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Durmahatta, and as in fact he does carry on business there, and the money paid under the agreement was paid out of the Calcutta business, Calcutta was the place where the defendant would be fully entitled to redeem by paying the mortgage-money. The defendant admits that Rs. 4,000 was paid to him, and that the same is due, and that it was paid at the registry office at Cossipore. The affidavit of the gomasta, made at the time of presenting the plaint, states that the plaintiff knew nothing of the transaction, and that the gomasta was the only party who had a hand in the transaction. There is no doubt that the money was paid in Calcutta. I am prepared to hold that a money-decree can be made.

Attorneys for the plaintiff: Messrs. *Watson* and *Sen.*

Attorney for the defendant: *Mohendronath Bonnerjee.*

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Jackson, and Mr. Justice Ainslie.

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April 4
&
May 19.

DHURONIDHUR SEN AND OTHERS (DEFENDANTS) *v.* THE AGRA BANK (PLAINTIFFS).*

Injunction to restrain a Decree-holder from enforcing a Decree improperly or illegally obtained—Sale or Transfer of Dena Powna.

A, the proprietor of an indigo concern, which comprised a patni taluq, after mortgaging the entire concern to *B*, allowed the patni taluq to be sold for arrears of rent under Reg. VIII of 1819; *C*, the darpatnidar of the taluq, whose rights were thus extinguished, then sued and obtained a decree for damages against *A*. After *C* had obtained this decree against *A*, *A* sold his equity of redemption in the entire mortgaged concern to *B*, and by this sale, all the *dena* and *powna*, or liabilities and outstandings of the concern, were transferred from *A* to *B*. *C* then, after notice to *B*, obtained an order, by which *B* was made the judgment-debtor in the place of *A*. *B* took no proceedings within one year to set aside this order; but, after the lapse of

* Review of judgment on Appeal, No. 1 of 1878, under s. 15 of the Letters Patent, against the judgment of Mr. Justice Jackson, Officiating Chief Justice, Mr. Justice Markby, and Mr. Justice Ainslie, dated the 16th September 1878.

three years, upon *C* attempting to execute his decree, instituted the present suit to set aside the order, and for an injunction to restrain *B* from executing the decree against him.

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Held,—1*st*, that the purchase by *B* of the *deng-powna* of the indigo concern of which *A* had been the proprietor, did not make *B* liable to pay the amount, for which *C* had obtained a decree against *A*, as damages for the extinguishment of his darpatni right; 2*nd*, that the order substituting *B* for *A* in the suit for damages was illegal; 3*rd*, that although *B* was barred by limitation from suing to set aside that order, he was entitled to an injunction restraining *C* personally from executing the decree against him.

THIS was an application for a review of judgment in the decision reported in the 4th volume of the Indian Law Reports, Calcutta Series, p. 380.

The facts of this case were as follows:—In 1861, Messrs. Gillmore, McKilligan, and Co., who were then the proprietors of an indigo factory or concern, called the Paikurdanga Concern, mortgaged it to the Agra and Masterman's Bank. Amongst other properties belonging to this concern, there was a patni taluq called "Kalabaria," of which Brojonath Dutt was the darpatnidar. Whilst the Bank were in possession, the patni rent fell into arrears, and the taluq was, therefore, sold under the provisions of Reg. VIII of 1819, and, as a consequence, the darpatni right of Brojonath was cancelled.

Brojonath therefore, in 1867, brought a suit against the executors of Messrs. Gilmore, McKilligan, and Co., for damages occasioned to him by reason of the loss of his darpatni rights; and, in June 1867, obtained a decree entitling him to realize the damages from the estate of the original patnidars. Brojonath sold his decree to one Giridhur Sen, the predecessor in title of the present defendants. On the 11th August 1869, the executors of Gilmore, McKilligan, and Co. sold the right of redemption in the indigo concern with its *dena* and *powna* to the Agra Bank.

