APPELLATE CIVIL.

Before Cuming and B. B. Ghose JJ.

1926

Jan. 11.

UPENDRA NATH BOSE

v.

K. B. DUTT*.

Execution of Decree—Partial execution—Execution of part of a decree, if it bars a subsequent execution of the entire decree—Civil Procedure Code (Act V of 1908), O. I, r. 2.

An appellate decree of the High Court made the judgment-debtors liable for payment of costs of the trial Court as well as of the High Court. In an application for execution of that decree, the decree-holders sought to execute the decree for costs of the High Court only and obtained partial satisfaction. In a subsequent application for execution, the decree-holders applied for execution of the balance of the costs allowed in the High Court as also the costs of the lower Court :—

Held, that the last application for execution was sustainable.

Nepal Chandra Sadookhan v *Amrita Lall Sadookhan* (1), *Dalichand Bhudar* v. *Bai Shivkor* (2), *Radha Kishen Lall* v. *Radha Pershad Sing* (3), *Huro Sankar Sandyal* v. *Taruck Chunder Bhuttacharjee* (4) and *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (5) referred to.

Appeal from Order by the plaintiffs, judgment-debtors.

This appeal arose out of an application for execution of a decree of the High Court, which made the plaintiffs, judgment-debtors, liable for payment of costs of the trial Court as well as of the High Court.

* Appeal from Original Order, No. 187 of 1924, against the order of N. N. Biswas, Subordinate Judge of Dacca, dated Feb. 23, and March 10, 1924.

(1) (1899) I. L. R. 26 Calc. 888.
(2) (1890) I. L. R. 15 Bom. 242.
(3) (1891) I. L. R. 18 Calc. 515.
(4) (1869) 11 W. R. 488.
(5) (1881) I. L. R. 8 Calc 51 ; L. R. 8 I. A. 123.

The first application in 1918 for execution was for realization of the costs of the trial Court and of the High Court. The application was dismissed. The next application in 1920 was for realisation of the costs of the High Court only. This case was disposed of on the 20th May, 1921, on part satisfaction, Rs. 1,800 being paid towards the decree for costs of the High Court. In the next application for execution in 1922, no claim was made for the recovery of costs of the lower Court at first. Subsequently the claim for costs of the lower Court was added by an amendment of the petition, after the period of limitation. The case was, however, dismissed for other reasons. The present application was made on the 13th of June, 1923, praying for realisation of costs allowed by both Courts. The judgment-debtors resisted the application, contending *inter alia* that it was barred by limitation. The Subordinate Judge, 1st Court, Dacca, overruled the objection and directed the execution to proceed.

The judgment-debtors thereupon preferred this appeal to the High Court.

Mr. Atul Chandra Gupta (with him *Babu Radhica Ranjan Guha*), for the appellants. The question has been treated in the Court below as one of limitation, viz., whether an application for partial execution saves the whole decree from the bar of limitation, as a step in aid of execution. But the real point is, whether by executing only a part of what is, after all a decree for one sum of money, viz., costs of two Courts, the decree-holder must not be taken in law to have given up the remainder. On this point, the case of *Nepal Chandra Sadookhan* v. *Amrita Lall Sadookhan* (1) and the case on which it rests, viz., *Dalichand Bhudar* v. *Bai Shivkor* (2) are no authority. The

(1) (1899) I. L. R. 26 Calc. 888. (2) (1890) I. L. R. 15 Bom. 242.

1926

UPENDRA NATH BOSE v. K. B. DUTT.

matter is dealt with by Sir Barnes Peacock in *Huro Sunkur Sandyal* v. *Taruck Chunder Bhuttacharjee* (1). Order II, rule 2 of the Code may not apply in terms to execution petitions [*Radha Kishen Lall* v. *Radha Pershad Sing* (2)], but unless the principle were applied at least to execution of reliefs of the same nature decreed, there would be no bar, as Sir Barnes Peacock points out, against a decree-holder putting a decree for a lakh of rupees in execution for a lakh of times at the rate of one rupee each time and perhaps putting the judgment-debtor in jail also a lakh of times. This cannot be prevented by refusing to execute a decree in part, for there is no law which compels a decree-holder to execute his whole decree if he do not wish to and therefore must be prevented by applying the rule of implied waiver.

Babu Upendra Lal Ray, for the respondents. There are many cases which hold that a partial execution saves limitation. They, by implication, show that subsequent executions are not barred by the principle of waiver. In a previous execution proceeding the Court allowed, by way of amendment, the costs of the lower Court to be added to the execution petition. That must be taken as a decision in favour of the maintainability of the execution like the present one and bars the present objection: *Mungul Pershad's* case (3).

