

(1918) 01 CAL CK 0043**Calcutta High Court****Case No:** None

Ishan Chandra Samui

APPELLANT

Vs

Dulal Chandra De

RESPONDENT

Date of Decision: Jan. 22, 1918**Citation:** AIR 1919 Cal 50 : 44 Ind. Cas. 220**Hon'ble Judges:** Richardson, J; Beachcroft, J**Bench:** Division Bench**Judgement**

Richardson, J.

The question in this appeal is whether an application for execution is barred by limitation under the provisions of Article 182 of the First Schedule of the Indian Limitation Act. The application was made on the 25th March 1916. The previous application made on the 12th May 1914 was withdrawn by the decree-holders on the 22nd August 1914, the order then made by the Court being, "the execution case is dismissed for non-prosecution and that the objection case of the judgment-debtor is also dismissed for the present." Now with reference to the application of the 25th March 1916 the judgment debtor pleaded that the previous application of the 12th May 1914 was out of time. It is conceded for the decree-holder that amongst the objections taken to that application there was an objection on the ground of limitation. Regard being had to the way in which the case terminated, it cannot be said that that objection was adjudicated upon. That being so, no question of res judicata, constructive or otherwise, arises and it is open to the judgment-debtor to take the point in the present case. If the point is open, there can be little doubt that the application of the 12th May 1914 was out of time. The application previous to that resulted in proceedings which terminated on the 13th January 1911 and from that date it is more than three years to the 12th May 1914.

2. For the decree-holder it has been strenuously urged by the learned Pleader who appears for him that the application of the 12th May 1914 was within three years of another application which I have not yet mentioned, which was made on the 3rd

January 1914 within three years of termination of the previous case. In my opinion, however, the application made on the 3rd January 1914 is of no avail to the decree-holder, because it was not an application in accordance with law or a step-in aid of execution taken in accordance with law. The application was rejected on the ground that it did not specify correctly all the particulars which Rule 11 of Order XXI requires that an applicant for execution should specify. It appears that the amount which had been recovered in the course of some previous proceedings was not correctly stated. No doubt, it was open to the Court dealing with that application either to reject it or to return it for amendment. Apparently the Court was not moved for leave to amend and the course which the Court actually took was to reject the application, which it could only do if the application was not in accordance with law. The terms of Clause (2) of Rule 17 of Order XXI show that when an application is rejected, it is not an application in accordance with law. The point has been decided in the case of *Joyanuddin Khan v. Jamiruddin Sarkar* 37 Ind. Cas. 916 : 21 C.W.N. 835. The result is that the objection taken to the present application on the ground of limitation succeeds. The previous application was out of time and this application is also out of time.

3. The appeal must, therefore, be allowed and the application for execution must be dismissed. In the circumstances we make no order as to costs.

Beachcroft, J.

4. I agree.