

in aid of execution of the decree. In the first place, the appeal of the judgment-debtor does not operate as a stay of execution; for the law expressly provides (s. 545 of Act X of 1877), that execution of a decree shall not be stayed by reason only of an appeal having been preferred against the decree, and it is not asserted here that the Appellate Court ordered the execution to be stayed. In the second place, the application must be made to the proper Court for execution, that is, as defined in explanation 2 of art. 179, the Court whose duty it is (whether under s. 226 or 227 of the Code of Civil Procedure or otherwise) to execute the order. Obviously, therefore, the Appellate Court is not such a Court, and cannot be applied to for such a purpose.

Consequently, as it is admitted that the application for execution is out of time if the opposition of the judgment-creditor in the appeal is not to count as such, we affirm the order of lower Court, and discharge the rule with costs:

Rule discharged.

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KRISHTO
GOUMAL NAG
v.
MAHABAT
KHAN.

Before Mr. Justice Mitter and Mr. Justice Tottenham.

NUND LALL BOSE AND ANOTHER (PLAINTIFFS) v. MIEER ABOO
MAHOMED AND OTHERS (DEFENDANTS)*

1879
July 14.

Execution-Proceedings—What matters may be determined on—Limitation—Res Judicata—Act VIII of 1869, s. 7—Act IX of 1871, sched. ii, arts. 60 and 118.

A, a Hindu widow, granted, without legal necessity, a mokurari lease of certain mouzas, portion of her husband's estate, to B. During B's possession part of the lands comprised in the granted mouzas were taken up by Government, and the compensation-money was lodged in the Collectorate. A having afterwards died, the next heirs of A's husband, on the 7th October 1871, sued B to recover possession of the mouzas, but not being aware of the facts, did not in that suit claim the compensation-money lying in the Collectorate. While this suit was still pending, B, in March 1872, drew the compensation-money out of the Collectorate. The heirs, after obtaining a decree

* Appeal from Appellate Decree, No. 1076 of 1878, against the decree of E. Grey, Esq., Judge of Gya, dated the 4th April 1878, affirming the decree of Baboo Bolai Chand, Subordinate Judge of that District, dated the 12th May 1876.

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against *B* for possession of the mouzas, on the 13th September 1875, instituted a fresh suit against him to recover the compensation-money wrongfully drawn out by him from the Collectorate.

Held, 1st, that the suit was not barred by s. 7 of Act VIII of 1859.

Held also, that it was not barred by limitation, although more than three years had elapsed since the money had been drawn out by *B*. Art. 118, and not art. 60, of sched. ii of the Limitation Act IX of 1871, applying to the case.

Held further, that the claim of the heirs was a proper subject for a regular suit, and could not have been heard and determined in the course of the proceedings in execution of the decree which they had obtained against *B* for possession of the mouzas.

THE facts in this case were as follows:—One Sreemutty Moti Sunduri Dasi, a Hindu widow, while in possession of certain mouzas, portion of the estate of her deceased husband, granted them without legal necessity by a mokurari lease to the defendants. While the defendants were in possession under this mokurari lease, a portion of the lands comprised in the mouzas was taken up by Government for public purposes, and about April 1871, Rs. 2,674, the sum adjudged to be the fair compensation for the land taken, was deposited by Government in the Collectorate. Sreemutty Moti Sunduri Dasi having died shortly afterwards, the plaintiffs in the suit, who were the nephews and next heirs of her husband, on the 7th October 1871, instituted a suit against the defendants in this suit, to recover possession of the mouzas that had been granted in mokurari to them by Sreemutty Moti Sunduri Dasi, on the ground that the latter, as a Hindu widow, had no power to create an interest which would last beyond her own life. It did not appear that, at the time of filing this suit, the plaintiffs had any knowledge either, that part of the lands comprised on the mouzas had been taken by Government, or that the compensation-money had been lodged in the Collectorate. This suit was decreed in favor of the plaintiffs on the 30th of June 1873, and the decree so obtained was afterwards confirmed upon appeal by the High Court. During the pendency of this suit, the defendants, in March 1872, drew the compensation-money out of the Collectorate. The present suit was instituted by the plaintiffs on the 13th September 1875 against the defendants, after the decree in the first suit

had been confirmed on appeal, to recover the compensation-money which had been wrongfully appropriated by the defendants. The defendants pleaded—

1st.—That the suit was barred by s. 7 of Act VIII of 1859.

2nd.—That if not barred by s. 7 of Act VIII of 1859, it was barred by art. 60 of sched. ii of Act IX of 1871, as it was in effect a suit “for money payable by the defendants to the plaintiffs for money received by the defendants for the plaintiffs’ use.”

3rd.—That if neither of the pleas in bar were applicable, the claim of the plaintiffs was not a proper subject-matter for a separate and regular suit, but should have been put forward and heard and determined in the course of the execution-proceedings by the Court which had made the first decree, declaring the mokurari lease to have been extinguished by the death of Moti Sunduri Dasi.

The Subordinate Judge of Gya, before whom the case came in the first instance, decided that the suit was barred by s. 7 of Act VIII of 1859, as the plaintiffs, when they instituted their suit to recover the mouzas, which they asserted to be then in the wrongful possession of the defendants, might also have claimed that money lodged in the Collectorate, and accordingly dismissed the suit.

On appeal to the Judge of Gya, that Judge held, that the suit was not barred either by s. 7 of Act VIII of 1859 or by art. 60 of sched. ii of Act IX of 1871, but that the claim of the plaintiffs was not one which could be asserted in a regular suit, as it ought to have been put forward and determined in the course of the execution-proceedings in the previous suit; and accordingly dismissed the appeal with costs.