Mr. Atul Chandra Gupta, in reply. In none of the two cases cited, the present question was raised and decided and they cannot be used as authority deciding the matter by implication. The former execution proceeding was dismissed, and hence any decision, if there was any, against the decree-holder, in that

(1) (1869) 11 W. R. 488, 489-90. (2) (1891) I. L. R. 18 Calc. 515
(3) (1881) I. L. R. 8 Calc. 51 ; L. R. 8 I. A. 123.

proceeding was not binding on him. He could not have appealed from it.

1926

UPENDRA NATH BOSE v. K. B. DUTT.

GHOSE J. This appeal arises out of an application for execution of a decree for costs. The appellants were the plaintiffs in a certain suit. The final decree in the High Court was made against them and they were made liable for payment of costs of the trial Court as well as of the High Court. The decree of the High Court was dated the 5th of July, 1917. Execution of costs was applied for on the 23rd of March, 1918, and it was for the realization of costs both of the Appellate Court and the trial Court. That application was dismissed in August, 1918, and it is unnecessary to state the reason for the order. The second application for execution was made on the 5th of July, 1920, and in that application the decree-holders sought for executing the decree for costs allowed by the High Court only; and the argument of the appellant is based upon this fact. On that application partial satisfaction was obtained by the decree-holders. The third application for execution was made on the 31st July, 1922, in which the decree-holders originally applied for execution of the balance of the costs allowed in the High Court only and afterwards, by an amendment of the application, the costs of the lower Court were also included in the application. That application was also dismissed and the present application was made on the 13th of June, 1923, including the costs allowed by both the Courts to the decree-holders. The objections on behalf of the judgment-debtors in the lower Court were that the application was barred by limitation, and, secondly, that the decree-holders having asked for the execution of the costs of the High Court only in their application of the 5th July, 1920, they were precluded in the

1926

UPENDRA NATH BOSE v. K. B. DUTT

GHOSE J.

present application from seeking to execute the decree for costs of the lower Court. The learned Subordinate Judge has rejected the objection of the judgment-debtors and directed the execution to proceed.

The judgment-debtors appeal to this Court and on their behalf the only ground that has been raised is that the decree-holders are precluded from executing the costs of the first Court on account of the course they had taken in their application of the 5th of July, 1920, in which they applied for execution of the costs of the High Court alone. It is not disputed that if the application is maintainable it is not barred by limitation. It is argued that the decree-holders are entitled only to maintain the application for execution with regard to the balance of the costs of the High Court. In the lower Court it appears that the question urged was only on the basis of limitation and it is not disputed that the Subordinate Judge was right in holding that the application would not be barred by limitation. It is, however, contended that the case of *Nepal Chandra Sadookhan* v *Amrita Lall Sadookhan* (1) does not support the proposition that a decree-holder after applying for a partial execution of a decree for money can maintain a subsequent application for execution of the entire decree. The contention on behalf of the appellants raised by Mr. Gupta is that the principle laid down in Order 2, rule 2, Code of Civil Procedure, with regard to suits applies to applications for execution, at any rate where the decree is not for different reliefs given to the decree-holders. It is, however, admitted that that rule does not apply in terms to an application for execution of a decree. With regard to the case of *Nepal Chandra Sadookhan* v. *Amrita Lall Sadookhan* (1), Mr. Gupta

(1) (1899) I. L. R. 26 Calc. 888.

argues that that case is distinguishable on the ground that the decree was for costs as well as for recovery of immoveable properties, and a previous execution was taken for costs only. The judgment-debtor raised no objection and therefore it was held that the judgment-debtor could not raise any objection in the subsequent proceedings that the previous application for execution was not in accordance with law. The learned Judges there were really dealing with the question of limitation and they held that the subsequent application was not barred by limitation. The case of *Dalichand Bhudar* v. *Bai Shivkor* (1) is almost similar in its facts, except that instead of the decree being one for recovery of immoveable properties and costs the decree was for recovery of certain ornaments and costs. There also the question was decided whether the subsequent application was barred by limitation or not. These cases, therefore, do not exactly touch the point that has been raised on behalf of the appellants by the learned advocate. Reliance is placed mainly in support of the argument on behalf of the appellants on the case of *Huro Sunkur Sandyal* v. *Taruck Chunder Bhuttacharjee* (2) in which at page 490, Sir Barnes Peacock observed: "I do not mean to say that a person may not apply for execution of part of a decree if he admits that the remainder has been satisfied: nor do I mean to say that where a decree is perfect for execution in certain respects and imperfect in other respects, that execution may not be taken out for the portion which is perfect". On this statement Mr. Gupta argues that when a decree-holder applied for execution of part of a decree he must be taken to have given up the remainder and it must be held that there was a satisfaction with regard to the portion for which he does not

(1) (1890) I. L. R. 15 Bom. 242. (2) (1869) 11 W. R. 488.