Giridhur Sen, then, in 1871, applied to the Court under s. 216, Act VIII of 1859, to substitute the Agra Bank in the place of the original judgment-debtors, on the ground that the Bank had purchased the entire rights of the Paikurdanga Indigo Concern with its *dena* and *powna*. A notice was issued against the Bank and served upon the manager, but he did not appear to oppose

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the application, and, on the 21st June 1871, the order applied for was obtained.

In December 1874, the defendants, as assignees of Giridhur Sen, applied to execute against the Agra Bank the decree which had been obtained by Brojonath against the executors of Gillmore, McKilligan, and Co. This application was unsuccessfully opposed by the Agra Bank, and, after some intermediate proceedings, the present suit was instituted by the Agra Bank against the defendants "to set aside the order of 21st June 1871, and all proceedings taken thereunder, and for an injunction to restrain the defendants from proceeding further therein."

The defendants contended that the suit was barred under cl. 15, sched. ii of Act IX of 1871, it not having been brought within one year from the date on which the order of the 21st June 1871 was obtained; and that, as the plaintiffs had been substituted in the place of the original judgment-debtors, and notice had been served upon them and they had not then objected, they were incompetent to object now.

The Subordinate Judge found that the plaintiffs' suit was barred, as not having been brought within one year of the order sought to be set aside, namely, the order of the 21st June 1871; and also that, inasmuch as the plaintiffs were in possession of the entire estate of the original judgment-debtors, they were liable to pay the amount of the decree, and accordingly dismissed the plaintiffs' suit with cost.

The plaintiffs appealed to the Civil Judge of Jessore, but under an order, dated 19th June 1876, the case was transferred to the High Court.

The Judges of the Division Bench, Mr. Justice White and Mr. Justice Mitter, differed in opinion; Mr. Justice White being of opinion that the Court had no power to order that the Bank should be made a party to the suit; that as far as regarded the prayer of the plaintiffs to set aside the order of the 21st June, they were barred by limitation, but was of opinion that they were entitled to an injunction restraining the defendants from taking further proceedings to enforce that decree. Mr. Justice Mitter, substantially agreeing with the Court below, was of opinion that the Bank were not entitled to an injunction. A

decree for an injunction having been drawn up in accordance with the decision of the senior Judge.

The defendants appealed under s. 15 of the Letters Patent against the decision of Mr. Justice White. The Court, consisting of Mr. Justice Jackson, Mr. Justice Markby, and Mr. Justice Ainslie, held, that the Subordinate Judge had no power to make the order of substitution; but that a subordinate Court had no authority to issue an injunction against the decree-holder to restrain him from executing the decree of another Judge exercising co-ordinate jurisdiction upon the grounds that the proceedings by which the decree was obtained were illegal; they, therefore, refused to grant the injunction, and allowed the appeal.

A review of this judgment having been obtained on the 1st May 1879, the case was re-argued before a Full Bench consisting of Sir Richard Garth, C.J., Mr. Justice Jackson, and Mr. Justice Ainslie.

Baboo *Rashbehary Ghose* for the appellants.—*Firstly.*—As to the Bank being liable for all the debts under the *dena-powna* clauses. [JACKSON, J.—You can't go into that; you did not raise the question in the case when it came up before the Full Bench before.] This being a review, I am entitled to go into the whole case again as it was heard in the Court of first instance—see the case of *Sainal Ranchhod* v. *Dullabh Dvarka* (1). [GARTH, C.J.—I think you are only entitled to go into the points on which the rule granting the review was allowed; this matter was not mentioned when the rule was argued, and we cannot enter into it now.] As to whether a suit like this will lie at all, the jurisdiction of the Court of Chancery cannot be exercised out here; it is only possible in a country where there are two different sets of Courts administering two different systems of law. No suit will lie to restrain a Court from proceeding with an order previously passed by that Court. In the case of *Protheroe* v. *Forman* (2), where judgment went by default at law, an injunction to stay execution on a bill filed after the judgment was refused. The ground of Lord Eldon's judgment was, that the person against whom judgment at law

(1) 10 Bom. Rep., 360. (2) 2 Swanston, 227.

