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incumbrance in favour of the mortgagee, now plaintiff. The defendant therefore is in, as he was before, as tenant of the plaintiff, subject to the terms of the lease, and amongst others to the plaintiff's right of re-entry on default in payment of the stipulated rent.

We, therefore, reverse the decree of the District Court, and restore that of the Subordinate Judge, with costs throughout on the respondent.

Decree reversed.

APPELLATE CIVIL.

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

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July 25.

GURUPADAPA BASAPA (ORIGINAL PLAINTIFF), APPELLANT, *v.* VIR-BHADRAPA IRSANGAPA (ORIGINAL DEFENDANT), RESPONDENT.*

Limitation Acts—Which applicable—Decree—Execution—Art. 179, *Sch. II of Act XV of* 1877—*Application to keep alive decree.*

The plaintiff obtained a decree against the defendant in 1872. He first applied for its execution in 1874, and his application was disposed of on the ground that the requisite court fee had not been paid. His next application was in 1876, and it was disposed of because no property could be found to satisfy the decree. His third application, made on the 10th of March, 1879, was one asking merely that the decree might be kept alive. He now applied for the fourth time on the 26th of November, 1881, and sought execution of the decree.

Held that the law of limitation applicable to proceedings in execution is not the law under which the suit was instituted, but the law in force at the date of the application for execution, in absence of a legislative provision to the contrary (such as that contained in section 1 of Act IX of 1871). The law of limitation therefore to be applied to the application of the 10th March 1879 was Act XV of 1877; and inasmuch as that application did not ask for any step to be taken towards executing the decree, it was not in accordance with art. 179, sch. II of Act XV of 1877, and did not save the present application from being barred.

Mangal Prasad's case (1) explained.

THIS was a second appeal from the decision of A. C. Watt, Judge of Dharwar, reversing the order of Rav Saheb R. G. Bhadabade, Subordinate Judge of Haveri.

* Second Appeal, No. 398 of 1882.

(1) L. R., 8 I. A., 123.

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The plaintiff in 1872 obtained a decree against the defendant, and in 1874 applied for its execution. The necessary court fee was, however, not paid, and the application was put by as disposed of. Another application was made by him in 1876, but no property could be found to statisfy the decree, and, accordingly, that application was also put by as disposed of. A third application was made on the 10th of March, 1879. It was presented merely with the view of saving limitation. It simply prayed that the decree might be kept alive. The plaintiff presented his last application for execution on the 26th of November, 1881, within three years of the one immediately preceding it. The Subordinate Judge held that the latter application saved the bar. The District Judge came to a different conclusion. It was assumed by both the Courts, in absence of objection by the defendant, that Act XV of 1877 governed the case. The Subordinate Judge considered that the difference in the wording of article 179, sch. II of Act XV of 1877, and article 167, sch. II of Act IX of 1871, was merely verbal, and should not be allowed to operate to the prejudice of honest creditors, according to the practice introduced under the latter enactment, which plainly stated that the object of their application was merely to keep the decree alive. The District Judge said: "The law which governs the application of 1879, is Act XV of 1877, sch. II, art. 179, para. 4. The material parts are the date of applying, in accordance with law, to the proper Court for execution, or to take some step in aid of execution. From these it is contended that the application must be according to law. The requirements of the law are contained in section 235 of the Code of Civil Procedure. The application of the 10th of March, 1879, contains a simple prayer that the Court should help to keep the decree within time, and the prayer is granted. * * * It seems to me that the application and the order on it were mere nullities."

The plaintiff thereupon appealed to the High Court.

