1894.

SHIVRA'M CHINTA'MAN v. SARASVATI-BÁI.

It is unnecessary to consider whether in no circumstances the time taken up by an unsuccessful suit should be deducted or the subsequent second *darkhást* treated as a revival. The suit in the present case having been withdrawn by the plaintiff, the assignee of the decree-holder, cannot be treated as a step in aid of the execution. We confirm the decree with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

1894. *December* 3.

DWA'RKANA'TH APPA'JI (ORIGINAL PLAINTIFF), APPELLANT, *v.* A'NAND-RA'O RA'MCHANDRA (ORIGINAL DEFENDANT), RESPONDENT.*

Limitation Act (XV of 1877), Art. 179, Cl. 4—"Step in aid of execution"—Payment of deficient court fee—Execution of decree.

An application for execution of a decree was presented on 17th July, 1890. A notice under section 248 of the Code of the Civil Procedure (Act XIV of 1882) was issued on 18th July, 1890. The process fee for service of the notice being deficient, the decree-holder paid the deficiency on 29th August, 1890. On the 22nd August, 1893, the decree-holder presented a fresh application for execution.

Held, that the second application for execution was time-barred. The payment of the additional court fee was not "a step in aid of execution of a decree" within the meaning of clause 4, article 179 of Schedule II of the Limitation Act (XV of 1877).

SECOND appeal from the decision of H. F. Aston, District Judge of Thána, in Appeal No. 367 of 1893.

The plaintiff having obtained a decree, applied for execution on 17th July, 1890. Thereupon a notice was issued under section 248 of the Code of Civil Procedure (Act XIV of 1882) on the 18th July, 1890. A process fee of annas 8, instead of Rs. 2, was levied by mistake on the notice in question in the first instance. When the mistake was found out, the decree-holders were required by the Court to make good the deficiency. The deficient court fee was paid on 29th August, 1890, but the notice under section 248 of the Code of Civil Procedure had already been issued and served on the judgment-debtor.

* Second Appeal, No. 401 of 1894.

1894.

DWÁRKA-NÁTH APPA'JI v. ÁNANDRA'O RA'M-CHANDRA.

On the 22nd August, 1893, the decree-holders presented a fresh *darkhást* for execution. This *darkhást* was rejected by the Subordinate Judge, on the ground that it was barred by limitation.

This order of rejection was confirmed, on appeal, by the District Judge, whose judgment was as follows :—

"I agree with the view taken by the Subordinate Judge that a mere compliance with the Court's demand for the deficiency in a court-fee on a notice already issued under an application for execution is not an *application* in accordance with law to the proper Court to take some step in aid of execution, and that such a compliance does not come within the description of the application referred to and contemplated in the above quoted clause (4 of article 179 of Schedule II of the Limitation Act XV of 1877)."

Against this decision the decree-holders appealed to the High Court.

Dáji A'báji Khare for appellant.

T. R. Kotwál for respondent.

JARDINE, J. :—After the executing Court had on the application of the decree-holder taken a step in aid, *viz.*, the issue of a notice under section 248 of the Code of Civil Procedure, the Court ordered him to pay up some deficiency in the court fee therefor. It is contended that the District Judge ought to have held that this payment saved limitation under article 179, clause 4, of the Limitation Act of 1877. The case of *Bhoma* v. *Kámáji*[1] is relied upon; but there is nothing in that case to show that the payment was made *after* the application to the Court and the step taken by it. On the present facts it does not appear that any application for execution, or to take a step in aid, was made when the additional court fee was paid. The words of clause 4, therefore, do not save the limitation—*Vellaya* v. *Jaganátha*[2]. *Rádha Prosad* v. *Sundar Láll*[3] is of a contrary tenor, but the reported judgment does not notice all the words of the clause. That case appears also inconsistent with *Rájkumár Banerji* v. *Rajlakhi Dabi*[4]. We concur with the District Judge in his decree rejecting the *darkhást* as time-barred, and confirm the decree with costs.

Order confirmed.

(1) P. J., 1884, p. 311.
(2) I. L. R., 7 Mad., 307.
(3) I. L. R., 9 Cal., 644.
(4) I. L. R., 12 Cal., 441.