APPELLATE CIVIL.

Before Mitter and Guha JJ.

1933

Nov. 13, 16, 21.

PRAKASHCHANDRA CHAKRABARTI

v.

BARADAKISHORE CHAKRABARTI.*

Execution—Application for execution made more than twelve years after the date of the decree—Jurisdiction of court—Wrong order, if can be attacked collaterally in another proceeding—Code of Civil Procedure (Act V of 1908), s. 48.

An executing court is competent to entertain an application for execution after the expiration of twelve years from the decree and any order passed by it on such application, though wrong in law under section 48 of the Code of Civil Procedure, is not without jurisdiction.

Such wrong decision is binding on the parties who were represented in the proceeding in which the decision was given and, so long as it stands, it cannot be attacked collaterally in another proceeding by such party on the ground of want of jurisdiction in the executing court.

Malkarjun v. *Narhari* (1), *Amritrav Krishna Deshpande* v. *Balkrishna Ganesh Amrapurkar* (2), *Jotindra Nath Ghosh* v. *Sourindra Nath Mitra* (3), *Venkatalingama Nayanim Bahadur Varu* v. *Dhanaraj Girji* (4) and *Raja of Ramnad* v. *Velusami Tevar* (5) referred to.

APPEAL by the defendants against an order of remand by the lower appellate court.

The facts of the case and arguments advanced in the appeal are stated in the judgment.

Bijankumar Mukherji and *Shailendramohan Das* for the appellants.

Chandrashekhar Sen for the respondents.

Cur. adv. vult.

*Appeal from Appellate Order, No. 29 of 1933, against the order of A. F. M. Rahman, District Judge of Tippera, dated May 24, 1932, reversing the order of Abaneeprasad Niyogi, Second Subordinate Judge of Tippera, dated Sep. 30, 1931.

(1) (1900) I. L. R. 25 Bom. 337 ; L. R. 27 I. A. 216.
(2) (1887) I. L. R. 11 Bom. 488.
(3) (1927) 31 C. W. N. 818.
(4) [1929] A. I. R. (Mad.) 826.
(5) (1920) L. R. 48 I. A. 45.

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MITTER J. This appeal is directed against an order of remand made in a suit for contribution. The contention of the defendants, now appellants, is that the entire suit should have been dismissed by the lower appellate court as the amount in question in the suit was not legally recoverable from them. In order to understand this contention a few relevant facts need be stated.

It appears that the Maharaja of Tippera obtained a decree for Rs. 674 for arrears of rent against the tenants of a certain *tâluk* on the 5th of May, 1908; in execution of the said decree, the tenure was sold on the 27th of May, 1912, for Rs. 4,850; out of this sum Rs. 984-1 was appropriated towards the decretal debt and Rs. 3,865-15 remained as surplus sale-proceeds. On the 22nd of December, 1911, the Maharaja got a decree for rent for the subsequent period against the said tenants in respect of the same holding and, in execution of the said decree, the Maharaja attached the surplus sale-proceeds, but, in the meantime, one Kamalakanta Banikya attached the surplus sale-proceeds in execution of a decree on the the foot of a mortgage. The Maharaja entered into a compromise with Banikya and got Rs. 1,000 as deposit and allowed Kamal Banikya to take the remainder of the sale-proceeds in satisfaction of Banikya's mortgage decree. The Maharaja refused to treat his acceptance of the sum of Rs. 1,000 as realization towards his decree of the 22nd December, 1911, and proceeded to execute the said decree. In intermediate proceedings, which were carried up to the High Court, it was held that the Maharaja was entitled to execute his decree of the 22nd of December, 1911. See exhibit 14, judgment of the High Court dated the 12th June, 1925. The Maharaja applied for execution in 1927 and in this execution case the pay of the plaintiff was attached. In the *tâluk*, in respect of which the rent decree was obtained, the plaintiff and the defendants were jointly interested. The decree was realised from the

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pay of the plaintiff alone and, consequently, the plaintiff has brought this suit for contribution. One of the substantial defences to the suit is that the executing court had no jurisdiction to execute the decree of 1911 in 1927, the decree being barred by limitation, having regard to the provision of section 48 of the Code of Civil Procedure and the amount which the plaintiff paid to the Maharaja was consequently not legally recoverable from the defendants. This defence was accepted by the Munsif, who dismissed the suit.