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went by default, instead of obtaining a new trial sought relief from the Court of Equity, and that, having allowed judgment at law to go against him by default when he might have appeared and defended, he had no right to come in and ask for relief from a Court of Equity. [AINSLIE, J.—Why did not the Agra Bank appeal against the order? Mr. *Woodroffe*.—We say it was no order at all, it being beyond the power of the Court to make the order of substitution; and moreover, it purported to be made under s. 208, and against an order under that section there was no appeal. We were, therefore, obliged to bring a fresh suit to set aside the order and get an injunction, and that suit had to be brought in the Court of the Subordinate Judge—see *Abedoonissa Khatoon* v. *Ameeroonissa Khatoon* (1).] Where an order is made by a Court of competent jurisdiction, it is just as final as a decree in a regular suit—*Sudaburt Pershad Sahoo* v. *Lotf Ali Khan* (2). [Mr. *Woodroffe*.—Abedoonissa's case disposes of s. 208, and a regular suit now does lie to set an order aside.] I contend (i) a suit in this country does not lie for an injunction to restrain a proceeding of another Court; (ii) assuming that it could lie, the present suit would not, as the plaintiff has contributed to place himself in the position in which he now finds himself.—See Kerr on Injunctions, pp. 17, 22. The case of *Lalla Poorihit Lall* v. *Mussamut Sabeerun* (3) shows that a person other than the heir and personal representative may be substituted on the record, and therefore an order like the present is not made without jurisdiction. Further, so long as the order of the 21st June stands, there is no remedy for the Bank, as the Statute of Limitations is in their way.

Mr. *Woodroffe* for the respondent.—What is the order of substitution? Is it a summary order or not? I say it is a nullity, and that there is no warrant in law for making such an order. Under the Civil Procedure Code, there is no authority for putting any person's name upon the record in the place of a plaintiff or defendant. Under s. 208 of Act VIII of 1859, it is allowable where a decree has been transferred from an original

(1) L. R., 4 I. A., 67. (2) 14 W. R., 339. (3) 7 W. R., 368.

decree-holder to another person, such person may apply for execution of the decree; but this must not be done in his own name; the section makes no provision for the transferee's name being placed on the record. Section 210 provides, that where a judgment-debtor is dead, execution may be made against his legal representative, but it makes no provision for the name of the representative being placed on the record: the word "or" in the latter part of the section is a misprint—see *Mirza Muhomed Aga Ally Khan Bahadoor* v. *The Widow of Balmakund* (1). Section 216 does not call on a person to show cause why he should not be made a party to the suit. [JACKSON, J.—The word 'decree-holder' is not defined in s. 208, but it means in all probability the original decree-holder.] [AINSLIE, J.—Your argument, Mr. Woodroffe, excludes all appeals in the case of the death of a judgment-debtor after decree; but *Sheikh Wahid Ally* v. *Mussamut Jemaye* (2), referred to in *Bishtoo Narain Banerjee* v. *Gunga Narain Biswas* (3), is against you.] Except under ss. 208 and 210, no person can come in either to execute a decree which has been obtained, or come in and execute a decree against a judgment-debtor; it is only under these sections that substitution can be granted; and the present order cannot be said to have been made under either, for the rules laid down have not been followed. Again, before notice can be issued under s. 216, application must first be made under s. 210. No notice was issued to us under that section. The Subordinate Judge would have to be satisfied that Grant and Collis (the executors of the surviving partner) were dead, but they were not so; and still in spite of that the name of the Agra Bank was substituted on the record. The whole proceedings were, therefore, void. If, therefore, the order was null and void, we were not bound to come in and answer it. Again, the order was one which was not appealable, nor was it open to review; if it had been open to appeal or review according to the case of *Abedoonissa Khatoon* v. *Ameeroonissa Khatoon* (4), nothing could be decided on it, and it would have been infructuous. Two conditions must occur to give the Court

(1) L. R., 3 Ind. App., 241.
(2) 11 W. R. (F. B.), 1.
(3) 11 W. R., 368.
(4) L. R., 4 Ind. App., 66, 70.

