

application to Bombay, and, further, that the grant in that case was the grant of a private person.

The only further question which has been argued is whether Fatima ratified the execution of the mortgage by her brother Moinooddin after she became of age, and if so, what is the effect of that ratification. Upon this subject their Lordships think it enough to say that they see no reason for differing from the conclusion which the High Court have come to, upon what is in a great measure a question of fact, viz., that she did not ratify that execution with knowledge of her rights, and that, therefore, she cannot be bound thereby.

For these reasons their Lordships will humbly advise Her Majesty that the judgment of the High Court should be affirmed and this appeal dismissed with costs, such costs to include the costs of both respondents.

*Appeal dismissed.*

Agents for the appellants.—Messrs. *Ashurst, Morris and Crisp.*

Agents for the respondents.—Messrs. *West, King, Adams and Collier.*

### APPELLATE CIVIL.

( 45 )

*Before Mr. Justice West and Mr. Justice Pinhey.*

SAKHARAM DIKSHIT (ORIGINAL DEFENDANT) APPELLANT, v. GANESH SATHE (ORIGINAL PLAINTIFF), RESPONDENT.\*

*Limitation Act (IX of 1871), Act. 121, Sch. II—Decree against Sirdar—Execution against a Sirdar's heir who is not himself a Sirdar—Decree directing gradual payment—Limitation in case of decrees payable by instalments.*

The plaintiff's father obtained a decree in the Court of the Agent for Sirdars in 1848 against the defendant's grandfather, a third class Sirdar. The decree gave an option to the Sirdar to pay up the debt at once, or year by year, out of the revenues of a village. The Sirdar chose the latter alternative, and execution proceeded accordingly on that footing till his death in 1862. His son survived him and died in 1867, when the defendant, who was not himself a Sirdar, succeeded.

The Subordinate Judge of Khed—to whom, on the cessation of the Sirdarship in the defendant's family, the Agent referred the decree for further execution—proceeded with the execution up to the year 1876, when these proceedings were pronounced to be irregular. The plaintiff thereupon in the year 1877 filed the present suit based on the decree of 1848 ;

Second Appeal. No. 373 of 1876,

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*Held* that the period of limitation applicable was that of twelve years from the date of the decree (Act IX of 1871, sch. II, art. 121), but that the decree should be viewed as analagous to an instalment decree and made as against the defendant in 1857—down to which time the proceeds were regularly realized,—because it then on his father's death became first operative against him.

In the case of a decree payable by instalments, as the command of the Judge prescribes a term for the performance of the several parts of his order, it is to be construed as becoming a judgment for purposes of limitation as to each instalment only on the day when payment is to be made.

THIS was a second appeal from the decision of S. H. Phillpotts, Judge of the District of Poona, confirming the decree of the Subordinate Judge of Khed.

In the year 1848 an ancestor of the plaintiff obtained a decree in the Court of the Agent for Sirdars at Poona against the defendant's grandfather, a Sirdar of the third class. The decree directed that the amount awarded might either be paid up at once or realized year by year by an appropriation of the Sirdar's one-eighth share of the village of Wada. The execution proceeded on the footing of the alternative favourable to the judgment-debtor, who paid his share regularly to the plaintiff till his death in 1862. The Sirdar was succeeded by his son, who also paid in his eighth share to the plaintiff till his death in 1867.

The defendant, the grandson of the judgment-debtor, was not invested by the Government with the dignity of a Sirdar, and the Agent, consequently, had no jurisdiction over him. The execution, however, proceeded on the same footing as before through the Subordinate Court of Khed, till 1876, when, in accordance with a decision of the High Court, (1) the District Judge of Poona pronounced that all the proceedings taken since the year 1867 were irregular, and suggested to the plaintiff the filing of a new suit against the defendant.

In the year 1877, therefore, the plaintiff brought the present suit in the Subordinate Judge's Court at Khed. The defendant pleaded, *inter alia*, that the suit was barred by limitation, more than twelve years having elapsed since the passing of the original decree.

The Subordinate Court of Khed, as well as the District Court of Poona, gave a decree for the plaintiff.

(1) See *Khasanda v. Sakharan*, 12 Bom. H. C. Rep. 212.

*Shamrav Vitthal* for the appellant.—The suit is barred by the law of limitation. Act IX of 1871, sch. 2, art. 121, gives a limitation of twelve years from the date of judgment, which was in this case in 1848. The plaint expressly mentions that the claim is founded on this judgment, and both the lower Courts concur in treating the suit as one based upon it. The plaintiffs reaped the benefit of the decree for some time, and if the law prevents the further execution of that decree the plaintiff does not thereby acquire a fresh ground of action for the sum still due. Art. 121 contemplates a judgment not capable in itself of execution. Here it was otherwise, and was, in fact, executed in part. Reading art. 121 with 132, and viewing the judgment debt as a charge upon immoveable property, we come to the same limitation of twelve years, commencing from the time the debt became due; in other words, the cause of action arose in 1848, and the present suit is barred.

