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[242] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

DALICHAND BHUDAR, DECEASED, BY HIS HEIRS FULCHAND AND OTHERS (*Original Judgment-debtors*), *Appellants v.* BAI SHIVKOR, WIDOW OF KACHRA MULJI (*Original Execution-creditor*), *Respondent.**

[25th August, 1890.]

Decree—Execution—Application for execution not "in accordance with law"—Step in aid of execution—Subsequent application for execution—Objection to the previous application—Limitation—Cl. 4, art. 179, sch. II of Act XV of 1877—S. 207, Civil Procedure Code (Act VIII of 1859)—Section 13, Expl. II, ss. 231, 235, Civil Procedure Code (Act XIV of 1882).

An application for partial execution of a decree, though not "in accordance with law," is a step in aid of execution, as contemplated by cl. 4, art. 179, sch. II of the Limitation Act (XV of 1877).

A judgment-debtor, who did not appeal against a previous order for execution of a portion of the decree and who did not dispute the validity of such order, cannot, in the matter of a subsequent application for execution of the remaining portion of the decree, contend that the first application was not "in accordance with law," and that the subsequent application being presented after the lapse of three years from the date of the decree was barred by limitation.

Kalidas Manchand v. *Varjivan Ranji* (1) followed.

[F., 26 C. 888 (890); R., 19 B. 261 (268); D., 1 N.L.R. 61 (65).]

THIS was a second appeal from the decision of Dayaram Gidumal, Acting Assistant Judge of Ahmedabad.

The facts of the case were as follows:—

On the 13th January 1882 the plaintiff got a decree against the defendants for the recovery of certain ornaments and for costs of suit.

On the 5th April 1884 the plaintiff made an application for execution of the decree in so far as it related to costs. In the column of relief, however, it was stated that the plaintiff wanted execution to issue for costs, and that with respect to ornaments which were not delivered to her she would make a separate application. In pursuance of this application the costs were paid to the plaintiff.

On the 4th April, 1887 the plaintiff presented an application for the recovery of the ornaments or their value.

[243] The defendants contended (*inter alia*) that the plaintiff's application for execution was time-barred.

The Subordinate Judge was of opinion that the plaintiff's first application, dated the 5th April, 1884, being not "in accordance with law," inasmuch as it was not an application for the execution of the decree in its entirety, but for a portion of that decree only, namely the costs, her second application of the 4th April, 1887, which was presented after the expiration of three years from the date of the decree, was time-barred, and he rejected the plaintiff's application.

The plaintiff appealed to the District Court. The Assistant Judge held that in the matter of the first application the defendants having failed to raise the objection that it was not "in accordance with law" they

* Second Appeal, No. 371 of 1889.

(1) 15 B. 245, Note.

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were estopped from raising the point, and that the matter must be considered to be *res judicata*. The Assistant Judge reversed the decree of the Subordinate Judge and allowed execution to issue.

The defendants preferred a second appeal.

Rao Saheb *Vasudeo Jagannath Kirtikar*, for the appellant.

Govardhanram Madhavram Tripathi, for the respondent.

JUDGMENT.

SARGENT, C. J.—In this case the respondent, the execution-creditor, had obtained a decree for costs and for the delivery to her of ornaments. On the 5th April, 1884, she applied for its execution, as regards the costs, stating at the same time that the ornaments had not been delivered, and she would make a separate application for them. The present application, which is for the ornaments, was made on 4th April, 1887, and is, therefore, too late, unless it had been kept alive by the previous application.

In *Huro Sunker Sandyal* v. *Taruck Chunder Bhuttacharjee* (1) Sir Barnes Peacock discussing s. 207 of Act VIII of 1859 held that, in the case of a decree which is perfect for execution in its entirety, a judgment-creditor cannot be allowed to execute it in part. The language of s. 230 of the present Civil Procedure Code is to the same effect. The first application for execution was, therefore, not "in accordance [244] with law" and could not, therefore, of itself supply a fresh date from which time would be calculated, as provided by art. 179, sub-cl. 4 of the Statute of Limitations of 1877. This was so held in the analogous case of an application for execution by one of several joint judgment-creditors of a part only of the decree as contravening s. 231, Civil Procedure Code—*Ram Atuar v. Ajudhia Singh* (2); *The Collector of Shahjahanpur* v. *Surjan Singh* (3).

