

1872.
July 9.

[APPELLATE CIVIL JURISDICTION.]

Miscellaneous Special Appeal No. 9 of 1872.

DA'MODHAR LAKHMIDA'S.....*Appellant.*

GULABDA'S LA'LBHA'I*Respondent.*

Limitation—Act XIV. of 1859, Sec. 20—Execution of decree—Warrant.

On the 26th June 1867, a decree-holder applied for execution of his decree. A notice was thereupon issued to the judgment debtor to show cause on the 13th July 1867 why the decree should not be executed against him. The judgment debtor not appearing to show cause on the 13th July 1867, the Subordinate Judge of Surat ordered a warrant to be issued. Subsequently on the same day (13th July 1867), the decree-holder applied to the Court to stop all further proceedings in the case, on the ground that the judgment debtor had promised to satisfy the decree. The decree, however, remaining unsatisfied, the judgment creditor, on the 12th July 1870, presented a second application for execution. The Subordinate Judge rejected it as barred under Sec. 20 of Act XIV. of 1859, as it was beyond three years from the 26th June 1867, the date of the previous application. In Appeal, the District Judge confirmed the order.

On special appeal, the High Court reversed the orders of both the lower courts and held the proceedings to have commenced on the 26th June 1867 and continued till the 13th July 1867 on which day the judgment debtor was to show cause, and up to which day, therefore, the judgment creditor must be considered as going on with one and the same proceeding, as the first court actually made an order for a warrant to issue on that day.

THIS was a Miscellaneous Special Appeal from the order of W. H. Newnham, Acting District Judge of Súrat, in Miscellaneous Appeal No. 285 of 1871, confirming the order of the Subordinate Judge of Súrat.

Dámódhar obtained a decree against Gulabdá's, in the Court of the Principal Sudr Amin of Súrat, on the 25th September 1861. After several ineffectual attempts at execution, he made an application to execute his decree on the 26th June 1867. A notice was issued on the same day, calling upon the judgment debtor to appear on the 13th July 1867 to show cause why the decree should not be executed against him. The notice was duly served on Gulabdá's. The Court took up the case on the 13th July 1867. The name of

Gulabdás was called out, but as he did not appear to show cause, the Court passed an order for the issue of a warrant. During the course of the day, however, the decree-holder represented to the Court that as the judgment debtor promised to satisfy the decree in a short time, no further proceedings might be taken in the matter for the present. The execution case, accordingly, was struck off the file on the 13th July 1867. On the 12th July 1870, another application for execution was made by the decree-holder. Gulabdás contended that it was barred by limitation. The First Class Subordinate Judge of Súrat considered the previous proceedings in execution pending only till the 26th June 1867, the day on which the former application was presented, and held the application of the 12th July 1870 barred by Section 20, Act XIV. of 1859, as it was beyond three years from the date of the previous application. In appeal, the District Judge of Súrat confirmed the order of the first Court.

The appeal was argued before Sargent, Acting C.J., and Melvill, J., on the 9th July 1872.

Nagindás Tulsidás for the appellant :—As the case was called on for hearing on the 13th July 1867 and an order for the issue of a warrant was made on that day, the proceedings must be regarded as pending up to that date. Any act *bonâ fide* performed by the execution creditor or by the Court or its officer for the furtherance of the execution of the decree is a proceeding within the meaning of Sec. 20 of Act XIV. of 1859. In the present case, a warrant for execution was actually ordered to be issued. It could not be maintained that that order was not for the furtherance of the execution of the decree. The mere fact of the case being subsequently struck off the file, does not show any want of *bonâ fides*, on the part of the decree-holder. He cited *Ram Sahaye Singh v. Degun Singh (a)*.

Dhirajlál Mathurádás contra. :—On the 13th July 1867, the judgment debtor was not present in Court. The decree-holder, of his own accord, asked the Court on that day to

(a) 6 Calc. W. Rep. Mis. R. 98.

1872.

DA'MODHAR
LAKHMIDA'S
v.
GULABDA'S
LA'LBHA'I.

1872. drop all proceedings. It could not, therefore, be maintained that he was acting *bond fide* to have his decree satisfied. Hence, according to the several rulings of this Court and of the Calcutta High Court, the application of the 12th July 1870 must not be considered as made in time. [Melvill, J., referred to the ruling of the Privy Council in *Roy Dhunput Singh v. Madhomotee Debia (b).*]

DA'NODHAR
LAKHMIDA'S
v.
GULABDA'S
LA'LBHAI.

PER CURIAM :—The Acting Judge was wrong in holding that the last proceeding in execution was on the 26th June 1867. That was the date of the commencement of the proceedings which continued up to the 13th July 1867, the day on which the defendant was to show cause, and the plaintiff must be considered as going on with one and the same proceeding up to that day. Moreover, it appears from the record of proceedings in execution that the Court actually made an order for a warrant to issue on that day, although it was subsequently vacated by the desire of the plaintiff. The order, therefore, must be reversed with costs on special respondent throughout.

Order reversed with costs.

(b) 8 Madras Jurist, 308.