APPELLATE CIVIL.

Before Mr. Justice Stephen and Mr. Justice Holmwood.

1908
July 16.

UMED ALI

v.

ABDUL KARIM CHAPRASHI.*

Execution of decree—Application for execution—Service of notice on the judgment-debtor after the decree was barred—Limitation.

Held, that a mere service of notice on the judgment-debtor after the decree was barred was not a proceeding in execution, merely because the judgment-debtor did not come in and oppose it.

Mungul Pershad Dichit v. *Grija Kant Lahiri*(1) and *Norendra Nath Pahari* v. *Bhupendra Narain Roy*(2) distinguished.

Bisseshur Mullick v. *Maharajah Mahatab Chunder Bahadoor*(3) referred to.

APPEAL from order by the judgment-debtor Umed Ali.

This appeal arose out of an application for the execution of a decree dated the 28th of September, 1899. On the 28th November, 1901, the decree-holder made his first application for execution; and a notice was served on the judgment-debtor on the 6th December, 1901. On the 21st December, 1901, time was allowed to the decree-holder for taking proper steps, and on the 4th January, 1902, the application for execution was dismissed for default. On the 13th December, 1904, a second application for execution was made, and notice was served on the judgment-debtor on the 24th December, 1904. On the 14th of February, 1905, this application was also dismissed for default.

There was a third and a fourth application on the 25th of June, 1906, and the 14th of July, 1906, both of which were also dismissed for default on the 27th of July, 1906. The present application for execution was made on the 9th of April, 1907. The judgment-debtor objected that the application dated the

*Appeal from Order No. 527 of 1907, against the order of M. Yusuf, District Judge of Noakhali, dated Sept. 16, 1907, confirming the order of Atul Chunder Dass Gupta, Munsif of Sudharam, dated Aug. 5, 1907.

(1) (1881) I. L. R. 8 Calc. 51. (2) (1895) I. L. R. 23 Calc. 374.

(3) (1868) 10 W. R. (F. B.) 8.

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13th of December, 1904, being barred by limitation, subsequent applications would also be barred.

The Court of first instance held that the order for time was not a step in aid of execution, but as the judgment-debtor could not now question the validity of the execution case of 1904, inasmuch as notice was served upon him and he did not appear, the application for execution was not time-barred.

On appeal, the learned District Judge held that there could be no estoppel, but having held that the order of the Court to the decree-holder to take steps, which was passed on the 21st December, 1901, must have been based on some application of the decree-holder, and that, as his application for time was granted, the order must be taken to be a step in aid of execution, dismissed the appeal.

Against this decision the judgment-debtor appealed to the High Court.

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Dr. Priyanath Sen, for the appellant. In this case the order passed by the Court adjourning the case and directing the decree-holder to take proper steps does not necessarily imply that there was an application by the decree-holder for that purpose, and even supposing that there was such an application, it must have been an application for time, which could not be regarded as an application to take some step in aid of execution. Taking time does not aid the execution, but rather retards it. See *Kartick Nath Pandey* v. *Jugger Nath Ram Marwari*(1) and *Hira Lal Bose* v. *Dwija Charan Bose*(2).

Moulvie Nuruddin Ahmed, for the respondents: An application for time is an application to take some step in aid of execution. In any case, the judgment-debtor did not take this objection in more than one subsequent proceeding, although he was served with notice under section 248 of the Code of Civil Procedure. He is, therefore, now estopped from raising this objection on the principle laid down in the cases of *Mungul Pershad Dichit* v. *Grija Kant Lahiri*(3) and *Norendra Nath Pahari* v. *Bhupendra Narain Roy*(4).

(1) (1899) I. L. R. 27 Calc. 285.
(2) (1905) 3 C. L. J. 249; 10 C. W. N. 269.
(3) (1881) I. L. R. 8 Calc. 51.
(4) (1895) I. L. R. 23 Calc. 374.

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Dr. Priyanath Sen, in reply. The principle laid down in *Mangal Pershad's* case does not apply, inasmuch as here there was merely the service of a notice under section 248 to shew cause why the execution should not proceed, but no order was made by the Court allowing the execution to proceed, and in fact the execution proceedings were dismissed for default. The rule laid down in *Bisseshur Mullick* v. *Maharajah Mahatab Chunder Bahadoor*(1) applies. The distinction is pointed out by the Judicial Committee in the case of *Mungul Pershad Dichit* v. *Grija Kant Lahiri*(2). See also *Bhagwan Jethiram* v. *Dhondhi* (3).

