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Before Mr. Justice M. Melvill and Mr. Justice Kemball.

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KALYANBHAI DIPCHAND (*Appellant*) *v.* GHANASHAM LAL JADUNATHJI (*Respondent.*)* [13th September, 1880.]

Decree—Execution—Injunction restraininy execution—Practice—Revival of proceedings by representative of decree-holder—Substitution of name of representative on the record—Limitation Act, XV of 1877, sch. II, arts. 178-79—Act IX of 1871, art. 167.

J. obtained a decree against the firm of M.R. in 1863, and on the 16th September 1869, applied for execution by attachment and sale of certain immoveable property. The property was attached, but the sale was delayed by various causes until the 5th February 1876, when it was ordered to take place on the 18th March 1877. Meanwhile P. brought a suit against J., and on the 14th March 1876, he obtained an injunction restraining J. from proceeding *pendente lite* to the sale of the attached property. J. appealed against the order granting the injunction, which, however, was confirmed on the 26th June 1878. Meanwhile, on the 22nd January 1877, J. had died, and thereupon the proceedings in the matter of the injunction as well as in P's suit were carried on by G. as his representative. On the 19th January 1880, P's suit was dismissed and with it the injunction of the [30] 14th March 1876, fell to the ground. On the 5th February 1880, G applied to have his name substituted for that of J, in the application for execution of the 16th September, 1869, and to proceed with the case, and on the 19th February 1880, this application was granted, and an order made that execution should be procee led with on J's application of September, 1869. K., as representing the firm of M. R., appealed.

Held that G. was entitled to execution.

Where an application for execution has been made and granted but the right to execute has been subsequently suspended by an injunction or other obstacle, the decree-holder may apply for a revival of the proceedings within three years from the date on which the right to apply accrues, *i.e.*, the date on which the injunction or other obstacle is removed: Art. 178 of sch. II of Act XV of 1877.

Where a decree-holder, whose right of execution has been thus temporarily suspended, dies, his representative has the same rights as he had himself to apply for and obtain a revival of the proceedings.

Where an injunction obtained against the execution of a decree has been dissolved, the time during which it was in force cannot be deducted under s. 15 of Act XV of 1877 in computing the period of limitation, within which an application for execution may be made. Section 15 only relates to injunctions which stay the institution of suits, and the word "suit" does not include an application (s. 3).

It was contended in the above case that G. had no right to apply for a revival of proceedings unless his name were substituted on the record as J's representative that as his right to apply for such substitution accrued immediately upon J's death which had happened more than three years previously, so much of his application of 3rd February 1880, as related to the substitution of names was barred by art. 178 of sch. 2 of Act XV of 1877; and that, consequently, the other portion of his application which related to execution was necessarily inadmissible, inasmuch as it depended upon the substitution of G.'s name, which it was too late to effect.

Held, that under the circumstances of the case, G.'s right to apply for the entry of his name in the place of that of J, could not be regarded as having accrued immediately upon J.'s death. At that time J.'s application for execution, being suspended by the injunction, was to all intents and purposes non-existent. It could not be revived until the injunction was removed. During the continuance of the injunction an application by G. for the entry of his name could not have been entertained by the Court, inasmuch as

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J.'s application for execution was in abeyance, and would never be revived at all in the event of P. succeeding in his suit; and even if P. failed, it might also happen that J.'s application would not be revived in favour of G., for although he might be J.'s representative at the date of his application, he might be dead before the decision of P.'s suit.

[R., 5 A. 243=A.W.N. (1883) 8; 5 A. 459 (461); 5 A. 596 (598); 17 A. 425=A. W. N. (1895) 82; 18 A. 482 (496); 23 A. 13 (17) 10 B. 108 (111); 16 B. 294 (301); 20 B. 175 (178); 14 C. 385; 23 C. 397; 23 C. 437; 26 M. 780=13 M. L. J. 412; 28 M. 50=14 M.L.J. 401 (F. B.); 30 M. 209=17 M.L.J. 194; 7 Ind. Cas. 886 (888); D., 7 B. 293 (295).]

THIS was an appeal from the order of R. B. Mangeshrao Balvant, Subordinate Judge, first class, of Surat.

[31] The facts of the case and the arguments on either side are fully set forth in the judgment.

Farran, with him *Pandurang Balibhadra*, for the appellant, the original opponent.

Nanabhai Haridas, Government Pleader, for the original applicant.

