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counsel for the respondents, the question whether the Raja could apply for the revocation of the probate has not been argued before them, and therefore they give no final opinion upon it.”

It therefore appears from the opinion expressed by their Lordships in the Privy Council that no attaching creditor can seek to revoke the probate of a will, or oppose the grant of probate unless he puts his case upon the ground that the will set up was in fraud of creditors. We think that the ground set forth in the application made by the objector in this case amounts to a statement that the will set up by the wife of the judgment-debtor is a forgery and a fraud upon the mortgagee. Under such circumstances we are of opinion that the attaching creditor is entitled to oppose the grant of probate. Were we to come to any other decision the result would be that, although the attaching creditor would be in a position to contest the demand of any other person claiming the attached property, he would not be able to dispute any title derived under a will.

In regard to the merits of the case, we concur in the opinion expressed by the lower Court that the will is not proved to have been executed by the alleged testator, and we therefore dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice McDonnell and Mr. Justice Field.

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February 14.

BISWA SONAN CHUNDER GOSSYAMY (JUDGMENT-DEBTOR) v. BIN-
ANDA CHUNDER DIBINGAR ADHIKAR GOSSYAMY (DECREE-
HOLDER.)*

Limitation—Civil Procedure Code, ss. 108, 230 and 647—Application for execution of Decree—Practice of striking off execution proceedings—Procedure.

A decree was obtained on the 10th July 1858 and applications to execute it were made in June 1862 and January 1866. The last application prior to the coming into operation of the Civil Procedure Code of 1877 was on the 10th January 1876. This proceeding was struck off. The decree-holder on the 13th June 1879 again applied for execution; the decree was transferred

* Appeal from Appellate Order No. 840 of 1883, against the order of G. J. Lyall, Esq., Offg. Judge of Assam Valley Districts, dated the 27th July 1883, affirming the order of H. C. Williams, Esq., the Subordinate Judge of Durrung, dated the 5th March 1883.

to *S* for execution, where on objection that it was more than twelve years old and therefore barred by s. 230 of Act X of 1877, the execution proceedings were again struck off on the 17th January 1880. This order was appealed against, and eventually on the 25th April 1881 the application was re-admitted. In June 1881 an application was made to the *S* Court for transfer of the case for execution to *D* which was granted and the case transferred, but no steps having been taken by the decree-holder in the *D* Court, it was struck off by that Court on the 19th August 1881. On the 4th March 1882 (the judgment-debtor having died meanwhile) an application was made to the *D* Court to restore the proceedings for execution against his representative. Notices were issued, and the 2nd June was eventually fixed for the hearing. On that day no one was present on behalf of the decree-holder (whose pleader had died in the meantime), and the case was again struck off. On the 11th July 1882 application was made to restore the proceedings, notices were issued, and a day fixed for hearing, and after numerous adjournments the objections of the judgment-debtor were overruled on the 5th March 1883 and execution of the decree granted. On appeal the Judge found that the execution proceedings had been continuous throughout, and that there had been no unreasonable delay in the prosecution of the execution proceedings. *Held*, that execution of the decree was not barred by a. 230 of the Code of Civil Procedure.

The rights of the parties to execution proceedings are not affected in any way by the case being "struck off" by the Court, there being no provision in the Civil Procedure Code for such a course. *Baroda Soondari Debia v. Fergusson* (1) followed. The only proper mode of dealing with a case, whether a regular suit or a miscellaneous proceeding, when the parties do not appear is to dismiss it. A case so dismissed can be restored on application under s. 108, which is by s. 647 applicable as well to execution proceedings as to suits and appeals.

THE facts of this case are stated as follows in the judgment appealed from:—

"The date of the decree is the 10th July 1858; it has several times been executed, but never fully.

"The last occasion on which the execution was taken out, prior to the coming into force of Act X of 1877, was in 1876.

"On the 13th June 1879 the decree-holder filed an application before the Subordinate Judge of Tezpur in which he stated that the judgment-debtor having concealed his property, the application for execution made in 1876 had been struck off; that the decree-holder had now discovered that the judgment-debtor had taken some property to his house; and that execution against this property was desired. Notice was accordingly issued to the judgment-debtor. The execution proceedings were then transferred to the Court of the Subor-

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dinate Judge of Sibangar. An objection was there taken by the judgment-debtor that the decree was barred as more than twelve years old by the provisions of s. 230 of Act X of 1877. This objection was allowed by the Subordinate Judge and the execution case struck off on the 17th January 1880.

"This order was appealed against, and eventually on the 25th April 1881 the District Judge re-admitted the application under the last clause of s. 230 of the Code.

