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I wish to add that what I have said as to separate convictions requiring separate sentences must not be understood to lay down any rule as to cases in which the accused is charged with, tried for, and convicted of only one offence, and the facts proved might, if taken piecemeal, constitute minor offences forming ingredients of the graver offence of which the accused has been found guilty. In such cases only one sentence would, of course, be all that is required by the law.

Convictions affirmed; sentences altered.

APPELLATE CIVIL.

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October 26.

Before Mr. Justice Straight and Mr. Justice Mahmood.

SARJU PRASAD AND ANOTHER (JUDGMENT-DEBTORS) *v.* SITA RAM (DECREE-HOLDER.*)

Limitation—Execution of decree—Application for execution withdrawn by decree-holder—Act XV of 1877 *(Limitation Act), sch. ii, No.* 179 (4)*—Civil Procedure Code, ss.* 373, 374, 647.

S. 647 of the Civil Procedure Code makes ss. 373 and 374 applicable to proceedings in execution of decree. *Kifayat Ali* v. *Ram Singh* (1) and *Pirjade* v. *Pirjade* (2) followed. *Turachand Megraj* v. *Kashinath Trimbak* (3) and *Ramanandan Chetti* v. *Periatambi Shervai* (4) dissented from.

A first application for execution of a decree was withdrawn by the decree-holder on account of formal defects, the Court returning the application, but without giving permission to the decree-holder to withdraw with leave to take fresh proceedings.

Held that, with reference to the second paragraph of s. 373 read with s. 647 of the Code, the decree-holder was precluded from again applying for execution; but that, even assuming that permission to apply again could be inferred from the action of the Court in returning the application, s. 374 was applicable so as to make a subsequent application presented five years after the decree barred by limitation, with reference to art. 179 of the Limitation Act.

THIS was a reference to a Division Bench by Mahmood J. The facts are sufficiently stated in the order of reference, which was as follows :—

MAHMOOD, J.—The facts necessary for the decision of the main question of law raised by the argument of the learned pleader for

* Second Appeal, No. 2245 of 1886, from a decree of C. Donovan, Esq., District Judge of Benares, dated the 8th September, 1886, modifying a decree of Babu Mritonjoy Mukerji, Subordinate Judge of Benares, dated the 2nd July, 1886.

(1) I. L. R. 7 All. 359. (3) I. L. R. 10 Bom. 62.
(2) I. L. R. 6 Bom. 681. (4) I. L. R. 6 Mad. 256.

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the appellant are these. The decree sought to be executed was passed on the 22nd May, 1878, and an application for execution thereof was made on the 14th February, 1881, and such application having been made more than one year after the decree, a notice was issued to the judgment-debtor on the 25th June, 1881; but the application was objected to by the judgment-debtor upon the ground that it was not in due form, and the calculation contained therein was erroneous. Thereupon the decree-holder's pleader stated to the Court that the prosecution of the application was not then desired, and that the execution case might be struck off, and the decree, which had been filed with the application, might be returned. The Subordinate Judge thereupon struck off the case and directed that the decree should be returned to the decree-holder, which appears to have been done.

The present litigation has arisen from an application made by the decree-holder on the 14th February, 1884, and it was met by a plea that the previous application of the 14th February, 1881 having been withdrawn on the 21th December, 1883, the present application was barred by limitation. The Court of first instance disallowed the objection, upon the ground that the present application for execution, having been filed within three years from the preceeding application, was within limitation. Upon appeal, the learned Judge has upheld the order of the first Court, and the main point raised in second appeal is whether the action of the decree-holder in having the former application struck off on the 24th December, 1883, bars the present application.

The determination of this question seems to depend upon the following points:—

(1) Whether ss. 373 and 374, read with s. 647, of the Civil Procedure Code, are applicable to applications for execution of decree.

(2) If so, whether the withdrawal of the decree-holder from presenting his former application of the 14th February, 1881 renders that application unavailable for the purpose of limitation under cl. (4) of art. 179, sch. ii of the Limitation Act (XV of 1877).

(3) Whether the notice issued to the judgment-debtor on the 25th June, 1881 was, under the circumstances, such notice as

cl. (5), art. 179, sch. ii of the Limitation Act contemplates for the purposes of calculating limitation.