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jurisdiction: (i) the question must be between the parties to the suit, and (ii) it must relate to the execution of the decree; as to an appeal from such order, see *Sooba Beebee* v. *Fuhurunnissa Begum* (1). The case of *Pogose* v. *Catchick* (2) is an express authority that there is no appeal from an order or proceeding under s. 210. Although it is not easy to find an authority for the proposition that a suit may be brought for the purpose for which we have brought our present suit, yet the case of *The Agra Bank* v. *Brojosundari Dabi* (3) is a direct authority, and that case was decided by the very same learned Judges who have decided the other way in the present case. The case of *Dorab Ali Khan* v. *The Executors of Khajah Moheeooden* (4) decides, that if I obtain an order and set the law in motion, the execution-creditor is not liable but the Court; but if a creditor comes into Court and obtains an illegal order, then the execution-creditor shall be liable as having put the Sheriff in motion, and he is responsible to the execution-debtor as having sold his debt improperly. [GARTH, C. J.—Apart from the question of limitation, I should have some difficulty in deciding that one Court can restrain the proceedings of another Court; but it is quite sufficient for the Court to issue a perpetual injunction to restrain proceedings as against the Agra Bank.] In the judgment in the former hearing of this case two different matters have been mixed up, *viz.*, an injunction to restrain proceedings, and an injunction to prevent a person from doing a certain thing. We are not asking the Court to restrain the order of another Court, but we are asking for an injunction for an Appellate Court to restrain the order of a lower Court, which for the purposes of appeal is the same Court as the lower Court.

Mr. *Evans* on the same side.—If it be taken that this was an order at all, it was an order that a decree should be executed against a person who was not a party to the suit, and that could not be done without an adjudication as to whether the Agra Bank was liable or not; but Abedoonissa's case shows that there cannot be any adjudication under s. 208. We,

(1) I. L. R., 3 Calc., 371; S. C., 1 Calc., 331. (3) Reg. App. 121 of 1876.
(2) I. L. R., 3 Calc., 708; S. C., 2 Calc., 278. (4) I. L. R., 3 Calc., 806.

therefore, had no remedy but to bring this suit; if the suit lay, it was the duty of the Judge, after finding that his order was erroneous, to stay proceedings pending the hearing of the suit. If our argument is correct that it is an erroneous order, then a suit will lie; if the order were not erroneous, still a suit would lie to have an adjudication held under it.

Baboo *Rashbehary Ghose* in reply.

The judgment of the Court was delivered by

GARTH, C. J. (JACKSON and AINSLIE, JJ., concurring).—A review having been granted in this case upon the ground that the previous judgment of this Court contained an inaccurate statement of the facts, and that a review was necessary for purposes of justice, we are now called upon to decide a second time the appeal which has been preferred from the judgment of Mr. Justice White, whose opinion in the Division Bench prevailed over that of Mr. Justice Mitter. Messrs. Gilmore, McKilligan, and Co. were the proprietors of an indigo business called the "Paikurdanga Concern," over which the Agra Bank held a mortgage; one of the properties belonging to that concern was a patni taluq called "Kalabaria," of which Brojonath had the darpatni; the rent of this patni taluq not being paid, it was sold under the provision of Reg. VIII of 1819; and in consequence of that sale Brojonath's darpatni rights were cancelled. Brojonath then brought a suit against a number of persons including the executors of the deceased members of the firm of Messrs. Gilmore, McKilligan, and Co. for the damage which he had sustained by the cancellation of his rights, and he obtained a decree on the 3rd June 1867 for money to be realized from the estate of the original patnidars. This decree was sold to one Giridhur Sen, the predecessor in title of the present defendants. On the 16th August 1869, the executors of Mr. J. P. McKilligan, the last survivor of the firm of Gilmore, McKilligan, and Co., sold the Paikurdanga Concern with *dena* and *pouna* to the Agra Bank, the present plaintiffs. In 1871, Giridhur Sen applied to the Court, in which the decree for damages had been passed, to substitute the Agra Bank in the place of the original judg-

