

(1878) 03 CAL CK 0005
In the Calcutta High Court

Gopessur Mostofee and Others

APPELLANT

Vs

Ramsoonder Sandyal

RESPONDENT

Date of Decision : 07-03-1878

Acts Referred:

Citation : (1878) ILR (Cal) 716

Hon'ble Judges : Morris, J; Kemp, J

Bench : Division Bench

Judgement

Kemp, J.—It is contended by the pleader for the special appellant that if the starting point is to be the application u/s 212, which was made on the 2nd of January 1869, then the present application having been made more than three years from that date is barred. On the other hand, it is contended by the pleader who appears for the respondent, that the application of the 6th of September 1873 is within time, as the last previous application was made on the 22nd of November 1870. That was an application to sell the interest of the judgment-debtor in a certain decree and certain specified properties.

2. The pleader admits that this application of the 22nd November 1870 was not made u/s 212 of the Civil Procedure Code, but he says that it was an application "to keep in force" the decree within the meaning of Article 167 of Schedule II of the Limitation Act as interpreted by the Full Bench in *In re Chunder Coomar Roy v. Bhuggobutty Prasonno Roy* ILR 3 Calc. 235 : 1 C.L.R. 23. But we think that this reasoning is wrong. The application being for sale of certain properties already under attachment under an order issued on the application of the 2nd of January 1869, it was clearly an application to enforce the decree, and not one merely to keep the decree alive in the sense intended by the Full Bench. But the pleader further contends, on the strength of the decision of Justices Markby and Romesh Chunder Mitter, in the case of *Baboo Pyaroo Tuhobildarinne v. Syud Nazir Hossein* 23 W.R. 183 that the application of the 6th September 1873 must be treated as an application to revive and continue the proceedings instituted on the previous application of the 2nd of January 1869, those proceedings having been

stayed for a time,--i.e., from the 19th December 1870 to July 1873,--by reason of the judgment-creditor being forced to maintain, by a regular suit instituted for the purpose, the right of the judgment-debtor to the properties under attachment against third parties. But we observe that the circumstances of the case quoted differ materially from those in the present case. Mr. Justice Markby, who delivered the judgment of the Court, says: "Whatever may be the form of the last application, dated the 5th December 1873, in substance it was an application to the Court for the continuation of the former proceedings on the ground that the bar that was set up by reason of the adverse order u/s 246, had been removed by the decision in the subsequent regular suit;" and, therefore, for these reasons the learned Judges held that it was not an application to execute the decree within the meaning of Schedule II, Article 167 of Act IX of 1871. Now, in the present case, we find that these remarks do not in any way apply. The present application made by the decree-holder on the 6th of September 1873 was as follows: In the 9th column of the application in which he sets out the relief which he asks for from the Court,--namely, that the judgment-debtor's property being situated within the Chowkee of the Munsif of Nattore, it is necessary for him, the decree-holder, to take out a certificate before he can attach property within that jurisdiction, and he therefore prays the Court to forward a certificate of non-satisfaction to the Court of the Munsif of Nattore to enable the decree-holder to proceed to attach and soil the property situated within that jurisdiction; further, with that application he presented the original decree of 1864 for rent, and the subsequent orders of the Judge and of the High Court confirming that decree. It thus appears that the application contained no reference to the properties which were the subject of the regular suit, and was not therefore either in substance or in form such an application as was contemplated by Mr. Justice Markby in his judgment in the case above quoted.

3. It is not as though the judgment-creditor had represented that the obstacle which existed to obtaining satisfaction by selling the decree No. 11 of the Subordinate Judge of Rajshahye, in which the judgment-debtor had a title, had been removed by the reversal of the proceedings u/s 246. On the contrary, he asked for a certificate to be sent to the Munsif of Nattore in order that he might proceed against property which, so far as we understand, was quite independent of the property the subject of the regular suit, which suit had its origin in proceedings adverse to the judgment-creditor u/s 246. We are, therefore, of opinion that the case relied upon by the pleader for the respondent is not applicable to the circumstances and facts of the present case, and as it is clear that the application of the 22nd of November 1870 is not an application to keep the decree in force within the meaning of the Full Bench Ruling referred to, the judgment of the Judge must be reversed, that of the Munsif restored, and the appeal decreed with costs.