Cur. adv. vult.

STEPHEN AND HOLMWOOD JJ. This is an appeal against an order of the District Judge of Noakhali affirming the order of the Munsiff rejecting the appellant judgment-debtor's application for a declaration that the decree-holder's fifth application for execution is barred by limitation. The dates necessary for a determination of this question are given below: 1st application for execution—28-11-01. Notice served—6-12-01. Time allowed to decree-holder—21-12-01. Dismissed for default—4-1-02, 2nd application—13-12-04. Notice served—24-12-04. Dismissed for default—14-2-05. There was a 3rd and a 4th petition on the 25-6-06 and 14-7-06 respectively, which were also dismissed for default and the present application is dated 9-4-07. Upon these dates, as they stand, the application of the 13th December, 1904, was barred, and therefore the subsequent applications would also be barred.

Two grounds were, however, urged by the decree-holder in the Lower Courts for holding that the execution was not barred. First, that the application for time on the 21st December, 1901, was a step in aid of execution. Secondly, that the judgment-debtor was estopped by his conduct in not objecting to the subsequent execution proceedings, of which he got notice.

(1) (1868) 10 W. R. (F. B.) 8. (2) (1881) I. L. R. 8 Calc. 51.
(3) (1896) I. L. R. 22 Bom. 83.

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The Munsiff held that the first ground was untenable as the order for time was not a step in aid of execution, inasmuch as it was not shown that the decree-holder had applied either by petition or orally for time.

He, however, found that the judgment-debtor could not now question the validity of the execution case of 1904, inasmuch as notice was served upon him and he did not appear to contest the execution proceedings.

On appeal the learned District Judge held that there could be no estoppel, inasmuch as the rule laid down in the case of *Mungul Pershad Dichit* v. *Grija Kant Lahiri*(1) did not apply to this case. He, however, held that the order of the Court to the decree-holder to take steps, which was passed on the 21st December, 1901, must have been based on some application of the decree-holder, and that, as his application for time was granted, the order must be taken to be a step in aid of execution. He, therefore, dismissed the judgment-debtor's appeal. The learned Judge does not seem to have had before him the authorities in the rulings of this Court, which have decided that an application for time is not a step in aid of execution. In the case of *Kartick Nath Pandey* v. *Juggernath Ram Marwari*(2), it was held that an application for time is not a step in aid of execution and this, whether it was allowed or disallowed, and in a subsequent case of *Hira Lal Bose* v. *Dwija Charan Bose*(3) this view was approved by Mookerjee J. The ground, therefore, on which the learned Judge has dismissed the judgment-debtor's appeal is unsound and must be set aside. But we are asked to restore the Munsiff's finding on the authority of the well known case before the Judicial Committee of *Mungul Pershad Dichit* v. *Grija Kant Lahiri*(4). It is only necessary to point out that in that case an order for attachment made by the Subordinate Judge on an application, which would otherwise have been time barred, was held to operate as a decision that the execution was not barred, even though that decision was erroneous, but at the same time their Lordships of the

(1) (1881) I. L. R. 8 Calc. 51.
(2) (1899) I. L. R. 27 Calc. 285.
(3) (1905) 3 C. L. J. 240, 264; 10 C. W. N. 209.
(4) (1881) I. L. R. 8 Calc. 51.

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Judicial Committee declined to differ from the rule laid down by the Full Bench in *Bisseshur Mullick* v. *Maharajah Mahatab Chunder Bahadoor*(1), in which it was held that the mere service of notice on the judgment-debtor after the decree was barred was not a proceeding in execution merely because the judgment-debtor did not come in and oppose it. The case of *Mungul Pershad Dichit* v. *Grija Kant Lahiri*(2) is therefore no authority for the view taken by the learned Munsiff, still less so is the other case, on which he relies, viz., the case of *Norendra Nath Pahari* v. *Bhupendra Narain Roy*(3), inasmuch as in that case four valid grounds for saving limitation were established, namely, (*a*) an acknowledgment of liability, (*b*) a deposit of process fees for sale proclamation, (*c*) the registration of the application and attachment ordered thereon, (*d*) the minority of the decree-holder.

We are, therefore, of opinion that both the grounds urged by the respondent in this case fail and that the appeal must be decreed, but under the circumstances without costs.

Appeal decreed.

S. C. G.

(1) (1868) 10 W. R. (F. B.) 8. (2) (1881) I. L. R. 8 Calc. 51.
(3) (1895) I. L. R. 23 Calc. 374.