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IN THE MATTER OF THE PETITION OF HAMEED-OOLLAH.

It appears to me that the section as so altered must be regarded as a fresh enactment of the Legislature; and this being so, there can be no doubt that the intention of the Legislature is, that these cases arising in the mofussil should now be tried in the Court exercising the highest original civil jurisdiction, which in the present instance is the Court of the District Judge.

Rule discharged.

ORIGINAL CIVIL.

Before Mr. Justice White.

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Dec. 9 & 20.

ASHOOTOSH DUTT *v.* DOORGA CHURN CHATTERJEE.

Limitation Act (XV of 1877), *sched. ii, art.* 180—*Execution of Decree—Revivor—Civil Procedure Code (Act X of* 1877), *ss.* 230, 245, 248—*Scire facias, Writ of.*

The plaintiff obtained a decree in 1864. The first application for execution was made in September 1869 under s. 216 of the Civil Procedure Code (Act VIII of 1859); and after notice to the defendant as provided thereby, an order was made under that section for execution to issue. In September 1880, an application for execution was made under s. 230 of the Civil Procedure Code of 1877, which repealed Act VIII of 1859.

Held, that the order, after notice, had the effect of reviving the decree within the meaning of art. 180, sched. ii, Act XV of 1877, and therefore the decree was not barred by the law of limitation.

An order for execution under the Code made after notice to show cause has, on the Original Side of the Court, the same effect as an award of execution in pursuance of a writ of *scire facias* had under the procedure of the Supreme Court, *i.e.*, it creates a revivor of the decree.

The clause of s. 230 of Act X of 1877, which prohibits a subsequent application for execution, only applies where the previous application has been made under that section, and not where such previous application has been made under Act VIII of 1859.

IN this case the plaintiff obtained a money-decree in the High Court against the defendant on the 16th of November 1864. The first application for execution of this decree was made on the 18th September 1869, when the Court ordered a writ of attachment to issue against the person of the defendant. After several fruitless attempts to execute this and other subse-

quent similar writs, the plaintiff ultimately succeeded in arresting the defendant on the 28th of January 1873, and he was committed to jail. The defendant lay in jail for two years without satisfying the decree; and at the end of that time was released under the provisions of the Code of 1859, which limited imprisonment under a decree to two years.

In the meanwhile, the plaintiff had the decree transmitted for execution to the District Court at Hooghly; and that Court, upon an application made on the 20th of August 1874, ordered the right, title, and interest of the defendant in certain property within its jurisdiction and in the possession of the defendant to be attached.

When this was done, the defendant and his brother preferred a claim, on the ground that the property attached was *debutter* property. The claim was disallowed; and the defendant and his brother, on the 4th December 1874, brought a suit to establish that the property was *debutter*, and therefore not liable for the defendant's debts. This suit was carried through the various Courts of this country to the Privy Council, where it was finally decided, on the 6th of July 1879, that the defendant had, subject to the trusts for the idol, a saleable interest in the property attached. This interest was accordingly sold in July 1880 and realized Rs. 273-11. With the exception of this sum, no money was realized by the plaintiff under the decree, and there remained a balance due of Rs. 11,977-7. The plaintiff having, as he alleged, recently ascertained that the defendant possessed some immoveable property within the original jurisdiction of the High Court, procured the decree to be brought back to that Court; and, on the 15th September 1880, obtained the present rule, calling on the defendant to show cause why the decree should not be executed.

Mr. *T. A. Apcar* now showed cause and contended, that if s. 230 of the Civil Procedure Code applied to this application for execution, the application was barred, inasmuch as more than twelve years had elapsed from the date of the decree, and no fraud or force had been shown on the part of the judgment-debtor to prevent the execution of the decree within that time; see

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cl. (*a*), s. 230. That was the only exception in that section which could apply under the circumstances of the present case, and that exception did not apply here. But if s. 230 does not apply, the application is barred by art. 180, sched. ii of Act XV of 1877, which provides a period of limitation of twelve years from the time when the right to enforce the decree accrued. There were several provisions, two of which, it would be contended, were applicable here, as giving a fresh period from which the twelve years could be calculated,—namely, that the decree had been revived, or some part of the money secured by the decree had been paid or the debt acknowledged; but it is submitted there has been no revivor of the decree in the sense intended. The order of the 18th September 1869 was merely a continuation of the proceedings, and did not give a fresh point from which limitation could be computed, nor has there been any such payment as to give a fresh period of departure. It is submitted the payment contemplated by the proviso to art. 180 is a voluntary payment by the judgment-debtor or any one representing him, and not a payment enforced by execution-proceedings: no acknowledgment of the debt has been given. The present application for execution is therefore barred.