"In pursuance of the Judge's decision a petition was in June 1881, (date in month not stated), presented to the Subordinate Judge of Sibangar, asking that the case might be re-admitted and the decree transferred for execution to the Subordinate Judge of Durrung. On the 13th July 1881 the Sibangar Court wrote a proceeding transmitting the decree for execution to Durrung. On the 29th July 1881 the Subordinate Judge of Durrung recorded the following order on the proceeding received from Sibangar: "Register and give 7 days' grace to decree-holder to take the necessary steps." On the 19th August the case was struck off, the decree-holder having failed to take the necessary steps.

"On the 4th March 1882 (the judgment-debtor having meanwhile died) the decree-holder filed an application before the Durrung Subordinate Judge, asking that the case which had been struck off and sent to the record-room might be brought again on the file; that notice might be sent to the judgment-debtor's son, who was his heir; and that the property specified in the application might be attached and sold. On the 1st April 1882, it was ordered that notice should issue to the judgment-debtor under s. 248, Civil Procedure Code, to show cause why the decree should not be executed against him. The judgment-debtor having filed objections, it was ordered on the 1st May that the 18th May should be fixed for hearing the suit. On the 18th May the Deputy Commissioner being absent the case was postponed till the 2nd June. On the 2nd June 1882, the following order was passed:—"No one is present on behalf of the decree-holder whose pleader has died. The case will be struck off."

"A petition, dated 16th June (but apparently not presented till 11th July) was then filed by the decree-holder, before the Subordinate Judge, asking that the decree might be re-admitted.

"On the 11th July 1882 it was ordered that this should be brought up with the previous papers.

"On 22nd July it was ordered that notice should be issued on the heirs of the judgment-debtor under s. 248 to show cause, the 22nd August being fixed for hearing.

"On the 22nd August 'the pleader for the opposite party being sick, case adjourned till to-morrow.'

"On 23rd August the case was again adjourned till 23th August.

"On 23th August, at the request of the decree-holder's pleaders, the case

was adjourned till 6th September 1882, to see what execution of decree cases took place previous to 1879.

"On 6th September, 'no time; case postponed to 8th.

"On 8th September three witnesses examined on behalf of decree-holder, and summons ordered to issue to objections (that is, judgment-debtor's) witnesses to appear on 4th October next.

"4th October, 'case postponed to first open day after Doorga Poojn holidays.

"Nothing seems to have taken place on the day fixed.

"3rd February 1883, 'at request of judgment-debtor, case adjourned till pleader returns.'

"5th March 1883, objection raised dismissed, decree-holder to furnish list of property he desired to be attached by 14th."

From this order an appeal was preferred to the Judge on the following grounds:—(1), that the decree is barred from execution under s. 230 of Act XIV of 1882; (2), no steps having been taken to execute the decree between the 30th June 1862 and 10th January 1866 and between the 10th January 1876 and the 11th July 1879 the decree cannot be executed; (3), the appellaut having received no assets from the judgment-debtor the decree cannot be executed against him; (4), the decree-holder has been satisfied already and what is claimed as due is interest upon interest.

In his judgment the Judge stated as to these grounds:—

"As regards the first ground it is urged that s. 230 of the Civil Procedure Code gives, in the case of decrees more than twelve years old, only the right to one application for execution to be made 'within three years after the passing of the Code'; the Code received the Governor-General's assent on the 30th of March 1877 and came into force on the 1st October 1877; taking the latter (as has been held to be the proper interpretation) as the date of passing, it is said that after the 1st October 1880 it was no longer possible to take proceedings for execution of the decree granting that the proceedings instituted on the 13th June 1879 were within time; these proceedings terminated with the order striking off the case on the 19th August 1881; the renewed application for execution presented on the 4th March 1882 was inadmissible, and it, too, was brought to an end by the order striking off the case on the 2nd June 1882; the present is the third application since the passing of the Act X of 1877 and is barred by limitation.

"In support of this contention I am referred to the rulings of the High Court in *Afrannissa Chowdhani v. Sherafutolla Chowdhry* (1) and *Sreenath Gooloo v. Yusuf Khan* (2). In the former of these cases an application was made for execution within the three years, and granted, but erroneously

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(1) 9 C. L. R., 321.

(2) 9 C. L. R., 335.

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(as the High Court held) struck off on an untenable ground by the Judge. A second application was made and rejected under s. 230. The Court held that the decree-holder could not obtain relief on appeal against the 2nd order, because his proper course was to have appealed against the first order. In the second of these cases an application to execute was made within time, and subsequently a second application was put in, asking that the properties specified in the first application might be released from attachment and certain other properties specified in the form attached in their stead. It was held that the latter was a second application and barred by the section referred to.

