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of the Privy Council in *Fattehcand's* case cannot apparently now be held to govern such a case as the present. I adhere, therefore, to the decision already given at the hearing as regards the admissibility of the bargain-paper on which the present suit is brought.

Attorneys for the plaintiff.—Messrs. *Macfarlane and Edgelow.*

Attorney for the first defendant.—Mr. *Pestonji Kavasji.*

Attorneys for the second defendant.—Messrs. *Smith and Frere.*

APPELLATE CIVIL.

1882 *September* 2. 1883 *May* 3.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Kemball.

ISHWARDAS JAGJIVANDAS, FOR HIMSELF AND AS GUARDIAN OF HIS NEPHEW MANRUKHLAL GULABDAS AND ANOTHER, APPLICANTS, *v.* DOSIBAI, WIDOW OF JEHANGIRSHA ARDSHIR, FOR HERSELF AND AS LEGAL REPRESENTATIVE OF HER DECEASED MOTHER-IN-LAW, BAI AVABAI, WIDOW OF ARDESHIR DHANJISHA, OPPONENT.*

Award—Act VIII of 1859, *Sec.* 327—*Judgment and decree—Execution—Act X of* 1877, *Sec.* 526—*Limitation—Act XV of* 1877, *Sched. II, Art.* 178—*Estoppel.*

At the request of the applicants, the lower Court filed an award on the 20th December, 1866, but no judgment was passed in terms of it. Several applications for execution of the award were subsequently made and granted. The last application was made in 1880, and was rejected on the ground that there was no decree to execute. The order was confirmed by the High Court on appeal. The applicants then applied to the lower Court to pass judgment in terms of the award. The Court rejected the application as barred under the Limitation Act XV of 1877, sched. II, art. 178. The applicants appealed.

Held by *Sargent*, C.J., and *Kemball*, J., that, looking to the provisions of the Codes of Civil Procedure of 1859 and 1877 with respect to the filing of awards in Court and the proceedings thereon, it appeared to be the duty of the Court, under both Codes, to proceed to pass judgment according to the award as soon as it was ordered to be filed, without waiting for any application that that should be done, though such application was, as a matter of practice, usual; and that being so, such an application was one which, under the authority of *Kylasa Goundan* v. *Ramasami Ayyan* (1) and *Vithal Janardan* v. *Vithojirav Putlajirav* (2), was not within the contemplation of the Limitation Act.

Held, further, that the same effect should be given to the language of section 327 of Act VIII of 1859 and section 526 of Act X of 1877. The expression "may be

* Application under Extraordinary Jurisdiction. No 20 of 1883.

(1) I. L. R., 4 Mad., 172. (2) I. L. R., 6 Bom., 568.

enforced" in the concluding part of section 327 ought to be read as "shall be enforced" as far as it applies to the Court, although the enforcement by execution of the decree must always, of course, be permissive, as regards the plaintiff.

By *Melvill* and *Pinhey*, JJ.—Before effect can be given to an award by execution proceedings, there must be a judgment according to the award and a decree following thereon.

A judgment-debtor, against whom an order for execution has been obtained behind his back, is not estopped from afterwards contending that there exists no decree which can be executed.

THIS was an application, under the extraordinary jurisdiction of the High Court, against the decision of Khan Bahadur B. E. Mody, First Class Subordinate Judge of Surat, in Suit No. 864 of 1866.

Ishwardas with his brother and two nephews had a claim for a considerable sum of money against the opponent Dosibai. On the 18th October, 1866, the matter in dispute was referred to certain arbitrators, who made their award on the 3rd December following. The applicants presented the award in the Court of the Subordinate Judge of Surat, who filed it on the 20th of the same month. Subsequently, from 1867 to 1877, the applicants made several applications to the Court from time to time for the execution of the award which were granted. They made their last application in 1880. The Subordinate Judge (Mr. Mangeshrav Balvant) rejected it, on the ground that there had been no judgment according to the award, and, therefore, no decree for execution. The applicants appealed to the High Court.