1926

UPENDRA NATH BOSE v. K. B. DUTT.

GHOSE J.

make any application for execution. This argument it seems to me, is not supported by the observations made by Sir Barnes Peacock in that case. The learned Judge there disapproved of piecemeal execution of a decree. But it is no authority for the proposition that if a portion of a decree has been previously executed an application for execution of the remainder would not be sustainable, because the mischief of partial execution could only be applied properly to the former application. The subsequent application is for the balance that would be found due after the previous execution had been levied. As there is no authority for the proposition that the principle of Order 2, rule 2, Code of Civil Procedure, should apply to an application for execution of a decree, I am unable to hold that the present application is not maintainable.

Reference may be made on this question to the case of *Radha Kishen Lall* v. *Radha Pershad Sing* (1) where the learned Judges held that section 43, which is now Order 2, rule 2, Code of Civil Procedure, did not apply to proceedings in execution and when a decree gives reliefs of different character such as a decree for possession and a decree for costs, they held that there was nothing in the Code of Civil Procedure which prevented separate and successive applications for execution as regards each of them. If that rule does not apply then there is nothing to prevent successive applications for execution of a portion of the decree from being made although the Court might refuse to execute a portion of the decree when such an application was made on a former occasion. The learned vakil for the respondents, Mr. Roy, argues that as all the cases lay down that when there has been a previous application for partial execution

(1) (1891) I. L. R. 18 Calc. 515.

that saves limitation as a step in aid of execution, by implication the cases must be supposed to have held that subsequent applications were maintainable.

It is worthy of note that in none of these cases which have been cited was this objection taken that a subsequent application is not maintainable on the principle of Order 2, rule 2, Code of Civil Procedure. I therefore hold that the present application is maintainable.

There is one other point which may be noticed and it is this: as I have already stated that the application of the 31st July, 1922, was originally for the execution of the balance of the costs of the High Court alone. The application was then amended under the orders of the Court by including the costs of the lower Court also. Objection was taken to this amendment. With regard to that the learned Judge states as follows: "The judgment-debtor contends that such amendment cannot be allowed. My predecessor-in-office allowed this amendment. Applications for execution are proceedings in suit. Section 153, Code of Civil Procedure, says that the Court may, at any time and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceedings in a suit. This Court finds that the amendment was permissible in law." It is contended on behalf of the respondent that, on the authority of the case of *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1), the question cannot be raised in the present proceedings, it having been decided previously in favour of the decree-holders. The appellants answer that when the execution case was dismissed they could not appeal and therefore that decision is not binding upon them. But I do not think that that argument is sustainable; because it

(1) (1881) I. L. R. 8 Calc. 51; L. R. 8 I. A. 123.

1926

UPENDRA NATH BOSE v. K. B. DUTT.

GHOSE J.

was open to the judgment-debtor to appeal from that part of the order under which the Court allowed the amendment of the application for execution and ordered that the execution would be proceeded with for costs of the lower Court also.

On these grounds this appeal must be dismissed with costs. Hearing-fee three gold mohurs.

CUMING J. I agree.

S. M. *Appeal dismissed.*

LETTERS PATENT APPEAL.

Before Walmsley and Chakravarti JJ.

JOGESH CHANDRA ROY

v.

ANNADA CHARAN CHAUDHURY.*

1926

Jan. 11

Lease—Holding over—Right to renewal.

In a lease for six years with liberty to the lessee to renew the same for another six years and on the expiration of those six years for another renewal upon similar terms, the heirs of the original lessee continued to be in possession after the expiry of the original lease and transferred the leasehold interest to others :—

Held, that the successors-in-interest of the original lessee are not entitled to ask for a renewal of the lease which they could exercise after the expiry of the first six years of the lease.

Jardine, Skinner & Co. v. *Rani Surut Soondari Debi* (1) explained.

* Letters Patent Appeal No. 56 of 1925, in Appeal from Appellate Decree No. 1542 of 1923, against the decree of A. H. Cuming, one of the Judges of this Court, dated April 22, 1925.

(1) (1878) L. R. 5 I. A. 164.