1877

MONOHUR DOSS v. MCNAGHTEN.

hands as the purchaser does; what he intends to do is merely to work out the debt due to himself. Mr. Bell argued that the position of a mortgagee is stronger than that of a purchaser. I do not see any principle under which a mortgagee can be made liable for such a claim as this unless upon the principle laid down by the Full Bench that he has undertaken to do so.

Therefore, on these grounds, I think the decision of the Court below was right, and this special appeal ought to be dismissed with costs.

PRINSEP J.—I am of the same opinion.

Appeal dismissed.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice L. S. Jackson, Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Ainslie.

CHUNDER COOMAR ROY AND OTHERS (DECREE-HOLDERS) *v.* BHOGOBUTTY PROSONNO ROY AND ANOTHER (JUDGMENT-DEBTOR).*

1877
Sept. 11.

Limitation Act (IX of 1871*), Sched. II, art.* 167—"*Applying to enforce the Decree*"—*Application* "*to keep the Decree in force*"—*Act VIII of* 1859, *s.* 212.

The words "applying to enforce the decree," in Act IX of 1871, Sched. II, art. 167, mean the application (under s. 212, Act VIII of 1859, or otherwise) by which proceedings in execution are commenced, and not applications of an incidental kind made during the pendency of such proceedings.

In cases governed by Act IX of 1871, a decree-holder who has applied to the Court *simpliciter* "to keep the decree in force," may, within three years from the date of such last named application, obtain execution of his decree.

THE facts of this case and the authorities cited appear in the judgment of Ainslie, J., referring the case to a Full Bench.

AINSLIE, J.—On the 22nd February 1875, the decree-holder applied, under s. 212, Act VIII of 1859, to put his decree

* Miscellaneous Regular Appeal, No. 386 of 1876, against the order of H. T. Prinsep, Esq., Judge of Zilla Hooghly, dated the 28th of August 1876.

1877

CHUNDER COOMAR ROY v. BHOGOBUTTY PROSONNO ROY.

into force. The Judge below holds that the application must be dismissed under the Limitation Act, Sched. II, art. 167, cl. 5, because the last application for execution under s. 212 having been filed on the 21st December 1871, notice under s. 216 was issued on the 17th January 1872, and the time limited for renewing the application is three years, commencing from that date.

This appeal is brought to have it determined whether applications subsequent to the 21st December 1871, and in furtherance of the proceedings then set on foot, are not applications to enforce, or keep in force, the decree. There was an application for attachment of property made, after issue of notice under s. 216, on 1st February 1872. A writ of attachment was issued on 16th, and returned with certificate of execution on the 28th idem, and on the 29th an order was recorded requiring the judgment-creditor to deposit the costs of proclamation of sale within seven days. Up to this time there was nothing that can, on any construction, come within the meaning of the words "application to enforce or keep the decree in force" done within three years next before 22nd February 1875. The further proceedings were: payment into Court of the costs of proclamation of sale by *challan* on the 4th March 1872; order for sale on 20th April, and proclamation accordingly; sale on that date; and application on the following day by the decree-holder to take the sale proceeds out of Court. This last I cannot hold to be an application to enforce or keep the decree in force. As far as the debtor was concerned, the proceedings had terminated—*Maharajah of Burdwan* v. *Luckee Monee Debee* (1), *Juggut Mohinee Bibee* v. *Ram Chand Ghose* (2); and the money was held in deposit on account of the decree-holder, who could leave it lying in the treasury or take it out at his own convenience. If this is to be deemed an application within the meaning of the clause, it is in the power of the creditor to extend his time by not drawing money which has completely passed from the control of the debtor, and is in fact his own.

There remains the payment of money into Court for the purpose of causing issue of proclamation of sale under the

(1) 8 W. R., 359. (2) 9 W. R., 100.

order of 29th February. The first question is, whether this was an application at all; the next, whether it was one to enforce or keep the decree in force. I think it must be taken that the *challan* by which money was tendered for the costs of issue of proclamation of sale, when taken in connection with the original application to execute the decree by attachment and sale, and the attachment effected and order thereupon, was an application to the Court to proceed with the execution of the decree; it is therefore necessary to go on and try the second question.