JUDGMENT.

The judgment of the Court was delivered by

M. MELVILL, J.—On the 2nd September, 1863, Jadunathji, father of the respondent Ghanashamlalji, obtained a decree for money against the firm of Manekchand Rupchand. On the 16th September, 1869, he applied for execution of the decree by attachment and sale of certain immoveable property. It is not disputed that this application was made within the period allowed by law. The property was attached, but the sale was delayed by various causes, which it is not material to consider, until the 5th February 1876, when the sale was ordered to take place on the 18th March following. Meanwhile, Premchand Roychand brought a suit against Jadunathji, the object of which was to restrain Jadunathji from the committal of the breach of a contract, whereby it was alleged that Jadunathji had covenanted with Premchand not to proceed in execution against the particular property which had been attached; and on the 14th March, 1876, Premchand obtained an injunction restraining Jadunathji from proceeding *pendente lite* to the sale of the attached property. The order granting the injunction was appealed against to the High Court, which, on the 26th June, 1878, confirmed the order. Meanwhile, on the 22nd January, 1877, Jadunathji had died; and thereupon the proceedings in the matter of the injunction, as well as in Premchand's suit, were carried on by the respondent as Jadunathji's representative. On the 19th January, 1880, Premchand's suit was dismissed; and with it, the injunction of the 14th March, 1876, fell to the ground. Immediately afterwards, namely, on the 3rd February, 1880, the respondent applied to the Subordinate Judge to substitute his name for that of his father in the application of 1869, and to proceed with the case. The Subordinate Judge refused at first to make any order on this application, because he was not satisfied that the applicant was [32] Jadunathji's legal representative; but on a similar application being made on the 19th February, the Subordinate Judge declared himself satisfied on this point, and, accordingly, ordered hat the respondent's name should be substituted for that of Jadunathji, and that execution should be proceeded with upon Jadunathji's application of 1869. Kalyanbhai, as representing the firm of Manekchand Rupchand, made an effort to induce the Subordinate Judge to revoke this order; but having failed in this effort, he has now appealed to this Court.

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The only question which either party has asked us to decide is, whether the applications made by the respondent on the 3rd and 19th February, 1880, were or were not barred by the law of limitation. The fact of an application having been made on the 3rd February is really immaterial, and we may confine ourselves to the consideration of the application of the 19th February, on which the Subordinate Judge's order for further execution was passed.

The appeal has been argued at great length; but the grounds on which the appeal has been supported and resisted may be very briefly stated.

For the appellant, it was contended that the only course open to Jadunathji's representative was to make an application for execution in the manner prescribed in s. 232 of Act X of 1877; that his application of the 19th February, 1880, was not such an application as is contemplated in that section; and that even if it were so, it was barred by art. 179, sch. II of Act XV of 1877, inasmuch as it was not made within three years from the date of Jadunathji's application in 1869, which, it is said, was the only application answering to the description contained in the said art. 179. It was further argued that, even if art. 179 does not apply, yet art. 178 certainly applies; and that under that article no application could be made by Jadunathji's representative, after three years had elapsed from the date of Jadunathji's death.

For the respondent, it was argued that neither of the arts. 178 or 179 apply to the matter; that the application of the 19th February, 1880, was not a fresh application for execution, but [33] merely an application for a substitution of names, and for the revival of Jadunathji's original application of the 16th September, 1869; that, accordingly (having regard to the third paragraph of s. 3, Act X of 1877), the rules of procedure to be applied are those contained in Act VIII of 1859; that by s. 102 of that Act (which was extended to miscellaneous cases and proceedings by s. 38 of Act XXIII of 1861) nothing more was required than that an application for the substitution of names should be made within what the Court may consider a reasonable time; that the Subordinate Judge was right in considering that the respondent's application was made within a reasonable time; and that, at any rate, whether he was right or wrong, there is no appeal against his decision. It was further stated that even if art. 179, sch. II, Act XV of 1877, were held applicable to the case, the respondent was in a position to show that certain applications had been made by him in Premchand's suit, and in another suit, within three years preceding the 19th February, 1880, and that these applications sufficiently fulfilled the requirements of the said art. 179.