Upon the two first points there is a conflict of decisions. Whilst the ruling of the Madras High Court in *Ramanandan Chetti* v. *Periatambi Shervai* (1) tends to show that an application for execution, though informal and not prosecuted, but returned for amendment, is sufficient to save limitation, the Bombay High Court held a contrary view in *Pirjade* v. *Pirjade* (2) by applying s. 374 read with s. 647 of the Code to applications for execution of decree, and this last case was followed by Oldfield, J., with my concurrence, in *Kifayat Ali* v. *Ram Singh* (3). But in a more recent case, Sargent, C. J., in *Tarachand Megraj* v. *Kashinath Trimbak* (4), dissented from the rule laid down in *Pirjade* v. *Pirjade* (2) and held that the provisions of ss. 373 and 374 were not applicable to applications for execution, notwithstanding s. 647 of the Code, and that, therefore, even an application for execution which has been withdrawn by the decree-holder with permission to apply again was not affected for purposes of limitation under cl. (4), art. 179, sch. ii of the Limitation Act; and in laying down this rule, the learned Chief Justice relied upon the principle of a Full Bench ruling of the Calcutta High Court in *Eshan Chunder Bose* v. *Prannath Nag* (5). Under this state of the law, I do not think that the questions involved in the two first points are free from difficulty.

Again, so far as the third point is concerned, the ruling of this court in *Behari Lal* v. *Salik Ram* (6) is important; but in that case, there being a difference of opinion between Pearson and Spankie, JJ., the appeal was referred to Oldfield, J., under s. 575 of the Civil Procedure Code (Act X of 1877), and the last-named Judge disposed of the case by agreeing with Pearson, J., but without consulting the two learned Judges who had differed in opinion—a procedure which, according to the latest interpretation of that section in *Rohilkhand and Kumaun Bank, Limited*, v. *Row* (7) was not in strict accord with the intention of the Legislature in framing that section. Moreover, the ruling in that case impugned an

(1) I. L. R. 6 Mad. 250.
(2) I. L. R. 6 Bom. 681.
(3) I. L. R. 7 All. 359.
(4) I. L. R. 10 Bom. 62.
(5) 22 W. R. 512.
(6) I. L. R. 1 All. 675.
(7) I. L. R. 6 All. 468.

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earlier ruling of this Court in *Franks* v. *Nuneh Mal* (1), and, under the circumstances, I can scarcely regard the points in this case as definitely settled by the case-law.

I may also add that in some recent cases the Lords of the Privy Council have applied the principles of the rule of *res judicata* as defined in s. 13 of the Civil Procedure Code to proceedings in execution of decrees, and those cases were referred to by Field, J., in *Bandey Karim* v. *Romesh Chunder Bundopadhya* (2); but that learned Judge went on to say:—"We do not, on the present occasion, propose to go into this broad, general, and probably difficult question, whether the principal of *res judicata* as enunciated in s. 13 of the Code of Civil Procedure applies in all its generality to proceedings after decree." It seems to me that, so far as our Civil Procedure Code is concerned, probably the only authority by which the rule of *res judicata* as contained in s. 13 of the Code can be applied to execution cases is s. 647 of the Code; and if this is so, there seems analogical reason for holding that the provisions of ss. 373 and 374 of the Code would also be applicable to such cases, without interference with the provisions of art. 179, sch. ii. of the Limitation Act. But I do not think that I should, sitting here as a single Judge, dispose of these important questions of law, notwithstanding the conflict of decision which I have pointed out, and indeed if I had the power under the Rules of this Court to refer the case to the Full Bench, I should probably have done so. But under the Rules of the 11th June 1887, I can only refer this case to a Division Bench consisting of two Judges, and I do so accordingly.

Lala *Juala Prasad*, Munshi *Hanuman Prasad*, and Munshi *Madho Prasad*, for the appellants.

Munshi *Kashi Prasad* and Lala *Lalta Prasad*, for the respondent.

