(1880) 12 CAL CK 0009

Calcutta High Court

Case No: None

Ashootosh Dutt		APPELLANT
	Vs	
Doorga Churn Chatterjee		RESPONDENT

Date of Decision: Dec. 20, 1880

Acts Referred:

- Limitation Act, 1877 - Article 180

Citation: (1881) ILR (Cal) 504

Hon'ble Judges: White, J

Bench: Single Bench

Judgement

White, J.

The decree is more than twelve years old, and as such execution would be barred under Article 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."

2. 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 from 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 Sections 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.

3. The corresponding sections to those in the Code of 1877 are Sections 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."

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

5. The proviso in question is a transcript of one in the repealed Limitation Act of 1871, and in tracing back to its source, the language used in the proviso, we find the words first used in Section 19 of Act XIV of 1859,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."

6. 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 defendants. 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.

7. 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, Article 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 Farrell v. Gleeson (11 Clause and Fin. 702) and In the matter of Blake (2 Ir. Ch. Rep. 643), 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 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.

8. 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, not-withstanding 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.

9. 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 Section 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.

10. 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 subsequeut application, no matter what diligence may have been used, unless the judgment-debtor has, by 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 Section 230 only applies where the previous application for execution was actually made u/s 230, and not where, as here, the previous application was made under the Code of 1859. The language employed in Section 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."

11. The natural meaning of the foregoing language is, that the previous application must be one made u/s 230. Mr. Kennedy has cited the cases of Byraddi Subbareddi v. Dassappa Rau (I. L. R. 1 Mad. 403) and Ram Kishen v. Sedhu (I. L. R. 2 All. 275), in which these Courts considered that the restriction upon the subsequent application only applied where the previous application had been made u/s 230. The effect of this new provision in Section 230 is to cut down the right of a judgment-creditor to procure execution to issue upon an unsatisfied judgment.

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

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

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