

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of Mungul
Pershad Dichit and another v. Grija Kant
Lahiri Chowdhry from the High Court of
Judicature at Fort William, in Bengal; de-
livered 18th June 1881.*

Present :

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR RICHARD COUCH.

SIR ARTHUR HOBHOUSE.

On the 22nd September 1877 Ishana Debi, the mother and guardian of the Appellants, presented a petition to the Subordinate Judge of Mymensing, in which she stated that her husband instituted a suit, No. 26 of 1851, against Shama Kant Lahiri Chowdry, deceased, and obtained a decree against him on the 8th of July in that year; that, after application to execute the decree, her husband died, and that she as guardian of the minors, being substituted in the place of her husband, revived the decree against the Defendant, Shama Kant Lahiri, and after his death against his son, who was the owner and possessor of the property left by him, and that the property of the judgment debtor was attached; that after the date of the sale had been fixed the sale was stayed on the application of the judgment debtor with the attachment continuing, and the execution case struck off on Monday, the 9th of February 1875. She, therefore, prayed that the execution case might

Q 4734. 125.—6/81.

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be restored, and that notice being first served on Grija Kant Lahiri Chowdry, the son and heir of the said Shama Kant, the amount due under the decree might be realized, together with interest for the time of pendency and the costs of execution by sale of the property under attachment.

The facts stated in the petition were correct, and were reported to be so by the Amlah to whom the case was referred for report. The judgment debtor, having been served with notice, appeared, and contended, amongst other things, that the application was barred by limitation, that the decree was dated the 8th of July 1851, and that no proceedings had been *bona fide* taken from that time to keep the decree alive within the period laid down by Act 14 of 1859 and 9 of 1871, and he alleged that the decree holder, actuated by *mala fides*, not having realized the money for such a long time, simply with the desire of increasing the interest, was not entitled, according to law and justice, to enforce it.

The dates of the several applications and proceedings to enforce, or keep in force, the decree are, with one exception, correctly stated in the judgment of the Subordinate Judge. They are as follow :—

The date of the decree, 8th July 1851.

First petition of execution, 3rd May 1861.

Notice served, 25th May 1861.

Struck off for default of payment of costs of attachment,
27th June 1861.

Second petition, 9th February 1863.

Struck off for default of payment of costs, 29th August
1863.

Third petition, 19th December 1864.

Debtor's property attached, 6th June 1866.

Struck off at request of parties, 19th June 1866.

Fourth petition against Grija Kant as heir of Shama Kant,
now deceased, 8th May 1868.

Notice, attachment, sale proclamation, &c., served, after
which debtor applied for two months' time, and execution
struck off, 19th August 1868.

Fifth petition, 26th July 1871.

Notice served on the debtor, 7th August 1871.
 Attachment caused, 31st August 1871.
 Sale proclamation issued, 26th September 1871.
 Debtor applied for two months' time, 30th November 1871.
 Struck off for default of payment of sale fee, 31st January 1872.
 Sixth petition, 5th September 1874.
 Notice issued, 10th September 1874.
 Notice served, 23rd September 1874.
 Decreedar's petition to attach properties, 8th October 1874.
 Sale proclamation issued, 27th Aughran 1281.
 Petition of judgment creditor to stop sale for seven days, and sale stopped, 21st January 1875.
 Debtor's petition to stop sale for three months, admitting the debt, and kharijed, 25th January 1875.
 Seventh, or present petition, 22nd September 1877.

Taking those as the correct dates, he held that the application of the 22nd of September 1877 was barred by limitation, not being within three years from the date of the petition of the 5th of September 1874, or from the date of the issuing of the notice on the 10th of September 1874, under Sect. 216 of the Code of Civil Procedure (Act 8 of 1859). In arriving at that conclusion, he treated the case as falling within the Indian Limitation Act, 1871 (Act 9 of that year), and he held, amongst other things, that, under Clause 5 in the 3rd column of Art. 167 of the Second Schedule, the date of the issuing, and not the date of the service of the notice, was the date referred to; and that under Clause 4 of the 3rd column of the same article, the date of the 6th petition, and not the dates of the subsequent order or proceedings under it, was the date from which the period of limitation began to run. Both of those dates, it will be observed, were more than three years before the 22nd September 1877, the date of the petition under consideration.

