(1866) 08 CAL CK 0011

Calcutta High Court

Case No: Summary Special Appeal Nos. 778 of 1865 and 347 of 1866

Gurudas Akhuli		APPELLANT
	Vs	
Gobin Naik and Others Sheo Sahi Sing Vs Ram Sahai Sing		RESPONDENT

Date of Decision: Aug. 15, 1866

Judgement

Sir Barnes Peacock, Kt., C.J.

The answer to the questions stated for the opinion of a Full Bench depends upon the proper construction of the words "unless some proceeding shall have been taken to enforce such judgment, decree or order" in s. 20, Act XIV of 1859. It was contended, in the course of the argument, that the words "unless some proceeding shall have been taken" mean unless some warrant for execution shall have been issued. It is clear, however, that that is not the meaning of the words. S. 20 begins "no process of execution shall issue," whereas s. 19 commences with the words "no proceeding shall be taken," which shows that the Legislature did not consider the words "process of execution" and "proceeding to enforce such judgment" to be synonymous. The words used in s. 20, after the word "unless," are nearly the same as those used in the commencement of s. 19. The two sections are passed upon a different principle. S. 19 enacts, that "no proceeding shall be taken to enforce any judgment, &c., but within twelve years next after a present right to enforce the same has accrued, &c., unless, &c." But according to the literal wording of s. 20 no process of execution could ever issue to enforce a judgment, even within a "week from the date of it, unless some proceeding was taken to enforce it, or keep it in force within three years next before the application for execution. The meaning of the section was doubtless to prevent process of execution being issued on a judgment, decree or order of a Court not established by Royal Charter after the expiration of three years from the date of it, unless some proceeding to enforce it, or keep it in force, should have been taken within three years next before the application for execution. We think that the words "some proceeding" in s. 20 include applications for

execution bona fide made under s. 207 of the Code of Civil Procedure, and all acts done either by the Court, or by an officer of the Court, or by the bona fide applicant, for enforcing the decree or keeping it in force. For instance, if a decree or order of Court were more than one year old, an application made to the Court for execution would be a proceeding to enforce the decree, although it would be necessary to issue a notice to the judgment-debtor, or his representatives, to show cause why execution should not issue against him; so also the service of such notice, if made bona fide; so also the issue of a process of execution; or the execution of such process these would all be proceedings; but no proceeding would, be effectual within the meaning of s. 20 unless it were bond fide. If the party were to make an application to the Court for execution, and should neglect to lodge the necessary talabana, his neglect would be evidence from which the Court upon a subsequent application for execution, would have to decide whether the former application was bona fide or merely colorable for the purpose of keeping the decree alive. In all these cases the Court to which the application for execution is made must decide whether the former application, which is relied upon, was bona fide or not. We cannot lay it down as a rule of law that an application made without lodging talabana would not be a bona fide application, for it might be that immediately after the making of the application the defendant might die, and it might be necessary instead of lodging the talabana to make a fresh application for execution against his heir-at-law.

2. The Judges who referred the question in No. 778 appear to be right in considering that, in cases falling within s. 216 of the Code of Civil Procedure, the judgment-creditor should apply for the execution of the decree, and not for the issue of a notice, and that it is the duty of the Court to issue the notice. But in such case the application for execution, upon which a notice is issued, is just as much a proceeding to enforce the decree, as an application for execution of a decree not a year old in which a warrant is issued. The application in either case is a proceeding.

3. It also appears to us that issue of the notice by the Court is a proceeding, and that the service of the notice by the officer of the Court is a proceeding. The latter is as much a proceeding as a levying of part of the amount under an attachment in a case in which there are not sufficient assets of the debtor to satisfy the decree in full. If a question arises on any subsequent application from what period the three years will date, it will date from the last of the proceedings, either a bond, fide application, or the last act done by the party, by the Court or by the officer of the Court in furtherance of the application. That disposes of the appeal No. 778 of 1865.

4. As to appeal No. 347 of 1866, we think that the mere pendency of proceedings struck off the file for want of prosecution is not the taking of a proceeding. There must be some application made, or some act done, to enforce the decree, or to keep it in force, to constitute a proceeding. The striking an execution-case off the file is clearly not a proceeding for the purpose of enforcing the decree. In such a case,

therefore, the time would date from the period when the application was first made, or when the last bona fide act was done in furtherance of the application. From that time the period of three years mentioned in Act XIV of 1859 would count.

5. We think that, in No. 778, the appeal should be dismissed without costs; and in No. 347 the appeal should be dismissed with costs.

Trevor, Loch and Macpherson, JJ.

Jackson, J.

6. It is not necessary that I should attempt to add anything either to the judgment or the reasons which have been stated by the Chief Justice. But as I was one of the Judges who referred the case No. 778 of 1865, and as I then inclined to the opinion that the service of a notice might not be a sufficient proceeding to keep the decree in force, I think it right to state that I entirely concur in the judgment which has now been delivered. The principle which the Court has adopted in the present case both obviates the doubts and difficulties which I felt on that occasion, and also lays down a safe and intelligible rule for the guidance of the Courts below.

7. I observed that the issue of notice under s. 216 was not so much the act of the decree-holder as that of the Court. That perhaps is quite true. But it is nevertheless the case that the issue of notice, although not the direct act of the party, springs from his application; it is a legitimate consequence of his application. And the issue of a notice under the section cited, and the obtaining of an order to execute the decree thereon, would afford an extremely good criterion of the bona fides of his application. For these reasons I entirely concur in the judgment.

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[1] See the new Limitation Act (IX of 1871), Second Schedule, Third Division, No. 167, which omits the word "proceeding," and allows execution within three years from "the date of applying to the Court to enforce, or order, or keep in force, the decree or order" or from "the date of issuing a notice under the Code of Civil Procedure, s. 216," &c.

See also Buldeo Narayan v. Scrymgeour, 6 B.L.R., 611; and Roy Dhunput Singh Roy Bahadoor vs. Mudhomotee Dabia .

[2] Act XIV of 1859, s. 20.-- "No process of execution shall issue from any Court, not established by Royal Charter, to enforce any judgment, decree or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree or order, to keep the same in force within three years next preceding the application for such execution."