APPELLATE CIVIL.

Before Mr. Justice Chandavarkar.

NATHUBHAI KASANDAS (ORIGINAL PLAINTIFF), APPELLANT, *v.* PRANJIVAN LALCHAND AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1909. *November 22.*

Limitation Act (XV of 1877), Article 179—Decree—Execution—Execution made conditional upon payment of Court fees—Application for execution without payment—Dismissal—Second application with payment—Application made in accordance with law.

A decree was passed on the 30th June 1900 whereby partition of immoveable property was ordered: but the execution of the decree was made conditional on the payment of the proper Court fees. On the 29th June 1903 an application to execute the decree was made, but it was dismissed as it was not accompanied by payment. A second application to execute the decree was presented on the 27th June 1906: it was accompanied by payment. The lower Courts dismissed it on the ground that it was time-barred inasmuch as the first application made in 1903 was not one in accordance with law as required by Article 179 of Schedule II to the Limitation Act, 1877.

Held, that the first application was made in accordance with law, for, upon that application, it was competent for the Court to order that the execution should begin on the Court fees being paid within a certain date.

Held, further, that the second application was within time.

PER CURIAM:—An application for execution of a decree to be in accordance with law must ask for something *within* the decree and not *outside* it.

SECOND appeal from the decision of G. D. Madgaonkar, District Judge of Broach, confirming the decree passed by M. H. Vakil, Subordinate Judge of Ankleshwar.

Proceedings in execution of a decree.

The decree was passed on the 30th June 1900. It ordered a partition of immoveable property in possession of the defendant and directed that before the plaintiff could recover his share by partition he should pay the amount of Court fee leviable on his claim.

The plaintiff applied on the 29th June 1903 to execute the decree but the Court dismissed the application as it was not accompanied by payment of Court fees.

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A second application, accompanied by the payment, was made on the 27th June 1906.

The lower Courts dismissed the application on the ground that it was barred, inasmuch as the first application not having been accompanied by payment was not made in accordance with law as required by Article 179 of the Limitation Act, 1877.

The plaintiff appealed to the High Court.

M. N. Mehta for the appellant.

L. A. Shah for the respondent.

CHANDAVARKAR, J.:—The decree, execution of which has been held by both the lower Courts to be barred by the Law of Limitation, was one for partition of immoveable property passed on the 30th of June 1900, and directed that the plaintiff should not be entitled to execute it until he had paid Court fees. The present application for execution was made on the 27th of June 1906 by the plaintiff, who with it paid the Court fees into Court in fulfilment of the condition precedent to his right to execution. *Primâ facie* the application is barred, having been made more than three years after the date of the decree. But the application is sought to be brought within time by reason of an application made for execution on the 29th of June 1903. The lower Courts have held that that application does not help the plaintiff, because it was not one made in accordance with law, as required by Article 179 of Schedule II to the Limitation Act. In the present case what the decree directed was that the plaintiff should not be entitled to execution—that is, to the partitioning off of his share and its allotment to him—unless he paid the Court fee on that share. The payment was prescribed as a condition of the partition, not to the making of an application for it. There was nothing in the decree to prevent the plaintiff from applying for execution on one day and paying the Court fee on any day subsequent before the disposal of the application by the Court. The application itself cannot be said to have been not in accordance with law merely because it was not accompanied by a payment of the Court fee. This view is in accordance with the principle of the decision of this Court in *Narayan Govind* v.

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Anandram Kojiram[1], which is followed by the Madras High Court in *Syed Hussain Saib Rowthen* v. *Rajagopala Mudaliar*[2].

But it is urged for the respondents that the application of the 29th of June 1903 was not in accordance with law, because it asked the Court to do what it was not competent to do—that is, it asked the Court to order partition to be effected without payment of the Court fee directed by the decree as a condition of such order. And in support of this argument *Chattar* v. *Newal Singh*[3], *Munawar Husain* v. *Jani Bijai Shankar*[4], *Langtu Pande* v. *Baijnath Saran Pande*[5] are cited. It is true that, according to these decisions, as also according to *Pandarinath Bapuji* v. *Lilachand Hatibhai*[6], an application for execution, which asks the Court to do what it has no power under the decree to do, is no application for execution at all. The reason is that an application for execution of a decree to be in accordance with law must ask for something *within* the decree and not *outside* it. Applying that test here, what the plaintiff asked the Court to do by his application of the 29th of June 1903 was not outside the decree. It was within the competence of the Court to order partition on Court fee being paid as directed by the decree. The decree directed that no partition should be effected in execution unless Court fee were paid. Upon the plaintiff's application it was competent for the Court to order that the execution should begin on Court fee being paid within a certain date. No doubt the Court passed no such order but dismissed the application for execution on the ground that Court fee had not been paid; but all the same it was competent to the Court to pass an order for payment prescribing a date for it. On these grounds the *darkhast* must be held to be within time. The decree is reversed and the *darkhast* remanded for disposal according to law. Costs of the *darkhast* hitherto incurred including those of this second appeal to be paid by the respondents.

Mr. Shah argues that the point on which I have held that the present *darkhast* is not barred by limitation is *res judicata*

(1) (1891) 16 Bom. 480.
(2) (1906) 30 Mad. 28.
(3) (1889) 12 All. 64.
(4) (1905) 27 All. 619.
(5) (1906) 28 All. 387.
(6) (1888) 13 Bom. 237.

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inasmuch as this very point was substantially decided by this Court against the present appellant in Second Appeal No. 119 of 1904. That second appeal arose out of an application for execution of this very decree, which both the Courts below had dismissed because the appellant had not paid the Court fee. The second appeal was decided by Crowe, J., and myself and we confirmed the order of the lower Courts dismissing the application. There is no written judgment. Mr. Markand Mehta for the appellant reminds me that the ground on which Crowe, J., and I confirmed the order was that the plaintiff had no right to execution without payment of Court fee. And it was so, if I re-collect rightly. That was no adjudication either that the application then made or any previous application was not in accordance with law for the purposes of limitation or that the condition in the decree as to Court fees was of such a character that the Court fee must be paid *first* and the application for execution could only be made *afterwards*.

Decree reversed.

R. R.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

P. R. & Co., APPELLANTS AND PLAINTIFFS, v. BHAGWANDAS CHATURBHUJ, RESPONDENT AND DEFENDANT.*

1909. *March* 10.

Suit for price of goods bargained and sold—Cause of action—Indian Contract Act (IX of 1872), sections 39, 73, 120—Indian Contract Act has not altered the law relating to recovery of debts and liquidated demands—Civil Procedure Code (Act V of 1908), section 128.

Before the passing of the Indian Contract Act wherever a consideration was executed for which a debt payable at the time of action had accrued due either under an express promise or under one implied by law the debt might be sued for in an *indebitatus* count; thus the count lay where the consideration moving from the seller of goods was executed by his providing goods and only the money debt due by the buyer remained. The form of count in such a case

* Appeal No. 65. Suit No. 619 of 1908.