Mr. *Kennedy* (with him Mr. *Bonnerjee*), in support of the rule, contended, that there had been both payment and revivor within the meaning of art. 180 of Act XV of 1877. Any payment would be sufficient, and the plaintiff has admittedly received a portion of the debt since taking out execution. [WHITE, J.— That was not a payment, but an exaction.] But even if this is not sufficient, there has been a revivor of the decree by the order of the 18th September 1869. That was an order made after more than a year from the date of the decree, and must be taken to have been made under the then existing procedure, namely, ss. 215 and 216 of Act VIII of 1859. Now those sections were merely an express enactment continuing the procedure by *scire facias* as it existed in the Supreme Court as part of the law of England. That law is laid down in Tidd's Practice, vol. ii, p. 1103, which shows that one of the cases in which writs of *scire facias* were issued was where a

judgment was more than a year old, in which case the judgment-creditor had to cause the writ to be issued, calling on the debtor to show cause why execution should not be allowed. There were two cases in which writs of *scire facias* were in general use; the other being where the judgment-debtor was dead. With respect to a writ issued after the death of the judgment-debtor, it was held that it created a new right and was not a mere continuation of the suit—*Farrell* v. *Gleeson* (1) and *Farran* v. *Beresford* (2). These cases were afterwards cited before the Privy Council in Ireland in *In the matter of Blake* (3) and *Griffin* v. *Blake* (4), where the question was, whether there was any distinction between the effect of a writ of *scire facias* issued after the death of the debtor, and one issued because the judgment was more than a year old; and it was there held there was no distinction, and that the latter equally created a new present right to receive the debt. What was meant by a revivor is shown too in Fitzherbert's Natura Brevium, p. 266. Without this procedure the judgment could not be enforced. This then was the procedure in force in the Supreme Court in 1859, when the Civil Procedure Code and the Limitation Act of that year were passed. It is submitted that the Legislature intended to substitute the procedure laid down in ss. 215, 216 of the former Code for the proceeding by *scire facias*, and that the effect of a notice under the latter section should have the same effect as the issue of the writ. The words used in s. 19 of the Limitation Act of 1859 have been continued down to the present time—see art 180, sched. ii of Act XV of 1877; and the procedure in ss. 215, 216 of Act VIII of 1859 is continued in ss. 245, 248 of Act X of 1877. [WHITE, J. — There is nothing about revivor in s. 248 of the Civil Procedure Code. Does the taking proceedings under s. 248 have the effect of reviving the decree, notwithstanding that omission?] It is submitted it has; the notice gives a new right, just as the *scire facias* did. The Civil Procedure Code was passed prior to the Limitation Act; so, supposing there is an error, the latter Act should guide the Court. [WHITE, J.—Section 230 of the Code seems to prohibit the

(1) 11 Cl. and Fin., 702.
(2) 10 Cl. and Fin., 319.
(3) 2 Ir. Ch. Rep., 643.
(4) *Id.*, 645.

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Court altogether from entertaining the application.] As to s. 230 of the Procedure Code of 1877 it is submitted it does not apply. Act X of 1877 does not apply to "any proceedings after decree that may have been commenced and were still pending" on the 1st October 1877, when the Act came into force; see s. 3 as amended by Act XII of 1879. This section was altered on account of the Full Bench ruling in *Runjit Singh* v. *Meherban Koer* (1). These proceedings were prior and pending at that time. Besides, s. 230 says, that the prior application must have been made under that section, otherwise the section does not apply. [WHITE, J. — It was made under the provisions of the then Code of Civil Procedure, which were to the same effect as s. 230.] The words are express "under this section," not "under the Procedure Code," which would have been probably used if the intention of the Legislature had been other than I contend it was. As to fraud on the judgment-debtor's part, it is submitted that his saying his property was *debutter* amounted to fraud; it was really concealing his property. [WHITE, J.— I can't say he had no ground for saying so. Two Courts decided in his favor.]