The learned Legal Remembrancer, who appeared for the appellant, pointed out the difference of the words used in the first and third columns of the schedule under art. 167. As to the entry in the first column, headed "description of application," it is beyond doubt that the words "for the execution, &c.," apply to applications under s. 212. It was contended that if the words "applying to the Court to enforce" are meant to be restricted to such applications, the language in the third column would have followed the form used in the first column, and have run as follows—or to the same effect—"or (when the application next hereinafter mentioned has been made) the date of applying to the Court under s. 212, Code of Civil Procedure, to enforce the decree, or otherwise applying to keep it in force."

In the parenthesis in the schedule, the word "application" is used in the singular, but it is manifest that more than one kind of application is contemplated. The words "to keep in force" do not apply to an application under s. 212. They may be intended to apply to such applications as those suggested by Mr. Justice Markby in the case of *Rajah Nilmoney Singh Deo* v. *Nilcomul Tuppadar* (1), but with that I am not now concerned. The use of the singular is, therefore, in no way inconsistent with a construction of the words "applying to enforce," which shall include more than one form of application. Moreover, the absence of such reference to the section of the Code as occurs in the next following clause of the same article, and the change of expression from "application for execution" to "applying to enforce," may reasonably be presumed to be

(1) 25 W. R., 546.

1877

CHUNDER COOMAR ROY v. BHOGOBUTTY PROSONNO ROY.

intentional and to have a purpose, and the construction contended for by Mr. Bell certainly gives effect to the varied form of expression. It cannot be said that the position of the clauses indicates a restricted construction of the earlier clause, inasmuch as the later clause provides for an extension of time by reference to a proceeding of later date than an application for execution, for this is to ignore the application to keep in force which, apparently, may be many months, possibly three years, later than either the application to execute under s. 212, or the notice under s. 216.

The law of limitation being a Statute in restraint of right, must, in case of doubt, be construed favorably to the rights restrained, and it seems to me that any application in furtherance of an application to put a decree into execution may be held to be an application to enforce the decree. If it becomes necessary to apply to the Court to take some further step in execution proceedings already started, that is really an application to enforce.

The reported cases on this article of the schedule brought to my notice are not numerous; and of these only two directly bear upon the present question. These are the cases of *Faez Buksh Chowdhry* v. *Sadut Ali Khan* (1), decided by Jackson and McDonell, JJ., and *Rajah Nilmoney Singh Deo* v. *Nilcomul Tuppadar* (2), by Markby and McDonell, JJ.

The other cases brought before me were:—*Gouree Sunhur Tribedee* v. *Arman Ali Chowdhry* (3), *Eshan Chunder Bose* v. *Prannath Nag* (4), *Booboo Pyaroo Tuhobildarinee* v. *Syud Nazir Hossein* (5), *Shaikh Subhan Ali* v. *Shaikh Sufdar Ali* (6), *Abdool Hekim* v. *Shaikh Assentoollah* (7), *Jibhai Mahipati* v. *Parbhu Bapu* (8). I will examine these first:—

Gouree Sunkur Tribedee v. *Arman Ali Chowdhry* (3) was decided by Couch, C. J., and Jackson, J. This case only decides that as the application relied on was not an application under s. 212, it did not serve to keep the decree in force.

(1) 23 W. R., 282.
(2) 25 W. R., 546.
(3) 21 W. R., 309.
(4) 14 B. L. R. 143; S. C., 22 W. R., 512.
(5) 23 W. R., 183.
(6) 24 W. R., 227.
(7) 25 W. R., 94.
(8) I. L. R., 1 Bomb., 59.

It was said that the provision in art. No. 167 must be held to require an application to be in accordance with s. 212. That is the least that must be done, supposing that the decisions about *bona fides* should be held to be not applicable now. All that can be gathered from the report is, that the decree-holder was probably relying on some informal application for execution, and not on an application following and subsidiary to a regular application under s. 212. The report does not state the facts. But this is the view of the case taken in the Bombay case to be referred to hereafter.

The next case, *Eshan Chunder Bose* v. *Prannath Nag* (1), was decided by a Full Bench. The case was referred to a Full Bench by Jackson and McDonell, JJ. In the referring order, Mr. Jackson said that it had been pressed on them that because every application made after the period of limitation prescribed for it must fail, therefore, conversely, every application made within that period is a good application to stop limitation running; and that another Bench (Markby and Mitter, JJ.) had held that this is now the law, and that all questions of *bona fides* are excluded. Pointing out the resulting unlimited delays that might be brought about, he asked for a decision on the question of *bona fides*. The Full Bench unanimously held that the provisions of the present law are absolute and irrespective of any question of *bona fides*. I may observe (though it refers more properly to an earlier part of this order) that Mr. Justice Jackson expressly rests his judgment on the ground that the silence of the Legislature on the question of *bona fides* must be taken to have been intentional.