An appeal was taken to the District Judge of Tippera by the plaintiffs. The learned District Judge remanded the suit to the lower court, with the direction to the lower court to come to a finding as regards each of the judgment-debtors in the rent-execution case arising out of the decree of the 2nd of December, 1911, whether he had due notice of execution-proceedings or had no opportunity of having his objection determined by the executing court by reason of defective notice or by reason of fraudulent suppression of notice. The learned District Judge further directed that the suit should be dismissed with costs in respect of each such (if any) judgment-debtor in respect of whom the Subordinate Judge might hold that he had no opportunity of having his objection determined by the executing court by reason of defective notice or by reason of fraudulent suppression of notice, and in respect of those judgment-debtors who might be found to have had due notice, the Subordinate Judge will determine certain issues and pass orders according to law. The learned District Judge affirmed the findings of the Subordinate Judge on issues 1 to 4.

It has been argued on behalf of the appellant, by Dr. Mukherji that the remand is wholly unnecessary and the suit should have been dismissed, as the executing court had no jurisdiction to execute the decree of 1911 in the year 1927, having regard to the provisions of section 48 of the Code of Civil

Procedure. Stress is laid on the following sentence of section 48—

> No order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from : (*a*) the date of the decree sought to be executed.

and it is argued that these words make it clear that it would not be competent for the executing court to entertain any fresh application for execution after the expiration of twelve years and that the question is really one which goes to the root of the jurisdiction of the executing court to entertain such an application. On the other hand, it is maintained by Mr. Sen, who appears for the respondents, that the question is one not of want of jurisdiction in the executing court, but of an erroneous decision by a court, which has jurisdiction to entertain the application. The learned District Judge has apparently accepted the latter view and the question in this appeal is as to which of the two contentions is right? It appears to us that the respondents' contention must prevail. It is true that the application for execution is not barred under the Limitation Act, but would be barred under this section (section 48), as it was made twelve years after the date of the decree. But where the executing court decides that the execution of the decree is not barred notwithstanding the provisions of section 48, it merely decides wrongly; and, as has been pointed out by their Lordships of the Judicial Committee of the Privy Council in the case of *Malkarjun* v. *Narhari* (1), the court has jurisdiction to decide wrongly as well as rightly. This wrong decision will certainly be binding on the parties who were represented in the proceeding in which the decision was given or had notice of that proceeding. This erroneous order was liable, at the instance of parties who were properly represented in the proceeding or had notice of the same, to be corrected by a court of appeal or revision,

(1) (1900) I. L. R. 25 Bom. 337 ; L. R. 27 I. A. 216.

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but so long as it stands it cannot be attacked collaterally in another proceeding by such party on the ground of want of jurisdiction in the executing court. Dr. Mukherji has argued, on the analogy of the provision as to *res judicata* as embodied in section 11 of the Civil Procedure Code, that the use of the expression "no order shall be made" ousts the jurisdiction of the executing court to entertain the application for execution, just as the use of the expression "no court shall try any suit or issue..." in section 11 has the effect of ousting the jurisdiction of the court to entertain a fresh suit or try a new issue with reference to matters which had already been decided. The analogy, however, does not assist the appellants, for the expression "no court shall try any "suit or issue.....", while it prohibits an enquiry *in limine* as to a matter already adjudicated upon, does not affect the jurisdiction of the court. As was pointed out by Mr. Justice West, the decision of a question of *res judicata* as of limitation or the like, raised in a case, is not, even though wrong, a failure, or a cause of failure, to exercise jurisdiction, any more than a wrong decision on the whole litigation; see *Amritrav Krishna Deshpande* v. *Balkrishna Ganesh Amrapurkar* (1). See also *Jotindra Nath Ghosh* v. *Sourindra Nath Mitra* (2). The court which had to execute the decree of 1911 had to determine whether the application for execution made in 1927 offended against the provisions of section 48 of the Code of Civil Procedure. In determining that section 48 was not infringed, the executing court was exercising its jurisdiction, although, in exercising such jurisdiction, it may have arrived at a wrong conclusion. The previous decision of the executing court arrived under such circumstances would certainly be binding on those who were either represented in the execution proceeding or had notice of the same.

The view we take receives ample support from a decision of the High Court of Madras in a recent

(1) (1887) I. L. R. 11 Bom. 488. (2) (1927) 31 C. W. N. 818.

case. See *Venkatalingama Nayanim Bahadur Varu* v. *Dhanaraj Girji* (1). Indeed as has been pointed out by the Judicial Committee in a case based on a somewhat similar state of facts it was not only competent for the present appellants, if they had notice, to bring forward the plea of twelve years' limitation, as provided for by section 48 of the Code of Civil Procedure, when the execution case was determined, but it was incumbent on them to do so. See *Raja of Ramnad* v. *Velusami Tevar* (2). The learned District Judge has rightly sent back the case for determining the issues which properly arise in this case.

The result is that the appeal fails and is dismissed with costs. We assess the hearing-fee at one gold mohur.

GUHA J. I agree.

Appeal dismissed.

A. A.

(1) [1929] A. I. R. (Mad.) 826. (2) (1920) L. R. 48 I. A. 45.