Mahadev Chimnaji Apte for *Ganesh Ramchandra Kirloskar* for the appellant.—The suit was instituted while Act XIV of 1859 was in force, which Act, consequently, applies to the application. Section 20 of this Act says: "No process of execution shall issue from any Court to enforce a decree, unless some proceeding shall

have been taken to enforce such decree within three years next preceding the application for such execution." Act IX of 1871, art. 169, sch. II, requires an application merely to "enforce, or keep in force, the decree or order." Section 235 of the Code of Civil Procedure does not render it necessary that the applicant should ask aid in any specific manner. It is admitted that the application was made *bonâ fide*. Limitation Acts should be construed, as far as possible, so as to prevent the defeat of *bonâ-fide* endeavours to secure the fruits of a decree once obtained—*Kunhi Mannan* v. *Seshgiri Bhakthan* (1). Where a decree was transferred by the Court which passed it to another Court for execution, an application to the latter to return the decree to the former for further exectuion was held to be step in aid of execution, even within the more strictly worded provision in clause 4, art. 179 of Act XV of 1877, sch. II—*Krishnayyar* v. *Venkayyar*(2). An insufficiently stamped application for execution for a decree was held to be sufficient to keep the decree alive under the same provision—*Ramasami Ayyan* v. *Seshayyangar*(3). Even an application for the transfer of a decree under section 223 of the Code of Civil Procedure was held to be sufficient for the purpose under it—*Latchman Pundeh* v. *Maddan Mohun*(4). The earlier Acts were less stringent, and we say the Limitation Act of 1859, which was in force when the suit was filed, applies to this case. That is the principle ruled in *Mangal Prasad's* case(5).

Shámráv Vithal for the respondent.—*Mangal Prasad's* case(5), is founded on the reservation contained in section 1 of Act IX of 1871. It does not decide that the law of limitation in force at the date of the filing of the suit is to be applied to an application for execution of the decree in the suit. Act IX of 1871 distinctly provided that nothing contained in sections 2 and 3, or in parts II and III, was to apply to suits instituted before the 1st of April, 1873. Act XV of 1877 repeals all previous limitation Acts unreservedly. This, therefore, is the Act which applies. It was not attempted to apply Act XIV of 1859 in the Courts below. Under Act XV of 1877 the application to save the bar

(1) I. L. R., 5 Mad., 141.
(2) I. L. R., 6 Mad., 81.
(3) I. L. R., 6 Mad., 181.
(4) I. L. R., 6 Cal., 513.
(5) L. R., 8 I. A., 123.

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must be according to law, which the application of 10th March, 1879, was not. The law does not provide for an application merely to keep alive the decree. Allowing such an application, would be to defeat the object of the law of limitation—*Muhammad Umar* v. *Kamila Bibi*(1). Moreover, 'section 3 of Act XV of 1877 defines the word 'suit' so as expressly to exclude an appeal or an application. The present application is, therefore, time-barred under Act XV of 1877.

The judgment of the Court was delivered by

WEST, J.—The first question is that of what Act governs this case, and we think it is Act XV of 1877. Acts of limitation, like other laws relating to procedure, apply immediately to all steps taken after they have come into force, except when some provision is made to the contrary. The reason of this is that every one, seeking the aid of a Court seeks it on the terms from time to time imposed by the Legislature. He has not the privilege of making any application he likes in any way, and at any time he likes. Other interests than his are at stake, and the Courts are not to exercise their coercive power at his request over another person, except under such regulations as shall make their action compatible with the general welfare. They, accordingly, are commanded to act only in defined ways on applications which satisfy specified conditions. It has been contended that the judgment of the Privy Council in *Mangal Prasad's* case(2) involves the principle that when a suit has been instituted under a particular law of limitation, the execution of the decree therein is to be carried out under the same law. This, we think, an erroneous view of the decision. Where there is an express exemption of a particular class of suits from the operation of an Act, the exception may be comprehensive enough to include the consequent proceedings in execution, but such a result does not involve a subversion of the general principle (3) where no enactment affects it. Their Lordships of the Judicial Committee refer to, and rely on, the wording of the first section of Act IX of 1871, that certain parts of the Act shall not apply to suits instituted before a certain

(1) I. L. R., 4 All., 34. (2) L. R., 8 I. A., 123.