The appeal (No. 46 of 1881) came before Melvill and Pinhey, JJ., on the 20th September 1882.

Nanabhai Haridas (Government Pleader) for the appellants.—The lower Court was wrong in holding that the award, which was duly filed in Court under section 327 of Act VIII of 1859, could not be executed as a decree of the Court. It became such a decree when it was filed. The Court and the parties themselves have regarded the award as a decree for more than fourteen years, and execution has from time to time been taken out against the respondent on that understanding. No objection was then taken that there was no decree. It was taken for the first time in 1880. The objection, at best, is purely technical, and ought not to be allowed. The respondent is now estopped from raising it. The

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learned pleader in support of his argument cited *Mungal Pershad Dichit* v. *Grija Kant Lahiri*(1).

Shantaram Narayan for the respondent.

MELVILL, J.—We are of opinion that the decision of the Subordinate Judge is correct. Before effect can be given to an award by execution proceedings, there must be a judgment according to the award, and a decree following thereon; and in the present case there has been neither. It is true that certain proceedings have been taken from time to time to enforce the award; but the record of those proceedings does not show that the defendant had any notice of them, with the exception of those taken upon the Application No. 649 of 1877, in which the order made against the defendant was set aside in appeal. This circumstance distinguishes the present case from that of *Mungal Pershad Dichit* v. *Grija Kant Lahiri*(1), by which it was argued that our decision ought to be governed. In that case a notice had been served on the judgment-debtor to show cause why the decree should not be executed against him; and upon his failing to appear, an order was made against him, which not having been appealed against, or set aside, had the effect of *res judicata* in regard to the point of limitation. We do not think that it follows from that case that a judgment-debtor, against whom an order for execution has been obtained behind his back, is estopped from afterwards contending that there exists no decree which can be executed.

On the 28th September, 1882, Ishwardas and his nephews applied to the Subordinate Judge of Surat, praying that the Court would pass judgment in terms of the award dated the 3rd December, 1866. The Subordinate Judge Mr. B. E. Mody rejected the application as barred by limitation.

Ishwardas and his nephews then applied to the High Court under its extraordinary jurisdiction.

The application was heard by Sargent, C. J., and Kemball, J., on the 18th and 25th April, 1883. The principal question argued was whether the application of 28th September, 1882, was affected by any provision of the law of limitation.

(1) L. R., 8 I. A., 123; S. C., I. L. R., 8 Calc., 51.

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Latham (with him *Pandurang Balibhadra)* appeared for the applicants.

Inverarity (with him *Shantaram Narayan*) appeared for the opponent.

The arguments of counsel and the cases cited by them are fully dealt with in the judgment of the Court.

SARGENT, C. J.—The question in this case arises out of the following facts. At the close of 1866, the applicant having called on the opponent, as the representative of one Ardeshirji Dhanjisha, for the sum of Rs. 1,15,068-14-2 as the amount of six instalments alleged to be due on two mortgages executed in the Samvat years 1889 and 1903, the matter in dispute was submitted by the parties on the 18th October, 1866, to arbitration. The arbitrators made their award on 3rd December, 1866, and the same was filed by the First Class Subordinate Judge on 20th December, 1866. Several applications for execution of the award were subsequently made and granted. The last *darkhast*, however, No. 19 of 1880, was rejected by the Subordinate Judge, Rav Bahadur Mangeshrav Balvant, on the ground that no judgment had been passed in terms of the award, and that there was no decree to execute. The order rejecting the *darkhast* was confirmed by the High Court, on appeal, on 28th September 1882. Whatever differences of opinion may have existed as to the proper mode of procedure under section 327 of Act VIII of 1859, and the corresponding section 526 of the Code of 1877, it must be considered to have been well settled in this High Court, at the latest since the circular order was issued in 1880, that the proper course is to have judgment passed in terms of the award, to be followed by decree, as provided by section 325 of Act VIII of 1859. The applicants, finding themselves arrested in their execution proceedings, applied to the Subordinate Judge to pass judgment in terms of the award, but he refused the application on the ground that all the proper parties were not before the Court, and also that it was barred by article 178, schedule II of the Limitation Act, XV of 1877, not having been made within three years from the 20th December, 1866. With respect to this second ground of refusal, it was contended for the applicants that the