We may at once say that we do not entertain any doubt that if s. 102 of Act VIII of 1859 be applicable to this case, the words "within what the Court may consider a reasonable time" must be held to have been superseded from the 1st October, 1877, by the provisions of Act XV of 1877; and that it is by the rules of limitation contained in the last-mentioned Act that our decision must be governed. We are also satisfied that we are competent to entertain an appeal against the Subordinate Judge's order of the 19th February, 1880; the effect of that order being to authorise proceedings in execution in compliance with an application which (if the applicant's contention be well grounded) could not legally be entertained.

From the statement which we have made of the previous proceedings in this matter, it is clear that there has been nothing like *laches* on the part of either Jadunathji or the respondent. Jadunathji during

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his lifetime, and the respondent after Jadunathji's death, did everything that was possible to obtain the discharge of the injunction obtained by Premchand Roychand. So [34] long as that injunction remained in force, it was impossible for the respondent to proceed further with the execution. As soon as the injunction was dissolved, the respondent made his application for further execution. If that application be barred by the statute, the statute stands urgently in need of amendment.

The Subordinate Judge, in computing the period of limitation, has considered himself authorised by s. 15 of Act XV of 1877 to deduct the time of the continuance of Premchand's injunction. However reasonable it might be that the Legislature should sanction such a deduction, the section referred to cannot be held to justify it. The section only relates to those injunctions which stay the institution of suits; and the word "suit" does not include an application (s. 3.) We must, therefore, find some other means, if possible, to give effect to what we may suppose to have been the intention of the Legislature.

It is manifest that, if art. 179 were held to govern applications such as that which we are now considering, the most monstrous injustice would ensue. If an injunction like that obtained by Premchand were to remain in force for three years (and under our system of successive appeals it would frequently do so), the result would be that further execution would become impossible. For art 179, like the corresponding provision in Act IX of 1871, requires that an application for the execution of a decree should be made within three years from the date, not of the last proceeding (as under s. 20 of Act XIV of 1859), but of the last application: and, therefore, if, after the removal of the injunction, the decree-holder were to apply for execution, he would be met by the object that more than three years had elapsed between the dates of his former and his subsequent applications.

Both the Calcutta and the Allahabad Courts have evaded this difficulty by holding, in analogous cases, that an application made by a decree-holder, after the removal of an obstacle which has for a time rendered execution impossible, is not an application to execute the decree within the meaning of Act IX of 1871, sch. II, art. 167 (which corresponds with Act XV of 1877, sch. II, art. 179), but merely an application for the continuation [35] of the former proceedings: *Booboo Pyaroo* v. *Syud Nazir Husein* (1), *Issurree Dassee* v. *Abdul Khalak* (2), *Hurronath Bhunjo* v. *Chunnilall Ghose* (3), *Paras Ram* v. *Gardner* (4). We think that we should accept and follow those decisions, as we do not see any more satisfactory mode of preventing the words of the statute from conflicting with what must have been the intention of the Legislature.

The decisions which we have cited, have reference to the provisions of Act IX of 1871. It is not clear that under that Act there would be any period of limitation provided for an application to revive a previous application which had been temporarily suspended. In the case of *Booboo Pyaroo* v. *Syud Nazir Husein* (1), reported 23 W. R. 183, Markby, J., throws out a vague suggestion, that the decree-holder might lose his remedy, if he were dilatory or negligent in pursuing it. In the Allahabad case the Chief Justice decided that the decree-holder had three years from the date on which the obstruction to execution was finally

(1) 23 W.R.C.R. 183.
(2) 4 C. 415.
(3) 4 C. 877.
(4) 1 A. 355.

removed, but he did not state on what provision of Act IX of 1871 he relied. The decision of the Chief Justice, however, would be strictly in accordance with the provisions of the new Limitation Act. Article 178, sch. II, Act XV of 1877, prescribes a period of three years for all applications for which no period of limitation is provided elsewhere; and the time begins to run from the date at which the right to apply accrues. It is clear that the right to apply for the revival of proceedings, which have been suspended by an injunction or other like cause, accrues, as a rule, on the date on which the injunction or other obstruction is removed.

Under this view, it is certain that if the application of the 19th February, 1880, had been made by the original decree-holder Jadunathji, no question of limitation could have been raised. This was indeed admitted in the course of the argument for the appellant. But it was contended that the case is different when the application is made, not by the original decree-holder, but by his representative; and this is the only question which it remains for us to consider.