Mr. *T. A. Apear* was allowed to reply. — The proviso in s. 3 of Act X of 1877 does not apply. This proceeding had not commenced, nor was it pending, before 1st of October 1877. What was pending was the proceeding in execution against the *debutter* property, which has been satisfied. Though the Limitation Act received the assent of the Governor-General subsequently to the Civil Procedure Code, yet both Acts came into force together. The means by which execution is to be obtained is the Civil Procedure Code alone, and the Court is bound by the words of that Code. If it was intended to introduce the writ of *scire facias* into the Code of 1859, the intention would have been made clear. The introduction of the word "revive" in the Limitation Act may well have been to exclude the writ of *scire facias*, inasmuch as that writ had been done away with by the Common Law Procedure Act of 1852. It is submitted that s. 230 of the Code of Civil Procedure is not

(1) I. L. R., 3 Calc., 662.

limited to cases in which a previous application has been made under that section, but is applicable to the present case. [Mr. *Kennedy* referred to *Byraddi Subbareddi* v. *Dasappa Rau* (1), *Sohan Lal* v. *Karim Buksh* (2), and *Ram Kishen* v. *Sedhu* (3), to show that unless a previous application has been made under s. 230 that section does not apply.]

Cur. adv. vult.

WHITE, J. (after stating the facts as above, continued):—The decree is more than twelve years old, and as such execution would be barred under art. 180, sched. ii of the Indian Limitation Act, 1877. But Mr. Kennedy, for the plaintiff, has contended with much ability and learning, that the order of this Court of the 18th of September 1869 was a revivor of the decree within the meaning of the proviso attached to the foregoing article, and which is in these words, "provided that when the judgment or decree has been revived . . . . . the twelve years shall be computed from the date of such revival, or the latest of such revivals."

The petition does not state how the order of the 18th of September 1869 came to be made. But it was made long after the Code of 1859 had been applied to this Court on its Original Side. It also appears to have been the first order for execution which issued upon the decree, and to have been made after the lapse of more than a year from the date of the decree; so I must take the order to have been made under ss. 215 and 216 of the Code of 1859, and, therefore, after notice to the defendant to show cause why the decree should not be executed against him.

The corresponding sections to those in the Code of 1877 are ss. 245 and 248, the latter of which enacts that notice to show cause must issue, "if more than a year has elapsed between the date of the decree and the application for its execution."

In neither of the Codes is an order for execution made after notice under these foregoing sections, described as reviving the decree. The question is, whether it has that effect,

(1) I. L. R., 1 Mad., 403. (2) I. L. R., 2 All., 281.
(3) I. L. R., 2 All., 275.

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and is what the Legislature had in mind when it speaks in the present Limitation Act of the revival of a decree.

The proviso in question is a transcript of one in the repealed Limitation Act of 1871, and in tracing back to its source, the language used in the proviso, we find the words first used in s. 19 of Act XIV of 1859, which enacts, that "no proceeding shall be brought to enforce a judgment or decree of a Court established by Royal Charter but within twelve years from the decree, unless in the meantime such decree shall have been duly revived. . . . . and in such case no proceeding shall be brought to enforce the decree but within twelve years after such revival or the latest of such revivals."

This was the first Limitation Act of the Legislature of India which applied to the Chartered Courts at the three Presidencies. In 1859, these Courts were governed by their own procedure. It was part of that procedure that execution could not issue upon a judgment more than a year old without suing out a writ of *scire facias* against the defendant. The 195th of the repealed rules of 1851 on the Plea Side of the old Supreme Court of Calcutta recognises the procedure to be such.

