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translated in the charge "This is an inborn habit of Kazi Meheri Saheb; deception is a part of his nature" from page 10 of the pamphlet. These it is impossible to regard as anything else than a general imputation on the complainant, purporting to be based on his supposed general conduct and not solely on what appears in the Fatwa. And we therefore think that the accused cannot be wholly acquitted of defamation. But having regard to the very vehement nature of the attack in exhibit A on a religious teacher, to which the pamphlet of the accused is a reply, and to the absence of any motive in accused except that of defending from insult the character of the teacher whom he revered, the sentence passed by the Magistrate is unduly severe, and we accordingly modify it by setting aside the sentence of imprisonment altogether and reducing the fine to one of Rs. 200.

R. R.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice and Mr. Justice Beaman.

1907. *February* 21.

HANMANT RAGHAVENDRA (ORIGINAL DEFENDANT 3), APPLICANT, *v.* SHANKAR RAVJI APTE (ORIGINAL PLAINTIFF), OPPONENT.*

Limitation Act (XV of 1877), sch. II, art. 164—Civil Procedure Code (Act XIV of 1882), sec. 108—Ex parte *decree against more defendants than one—Execution against some of the defendants—Application by the other defendants to set aside the decree—Limitation.*

When a decree is passed against more defendants than one, and the decree is executed against some of the defendants only, that is not a process for enforcing the judgment as against the other defendants, within the meaning of article 164, schedule II of the Limitation Act (XV of 1877).

Ravji Ramchandra v. *Ramji Bhikaji*(1) followed.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the order of T. D. Fry, District Judge of Dhárwár, confirming the order

* Application No. 236 of 1906 under extraordinary jurisdiction.

(1) (1888) P. J. p. 56.

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passed by T. V. Kalsulkar, Subordinate Judge of Hubli, in an execution proceeding.

One Madhavrav Raghavendrarav passed a money bond to his creditor Shankar Ravji Apte (opponent) and Madhavrav's father Raghavendrarav stood surety. Subsequently Madhavrav having died, Shankar Ravji Apte brought a suit, No. 944 of 1902, in the Court of the Subordinate Judge of Hubli, against Madhavrav's two sons Krishnarav and Gundorav, as defendants 1 and 2, and against Hanmantrav Raghavendrarav, who alleged himself to be the adopted son of Raghavendrarav, as defendant 3, for the recovery of the debt due by Madhavrav under the bond. An *ex parte* decree was passed against all the defendants on the 28th May 1903. The decree awarded the amount claimed "from defendants 1 and 2 (*i. e.* Krishnarav and Gundorav) and in default from the estate of the deceased Raghavendhrarav." On the 13th October 1903, plaintiff, Shankar Ravji, presented a darkhást for the execution of the decree against defendants 1 and 2 and this darkhást was disposed of on the 6th December 1903. Subsequently on the 6th June 1904 the plaintiff presented another darkhást for execution against defendants 1 and 2 and while the execution proceedings were going on a prohibitory order was served on the two defendants on the 18th August 1904. On the 11th March 1905 defendant 3 presented an application for the setting aside of the *ex parte* decree alleging that he got knowledge of the decree when certain property belonging to him was attached and brought to sale under the prohibitory order served on defendants 1 and 2.

The Subordinate Judge dismissed the application on two grounds namely, that it was time-barred under article 164, schedule II, of the Limitation Act (XV of 1877) inasmuch as it was not presented within thirty days from the 18th August 1904 and that the summonses in the suit were properly served on all the defendants.

On appeal by the applicant, defendant 3, the Judge confirmed the order on the ground of limitation on the 31st March 1906. His reasons were :—

I hold that the application is barred. The decree in suit No. 944 of 1902 was passed on 28th May 1903. An application for the execution was presented on

6th July (June ?) 1904, and Exhibit 6 in the execution proceeding is a prohibitory order which was duly served on 18th August 1904 * * * *

The prohibitory order which was served on all the three defendants was 'a process for enforcing the judgment' within the meaning of article 164 and the present application should therefore have been made within 30 days of 18th August 1904. It was not however presented until 11th March 1905 and is clearly time-barred.

The case of *Ravji V. Ramji*, P. J. 1888, p. 56, does not apply.

