FULL BENCH.

APPELLATE CIVIL.

Before Sir L. Jenkins, Chief Justice, Mr. Justice Candy, Mr. Justice Fulton, Mr. Justice Crowe and Mr. Justice Chandavarkar.

MALUKCHAND RATANCHAND AND ANOTHER (ORIGINAL DECREE-HOLDERS), APPLICANTS, *v.* BECHAR NATHA AND OTHERS (ORIGINAL JUDGMENT-DEBTORS), OPPONENTS.* 1901. *April* 15.

Limitation Act (XV of 1877), schedule II, article 179 (4)—Execution—Payment of bhatta—No fresh starting point.

An application for execution of a decree was made and granted on the 4th November, 1897. The *bhatta* (process-fee), however, was not paid to the Nazir until afterwards, namely on the 8th November, 1897. There was no written application in connection with this payment, nor did it appear that there was any oral application at the time of the payment except such as might be inferred from the fact of payment.

Held, that such a payment of *bhatta* did not constitute a fresh starting point from which the period of limitation prescribed by article 179 of the Limitation Act (XV of 1877) began to run.

From the mere fact of payment of *bhatta* an application such as is prescribed by that article cannot be inferred: at most it would merely be an application to receive the money and the payment would be no more than the performance of a condition essential to the order for execution.

REFERENCE by Ráo Sáheb Mohanrai Dolatrai, Subordinate Judge of Borsad in the Ahmedabad District, under section 617 of the Civil Procedure Code (XIV of 1882).

The point raised by the reference was whether in execution proceedings the mere payment of *bhatta* (process-fee) was "an application for execution" within the meaning of article 179 of the Limitation Act (XV of 1877) so as to be the starting point for a new period of limitation as prescribed by that article.

The applicants applied for execution of a decree in November, 1900. There had been a previous application for execution made and granted on the 4th November, 1897, but the *bhatta* (process-fee) in respect of that application was not paid until the 8th

* Civil Reference No. 27 of 1900.

1901.

MALUKCHAND v. BECHAR NATHA.

November, 1897. The question submitted to the High Court was whether the period of limitation prescribed by article 179 of schedule II of the Limitation Act, 1877, began to run from the latter date. If so, the present application was in time.

The reference by the Subordinate Judge was as follows:

The decree-holders apply to execute their father's decree by right of survivorship as against the defendants, alleging that their application is within time in consequence of the 'bhatta' having been paid in the previous proceedings on 8th November, 1897, Exhibit 5. The only question thus arising for determination is whether the payment of such *bhatta* is a step in aid of execution or not under article 179, clause 4, of the Limitation Act. Of course such a payment was till recently, under cover of the ruling at page 311 of Printed Judgments of 1884, considered such a step, but then the authority of that decision has been as it were doubted in the case of *Trimbak* v. *Kashinath Vidyadhar*, Printed Judgments of 1897, page 100, and hence the present reference, the point having not been expressly decided there. It has been urged that the law does not require any written application for the purpose, and there seems to be no reason why an oral application should not be presumed at the time of every such payment—the more so when it is remembered that a written application is required when the usual time is exceeded.

It is, however, sufficient to note that such payment after the presentation of a darkhást follows as a matter of ordinary routine only, and what is more, it being treated by circular No. 111 (*vide* High Court's Civil Circular Book, page 74) as an act more in the nature of a ministerial one than otherwise, it is obvious that the argument does not at all rigidly apply.

In these circumstances the correctness of the former practice, having regard to all the words of the clause under reference as noticed in the decision of 1897 aforesaid, seems open to serious question, and with this humble expression of opinion on the point, therefore, I would respectfully submit this case for the orders of the Honourable the High Court.

The case was heard by Jenkins, C. J., and Chandavarkar, J., who referred it to the Full Bench with the following judgment:—

JENKINS, C. J.:—The question referred to us for our opinion is, whether the payment of *bhatta* on the 8th November, 1897, saves an application for execution presented within three years of that date from the bar of limitation.