STRAIGHT, J.—This is a second appeal from an order of the Judge of Benares, passed on the execution side, on the 8th September, 1886. The execution proceedings in which it was passed had reference to a decree, dated the 22nd May, 1878, and the application for execution with which it deals was dated the 14th

(1) N.-W. P., H. C. Rep. 1875 p. 79. (2) I. L. R. 9 Calc. 65.

February, 1884. The whole question involved in this appeal is whether that application of the 14th February, 1884 is prohibited by any rule of procedure or of limitation, which the lower Courts have held it is not.

The first application for execution of the decree was made upon the 14th February, 1881, and it is in reference to that application and to what took place upon it that the questions involved in the discussion that has taken place before us are concerned. It seems that after notice of that application of the 14th February, 1881 had been given to the judgment-debtor, he appeared and objected to the form of the application upon the ground that there had been a miscalculation in the application as to the amount covered by the decree in respect of which execution was sought. And it seems there can be no doubt that there was a miscalculation, because such was admitted to be the case by the pleader for the decree-holder. Accordingly, on the 24th December, 1883, the application having been pending in the Court for that long period of time, an order was made by the Court, the terms of which it is not necessary for me to recapitulate at length, but they have been explicitly translated for my benefit by my brother Mahmood, and they come to this, that the application was struck off at the request of the decree-holder's pleader, and that the copy of decree which had been filed with the application was returned to him. It is to be observed that in that order of the Court it is recited that the decree-holder's vakil stated in terms that "for the present we are not anxious to carry on the execution proceedings, and we therefore apply that the case may be struck off." That being so, I now come to the application with which we are more immediately concerned, *viz.*, that of the 14th February, 1884. And I have to consider whether, having regard to what took place in respect of the application of the 14th February, 1881, we can adopt and act upon and we ought to adopt and act upon the provisions contained in ss. 373 and 374 of the Civil Procedure Code; because if those provisions are applicable to this case, then undoubtedly the Courts below were wrong in allowing the execution of the decree, and the decree cannot be executed. Now I do not hesitate to say, and in making the remark I am only recapitulating what I have hitherto always desired to lay down in these matters, that I am

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anxious, as far as I possibly can, to have introduced into the conduct of execution proceedings as much of the regularity and precision of procedure as is applicable to the trial of original suits as is reasonably possible; and s. 647 of the Civil Procedure Code contemplates the adoption by the Courts, as far may be applicable, of the formalities of procedure, so that in the transaction of their miscellaneous business they may have certain well-understood landmarks—if I may so call them—to guide them in the conduct of that branch of their judicial work. Speaking generally, it seems to me that the assimilation of the provisions of ss. 373 and 374 to execution proceedings is highly desirable, and with the profoundest respect for the learned Chief Justice of Bombay, Sargent, C. J., and for the view he expressed in *Tara Chand Megraj* v. *Kashinath Trimbak* (1), I fail myself to see how, by importing the provisions of those sections of the Code into execution proceedings, any violence will be done to the terms or the operation of art. 179 of the Limitation law. It seems to me that while on the one hand it is perfectly possible to have an application for execution made in accordance with law which will render the terms of art. 179 of the Limitation Act perfectly and properly applicable, so on the other it is equally possible to have such a condition of things as an application for execution made and withdrawn under s. 373, in which state of things the limitation of art. 179 of the Limitation Act will not be applicable, because no application in accordance with law has been made, whereas the special limitation of s. 374 of the Civil Procedure Code will be applicable. Therefore, as I said before, I do not myself see that there will be any conflict between the sections of the Civil Procedure Code to which I have referred and art. 179 of the Limitation Act. Now, looking to the terms of the order of the Court passed in this matter upon the 24th December, 1883, it is obvious not only that the pleader for the decree-holder knew that there were defects in his application, but further, he in explicit terms stated that he did not desire, for the present, to proceed with the execution: and I confess that it would seem to me to be almost a contradiction in terms to say that an application dealt with as this was, was an application for execution in accordance with law, such as would save the course of ordinary limitation running. On