The next case cited, *Booboo Pyaroo Tuhobildarinee* v. *Syud Nazir Hossein* (2), is scarcely connected with the present question in any way, and I shall pass it by as immaterial.

Shaikh Subhan Ali v. *Shaikh Sufdar Ali* (3). This case also is unimportant. Apparently there was nothing which could be called an application after the issue of notice under s. 216 on the 15th April 1871, up to 20th July 1874, when the fresh application for execution was put in, though the former case was not struck off the file till 24th August 1871.

(1) 14 B. L. R., 143; S. C., 22 W. R., 512.

(2) 23 W. R., 183.

(3) 24 W. R., 227.

1877

CHUNDER COOMAR ROY v. BHOGOBUTTY PROSONNO ROY.

Abdool Hekim v. *Shaikh Assentoollah* (1). The former application was on 31st October 1868; notice was issued on the 20th November 1868, and the new application was on the 28th November 1871. A petition of 12th December 1868 was relied upon as sufficient to save the case from the operation of the statute, but this was rejected on the ground that the decree-holder did not thereby apply to enforce execution; he simply prayed that the matter of the execution applied for on 31st October 1868 should be disposed of along with an application for an execution he had made in another suit.

Jibhai Mahipati v. *Parbhu Bapu* (2). The last application for execution was in February 1868. The proceedings thereon lasted till 10th September 1871, when they were brought to a close by an order setting out that all the money due had been received, except Rs. 20-13-3, which there was then no prospect of realizing. On the 30th September 1871, a petition was put in, which was afterwards relied on as bringing the next application for execution made on 19th October 1872 within time. The Court citing the Calcutta case—*Gouree Sunkur Tribedee* v. *Arman Ali Chowdhry* (3)—held that it was not an application to execute at all, and was itself out of time.

I now come to the two cases directly on the question before me. The second merely follows the first, and it will be convenient to notice it first. In *Rajah Nilmoney Singh Deo* v. *Nilcomul Tuppadar* (4), the application to execute was made on 29th December 1873, the last previous application was on 10th September 1870. A notice under s. 216 issued on this; the date is not given, but it seems to have been admitted that it was not within three years. It was suggested that further proceedings might have been taken, but this was not enquired into. Mr. Justice Markby, in delivering judgment, said:—"The case of *Faez Buksh Chowdhry* v. *Sadut Ali Khan* (5) decides that, under the new law of limitation, when proceedings have been had subsequent to the application to execute the decree and to the issue of notice, limitation does not

(1) 25 W. R., 94.
(2) I. L. R., 1 Bomb., 59.
(3) 21 W. R., 309.
(4) 25 W. R., 546.
(5) 23 W. R., 282.

run from the date of any such subsequent proceedings, but only from the date of the first application to execute the decree, or from the notice, as the case may be. That is a decision of a Division Bench of this Court in which Mr. Justice McDonell was a party, and I should not feel justified in departing from it.

This brings me to the last case to be noted, *Faez Buksh Chowdhry* v. *Sadut Ali Khan* (1), decided by Jackson and McDonell, JJ., which governed the case just cited. The application before the Court was in September 1873, the last preceding one in August 1870. It was urged that, under that application, proceedings had been taken, property sold, and money recovered; but it was held that "the Act does not allow limitation to run from the date of such proceedings, but only from the date of the application." Why the Court held the applications, to enforce a decree mentioned in art. 167, cl. 4, to be limited to applications under s. 212, is not stated.

That the decisions, as far as they go, run one way, must be admitted, but the principle of construction has been discussed in none of them; and with the greatest respect for the example of my learned brother Markby, I think I shall not be uselessly wasting the time of the Court by placing the question, which it is of immense importance to get finally settled, before a Full Bench.

