

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Roy Dhunput Singh v. Madhomotee Dabia, from the High Court of Judicature at Fort William in Bengal; delivered 2nd May 1872.*

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Present:

SIR JAMES W. COLVILLE.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

IN this Appeal the only question which arises is, whether within three years preceding the application for execution made in the Court below any proceeding had been taken to keep the original decree in force; the question depending on the 20th section of Act 14 of 1859. The precise date of the original decree has not been stated, but that date is immaterial, because the question is whether there was any proceeding within three years preceding the application for execution which was made on the 24th April 1869; and undoubtedly it must be shown that within three years of that date some proceeding was taken to keep the original decree in force.

The first proceeding relied on is a former application or suit for execution, the petition in which bore date the 12th December 1865, under which there was an order for the sale of a putnee talook, which was to take place on the 26th February following. On the day of the sale, by agreement, an order was made for the postponement of the sale for two months, and upon that order being made, it was further ordered that the case be struck off the file. It was contended for the Appellant that this execution suit must be considered to have continued in living force, although by the sus-

pensory order no proceedings were to be taken by way of sale for two months, and that the three years did not commence to run until the end of these two months. Their Lordships do not think it necessary to decide that question; they desire to give no opinion judicially upon it; having come to the clear opinion that the proceedings which were founded by the subsequent petition of the 20th March 1866 are sufficient to take the case out of the operation of the limitation.

The petition of the 20th March 1866, which was filed before the above-mentioned period of two months had expired, after referring to the decree, and to the execution and the postponement of the sale, alleges that the judgment debtor had subsequently taken out a decree against a debtor of his own, and sued out execution, and caused some property to be sold, and that the purchase money, an amount of 551 rupees, was received on deposit, and then the Petitioner proceeds, " While my execution was " pending I caused that amount belonging to " the judgment debtor to be attached and file " this petition, and pray that my execution suit " may be restored to the file, and that the afore- " said attached amount, Rs. 551, be paid to my " mookhtar."

This petition, if *bond fide*, would clearly be a proceeding to enforce the judgment; its object being to obtain execution of the money attached. It was referred to the officer of the Court, and the officer upon that reference found that no moneys were attached in execution of the decree in which the petition was filed, that is the decree in the present suit, but that certain moneys had been attached in another suit between the Appellant and the Respondent. The report is dated on the 3rd of May. On the 12th of May an order of the Court is made upon it, which has the following preamble: "Whereas " no money has been attached no orders can be

“ passed for the payment of such money, nor  
“ can other steps be taken. It is accordingly  
“ ordered that the case be struck off the file  
“ and the mookhtarnama be returned.” It seems  
to result from the report of the officer of the  
Court, and the order made upon that report,  
that no execution could issue upon the petition  
in consequence of the money not having been  
attached in this suit, and that there was another  
suit between the same parties, in which that  
sum of money had been attached.

It is said that this proceeding cannot be  
held to be one to keep the judgment in force,  
because it was a petition to obtain execution of  
a sum of money which it was not possible that  
the execution could reach, and that that must  
have been so to the knowledge of the decree-  
holder. It seems to their Lordships that these  
circumstances really affect only the *bona fides*  
of the proceeding. If their Lordships could  
infer from these facts that the petition was a  
colourable one, not really with a view to  
obtain the money; if they could come to that  
conclusion, in point of fact, the proceeding  
would not be one contemplated by the Statute;  
but their Lordships cannot come to that con-  
clusion. It appears that the decree-holder  
really desired to obtain execution of this money,  
and the fair inference is that he had mistaken  
the suit in which he could apply for execution,  
and having the attachment in another suit, he,  
by mistake, applied for execution in the present  
one, in which he had not obtained the  
previous attachment which is necessary to ground  
execution.

Then, assuming it to be a *bona fide* pro-  
ceeding, which failed in consequence of that  
mistake, their Lordships think that the original  
petition was a proceeding to enforce the  
judgment, and to have execution of it; that  
it was a continuing proceeding duly prosecuted  
by the Appellant, up to the time of the report,

and further up to the time when the judgment was finally given; and that during the whole of such pendency the decree-holder must be considered as going on with one and the same proceeding. Their Lordships do not consider that the fact that it was, in the end, abortive, takes from it the character of a proceeding to enforce the decree. The consequence will be that the 12th May 1866, when the petition was dismissed, is the date from which the three years ought to commence to run. This decision is entirely in accordance with the judgment of this Committee in the case of Maharajah Dheraj Chund Bahadoor and Bulram Singh, and does not conflict with any case to which their Lordships have been referred.

The result is that their Lordships will humbly advise Her Majesty to allow this Appeal and to order that the judgment under appeal be reversed, and that in lieu thereof the Appeal to the High Court be dismissed, and the judgment of the first judge be affirmed, with costs. The Appellant will have the costs of this Appeal.