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ment-debtors, on the ground that the Bank had purchased the rights of the Paikurdanga Concern with *dena* and *powna*, and were consequently liable to pay the amount of the decree. A notice of this application was served on the Manager of the Bank, but he being advised that the Court could not possibly grant the application, did not appear to oppose it.

The application, however, was granted, and the Agra Bank were substituted in the place of the judgment-debtors. In December 1874, the defendants applied to execute the decree against the Agra Bank; and on this occasion the Manager of the Bank opposed the application: this opposition, however, was overruled. He then applied to this Court, under s. 15 of the Charter Act, to set aside the order under which the Agra Bank was substituted for the original judgment-debtors, on the ground that the Court had no jurisdiction to make such an order; but this application was refused. The Agra Bank then brought this present suit, praying that the order of substitution might be declared illegal; that the proceedings taken upon it should be set aside; and that the defendants should be restrained from taking proceedings upon it against the plaintiffs. The defendants contended—

1*st*.—That as the plaintiffs' object was in effect to set aside the order of the 21st of June 1871, and as the suit was not brought within a year from that date, the plaintiffs were barred by limitation (art. 15, sched. ii of Act IX of 1871).

2*ndly*.—That as the plaintiffs had not appeared to urge this objection in the execution proceedings, they had no right to do so by a regular suit.

3*rdly*.—That as the Agra Bank were the mortgagees in possession of the patni taluq which was sold for arrears of rent, it was through their default that the patni taluq was sold and the darpatnidars' interest cancelled.

4*thly*.—That as the Agra Bank had become the owner of the business carried on by Gilmore, McKilligan, and Co., with *dena* and *powna*, they were liable to satisfy the decree obtained by the defendants' ancestor against Gilmore, McKilligan, and Co.

The Subordinate Judge in the Court of first instance held that plaintiffs' claim was barred by limitation; and also that the plain-

tiffs as assignees of Gilmore, McKilligan, and Co. had become liable to pay the amount of the decree, and consequently dismissed the plaintiffs' suit, and on appeal to this Court the Judges of the Division Bench differed in opinion; Mr. Justice Mitter substantially agreeing with the Court below, and Mr. Justice White deciding that in point of law the plaintiffs were not liable for the amount of the decree, and that they were entitled to an injunction restraining the defendants from taking further proceedings to enforce that decree. The opinion of Mr. Justice White, being the senior Judge, prevailed. An appeal was then preferred from his decision, and the Appellate Court as originally constituted allowed the appeal, but a review has been granted, and we have now heard the case re-argued. We have already expressed an opinion during the argument that the Agra Bank were not liable to the present defendants for the amount of the decree; that decree, as it seems to us, had nothing to do with the debts of the Indigo Concern; the Agra Bank were in no sense the representatives of Gilmore and Co.; and the Subordinate Judge had no right whatever to substitute the Bank in the place of the original judgment-debtors. The only points upon which we have entertained the least doubts are:—

(1) Whether the Agra Bank, having neglected to appear in the execution proceedings, and to urge their objection to the order made by the Court, can now maintain this suit for the purpose of relieving themselves from that order; and

(2) Whether the suit is barred under art. 15 of the Limitation Act, not having been brought within a year from the time when the order was made.

