
(1874) 09 CAL CK 0004

Calcutta High Court

Case No: Miscellaneous Special Appeal No. 77 of 1874

Eshan Chunder Bose

APPELLANT

Vs

Prannath Nag

RESPONDENT

Date of Decision: Sept. 7, 1874

Judgement

Markby, J.

I think the question must be answered in the affirmative. Act IX of 1871 (the new limitation Act) clearly recognises a right on the part of a decree-holder to make such an application. No. 167 of the 2nd schedule provides for this case as far as the Law of Limitation applies, and it says "that an application for the execution of a decree or order of any Civil Court not provided for by No. 169," which is intended for Courts established by Royal Charter, is to be made "within three years from the date of the decree or order; or (where there has been an appeal) the date of the final decree or order of the Appellate Court; or (where there has been a review of judgment) the date of the decision passed on the review; or"--this is the part which is material upon the present occasion--"(where the application next hereinafter mentioned has been made) the date of applying to the Court to enforce or keep in force the decree or order; or (where the notice next hereinafter made has been issued the date of issuing a notice under the Code of Civil Procedure, s. 216." These words clearly give to the person who has a decree the power, so far as regards the Law of Limitation, of applying for the execution of it within three years from the date, or within three years from the date of the application to the Court to enforce or keep it in force. There is no restriction as to the second or third or any subsequent application. So far then as regards this Act, the decree-holder is not restricted. All that appears necessary for him to do is to take care that the application is within three years from the date of applying to enforce the decree or keep it in force; and he is at liberty within three years from that date to apply again for execution. The Code of Civil Procedure, recognizes there being more than one application to execute a decree. S. 216, which provides for the issuing of notice, says at the end:--"Provided further that no such notice shall be necessary in consequence of the application being against an heir or representative if upon a previous application for execution against the same person, the Court shall have ordered execution to issue

against him." S. 15 of Act XXIII of 1861, which is substituted for--the provision in Act VIII, says that "the Court, on receiving any application for execution of a decree containing the particulars mentioned in s. 212 of Act VIII of 1859 or such of them as may be applicable to the case, shall enter a note of the Application, and the date on which it was made in the register of the suit. If it shall be shown to the Court that the particulars do not correspond with the original decree, the Court shall either, return the application for correction to the person making it, or shall with the consent of such person cause the necessary correction to be made. If the application be admitted the Court shall order execution of the decree according to the nature of the application." Now, it is true that, in s. 221 of Act VIII of 1859, it is said that, "when all the necessary preliminary measures have been taken, where any such are required, the Court, unless it see cause to the contrary, shall issue the proper warrants for the execution of the decree," but what is intended by "cause to the contrary" does not appear in any part of Act VIII; and it might be difficult to say what would be "cause to the contrary" within the meaning of s. 221. In *Davis v. Middleton* 8 W.R., 288; see p. 284, Sir Barnes Peacock, speaking of this section, says:--"Looking to the previous sections we do not think it was the intention of the Legislature to control by those words the option of the judgment-creditor. It would be very inconsistent if the Court under s. 15, Act XXIII of 1861, were bound to order the execution, and were not bound under s. 221, Act VIII of 1859, to issue the warrant." The learned Chief Justice appears to have been of opinion that the words of s. 15 of Act XXIII did not leave to the Court a discretion, provided all the previous requisites in the application had been complied with: and in the absence of any further indication in Act VIII of 1859 of what was the intention of the Legislature in using the words "unless it see cause to the contrary," it appears to me that the Courts have not a discretion of granting or refusing a second application for execution, I do not say that this is a desirable state of the law. Indeed, I am far from thinking that it is so. But we have to determine what are the provisions of the Code of Civil Procedure, and not what should be the law. And this leads me to remark that the case of *Byjnath Pundit v. Kunhya Lall Pundit* 9 W.R., 527, in which Phear, J., after deciding the question before him expressed his opinion that the Court should not grant the second application as a matter of course, and that the Court should satisfy itself that the failure of the previous execution proceedings is not attributable to the fault of the decree-holder, an opinion in which Sir Charles Hobhouse appears to have been careful not to express his concurrence, is in my judgment a statement rather of what the law ought to be than what it is. We cannot regard that opinion as an authority for the practice in cases of this kind; and it appears to me to be somewhat opposed to the opinion of the late Chief Justice which I have quoted.

2. I therefore think that we; must answer the question in the affirmative. At the same time I think this is not a satisfactory state of the law for the execution of decrees, because it may enable a decree-holder to keep the decree alive for very many years, when he ought not to be allowed to do so.

3. The decree of the Subordinate Judge will be reversed, and the decree of the Munsif will stand.

Jackson, J.

I have felt myself bound to assent to the conclusion just announced by the Chief Justice; but, inasmuch as with the concurrence of McDonell, J., I referred this question for consideration of a Full Bench, and inasmuch also as I was a party to the decision of the Full Bench in *Ram Sahai Sing v. Sheo, Sahi Sing B.L.R., Sup. Vol., 492*, and to several other decisions, about that time and subsequently, in which the question of bona fides was very much discussed, I think I ought to say a few words upon this question. I "am bound to say that I do not feel very much pressed by the difference in language between the present Law of Limitation and Act XIV of 1859, because it seems to me that the doctrine by which the terms of s. 20 of Act XIV of 1859 were explained--the words in that Act being "some proceeding taken to enforce a judgment, decree or order"--might equally well apply to the terms of No. 167 of the new Limitation Act; because if the Court were actuated by the same opinion as was expressed at the time of the case of *Ram Sahai Sing v. Sheo, Sahi Sing B.L.R., Sup. Vol., 492*; the words "applying to the Court to enforce or keep in force the decree or order" might well have been interpreted to mean applying to the Court bona fide for the purpose of enforcing the decree or order, or keeping the same in force, and not a mere colorable application for the purpose of keeping the decree alive. But inasmuch as this Act has been passed several years after that decision and the following decisions, and as the Legislature must be supposed to have been aware of those decisions, and has, I suppose, designedly omitted to incorporate in the Act the principles of those decisions, I think we ought now to abstain from qualifying the precise terms of the Act by any such doctrine as that introduced in the decision of *Ram Sahai Sing v. Sheo Sahi Sing B.L.R., Sup. Vol., 492*. In deference therefore to the opinion of the Chief Justice and my other learned colleagues, I assent to the interpretation now put upon the Act. I said in the course of the remarks which I made in referring this case that I could not recall to mind any section or provision of the CPC in which express provision is made for a second application for executing a decree. I ought no doubt to have referred to the terms of s. 216, although that rather alludes to the making of a second application, because it is impossible to shut one's eyes to the fact that the CPC and the Limitation Act do expressly recognise, though they omit to regulate the right of a decree-holder to make second and further applications for execution. I still think, and I think more strongly than ever, that the disastrous consequences, to which I referred in my remarks, of removing absolutely all checks to applications for executing decrees are likely to follow; but at the same time I also think it is better that those consequences should be exposed by actual example and brought to notice in judgments of the Courts; and the remedy left to the Legislature which can properly and effectually deal with them, than that the Courts should by a forced construction endeavour to mitigate by their own authority the action and rigour of the law. I therefore concur in the judgment of the learned Chief Justice, and I hope that these cases and the probable

consequences may attract the notice of the Legislature, and may lead to some proper and effectual remedy being applied.