitation applicable to this case. The case quoted by the lower Court strictly applies to the fact of this case. The form and method of application lastly made by the judgment-creditor may be open to comment, but the Court will look rather to the facts which preceded that application, and not to the way in which the application was made.

Baboo *Mohini Mohun Roy* in reply.

The judgment of the Court was delivered by

KEMP, J. (who, after shortly stating the facts, continued):—It is contended by the pleader for the special appellant that if the starting point is to be the application under s. 212, which was made on the 2nd of January 1869, then the present application having been made more than three years from that date is barred. On the other hand, it is contended by the pleader who appears for the respondent, that the application of the 6th of September 1873 is within time, as the last previous application was made on the 22nd of November 1870. That was an application to sell the interest of the judgment-debtor in a certain decree and certain specified properties.

The pleader admits that this application of the 22nd November 1870 was not made under s. 212 of the Civil Procedure Code, but he says that it was an application “to keep in force” the decree within the meaning of art. 167 of Sched. II of the Limitation Act as interpreted by the Full Bench in *In re Chunder Coomar Roy v. Bhuggobutty Prosonno Roy* (1). But we think that this reasoning is wrong. The application being for sale of certain properties already under attachment under an order issued on the application of the 2nd of January 1869, it was clearly an application to enforce the decree, and not one merely to keep the decree alive in the sense intended by the Full Bench. But the

(1) I. L. R., 3 Calc., 235; S. C., 1 C. L. R., 23.

pleader further contends, on the strength of the decision of Justices Markby and Romesh Chunder Mitter, in the case of *Baboo Pyaroo Tuhobildarinee v. Syud Nazir Hossein* (1), that the application of the 6th September 1873 must be treated as an application to revive and continue the proceedings instituted on the previous application of the 2nd of January 1869, those proceedings having been stayed for a time,—*i. e.*, from the 19th December 1870 to July 1873,—by reason of the judgment-creditor being forced to maintain, by a regular suit instituted for the purpose, the right of the judgment-debtor to the properties under attachment against third parties. But we observe that the circumstances of the case quoted differ materially from those in the present case. Mr. Justice Markby, who delivered the judgment of the Court, says: “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 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, therefore, for these reasons the learned Judges held that it was not an application to execute the decree within the meaning of Sched. II, art. 167, of Act IX of 1871. Now, in the present case, we find that these remarks do not in any way apply. The present application made by the decree-holder on the 6th of September 1873 was as follows:—In the 9th column of the application in which he sets out the relief which he asks for from the Court,—namely, that the judgment-debtor’s property being situated within the Chowkee of the Munsif of Nattore, it is necessary for him, the decree-holder, to take out a certificate before he can attach property within that jurisdiction, and he therefore prays the Court to forward a certificate of non-satisfaction to the Court of the Munsif of Nattore to enable the decree-holder to proceed to attach and sell the property situated within that jurisdiction; further, with the application he presented the original decree of 1864 for ret., and the subsequent orders of the Judge and of the High Court

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confirming that decree. It thus appears that the application contained no reference to the properties which were the subject of the regular suit, and was not therefore either in substance or in form such an application as was contemplated by Mr. Justice Markby in his judgment in the case above quoted.

It is not as though the judgment-creditor had represented that the obstacle which existed to obtaining satisfaction by selling the decree No. 11 of the Subordinate Judge of Rajshahye, in which the judgment-debtor had a title, had been removed by the reversal of the proceedings under s. 246. On the contrary, he asked for a certificate to be sent to the Munsif of Nattore in order that he might proceed against property which, so far as we understand, was quite independent of the property the subject of the regular suit, which suit had its origin in proceedings adverse to the judgment-creditor under s. 246. We are, therefore, of opinion that the case relied upon by the pleader for the respondent is not applicable to the circumstances and facts of the present case, and as it is clear that the application of the 22nd of November 1870 is not an application to keep the decree in force within the meaning of the Full Bench Ruling referred to, the judgment of the Judge must be reversed, that of the Munsif restored, and the appeal decreed with costs.

*Appeal decreed.*

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*Before Mr. Justice Ainslie and Mr. Justice McDonell.*

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 Feb. 14.

LATI KOOER (DECREE-HOLDER) v. SOBADRA KOOER  
 (JUDGMENT-DEBTOR).\*

*Practice—Execution of Decree—Mesne Profits—Act XXIII of 1861, s. 11.*

A sued B and obtained possession of certain property under a decree. On appeal this decree was reversed. The judgment and decree of the Appellate Court made no order about mesne profits which had accrued during the time the

\* Miscellaneous Special Appeal, No. 200 of 1877, against the order of A. V. Palmer, Esq., Judge of Zilla Shahabad, dated the 9th of May 1877, affirming the order of Moulvié Imam Ali, Munsif of Buxar, dated the 17th of February 1877.