From this decision the plaintiffs appealed to the High Court.

Bahoo Chunder Madhub Ghose and Bahoo Rajendro Nath Bose for the appellants.

Mr. R. E. Twidale for the respondents.

The judgment of the Court (MITTER and TOTTENHAM, JJ.) was delivered by

MITTER, J.—It appears to us that in this case the decisions of the lower Courts are erroneous, and must be set aside;

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and that the plaintiffs are entitled to a decree for the amount claimed.

The plaintiffs are the heirs of one Russick Lall Mitter. When the estate left by him was in the possession of his widow, Moti Sunduri, certain mouzas appertaining to that estate were given in mokurari by her to the defendants in this case. A portion of these mouzas having been taken by Government for public purposes, a certain amount of compensation-money was in deposit in the Collector's Court in lieu of the lands thus taken. On Moti Sunduri's death, a suit was brought on the 7th October 1871 by the plaintiffs against the defendants for the reversal of the mokurari potta and for possession of the lands covered by that pottu. The lands which were taken by Government, the compensation-money of which was in deposit, appear to have been included in that suit, the plaintiffs being ignorant of the fact that those lands had been taken by Government for public purposes. That suit was decreed on the 30th June 1873 in favor of the plaintiffs. In the meantime, that is to say, sometime in March 1872, the whole amount of the compensation-money which was in deposit in the Collector's Court, was taken by the defendants in this case. The present suit was brought on the 13th September 1875 by the plaintiffs to recover from the defendants that amount with interest from the date on which it was taken out of the Collector's hands.

The defendants resisted the claim, principally upon the ground that the plaintiffs' claim was barred by limitation, and that the suit was liable to be dismissed under s. 7 of Act VIII of 1859. Although, in the 7th paragraph of the written statement, the defendants stated that they were entitled to this money, it appears to us quite clear that the effect of the final decision of the 30th June 1873, between the parties, was to declare that the plaintiffs' title in respect of this money was superior to that of the defendants.

The Subordinate Judge dismissed the plaintiffs' claim under s. 7 of Act VIII of 1859. On appeal by the plaintiffs, the District Judge overruled that objection. He was also of opinion that the plaintiffs' claim was not barred by limitation,

the law applicable to the claim being that laid down in art. 118 of the second schedule of the Limitation Act of 1871. But the District Judge has dismissed the suit, upon the ground that the matter now in issue should have been raised and determined by the Court which had the charge of executing the decree of the 30th June 1873. He seems to be of opinion that the question at issue in this case is one which relates to the execution of that decree.

We are clearly of opinion that the ground upon which the District Judge has dismissed the suit, is erroneous. The decree which the plaintiffs obtained on the 30th June 1873 against the defendants was a decree for land. There was no decree for the recovery of the compensation-money, which is the subject-matter of this suit, and which in fact was drawn from the Collector's Court after the institution of the former suit. The question at issue in this case, is not one which relates to the execution of the decree passed in that suit on the 30th June 1873. Therefore, it is quite clear to us that the order of the District Judge dismissing the plaintiffs' suit cannot be sustained upon the ground upon which he has put his decision.

But the defendants (respondents) have urged before us that the District Judge's decision, with reference to the questions of limitation and the bar under s. 7 of Act VIII of 1859, is erroneous. It is contended that the article of the Limitation Act, which is applicable to this case, is art. 60, which runs thus:—"For money payable by the defendants to the plaintiffs; for money received by the defendants for the plaintiffs' use." In this case, it cannot be said that the money, which was taken out by the defendants from the Collector's hands, was so taken out for the plaintiffs' use. We are, therefore, of opinion that this article does not apply, and there being no other article in the second schedule of that Limitation Act which is applicable to the facts of this case, it seems to us that the plaintiffs are entitled to maintain this suit within six years from the date of the cause of action under art. 118 of that schedule, and that, consequently, the decision of the District Judge upon the question of limitation is correct.

As regards the objection under s. 7 of Act VIII of 1859,

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it appears to us that the defendants have not been able to show that, at the time when the first suit was brought, that is to say, on the 7th October 1871, the plaintiffs had any cause of action in respect of this money as against them. That being so, and it being also admitted that the money was really drawn from the Collector's office after the institution of that suit, we do not think that there is any force in this objection.

These are all the objections taken by the defendants to the plaintiffs' claim, and as it appears to us that the title of the plaintiffs in respect of this money cannot now be disputed, the plaintiffs are entitled to a decree. We, accordingly, reverse the decrees of the lower Courts, and direct that a decree be given to the plaintiffs for the money claimed with costs in all the Courts.

Appeal allowed.

ORIGINAL CIVIL.

Before Mr. Justice Wilson.

SHIBKRISTO SIRCAR v. ABDUOL HAKEM.

1879
 Dec. 19.

Practice—Amendment of Plaintiff—Alternative Relief—Frame of Suit—Account and Discovery.

After parties have come to trial to determine which of two stories is true, the plaintiff cannot be allowed to amend his plaint by abandoning his own story, and adopting that of the defendant, and asking relief on that footing: for the question, whether on that footing the plaintiff is entitled to relief, is one to which the defendant's attention has not been called, and as to which he has had no opportunity of answering.

In a suit to recover a specified sum for the hire of cargo boats and not asking for any other relief, the defendant alleged and proved, that he was merely the agent of the plaintiff to find hirers for the boats, and that he was not liable for the hire of the boats.

Held, that although *prima facie* a principal is entitled to an account and discovery from his agent, the plaintiff could not obtain such relief in the suit as framed, and that he could not, after coming to a hearing, be allowed to amend his plaint by inserting an alternative prayer for relief, upon the footing of the case set up by the defendant.