We are of opinion that the plaintiffs in this suit are entitled to be relieved from the effect of the order in question. That order was made under such circumstances that the plaintiffs had no means, by any proceedings which they might have taken in the former suit, of setting it aside or preventing the defendants from enforcing it; it is true that in the first instance they had an opportunity of objecting to its being made, but inasmuch as they were not in any sense the representatives of the judgment-debtors, they had certainly good reason to suppose that the Judge would not have made such a mistake as to sub-

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stitute them in their place. Then the order having been once made, they had no right of appeal against it, and they took the only means in their power of negativing its effect,—1*st*, by objecting to the application which was made by the defendants to enforce it by execution; and 2*ndly*, by applying to this Court under s. 15 of the Charter Act to set aside the order upon the ground that the Court had no right to make it. Both these attempts having failed, this suit is now the only means by which they can prevent the defendants from making an inequitable use of the order which they have unjustly obtained: the proper object of the suit is not to set aside the order, but to restrain the defendants by injunction from enforcing it. The principle laid down in Daniell's Chancery Practice, 3rd edition, p. 1218, is this—it is a general rule illustrated by an abundance of cases that "wherever a party by fraud, accident, mistake or otherwise" has obtained an advantage in proceedings in a Court of ordinary jurisdiction, which must necessarily make that Court an instrument of injustice, a Court of Equity will interfere to prevent a manifest wrong by "restraining the party, whose conscience is thus bound, from using the advantage he has gained." And in Drury on Injunctions, p. 96, where the same subject is discussed, it is said, "Upon this principle it seems immaterial *where or what the Court is* in which the proceedings are sought to be restrained, provided *the party sought to be restrained* is amenable to the jurisdiction and is capable of being acted on by the process of contempt of Court; and the extension of the jurisdiction of equity to stay proceedings in other Courts, besides Courts of common law and in foreign Courts as well as in Courts within the jurisdiction of the Court of Chancery, becomes, when considered in reference to the principle stated, as rational and intelligible as it is firmly established in practice." (See also Story's Equity Jurisprudence, ss. 899 and 900.) Acting upon this principle, we quite agree with Mr. Justice White that although the order of the 3rd of June cannot itself be set aside in this suit, the defendants ought to be restrained by a perpetual injunction from taking any further proceedings upon it as against the plaintiffs. In the view we have taken of this case, there is of course no ground for the objection founded on

art. 15 of the Limitation Act. Our judgment will not have the effect of *setting aside the order* in the former suit. It will only be binding on the defendants personally; it will prevent them from unjustly and inequitably availing themselves of an order which was to some extent the result of their own mistake, and certainly of error on the part of the Court who made it.

The appeal will, therefore, be dismissed, and the appellants will pay to the respondents the costs of both hearings.

Appeal dismissed.

Before Mr. Justice Jackson and Mr. Justice McDonell.

IN THE MATTER OF CHENI BASH SHAHA (PLAINTIFF) *v.* KADUM MUNDUL (DEFENDANT).*

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Limitation—Contract to pay by Instalments—Default in paying an Instalment of a Debt payable by Instalments—Act IX of 1871—*Act XV of* 1877, *sched. ii, art.* 75.

When a debt is made payable by instalments, with a proviso that, on default of payment of any one instalment the whole debt, or so much of it as may then remain unpaid, shall become due, limitation runs, under Act IX of 1871 or Act XV of 1877, from the time of the first default. A subsequent acceptance of the instalment in arrear operates as a waiver, and suspends the operation of the law of limitation; but merely allowing the default to pass unnoticed does not.

THIS was a reference to the High Court from the Judge of the Small Cause Court at Kooshtea, and the facts appear from the order of reference, which was as follows:—

A plaintiff sues the defendant for recovery of certain moneys due upon an instalment-bond purporting to have been executed by the latter. The bond is dated the 28th Pous 1281 (11th January 1875), and it contains a provision that, on default of payment of one of the instalments the whole of the money secured would become exigible. The two first instalments were respectively due in Cheyt 1281 (March 1875) and Bhadro 1282 (August

* Small Cause Court Reference, No. 600 of 1879, from an order made by Baboo Bulloram Mullick, Officiating Judge of Small Cause Court at Kooshtea, dated the 17th April 1879.