In *Bhoma* v. *Kamaji*[1] the question referred for decision of the High Court was "whether an application for execution of a money decree made within three years of the date of payment of *bhatta* for a sale warrant is within time." To this Sargent, C. J., and

(1) (1884) P. J. p. 311.

Kemball, J. answered as follows:—"The Court concurs with the predecessors of the Subordinate Judge in thinking that the payment of *bhatta* for the sale warrant is a 'step in aid' of execution."

In *Dwarkanath* v. *Anandrao*[1] a somewhat similar point arose. On the 17th of July, 1890, the plaintiff in that suit applied for execution. Notice was issued under section 248 of the Civil Procedure Code on the 18th July, 1890, and a process-fee of eight annas was levied. The proper fee was Rs. 2, and the deficit court-fee was made good by a payment into Court on the 29th August, 1890. The notice, however, had already been issued and served. On the 22nd August, 1893, a fresh *darkhást* for execution was presented, but the Court held that it was barred, though it was within three years of the 29th August, 1890.

The learned Judges in the course of their judgment said:

> The case of *Bhoma* v. *Kamaji* is relied on; 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 of execution was made when the additional court-fee was paid. The words of clause 4 therefore do not save the limitation.

Then in *Trimbak* v. *Kashinath*[2] it was said:

> Whether the payment of *bhatta* is a sufficient proof of an application to the Court to take the step in respect of which the *bhatta* is paid is doubtful according to the reported cases. The mere payment of a process-fee under circumstances from which no application can be inferred does not of course satisfy the requirements of article 179 (4).
>
> In *Bhoma* v. *Kamaji* the Court appears to have presumed an application from the payment of the process-fee.

An examination of *Bhoma's* case discloses no reference to such a presumption and the form of the answer appears to point to an opinion that the payment of the *bhatta* was *per se* sufficient to constitute a new starting point. The two later decisions throw a doubt on the opinion expressed in *Bhoma's* case, and we therefore refer for the decision of the Full Bench the question,—"Whether the payment of *bhatta* in execution proceedings is under any, and if so what, circumstances sufficient by itself, or by virtue of any inference arising therefrom to constitute the time from which the period of limitation begins to run under article

(1) (1894) 20 Bom. 179. (2) (1897) 22 Bom. 722.

1901.

MALUKCHAND v. BECHAR NATHA.

179 (4) in the second schedule to the Indian Limitation Act, 1877."

The case being thus referred, it was heard by a Full Bench consisting of Jenkins, C.J., Candy, Fulton, Crowe and Chandavarkar, JJ.

Manubhai Nanabhai (*amicus curiæ*) for the applicants (decree-holders):—The question is whether our present application which was made on the 7th November, 1900, is in time. The previous application was made on the 4th November, 1897, and the *bhatta* was paid on the 8th November, 1897. Our present application is in time if the period of limitation be computed from the day on which the *bhatta* was paid: article 179 of schedule II of the Limitation Act. We contend that the payment of the *bhatta* on the 8th November was itself an application for execution and a step in aid of execution. There is no provision of law which requires that such an application should be made in writing. Therefore it was open for us to make the application in any way we liked. The payment of the *bhatta* in Court having been accepted and a process having been thereupon issued, an application must necessarily be inferred. These circumstances themselves constituted an application on which the Court took action. The fact of the payment of the *bhatta* must be taken in connection with the darkhást for execution in respect of which it was made. *Bhatta* is not a mere payment of money, but it is a payment for issuing the process. If we had merely put the money on the table of the officer of the Court without saying anything, the officer of the Court would not know the object for which the money was paid. But when we paid the money and said that it was *bhatta*, it was at once understood that it was a payment for the issue of process. In the payment of the *bhatta* an application was implied. It has been held that payment of *bhatta* is a step in aid of execution—*Bhoma* v. *Kamaji*.[1] If the payment of *bhatta* is a step in aid of execution, then the fact of the payment was itself an application independently of the circumstance that process was issued. The Subordinate Judge erroneously supposed that the ruling in *Bhoma* v. *Kamaji*[2] was dissented from in *Trimbak* v. *Kashinath*.[3] *Dwarkanath* v. *Anandrao*[4] supports our contention.