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application to file the award became converted into a suit by the direction contained in section 327 of Act VIII of 1859, that the application "shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants." It was argued also that the provisions in section 325 as to the Court passing judgment in terms of the award and a decree following on it are incorporated in section 327 by the words of the latter, which enable the award when filed to be "enforced as an award under the provisions of the chapter," and that it was the duty of the Court to pass judgment on the award after it had been filed, or, at any rate, that it was not necessary for the Court to be set in motion in order to do so, and that in either case, and whether the application was or was not converted into a suit the application to pass judgment was not one within the contemplation of the second schedule of the Statute of Limitations of 1877. In *Shree Ram Chowdhry* v. *Dinobundhoo Chowdhry* (1) and *Mana Vikrama* v. *Mallichery Kristnan Nambudri*(2) it was held that an application to file an award, under section 525 of the Civil Procedure Code of 1877, was only converted into a suit for administration purposes and for classification of business of the Court, and that an order refusing to file an award was not appealable under the Civil Procedure Code of 1882. In *Ramadhin* v. *Mohesh*(3), however, an order made by the Court, previous to passing judgment according to the award, was held to be not appealable, because it was only an interlocutory order in a suit, and not included in section 588, Act X of 1877, thus showing that the Court regarded the application as a suit, after it had been registered as such, for other purposes than mere classification. Both Mr. Justice Pontifex, and Mr. Justice Field, in the judgments in *Shree Ram Chowdhry* v. *Denobundhoo Chowdhry*(1), rely on the absence of similar words to those which are to be found in section 331, *viz.*, that the Court shall "proceed to investigate the claim in the same manner and with like power as if a suit for the property had been instituted by the decree-holder against the claimant under the provisions of Chapter V." The learned Judges say that these words would have been unnecessary if the

(1) I. L. R., 7 Calc., 490. (2) I. L. R., 3 Mad., 68.
(3) I. L. R., 2 All., 471.

effect of the words, "shall be numbered and registered as a suit", were to convert the application into a suit to all intents and purposes. Assuming that to be so, we think that the same effect should be given to the language of section 327 of the Code of 1859, and that of section 526 of the Code of 1877. In both cases the object is clearly to explain the course to be pursued; and whether the Court be told to proceed to investigate the claim in the same manner as if a suit had been instituted, or that it shall order the award to be filed, and that the award "shall take effect" as an award made under the provisions of this chapter"—that is, as appears by section 522, by "judgment being passed according to the award followed by decree" (a term only applicable to a proceeding in a suit)—the effect of such directions, in construing the words "shall be numbered and registered as a suit", ought, we think, to be the same. The present case, however, arises under section 327 of the Civil Procedure Code of 1859, in which the language is "that if no sufficient cause be shown against the award, the award shall be filed, and may be enforced as an award made under the provisions of this chapter." These latter words have been construed by this Court, and indeed by most Courts, as directing that the same procedure should follow as in the case of an award under section 326. The conclusion to be drawn as to the meaning of the words "shall be numbered and registered as a suit" is necessarily the same. Moreover, in construing a code of procedure, we ought, we think, to give the framers of it credit for using a particular form of words in the same sense throughout the Code, unless the context clearly shows that it was intended to be used in a different or more restricted sense. As we do not find any evidence of such intention, either in section 327 of the Code of 1859, or in sections 525 and 526 of the Code of 1877, we think that the view taken by the Allahabad High Court is the correct one, and should be followed. If, then, the application be regarded as a suit, the proceedings in which, according to section 526 of the Code of 1877, are to be identical, after the award has been filed, with those provided by section 522, it would appear that it was the duty of the Court to proceed to pass judgment according to the award as soon as it was ordered to be filed. Now, it may be that it would be usual, as a