It was urged on behalf of the petitioner before the Subordinate Judge that the period of limitation ought to be counted from the 8th of October 1874, the date on which the execution creditor

applied to attach other properties of the judgment debtor, but he held that that application was not in accordance with the Code of Civil Procedure, and that consequently, upon the authority of the case of *Gouree Sunkur Trebelli v. Arman Ali* (21 Weekly Reporter, Civil Cases, p. 309), it was not an application within the meaning of the 4th clause of Article 167. In that case, however, which is not fully reported, it is to be inferred that no order was made upon the application. In the present case, the Subordinate Judge, upon the petition of the 8th of October 1874, made an order on the same day that the attachment process do issue (Record, p. 28).

The effect of that order will be presently considered.

The Subordinate Judge also observed that the sixth application was barred by limitation on the 5th of September 1874, as it was more than three years even from the 7th of August 1871, the date on which the notice was actually served, and much more so from the date of the fifth application, which was made on the 26th of July 1871. In support of that view he referred to the case of *Bisseshur Mullick v. Maharajah Maharab Chundur* (10 Weekly Reporter, Full Bench Rulings, p. 8). That case, however, is very different from the present. There there was merely the service of a notice on the judgment debtor after the decree was barred; but no order was made. Here an order for attachment was made by the Subordinate Judge on the 8th October 1874 (Record, page 28), after notice served on the judgment debtor on the 23rd of September 1874, to show cause why the decree should not be executed against him (Record, page 26). The order was made by a court having competent jurisdiction to try and determine whether the decree was barred by limitation. No appeal was preferred against it;

it was acted upon, and the property sought to be sold under it was attached, and remained under attachment until the application for the sale now under consideration was made.

The Courts below make no reference to the order, or to the attachment under it ; and in the list of dates set out by the Subordinate Judge, the order, and the date of it, are wholly omitted. Admitting, for the sake of argument, but only for the sake of argument, that the decree was barred when the sixth application was made ; when the notice was served on the 23rd of September 1874 ; and when the petition of the 8th of October 1874 was presented, and that the Subordinate Judge ought to have dismissed the petition upon the ground of limitation, although it was not set up or relied upon by the judgment debtor, still his order, though erroneous, was valid, not having been reversed.

The applicants appealed to the High Court from the order of the Subordinate Judge rejecting the application now under consideration. The High Court considered it unnecessary to determine the questions arising out of the petition and order of the 8th October 1874, or of any of the proceedings between the 5th of September 1874 and the 22nd of September 1877, inasmuch as they considered and held that the decree was barred when the petition of the 5th of September 1874 was presented ; the Judges said, " A decree once dead no proceeding " by means of an application out of time could re- " vive it." But, as already observed, the Subordinate Judge had jurisdiction upon the petition of 8th October 1874 to determine whether the decree was barred on the 8th October 1871, and he made an order that an attachment should issue. He, whether right or wrong, must be considered to have determined that it was not barred. A Judge in a suit upon a cause of action is bound to dismiss the suit, or to decree for the Defendant, if it

appears that the cause of action is barred by limitation. But if instead of dismissing the suit he decrees for the Plaintiff, his decree is valid, unless reversed upon appeal; and the Defendant cannot, upon an application to execute the decree, set up as an answer that the cause of action was barred by limitation. Suppose the order for attachment of the 8th of October 1874 had been affirmed on appeal by the High Court, upon the ground that it was not barred by limitation, it is clear that the Judge of the original Court, when the application for a sale of the property attached under it was made, could not have rejected the application upon the ground that the decree was barred on the 5th of September 1874, or on the 8th of October 1874, when the order was made, upon the ground that the decree was dead when the petition upon which the order was made was presented. Yet the order when affirmed upon appeal could have no greater binding effect than the order itself so long as it remained unreversed. Here the judgment debtor, so far from appealing against the order for the attachment, acknowledged its validity, and presented the petition of the 25th of January 1875 (p. 33), by which he prayed that the sale under the attachment might be stayed for three months, and the execution case struck off for the present, with the attachment remaining in force. Upon that petition being presented, the creditor agreed to have the execution stayed in accordance with the petition, "the attachment on the property attached continuing." It appears to their Lordships impossible to hold that, if immediately after the expiration of the three months the execution creditor had made the present application, it could, in the face of the order of the 8th October 1874 and the subsequent proceedings, have been reversed, upon the ground that the decree was dead on the 5th of September 1874, or on the 8th of

October 1874. The present application, having been made within three years after the order of the 8th October 1874, is as valid as if it had been made immediately after the expiration of the three months.

