

(1878) 06 AHC CK 0007

Allahabad High Court

Case No: None

Behari Lal

APPELLANT

Vs

Salik Ram

RESPONDENT

Date of Decision: June 3, 1878

Citation: (1875) ILR (All) 675

Hon'ble Judges: Spankie, J; Pearson, J; Oldfield, J

Bench: Full Bench

Judgement

Pearson, J.

The precedent to which the Judge refers supports Iris decision. But I am not myself able to assent altogether to the ruling in the precedent. In the first place, I doubt whether the notice issued by the Court can be regarded as good for nothing and a mere nullity, because it was issued on the strength of an application not strictly in the form and of the nature prescribed by Section 212 of Act VIII of 1859. Probably the Court should have rejected the application for the issue of a notice and required an application of the kind required in Section 212 specifying the particular relief sought, although no relief could be granted until the notice had been issued, and the omission might have been supplied afterwards. But it did, upon the application presented to it, issue a notice, and Article 167, Schedule ii of Act IX of 1871, allows an application to be made for the execution of a decree in cases where a notice u/s 216 of the CPC has been issued within three years from the date of issuing such notice. In the next place I conceive that the application for the issue of a notice u/s 216, though not an application on which such a notice could properly issue, was still an application to keep in force the decree. The Procedure Code, it is true, provides only for application for the execution of decrees u/s 212, but the limitation law recognises applications having for their object to keep decrees in force. An application which might be irregular in reference to Section 212 might still be an application of the other kind, and I cannot conceive that the decree-holder had any other object in view in making his application of the 3rd March 1875, than to keep the decree in force by warning the judgment-debtor that its enforcement was

contemplated. The present application is within three years from that date. I am therefore disposed to uphold the order of the Court of First Instance and to reverse that of the lower Appellate Court. Apparently Chuni Lal (the second judgment-debtor) has been improperly made a respondent to this appeal, as he was not a party to the proceedings in the lower Appellate Court, the subject of the appeal.

Spankie, J.

2. I am still of the same opinion as that expressed in the decision of this Court dated the 14th December 1876 ^{*} to which I was a party.

3. The terms of Section 216 of Act VIII of 1859 are precise and clear. If an interval of more than one year shall have elapsed between the date of the decree or the application for its execution, or if the enforcement of the decree be applied for against the heir or representative of an original party to the suit, the Court shall issue notice to the party against whom execution may be applied for, etc., etc."; but there must be an application for execution, alluding to the provisions of Section 212. It precedes and does not succeed the Court's issue of notice u/s 216 to the heir or representative of an original party to the suit, and where no application for execution has been made within three years from the date of the decree, I do not think that the decree-holder can fall back upon the notice issued u/s 210. If the application u/s 212 were bad, it seems to me that the Court had no power to issue the notice, and under such circumstances the mere issue of the notice cannot be regarded as giving the decree-holder a fresh period of limitation. The old procedure applies to this case. The order affirmed by my Honourable colleague would, I suppose, issue. But this appeal was filed on the 9th November, and, therefore, perhaps Act X of 1877 applies. If so, I should wish to refer the point of law to another Judge.

4. The learned Judges differing in opinion on the point of limitation, the appeal was referred to Oldfield, J., under the provisions of Section 575  of Act X of 1877. The following Judgment was delivered by

Oldfield, J.

5. I am of opinion that the execution of the decree is not barred by limitation.

6. The decree-holder filed an application on the 3rd March 1875, accompanied by a copy of the decree, asking that, after service of notice on the judgment-debtor, steps might be taken to realise the amount of the decree. Most of the particulars required by Section 212 were entered in the application, but it was silent as to the mode in which the assistance of the Court was required, whether by delivery of property specifically decreed, the arrest and imprisonment of the judgment-debtor, or attachment of his property or otherwise; but this defect in the application will not, I consider, render it of no legal effect for the purposes of limitation. All that the law

of limitation enacts is that the limitation shall run from the date of applying to the Court to enforce or keep in force the decree, and all that would seem to be required is that there shall have been an application with the object of enforcing or keeping in force the decree. We should strain the language of the law by putting any other construction on it. If the application is such as to show that it was made with that object, though informal, it will be an application within the meaning of the law of limitation, and there can be no doubt in this case that the application had the object of enforcing and keeping in force the decree.