[36] It is difficult to see why any difference should be drawn in this respect between the original decree-holder and his representative. We have pointed out the injustice which would result from the application of art. 179 to such a case; and this consideration applies as strongly to the representative as to the original decree-holder. His only remedy when an obstruction has lasted for more than three years, is to apply, as the decree-holder would apply, not for fresh execution, but for a revival of the original application; and as this is his only remedy, we must necessarily hold that it is reserved to him. He is, equally with the original decree-holder, prevented from making such an application, so long as the injunction or other similar obstacle continues; and, therefore, his right to apply cannot accrue until the obstruction is removed.

But it was contended, in opposition to the view, that a necessary preliminary to the revival of Jadunathji's application in favour of the respondent was the substitution of the respondent's name for that of Jadunathji on the record; that it was necessary for the respondent to apply for such substitution, and that, in fact, his application of the 19th February, 1880, was in part a prayer for such substitution; and that, as his right to apply for such substitution accrued immediately upon Jadunathji's death, which happened more than three years previously, so much of his application as related to the substitution of names was barred by art. 178, sch. II, Act XV of 1877, and that, consequently, the other portion of his application, which related to execution, was necessarily inadmissible, inasmuch as it depended upon the substitution of the respondent's name, which it was too late to effect. We do not, however, feel bound to hold that, under the circumstances of this case, the respondent's right to apply for the entry of his name in the place of that of the decree-holder accrued immediately upon the death of the decree-holder. In the analogous cases dealt with by the Calcutta Court to which we have referred (*Booboo Pyaroo* v. *Syud Nazir Husein* (1) and *Issurree Dassee* v. *Abdul Khalak* (2)), no application for the substitution of his name could have been made by the representative, if **[37]** the decree-holder had died; for the execution proceedings had been struck off the file, and there would therefore have been nothing on which the application could operate. In the present case Jadunathji's application was still on the file; but it was held in complete suspense, so long as

(1) 23 W.R.C.R. 183.

(2) 4 C. 415.

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the injunction continued in force. For the time being, it was to all intents and purposes as if it did not exist. It could not be revived for any purpose whatever, until the injunction was removed. If, during the continuance of the injunction, the respondent had applied for the entry of his name, we conceive that the answer of the Court to his application would have been this; that Jadunathji's application was in abeyance; that it might happen that it would never be revived at all, inasmuch as Premchand might succeed in his suit; that if Premchand failed, it might still happen that it would not be revived in favour of the respondent, for, even if he were Jadunathji's representative at the date of his application, he might be dead before the decision of Premchand's suit; and that for these reasons the Court refused to entertain his application, or to make any inquiry into his claim to be Jadunathji's representative, inasmuch as such inquiry would certainly be premature, and would possibly turn out to be useless.

For the reasons which we have stated, we are of opinion that the respondent's application of the 19th February, 1880, is governed, not by art. 179, but by art. 178, sch. II, Act XV of 1877: and that, inasmuch as it was made within three years from the date of the removal of the injunction, on which date we consider that the right to make the application accrued, the application was not barred by the provisions of the said article.

We, accordingly, confirm the order of the Subordinate Judge with costs.

Decree confirmed.

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5 B. 38=5 Ind. Jur. 372.

[38] APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

SAMALBHAI NATHUBHAI (*Original Plaintiff*), *Appellant v.* SOMESHVAR, MANGAL, AND HARKISAN (*Respondents*).*
[2nd August, 1880.]

Partnership—Hindu Law—Joint Hindu family—Business carried on by one member as manager—Liability of all as joint owners—Ancestral trade and ordinary partnership, difference between—Indian Contract Act IX of 1872.

J., the father of the three defendants, established a trading firm in 1865 under the name of J. H. He and his three sons lived together as a joint Hindu family. J. died in 1872 and the business was continued under the same name by S. as the eldest brother and manager of the family. The youngest of the three brothers was a minor at the date of his father's death. The plaintiff sued the three brothers to recover money due on an account signed by S. in the name of the firm. The second defendant contended that he had never participated in the property of the business; that he had not resided at the family residence for six years; that he could not be considered a partner of the firm and, therefore, was not liable to the plaintiff:

Held that he could not repudiate a liability arising out of the ordinary transactions of the firm. During his father's life he was joint owner, and after his father's death he acquiesced in the continuance of the firm under the same name and ostensibly, therefore, with the same constitution. He had done no act to divest himself of his share. He had given no notice of repudiation, and made no partition, and there was nothing to prevent him from demanding his share of

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* Second Appeal No. 20 of 1880.