“On the other hand it is argued for the respondent that the orders of the 19th August 1881 and 2nd June 1882, striking the execution proceedings off the file, do not operate to terminate those proceedings and that the proceedings consequent on the application of the 13th June 1879 must be regarded as continuous down to the present date. In support of this contention the following cases are quoted:—

“*Pudo Monee Dasseo v. Roy Mothooranath Chowdhry* (1); *Soonder Singh v. Subooria Alum Boshu Koor* (2); *Panoul Hug v. Kishen Mun Dabea* (3); *Barada Sundari Dabea v. Fergusson* (4). The first two of these rulings (the first of which is of the Privy Council) clearly lay down that no inflexible rule can be asserted regarding the effect of an order striking off an execution case, ‘but that the question must be determined by the facts and circumstances of each case. In the fourth and most recent of the cases the Court expressed itself as follows:—

“We wish to observe that it cannot be too widely known that when execution proceedings are struck off on the mere motion of the presiding judicial officer, the rights of the parties to those proceedings are not in any way affected. The striking off is not in accordance with any provision in the Code of Civil Procedure. It is done merely for the convenience of the Court, and with a view to diminish the number of cases which might otherwise appear to have been pending in their Court for a long time. When the striking off takes place upon the application of the parties, or after their failure to appear when they have received due notice to appear, their rights may be affected by the striking off, but whether they are so or not would depend upon the circumstances of each case.’

“Applying the principles just stated to the present case, I find that the striking off the execution proceedings on the 19th August 1881 was not a termination of them. It is to be borne in mind that the case had been transferred from one district to another, and that a reasonable time ought to have been given to the decree-holder to prosecute them in the new Court. It appears, however, that the proceedings only reached the Durrung Court on the 29th July, and that they were struck off for default of

(1) 12 B. L. R., 411; 20 W. R., 133.

(2) 24 W. R., 36.

(3) 9 C. L. R., 297.

(4) 11 C. L. R., 17.

prosecution twenty-one days later, without, as appears from the record, any notice having been given to the decree-holder.

"The next question that arises is, whether, granting that the order of the 19th August 1881 did not of itself operate to bring the proceedings to an end, the failure of the decree-holder to take any further steps for six months afterwards (until the 4th March 1882) implied abandonment of the proceedings. Here the point is more doubtful, and the facts are not very fully disclosed on the record or by the pleaders. But it is admitted that in this interval the original judgment-debtor died, and that of itself is reasonable ground for admitting a certain amount of delay in further prosecuting the case. I think on the whole that the interval does not of itself prejudice the right of the decree-holder to continue the proceedings.

"The next question is, whether the order of the 2nd June 1882 was a termination of the proceedings. I am clearly of opinion that it was not. The Deputy Commissioner had been absent on the 18th May, the date fixed for hearing, and the 2nd June was fixed only in the usual manner by notice in Court for the information of the pleaders engaged. The decree-holder's pleader had died between the two dates, only a fortnight apart, and on the 2nd June no one appeared. Granting that the case was not extinct as a result of the previous proceedings, I think that it was decidedly not brought to an end by the order of the 2nd June. Subsequent to this order no unreasonable delay occurred in prosecuting it, the next petition having been verified on the 16th June, and (apparently) prosecuted on the 11th July. Subsequent to that date nothing occurred to impose any check on the progress of the case. On the first ground of appeal, therefore, I find for the respondents.

"As regards the second ground I have already said that the matter was not fully argued, but it appears to me that it is now too late to urge the Limitation Act in respect of periods prior to the admission of the application for execution of the 13th June 1879. I may refer to the decision of the Privy Council in *Mangul Pershad Dicit v. Grija Kant Lahiri* (1) as apparently conclusive on the matter.

"The third and fourth grounds of appeal were not placed before the Court, and in the absence of any argument in support of them, the respondent is entitled to a decision in his favor in regard to them.

"The appeal is dismissed and the order of the lower Court confirmed."

Baboo *Bhoobun Doss* for the appellant.

Baboo *Jusodamundun Poramanick* for the respondent.