Their Lordships think it right to observe that, irrespective of the consideration that the order of the 8th of October 1874 was binding, the decree was not barred on the 22nd September 1877, when the application was made. Both of the Courts below have treated the case as governed by the Indian Limitation Act of 1871, Act 9 of that year. But their Lordships are of opinion that the present case does not fall within it. The Act was to come into force on the 1st of July 1871, but it was enacted by Section 1 that nothing contained in Section 2 or in Part 2 should apply to suits instituted before the 1st of April 1873. By Section 2, and the first schedule referred to therein, Act 14 of 1859, was with one exception, which does not affect this case, repealed. By Section 4 of the Act, which is part of Part 2, it was enacted that, subject to the provisions contained in Sections 5 to 26 inclusive, none of which appear to affect this case, every suit instituted, appeal presented, and application made after the period of limitation prescribed therefor, by the second schedule shall be dismissed, although limitation has not been set up as a defence. One of the applications for which a period of limitation is prescribed by the second schedule is an application for the execution of a decree or order of a Civil Court not established by Royal Charter. It appears to their Lordships that a thing which applies to an application in a suit applies to the suit, and that an application for the execution of a decree is an application in the suit in which the decree was obtained, and that as regards suits instituted

before the 1st of April 1873 all applications in it are excluded from the operation of the Act. Nothing therefore contained in Section 2, or in Section 4, or in Schedule 2, of the Act extends to an application for the execution of a decree in a suit instituted before the 1st of April 1873. There are many applications mentioned in Schedule 2, and for which a period of limitation is prescribed thereby, which are clearly applications in a suit; such for instance, as those described in numbers 166, 167, and 164. There are also many enactments which show that an application for execution of a decree is in an application in the suit in which the decree was obtained. For example, by Section 207, Act 8 of 1859, the application may be made by the pleader in the suit. By Section 212 the application is to contain "the number of the suit." By Section 216, if the enforcement of the decree is applied for against an heir or representative of "an original party to the suit," a certain notice is to be given. By Section 15, Act 23 of 1861, the application is to be entered "in the register of the suit," and so forth.

The reasons which may be presumed to have induced the legislature not to apply the new rules of limitation to suits commenced before the 1st day of April 1873 are of equal force with regard to application for the execution of decrees.

It cannot be disputed that, in several cases, such as the case reported in 22 Weekly Reporter, Civil Rulings, 155, applications for the execution of decrees in suits instituted before the 1st of April 1873 have been treated as falling within the provisions of Schedule 2 of Act 9 of 1871, but the point was assumed rather than decided.

It was scarcely contended in the argument before their Lordships that the application of

the 22nd of September 1877 was barred, if the case is governed by Section 20, Act 14 of 1859. It was within three years from the date of the service of the notice on the 23rd September 1874, which was a proceeding within the meaning of the last-mentioned section; also within three years from the date of the petition of the 8th of October 1874, and of the order of the same date made thereon.

In the face of the applications of the judgment debtor made from time to time to stay the sale of property which had been attached, it cannot be presumed that the decree was ever satisfied, nor was there any finding of either of the Courts below that the several proceedings were not *boná fide* for the purpose of enforcing the decree or of keeping it in force. It appears from the return of the Amlah of the 12th of November 1877 that the proceedings under the petition of the 8th of October 1874 were struck off on the 9th of February 1875, on account of the decree holders not paying the cost of issuing the notification; but as the sale was stayed on the 25th of January 1875 for three months upon the application of the judgment debtor, and upon the condition that the attachment should remain in force, the striking off of the case from the Judges' file on the 9th of February 1875 did not affect the rights of the decree holders. Their Lordships have alluded to this fact, as reference was made in the argument to the effect of strikings off.

For the reasons above stated, their Lordships will humbly recommend Her Majesty to reverse the decrees and orders of both the lower Courts, and to order the Respondent to pay the costs of the Appellants in those Courts, and further to order that the prayer of the petition of the 31st

of Bhadro 1284, corresponding with the 22nd of September 1877, be granted.

The Respondent must pay the costs of this appeal.