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matter of practice, for the plaintiff to ask the Court to pass judgment according to the award; but looking at the language of section 325 of the Civil Procedure Code of 1859, and of section 522 of the Code of 1877, we cannot think that any application would be necessary. The validity of the award had been either not disputed, or had been established—see *Dandekar* v. *Dandekars*(1)—and all that remained to be done was to pass judgment according to the award, and an application to do so was no more necessary than it would be to ask the Court to "pronounce judgment" after it has tried a suit on its merits, as it is enjoined to do by section 198 of the Civil Procedure Code. If this be a correct view of the duty of the Court, we think that any application which may be made to it to pass judgment can only be regarded as drawing the attention of the Court to the provisions of the section. We agree with the ruling of the Madras Court in *Kylasa Goundan* v. *Ramasami Ayyan*(2), followed by this Court in *Vithal Janardan* v. *Vithojirav Putlajirav*(3), that "the provisions of the Limitation Act relating to applications must be held to apply to applications for the exercise, by the authority to which the application is addressed, of powers which it would not be bound to exercise without such application", and are, therefore, of opinion that the application in this case was not one within the contemplation of the Statute. It was said, however, that the language of section 327 of the Code of Civil Procedure of 1859, under which this case falls, is different from that of section 526 of the Code of 1877. We think, however, that, looking at sections 325, 326 and 327, the words in question must be construed so as to agree with what is expressed by the latter words of section 326, where it is said that the "provisions of the chapter should be applicable to the enforcement of the award". In other words, the expression "may be enforced" ought, we think, to be read as "shall be enforced", so far as it applies to the Court, although, of course, the enforcement by execution of the decree would be permissive, as regards the plaintiff. We think, therefore, that the difference in the language of section 327 of the Code of 1859 cannot affect the conclusion already arrived at on

(1) I. L. R., 6 Bom., 663. (2) I. L. R., 4 Mad., 172.
(3) I. L. R., 6 Bom., 586.

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sections 522 and 526 of the Code of 1877, and that the plaintiff's application, to pass judgment according to the award, was not one within the contemplation of the Statute of Limitations.

We have been asked to allow the defendants leave to show cause against filing the award, on the ground that they were only served with notice on 18th December, 1866, and the award was filed on the 20th December, 1866. It is not, however, denied that the 20th December was the day named in the notice; and we see no reason, and after the lapse of sixteen years during which time the above objection has never been taken, although the award has been several times executed, we should certainly not be disposed, even if we had the power which may well be doubted, to interfere with the filing of the award.

The Subordinate Judge must, therefore, be directed "to proceed to pass judgment according to the award" to be followed by decree, and to afterwards proceed to dispose of the plaintiff's *darkhast* rejected on 28th September, 1882. We do not think we ought to accede to plaintiff's application that such decree should be made *nunc pro tunc*, as the delay cannot, we think, be said to be the exclusive act of the Court.

Parties to pay their own costs of this application.

Decree reversed and case remanded.

APPELLATE CIVIL.

1883
June 13.

Before Mr. Justice West and Mr. Justice Nanabhai Haridas.

ANANDRAV BHIKAJI PHADKE AND THREE OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* SHANKAR DAJI CHARYA AND TWELVE OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Caste—Suit for right to exclusive worship—Non-joinder of parties—Chitpavans—Palshes—Limitation—Section 21 *of Regulation II of* 1827—*Civil Procedure Codes Act VIII of* 1859, *and Act X of* 1877, *Sec.* 30.

Four persons of the Chitpavan caste brought a suit in 1876, alleging that they and the members of their caste, in common with certain other castes, possessed the exclusive right of entry and worship in the sanctuary of a temple, and that the

* Second Appeal, No. 248 of 1882.