The judgment of the Court (McDONNELL and FIELD, JJ.) was delivered by

FIELD, J.—The facts of this case are fully set out in the judg-

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

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ment of the learned Judge in the Court below, and it is not necessary for us to recapitulate them. The Judge refers to the following passage in the judgment of White, J., in *Barada Sundari Daboa v. Fergusson* (1):—"We wish to observe that it cannot be too widely known that when execution proceedings are struck off on the mere motion of the presiding judicial officer, the rights of the parties to those proceedings are not in any way affected. The striking off is not in accordance with any provision in the Code of Civil Procedure. It is done merely for the convenience of the Court, and with a view to diminish the number of cases which might otherwise appear to have been pending in their Court for a long time. When the striking off takes place upon the application of the parties or, after their failure to appear, when they have received due notice to appear, their rights may be affected by the striking off, but whether they are so or not would depend upon the circumstances of each case." It has been pressed upon us that the result of the application of this principle will be that decree-holders will manage to avoid altogether the provisions of the Limitation Act as to the execution of decrees. We are wholly unable to accede to this argument, and we desire to say that we concur in the view expressed in the passage which I have just quoted. If Mofussil Courts would follow the provisions of the Circular Orders laid down for their guidance, and post in their Court-houses a list of cases ready for hearing, specifying the date on which those cases are to be heard, parties would have no just ground of complaint, if their cases, being taken up on the dates so specified, were dismissed in default of their appearance. It would be very desirable that Courts in the Mofussil should abandon the practice of "striking cases off." There is no provision in the Code of Civil Procedure for striking off a case. The only proper mode of dealing with a case, whether a regular suit or a miscellaneous proceeding, when the parties do not appear is to dismiss it. When a case is dismissed in consequence of the parties not appearing, an application may be made to the Court under the provisions of s. 108. This section applies to regular suits, but under the provisions of s. 647 it is equally applicable to all proceedings other than suits and appeals. It is

(1) 11 C. L. R., 17.

therefore applicable to execution proceedings. When an execution proceeding *therefore* is dismissed in default of appearance of the decree-holder, he can within the time allowed by the law of limitation present an application under s. 108 asking that the order of dismissal be set aside, and that a day be appointed to proceed with the case. This application must of course set forth such matter as is specified in the section, and the grounds upon which it is made. If the Court of first instance, having improperly set aside its order dismissing a suit or other proceeding, appoints a day for taking further steps in the matter of such suit or proceeding there may be an appeal. The parties have thus full opportunity of litigating the question, whether an execution proceeding has been properly dismissed in consequence of the decree-holder not appearing at any stage at which such appearance may be necessary.

Now, let us apply these principles to the present case. The Judge has found that the execution was one continuous execution, and that the orders made upon the applications of the 4th March 1882 and 11th July 1882 merely restored the original execution proceedings to the file, and that, therefore, the original execution proceedings were being continued. If after the execution proceedings were struck off on the 19th August 1881, or on the 2nd June 1882, a proper application under the provisions of s. 108 of the Code had not been made, the judgment-debtor might have objected in the first Court, and might have followed out his objection by preferring an appeal.

No such course was taken, and neither in the lower Appellate Court nor on the grounds of appeal now before us has it been urged that the Court of first instance did not properly exercise its jurisdiction under s. 108 of the Code in restoring the execution proceedings to the file by its order in the petition of 4th March 1882, or by its subsequent order in the petition of the 11th July 1882. This being so, the only question which we have to consider is, whether the Judge in the Court below, having found that there has been one continuous execution proceeding throughout, we can say that the application of the 11th July 1882 is barred by s. 280 of the Code of Civil Procedure. We think we cannot say that it was so barred. Then the Judge having

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found that there has been one continuous execution, no ground has been shown to us upon which we can question his finding upon this matter, which is a matter of fact. The appeal must therefore be dismissed with costs.

Appeal dismissed.

Before Mr. Justice McDonell and Mr. Justice Field.

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February 19.

BAMASUNDARI DASSI (PLAINTIFF) v. KRISHNA CHANDRA DHUR
AND OTHERS (DEFENDANTS).*

*Registration Act, 1877, s. 50—Registered and Unregistered Documents—
Priority—Notice of prior sale.*

Quere.—Whether the case of a second registered purchaser with notice of a prior sale is an exception to the rule laid down in the Full Bench case of *Narain Chunder Chuckerbutty v. Dataram Roy* (1). The Court held that it was not necessary to decide the point in the present case inasmuch as the facts of the case did not justify them in finding that the purchaser had such notice.

THE plaintiff purchased from Ram Coomar *alias* Shib Nath Sen, the fourth defendant, a 5-gunda share of taluk Mohun by a registered *kobala*, dated the 22nd Bhadro 1285 (6th September 1868), for a consideration of Rs. 100. The plaintiff thereafter applied under Bengal Act VII of 1876 for registration of his name in respect of the above share, but was opposed by the first, second and third defendants, who alleged that they had purchased the same property (among others) from the fourth defendant by an unregistered *kobala*, dated 4th Srabun 1276 (16th July 1869), and claimed to have their names registered in respect of the 5-gunda share. The Collector accordingly rejected the plaintiff's application for registration of her name, and registered the share in the names of the first, second and third defendants, who, as the plaintiff alleged, had, in collusion with the fourth defendant, opposed her in entering in possession of the disputed share.

* Appeal from Appellate Decree No. 1208 of 1882, against the decree of T. M. Kirkwood, Esq., Judge of Mymensingh, dated the 24th of April 1882, affirming the decree of Baboo Bepin Chandra Roy, Additional Munsiff of Natrokon, dated the 4th of April 1881.

(1) I. L. R., 8 Calc., 597.