The applications I refer to as subsidiary and in furtherance of the enforcement of a decree, and which appear to me to be applications to enforce within the meaning of cl. 4, art. 167, are such applications as for attachment after issue of notice; for proclamation of sale after attachment; for further proclamation after temporary stay of proceedings; in short, all applications the expressed purport of which is to procure something to be done by the Court which is necessary to carry into effect, give force to, or enforce the primary application for execution under s. 212. I use the words *expressed purport* designedly to avoid any doubt whether I am not coming into conflict with the Full Bench decision in the case of *Eshan Chunder Bose* v. *Prannath Nag* (2). I do not mean to raise any question of the *bona fides* of the petitioning decree-holders, if the terms of any application subsi-

(1) 23 W. R., 282. (2) 14 B. L. R., 143; S. C., 22 W. R., 512.

1877

CHUNDER COOMAR ROY v. BHOGOBUTTY PROSONNO ROY.

diary to and in furtherance of an application under s. 212 set out and ask for something which is material to the progress of the execution. As at present advised, I believe it to be a sufficient application under the limitation law.

The question, then, may be stated in the following terms :— Under the terms of cl. 4, art. 167, Sched. II of the Limitation Law, is not an application to the Court to have something done for the purpose of carrying on and giving effect to a pending application for execution of a decree made under s. 212 of the Code of Civil Procedure an application from the date of which a fresh period of limitation runs?

It is scarcely necessary to say, as the order of reference implies it, that, in my opinion, the question of limitation was open for consideration by the Judge, and that an admission by one of two co-debtors could not operate to prevent his giving effect to cl. 4, art. 167, Sched. II of the Limitation Law.

MORRIS, J.—I think that the question raised by my learned colleague as to the effect of cl. 4, art. 167, Sched. II of the Limitation Act, should very properly be referred for the decision of a Full Bench of this Court.

The Senior Government Pleader (Baboo *Annoda Persad Bannerjee*) and Baboo *Srinath Dass* for the appellants.

Baboo *Mohini Mohun Roy* and Boboo *Juggut Chunder Bannerjee* for the respondents.

The following judgments were delivered by the Full Bench :—

GARTH, C. J.—We are of opinion that "applying to enforce the decree" in art. 167 means the application (under s. 212, Code of Civil Procedure or otherwise) by which proceedings in execution are commenced, and not applications of an incidental kind made during the pendency of such proceedings.

But we also think that some meaning must be given to the alternative expression "keep in force" occurring in the same article, and that consequently in cases governed by Act IX of 1871, a decree-holder who has applied to the Court *simpliciter*

"to keep the decree in force" may, within three years from the date of such last named application, obtain execution of his decree.

1877

CHUNDER COOMAR ROY v. BHOGOBUTTY PROSONNO ROY.

AINSLIE, J.—I accept the decision of my learned colleagues as the proper answer to the question put.

APPELLATE CIVIL.

Before Mr. Justice Markby and Mr. Justice Mitter.

MADHUB CHUNDER GIREE (DEFENDANT) *v.* SHAM CHAND GIREE (PLAINTIFF).*

1877
Nov. 24.

IN THE MATTER OF THE PETITION OF MADHUB CHUNDER GIREE.

Superintendence of High Court—24 and 25 Vict., c. 104, s. 15—Act XXIII of 1861, ss. 26 and 35.

The High Court will not, under s. 15 of 24 and 25 Vict., c. 104, interfere with judgments, decrees, or orders of a lower Court on the bare ground that they are erroneous at law, or are based upon a wrong conclusion of facts; there must be some special ground justifying the High Court to exercise such powers.

Where the appellant has a remedy by regular suit, the Court is reluctant to interfere.

THIS was a suit under s. 15 of Act XIV of 1859, for recovery of possession of certain immoveable property. The defendant was formerly Mohunt of the Tarokessur, and as such was in possession of the temple and its appurtenances, including the official residence of the Mohunt, and of large landed estates, the property of the endowment, as also of some other landed property, the private and individual property of the Mohunt. On the 24th November 1873 the defendant was convicted by the Court of Sessions of the offence of adultery, and was sentenced to three years' imprisonment. On the defendant's conviction and imprisonment, the plaintiff, who was at the time the defendant's senior disciple, took possession of the office of Mohunt, and remained in possession not only throughout the three years' imprisonment of the defendant

* Rule No. 1023 of 1877, against the decree of J. P. Grant, Esq., District Judge of Hooghly, dated 28th August 1877.