(1) P. J. 1884. p. 311.
(2) P. J. 1884. p. 311.
(3) (1897) 22 Bom. 722.
(4) (1894) 20 Bom. 179.

Markand N. Mehta (*amicus curiæ*) for the opponents (auction-purchasers). He cited the following rulings:—*Toree Mahomed* v. *Mahomed Mabood Bux*[1]; *Rajkumar Banerji* v. *Rajlakhi Dabi*[2]; *Umesh Chunder Dutta* v. *Soonder Narain Deo*[3]; *Ananda Mohan Roy* v. *Hara Sundari*[4]; *Raghunundun Misser* v. *Kallydut Misser*[5]; *Keshavlal Bechar* v. *Pitamberdas*[6]; *Dwarkanath* v. *Anandrao*[7]; *Bhagwan* v. *Dhondi*.[8]

JENKINS, C.J.:—The question whether payment of *bhatta* calls into play article 179 (4) in the second schedule to the Indian Limitation Act, 1877, is one on which conflicting views are held, and in view of this conflict, it is necessary to see what the Act, apart from the authorities, says.

So much of the article as governs this case requires (1) that there should be an application in accordance with law to the proper Court, and (2) that the purpose of the application should be for the Court to take some step in aid of execution. Here an application for execution was made and granted: until payment of *bhatta*, however, process according to the ordinary practice would not issue, so that this payment is in effect a condition of that issue. *Bhatta* was paid to the Názir on the 8th of November, 1897, and it is this payment that gives rise to the question in this case.

There admittedly was no written application in connection with this payment, but it is said that an oral application would answer the requirements of the article.

There is, however, no trace of any oral application except such as may be inferred from the fact of payment. But from a mere payment to the Názir I cannot infer such an application as the article prescribes: at most it would merely be an application to receive the money and the payment would be no more than the performance of a condition essential to the order for execution. The application leading up to the order for execution of course comes within the 179th article, but to hold that the payment of

(1) (1883) 9 Cal. 730.
(2) (1885) 12 Cal. 441.
(3) (1889) 16 Cal. 747.
(4) (1895) 23 Cal. 196.
(5) (1896) 23 Cal. 690.
(6) (1894) 19 Bom. 261.
(7) (1894) 20 Bom. 179.
(8) (1896) 22 Bom. 83.

1901.

MALUKCHAND v. BECHAR NATHA.

bhatta has a similar operation for the purpose of limitation is to my mind merely to place a premium on dilatoriness.

Therefore I would answer the question referred by saying that the payment of *bhatta* in this case did not constitute a fresh starting point from which the period of limitation began to run.

CANDY, FULTON, CROWE and CHANDAWARKAR, JJ., concurred.

Answer accordingly.

FULL BENCH.

APPELLATE CIVIL.

Before Sir L. Jenkins, Chief Justice, Mr. Justice Candy, Mr. Justice Crowe and Mr. Justice Chandavarkar.

1901. *April* 15.

DHANJIBHOY BOMANJI (ORIGINAL DEFENDANT), APPELLANT, *v.* HIRABAI (ORIGINAL PLAINTIFF), RESPONDENT.*

Husband and wife—Parsis—Suit for restitution of conjugal rights—Limitation—Limitation Act (XV of 1877), section 23, schedule II, article 35—Parsi Marriage and Divorce Act (XV of 1865).

A suit under the Parsi Marriage and Divorce Act (XV of 1865) by a wife for the restitution of her conjugal rights is barred by the lapse of time when restitution has been demanded by her and refused by the husband being of full age and sound mind more than two years prior to the commencement of the suit.

REFERENCE to a Full Bench by a Division Bench (Jenkins, C.J., and Chandavarkar, J.).

The plaintiff Hirabai sued the defendant, her husband, for restitution of conjugal rights.

She alleged that in August, 1883, the defendant had assaulted her and turned her out of his house.

On the 29th June, 1895, the plaintiff through her attorneys gave notice to the defendant requiring him to resume cohabitation with her. On the 11th July, 1898, the defendant replied refusing her request.

* Appeal No. 97 of 1900.