However, in *Kalidas Manchand* v. *Varjivan Rangji* (4) Nanabhai Haridas and Jardine, JJ., held that an application for partial execution, although not "in accordance with law," was "a step in aid of execution," as contemplated by art. 179 of the Limitation Act. That expression was considered in *Chowdhry Paroosh Ram Das* v. *Kali Puddo Banerjee* (5), and the Court held that an application for execution of a decree or order of any Civil Court, &c., is an application within the terms of s. 235 of the Code of Civil Procedure, *i.e.*, an application setting the Court in motion to execute the decree in any manner set out in the last column of the form prescribed; but having so set the Court in motion, any further application during the continuance of the same proceeding is an application to take some "step in aid of execution" within the terms of cl. 4 in the last column of art. 179. We are inclined to agree in this view as to what was intended by the expression "a step in aid of execution," but in any case it cannot surely be construed to mean an act contrary to the provisions of s. 235, which *ex hypothesi* was the character of the first application.

However, the lower Court of appeal has held, and we think rightly, that the judgment-debtor cannot now be allowed to set up as a defence that the first application for execution was not "in accordance with law." The Assistant Judge relies on the authority of *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (6). In that case the Privy Council held that the Court which made [245] the order for attachment to issue on the first application for execution "must be considered to have determined that the decree was not barred"—and the order not having been appealed against, the question was

(1) 11 W.R. C.R. 488 (489). (2) 1 A. 231 (234). (3) 4 A. 72.
(4) 15 B. 245, note. (5) 17 C. 53. (6) 8 I.A. 123=8 C. 51.

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res judicata—and, moreover, that the judgment-debtor having not only not appealed, but having actually acknowledged the validity of the order of attachment by presenting a petition praying for stay of the attachment for three months "it was impossible, in the face of the order and the subsequent proceedings," that the second application should be refused on the ground that the decree was dead when the first application was made. The latter part of the above reasoning of the Privy Council is inapplicable here. Not having taken the objection that the application was irregular, and having paid the costs with the full knowledge that the judgment-creditor, as stated by him in the *darkhast*, intended to make a separate application as to the ornaments, the judgment-debtor must be taken to have acknowledged the validity of the first application, and ought not, we think, now to be allowed to take the objection that it was not "in accordance with law." We must, therefore, confirm the order, with costs on the appellants.

Decree confirmed.

15 B. 245-N.

Before Mr. Justice Nanabhai Haridas and Mr. Justice Jardine.

KALIDAS MANCHAND (*Original Defendant*), *Appellant v.* VARJIVAN RANGJI AND OTHERS, (*Original Plaintiffs*), *Respondents.**

[25th January, 1888.]

THIS was a second appeal from the decision of G. Jacob, Joint Judge of Ahmedabad.

Suit to recover possession of a house. On the 27th January, 1881, the plaintiffs got a decree in second appeal, directing them to recover possession of the house in dispute after paying to the defendant the expenses properly incurred by the defendant in rebuilding the house. The decree awarded costs also to the plaintiffs.

On the 9th September, 1881, the plaintiffs presented an application for execution of the decree. The parties effected a settlement out of Court, and the application for execution was withdrawn by the plaintiffs on the 31st July 1882.

[246] On the 19th September 1882 the plaintiffs presented another application for execution of the decree with respect to the costs only.

On the 28th April 1885 plaintiffs filed a third application for execution; in this application the plaintiffs offered to pay a certain sum to the defendant which they alleged was actually spent by him in rebuilding the house, and sought to recover possession of it.

The defendant contended (*inter alia*) that the plaintiffs' application was not presented within three years from the date of their first application, namely, the 9th September 1881; their present application was, therefore, time-barred, and that a larger sum than that offered by the plaintiffs was due to him on account of the rebuilding of the house.

The Subordinate Judge held that as the plaintiffs' second application, dated the 19th September 1882, sought to execute the decree with respect to costs only, it did not furnish a fresh starting point for the period of limitation, and that as the present application was made after the expiration of three years from the date of the plaintiffs' first application, it was time-barred.

Against the decree made by the Subordinate Judge the plaintiffs appealed to the District Judge, who held that the plaintiffs' second application, dated 19th September 1882, was a step in aid of execution, and that the present application being made within three years from that date, was not time barred. The District Judge reversed the decree of the Subordinate Judge. In his judgment the District Judge observed as follows:—

"It is contended for the respondent that art. 178 and not art. 179 of sch. II of the Limitation Act applies to this case. It is argued that the decree of the High Court

* Second Appeal, No. 441 of 1887.