*Shantaram Narayan* for the respondent.—The execution of the original decree went on till 1867. It was only then the present suit became necessary. The first decree directed yearly appropriation of the revenues of Wádá. It was, therefore, impossible for the plaintiff to have expedited the liquidation of his debt by any amount of diligence on his part. It was, in reality, a decree directing payment by instalments where the time does not being to run till the day each instalment becomes due.

The judgment of the Court was delivered by

WEST, J.—The decree obtained in the Court of the Agent for Sirdars in 1848 by the plaintiff's father against the defendant's grandfather constituted a jural relation between them, which subsisted after of their decease between their representatives. Thus in 1867, when the Sirdar, father of the defendant, died, his son was still bound by the judgment, though, as he was not himself a Sirdar, the special jurisdiction of the Agent's Court did not extend to him. The Agent sent his decree for further and complete execution to the Court of the Subordinate Judge at Khed, by which execution was carried on for some years, down, in fact, to 1876, when the District Judge, acting on a decision of this Court,(1) pronounced the proceedings irregular, and directed a

(1) See *Khusaldas v. Sakharam*, 12 Bom. II. C. Rep. 212.

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refund of the sums realized. The judgment-creditor was at the same time toled, if he wished to obtain any further advantage by his judgment, that he must file a suit on it within three months.

This he has done, and it is not objected that, as for more than twelve years had elapsed since the date of the decree in 1848, the suit should have been rejected as barred by limitation. The clause of Act IX of 1871, which is applicable, is, in our opinion, art. 121 of sch. II of that Act, and this prescribes to a suit on a judgment a limitation of twelve years from the date of the judgment sued on. In ordinary cases this would, no doubt, be sufficient to bar the plaintiff in the present case, and the mere circumstance that he had been doing all that the existing law required towards keeping alive his decree, would not, according to the ruling in *Jibai Mahipatai v. Parbhu Bapu*, (1) prevent the newly-made law from operating, unless there was an express provision to that effect. But here the case is one in which the decree could not, by any diligence on the part of the judgment-creditor, have been advanced more towards execution than it was advanced down to the years 1876. As an indulgence towards the Sirdar, an option was allowed him of paying up the amount of the decree, or of having it realized years by year by means of the appropriation of his share of the revenue of a village. He chose the latter by declining the former alternative, and the proceeds seems to have been regularly realized down to 1876, though, as the Khed Court had not jurisdiction, it will be safer, comparing *Mahurajgir v. Anadrav* (2) with the more recent cases, (3) to say that they were regularly realized down to 1867. The judgment-creditor had to wait for such execution as the Court had directed. He could not hasten execution by a day.

In the case of a decree payable by instalments it has been repeatedly held that as the command of the Judge prescribes a term for the performance of the several parts of his order, it is to be construed as becoming a judgment for purposes of limitation, as to each instalment, only on the day when the payment is to be made.

(1) I. L. R. 1 Bom. 59.

(2) 8 Bom. H. C. Rep. 25, A. C. J.

(3) See *Khusaldas v. Sakharam*, 12 Bom. H. C. Rep. 212, and *Ganesh Daji v. Sakharam*, Printed Judgments for 1877, P. 227.

The lapse of the time prescribed has been regarded as a kind of condition precedent, on the satisfaction only of which the judgment hitherto postponed in execution became effectual. This principle seems to be recognized in section 230 of the new Code of Civil Procedure, and it seems to apply equally to the case before us as to a decree with a precise time fixed for each instalment, as little depends on the diligence of the judgment-creditor in the one case as in the other. The judgment in this case, therefore, must be held as one made, because then first operative, in 1867, as to all future proceeds of the village.

The original judgment-creditor seems for some years to have credited all sums received to the principal of the debt, although the decree directed that the moneys realized should first be applied to covering the interest. On this has been based an argument that the judgment-creditor thus abandoned his claim to the interest. There is nothing to show that he received any consideration for such an abandonment of a right, expressly given to him by his decree ; and though, in a doubtful case, these entries might be of value as evidence of some new bargain, they cannot by themselves prove it, or justify our superseding the positive decree by mere conjecture. Probably, the entries were made in mere ignorance of their arithmetical effect; but, even if the judgment-creditor had some benevolent intention, he was not bound to adhere to it, in the absence of anything which had converted it into a compact, express or implied, with the other party.

We must, therefore, confirm the decree of the District Court, with costs.

*Decree confirmed.*

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