The writ of *scire facias* was introduced into the Chartered Courts from the English law, and that law governed its operation and effect. By the common law of England, in the case of judgments in personal actions, if more than a year and a day passed without execution, the plaintiff's only remedy was an action of debt upon the judgment. The Statute of Westminster the *2nd*, 13 Edward I, c. 45, gave the plaintiff the alternative remedy of suing out a *scire facias* (4 Comyn's Digest, Title Execution, A. 4 and I. 4; Tidd's Practice, p. 1102). The effect of an award of execution in pursuance of the *scire facias* was to revive the judgment. It is so stated in Tidd's Practice, p. 1103; and the point is placed beyond controversy by *Farrell* v. *Gleeson* (1) and *In the matter of Blake* (2), before the Judicial Committee of the Privy Council in Ireland. These cases decide that *scire facias* upon a judgment is not a mere continuation of a former suit, but creates a new right. It would appear from Tidd's Practice, p. 1106, citing a case

(1) 11 Cl. and Fin., 702. (2) 2 Ir. Ch. Rep., 643.

from 2 Salkeld, 598, that although subsequent writs of *scire facias* may be taken out, and it may be necessary to take them out, it is the first *scire facias* which revives the judgment. It is unnecessary, however, to determine in this case how that may be, as the first order for execution in the present case is less than twelve years old.

There was then, at the date when the Limitation Act of 1859 came into force, a proceeding in the Supreme Court which had unquestionably the effect of reviving a judgment. This proceeding has since been displaced by a new proceeding, which in substance is the same as the old proceeding. It commences with a notice to show cause why the decree should not be executed, and terminates with an order for execution, which is tantamount to the award of execution under the *scire facias*. Inasmuch as the Legislature has, notwithstanding the change in procedure, retained in the present Limitation Act the language of the Act of 1859, and prescribed a fresh point of departure for the twelve years in the case of a judgment that has been revived, and inasmuch as I am bound to give effect, if possible, to every part of the language of the Legislature in the Limitation Act, I must hold that an order for execution under the Code made after notice to show cause has, on the Original Side of this Court, the same effect of reviving the judgment as the *scire facias* had.

It is contended for the defendant that though the order of the 18th of September 1869 may have revived the judgment, I am precluded from granting the present application by that part of s. 230 of the Code now in force which prohibits this Court from granting, except under certain circumstances, a subsequent application where the decree is more than twelve years old.

Section 230 of the Code, as it stood when the Code was passed in 1877, prohibited the granting of a subsequent application for execution of a decree more than twelve years old, unless the Court was satisfied that due diligence had been used to obtain satisfaction under the previous order for execution. As the section now stands, amended by the Act of 1879, it prohibits the grant of a subsequent application, no matter what diligence may have been used, unless the judgment-debtor has, by

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fraud or force, prevented the decree from being executed within the twelve years. The consequence is, that if from the mere impecuniosity of the judgment-debtor a decree remains unsatisfied for twelve years, no further order for execution can be made. No fraud or force has been found to exist in the present case, but Mr. Kennedy argues that this part of s. 230 only applies where the previous application for execution was actually made under s. 230, and not where, as here, the previous application was made under the Code of 1859. The language employed in s. 230 is this, "Where an application to execute a decree has been made under this section and granted, no subsequent application to execute the same decree shall be granted after the expiration of twelve years, &c."

The natural meaning of the foregoing language is, that the previous application must be one made under s. 230. Mr. Kennedy has cited the cases of *Byraddi Subbareddi* v. *Dassappa Rau* (1) and *Ram Kishen* v. *Sedhu* (2), in which these Courts considered that the restriction upon the subsequent application only applied where the previous application had been made under s. 230. The effect of this new provision in s. 230 is to cut down the right of a judgment-creditor to procure execution to issue upon an unsatisfied judgment.

I am of opinion that the restriction does not affect the present application, and that, consequently, I am not prevented from making this rule absolute.

When the case occurs of a subsequent application for execution after the grant of a previous application under s. 230, a somewhat difficult question may arise how to reconcile the language of that section with the proviso in art. 180 of sched. ii of the Limitation Act of 1877; but it is unnecessary now to pronounce any opinion upon the point.

The rule will be made absolute with costs, and execution will issue for the balance remaining due under the decree.

Rule absolute.

Attorney for the plaintiff: Mr. *Hechle.*

Attorneys for the defendant: Messrs. *Ghose* and *Bose.*

(1) I. L. R., 1 Mad., 403. (2) I. L. R., 2 All., 275.