The applicant, thereupon, applied to the Judge for review of judgment on the ground that the Judge was mistaken in supposing that the prohibitory order was served on all the three defendants. The Judge admitted the application and corrected his error, but finally dismissed the application on the 18th July 1906 on the following ground :—

The prohibitory order was *not* served upon the appellant. I hold at the same time, that under the circumstances of the case the appellant who claims the property as his own must have been aware of the order (see Ex. 26) and as he failed to come into Court within 30 days I can see no good reason to interfere with the decree confirming the order of the lower Court.

The applicant, upon this, preferred an application to the High Court under the extraordinary jurisdiction conferred by section 622 of the Civil Procedure Code, Act XIV of 1882, urging *inter alia*, that in the absence of the requirements imperatively enjoined by sections 235 and 248 of the Code, he was entitled to the equitable relief prayed for by him. A *rule nisi* was issued calling on the opponent (original plaintiff) "to show cause why the order of the District Judge of the 18th July, or in the alternative the order of the 31st March should not be set aside on the ground that the learned Judge failed to exercise jurisdiction vested in him in so far as he determined that it was not open to him to entertain the application under section 108 of the Civil Procedure Code as more than the 30 days prescribed by article 164 of the Limitation Act had elapsed prior to the application under section 108, whereas in fact of the two orders relating to execution, the first was not against the present applicant and the second was not preceded by notice under section 248 of the Code of Civil Procedure."

N. D. Jathar appeared for the applicant (original defendant 3) in support of the rule:—Section 235 of the Civil Procedure Code

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specifically enjoins that an application for execution must contain under column (i) of the table prepared under that section the names of the persons against whom the decree is to be executed. There were two applications in this case, but in none of them was any relief claimed against us. There was no execution sought for against us and consequently no process was issued against us at all. The ruling in *Ravji* v. *Ramji*[1] is fully applicable. The Judge erred in holding a contrary view. Article 164 of the Limitation Act cannot affect our application to set aside the *ex parte* decree.

Even assuming that execution was sought for against us, the want of a notice required by section 248 of the Civil Procedure Code vitiates the entire proceeding: *Sahdeo Pandey* v. *Ghasiram Gyawal*[2]. Assuming that there was such a notice, the notice merely is not equivalent to the "process of enforcing judgment" against us: *Poorno Chunder Coondoo* v. *Prosonno Coomar Sikdar*[3]. As a matter of fact no execution was asked for against us, consequently the provisions of the Limitation Act have no scope at all.

Section 108 of the Civil Procedure Code confers a very wide and equitable jurisdiction on the Courts. The term *shall* in the section makes it obligatory on the Courts to accept an application coming within the scope of the section.

G. K. Dandekar (and *M. B. Chaubal*) appeared for the opponent (original plaintiff):—Mere absence of the name of the person against whom a decree is to be executed in an application for execution should not be allowed to operate to the prejudice of a decree-holder. Such application does contain the names of the parties. The Judge has found as a fact that the applicant was aware of the decree. The application was, therefore, rightly rejected.

Even if it be held that article 164 of the Limitation Act is not applicable, the Judge has merely committed an error in law and such error would not entitle the applicant to come up in revision.

(1) (1888) P. J. p. 56. (2) (1893) 21 Cal. 19.
(3) (1876) 2 Cal. 123.

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JENKINS, C. J.:—This application arises out of a refusal by the lower appellate Court to set aside an *ex parte* decree under section 108.

The first Court refused to set aside the decree on the ground that the application for that purpose was beyond time, and also on the ground that the summons had been duly served.

The District Court confirmed the determination of the Court of first instance on the ground that the application under section 108 was beyond time.

Now the article of the Limitation Act which governs such an application is 164 which provides that "an application by a defendant for an order to set aside a judgment *ex parte* must be brought within thirty days from the date of executing any process for enforcing the judgment."

It has been determined in *Raoji Ramchandra* v. *Ramji Bhikaji*[1], that where the decree is against two defendants and the decree is executed against one only then that is not an execution of process for enforcing judgment against the other within the meaning of article 164.

Here there have been two applications for execution, but in each the persons against whom execution was sought were stated to be defendants 1 and 2, and not defendant 3 who is the present applicant.

It is therefore clear that the District Judge came to an erroneous conclusion.

We must make the rule absolute and send back the case for determination by the District Court.

Costs of this application and the costs hitherto incurred in the matter will be dealt with by the District Court.

Rule made absolute.

G. B. R.

(1) (1888) P. J. p. 50.