7. But the law of limitation also provides that the time shall run from the date of issuing a notice u/s 216 of the Code of Civil Procedure. A notice was issued in this case by the Court acting u/s 216 upon the application above referred to, and it appears to me too that the date of the notice will give a period from which the limitation will run. The issue of such a notice is incumbent on the Court where an application has been made under the circumstances stated in Section 216. The issue of the notice is the act of the Court apart from any requisition by the decree-holder to issue it, and I think it cannot be held that this act of the Court, when purporting to be done under the authority of Section 216, is illegal, and notice issued of no legal effect in consequence, merely because the application filed by the decree-holder, with reference to which the Court acted, may have been irregular in form, or defective in some of the particulars required by Section 212. The fact that the Court treated the application as one for enforcing the decree and issued the notice upon it u/s 216 of Act VIII of 1859 appears to me sufficient.

8. I find that the rulings of this Court have been conflicting on the points raised in this case. While two rulings * have been pointed out against the view now taken, a later one ♦ is in favour of it.

9. The order of the Lower Appellate Court is reversed and that of the Court of First Instance restored, and this appeal is decreed with costs.

*Misc. S.A. No. 60 of 1875. In this case, decree-holder applied on the 23rd November 1875, for the execution of his decree dated the 25th January 1872, relying on an application dated the 22nd January 1875, as one from which limitation ran. This application prayed that notice might issue, and stated that application would subsequently be made to the Court for its assistance in bringing the property of the Judgment-debtor to sale. A notice was issued, but the decree-holder took no further steps and the execution-case was struck off the tile. Stuart, C.J., and Spankie, J., held that as no application for execution was made within three years from the date of the decree, the decree-holder could not fall back upon the notice issued u/s 216 of Act VIII of 1859 as bringing his application of the 23rd November 1875, within time.

♦Decision when appeal is heard by two or more Judges.

[Section 575:--When the appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the

majority (if any) of such Judges.

If there be no such majority which concurs in a judgment varying or reversing the decree appealed against, such decree shall be affirmed;

Provided that if the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, the appeal may be referred to one or more of the other Judges of the same Court, and shall be decided according to the opinion of the majority (if any) of all the Judges who have heard the appeal, including those who first heard it.

When there is no such majority which concurs in a judgment varying or reversing the decree appealed against such decree shall be confirmed.

The High Court may from time to time make rules consistent with this Code to regulate references under this section.]

*Franks v. Nuneh Mal 1879 HCRN WP 79 : MSA No. 60 of 1876, dated the 14th December 1870.

❖ Misc. S.A. No. 35 of 1877, dated the 26th June 1877. In this case the decree-holder applied, on the 31st August 1870, in the form required by Section 212 of Act VIII of 1859, except that he did not state what was the assistance he desired from the Court. He stated in his application as follows: "Let a notice be issued, and then other applications will be made." A notice was accordingly issued, but as the decree-holder took no further steps in the matter notwithstanding that the Court called on him to do so within three days, the execution-case was struck off the file. Similar applications were made by the decree-holder in March 1872, and on the 22nd January 1875, under which notices were issued. The first of these was struck off the file because the decree-holder failed to comply with the Court's order to make any application he had to make within five days. The second was struck off on the decree-holder's application. He applied on the 1st September 1876 for the execution of the decree, by the arrest of the judgment-debtor, Stuart, C.J., and Pearson, J., held that the decree was capable of execution, observing that "all the applications appear to have been designed to keep in force the decree: the present application was within three years of the last application and a fortiori within three years of the notice issued thereunder."