(3) See *Reg.* v. *The Inhabitants of Denton*, 21 L. J. M. C. at p. 208, *per* Lord Campbell, C. J.; *Ex p. Cotten*, L. R. 11 Q. B. D., 301.

date in order to establish the conclusion that the execution of decrees in such suits shall not be affected by the same parts of the Act. Without this exception they must have thought the suits would be governed by the provisions in question, and so, too, would the proceedings in execution. Now, in Act XV of 1877, there is no provision exempting suits filed before a particular date from the operation of the Act. When it comes into force at all, it comes into force wholly and without exception, at any rate without any exception of this nature. It applies, therefore, at once to any suit instituted, and to any application made after it had come into force. Moreover, it says that 'suit' shall not include appeal or application. *Primâ facie*, suit would not include what the Act expressed by different words, and the intention must have been that the proceedings under each designation should be regarded as distinct from the others. Thus the command of the Legislature is left to operate unqualified on all applications made after the date prescribed.

In the case quoted—*Behary Lall* v. *Goberdhun Lall* (1)—"proceedings" are identified with "suit"; but we think that where a decree has been obtained, the application for execution initiates a new set of proceedings—see *Andrews* v. *Marris* (2)—and that, therefore, the rule of the General Clauses Act (I of 1868) is not to be held to govern all the remotest ministerial consequences of a suit arising on applications made years afterwards according to the procedure in force at its institution, but only to bring under the same law such series of proceedings as group themselves naturally together, as, *e. g.*, those on a particular application for execution. Where a right has been fully acquired, and the Court has not to be invited to a fresh exercise of its authority, the case is different—*Megasham Bhavanrav* v. *Vithalrav Bhavanrav* (3): the established right continues to operate according to its nature. But a fresh application must, unless the Legislature has excepted it—*Delhi and London Bank, Limited*, v. *Melmoth A. D. Orchard* (4)—be governed by the law in force when it is made—*Kimbray* v. *Draper* (5); *Papasastrial* v. *Anuntarama Sastrial* (6).

(1) I. L. R., 9 Cal. 446.
(2) 1 Q. B., 3.
(3) Sp. Ap. No. 148 of 1871.
(4) L. R., 4 I. A., 127.
(5) L. R., 3 Q. B., 160.
(6) I. L. R., 3 Mad., 98.

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Testing the application made on 10th March, 1879, by this rule and by article 179, sch. II. of Act XV of 1877, we do not think it was one made according to law from which a new period of limitation could be computed. It did not ask the Court to take any steps towards executing the decree, only to keep the decree alive: an application not provided for, or contemplated in the Code of Civil Procedure. The present application, then, was barred, and we confirm the District Judge's order, with costs.

Order confirmed.

APPELLATE CIVIL.

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

1883 *July* 27.

ANUSUYABAI, WIDOW OF BALAJI, (ORIGINAL DEFENDANT NO. 1), APPELLANT, *v.* SHAKHARAM PANDURANG (ORIGINAL PLAINTIFF), RESPONDENT.*

Res judicata—Appeal—Incidental finding—Decree.

Plaintiff sued for a declaration that certain lands were his, and for possession of them. Defendant No. 1 claimed the ownership of the lands; defendant No. 2 claimed to be mortgagee in possession. The decree simply dismissed the suit; but the lower Court found, as a fact, that the ownership of the lands was in the plaintiff, although the plaintiff was not entitled to possession of them by reason of the mortgage to defendant No. 2. Defendant No. 1 now appealed on the ground that, although the decree itself was entirely in her favour, she would be prejudiced in any future proceedings if the finding of fact as to the ownership of the lands were left unchallenged.

Held that the appeal would not lie; for the decree is what must be looked to to see what was conclusively decided, and there was nothing in the decree actually passed which the plaintiff could afterwards use as *res judicata* in his favour; and an appeal is not admissible on any point not having the authority of *res judicata*.

An adjudication is only conclusive evidence of the facts established therein or properly tending thereto; hence from a simple judgment against him a party cannot deduce any thing in his favour as *res judicata*, for nothing in his favour can have been an essential element of an adverse decree.

THIS was a second appeal from the decree of R. F. Mactier, Judge of Satara, confirming the decree of Rav Saheb J. S. Bodhrav Tirmalrav, Subordinate Judge of Rahimatpur.

The plaintiff alleged that one Balaji, the husband of defendant No. 1, Anusuyabai, on the 6th of December, 1871, sold to the

* Second Appeal, No. 397 of 1882.