(1) I. L. R., 10 Bom

the contrary, it seems to me that the state of facts, as they appear from the terms of that order, are such that we are fully warranted in applying s. 373 of the Civil Procedure Code, if it is applicable to what took place in respect of the application of the 14th February, 1881, and I myself have no doubt whatever, reading s. 647 of the Code in conjunction with ss. 373 and 374 of the Code, that those sections are applicable. Moreover, I am fortified in this view by the opinion expressed by my late brother Oldfield and approved by my brother Mahmood in the case of *Kifayat Ali* v. *Ram Singh* (1), and I am prepared unhesitatingly to follow that ruling, and accept the principle therein laid down, that s. 373 of the Civil Procedure Code is applicable to execution proceedings, so far as may be. With regard to that case of my brothers Oldfield and Mahmood, I may further say that they therein adopted a ruling of the Bombay High Court, in *Pirjade* v. *Pirjade* (2), and it seems to me that the reasoning of Melville, J., as stated in his decision in that case, is of a character to commend itself to one's better judgment, and I approve the grounds on which he proceeded. While he seems to me conclusively to point out why there need be no conflict or hostility between the provisions of the Civil Procedure Code and the Limitation Act, the learned Chief Justice of the Bombay High Court, Sargent, C. J., although he seems to indicate that there may be some such conflict, does not point out what that conflict is.

Adopting the view of the two judgments I have mentioned, how does it meet the circumstances of this case, and what portion of s. 373 of the Code fits in to the particular circumstances of the case?

As regards the first paragraph of that section, it is clear that it has no applicability at all, because no leave or sanction was given by the Court to the withdrawal of the application of the 14th February, 1881, with leave to institute fresh proceedings upon the same basis. But paragraph 2 of s. 373 of the Code undoubtedly does apply to the circumstances, in my opinion. The application was withdrawn at the instance of the pleader for the decree-holder, and with the distinct intimation that "for the present we are not anxious to carry on the execution proceedings;" but no permission was given to withdraw with leave to take fresh proceedings. I am

(1) I. L. R., 7 All. 359. (2) I. L. R., 6 Bom. 681.

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of opinion, and disposed to think, that the prohibition contained in the latter portion of that section's second paragraph has application; that it was not open to the decree-holder to make the application which he has now made.

But further than that, even if one can assume here for a moment that permission is to be inferred from the action of the Court in returning the petition for execution to decree-holder, s. 374 of the Code, with its specific and special limitation steps in, and the present application of the 14th February, 1884 would be barred, because it was not made within three years from the date of the decree, the application of the 14th February, 1881 having become a nullity by reason of the withdrawal of the petition.

So it must be looked upon that there was an unbroken interval of time from the date of the decree, 22nd May, 1878, till the 14th February, 1884, when the application, now the subject-matter of appeal, was presented before the Subordinate Judge. That being so, it seems to me that this present application is undoubtedly barred, and that the decree-holder is not entitled to pray in aid the proceedings which commenced in 1881 and terminated in 1883. What I mean to say is this, that all that took place with regard to the proceedings commencing on the 14th February, 1881, and ending on the 24th December, 1883 must be struck out, and they cannot be regarded as constituting an application on which the decree-holder can rely. This being the view that I take of the matter, it seems to me that this appeal ought to be decreed, and I, therefore, decree the appeal and, reversing the orders of the Courts below, hold that the application of the decree-holder for execution should be dismissed, and the judgment-debtors are entitled to have their costs in all the proceedings.

MAHMOOD, J.—I am of the same opinion, and as my learned brother has already stated the various aspects of the questions of law which induced me to refrain from deciding the case myself, sitting as a single Judge, and to refer it to a Division Bench consisting of two Judges, I need not say much. I have only to say that it seems to me that, upon general principles, all rules of procedure or adjective law which provide pleas in bar to the action are rules of convenience which should be applicable as much to all

miscellaneous proceedings (be they in the nature of applications for execution or any other class of applications) as they are applicable to regular suits. To take as an example the plea of *res judicata:* it is based upon the maxim "*Nemo debet bis vexari pro una et eadem causa,*" which is a maxim of wider application and has application to regular as well as miscellaneous proceedings. For why should a judgment-debtor be harassed twice, unless there is a reason admitting of explanation that the second application is not in fact a harassing twice? Such as the decree not being paid off at all or only partially satisfied, in which case the doctrine of *res judicata* will not apply, for reasons into which I need not enter in detail for the purposes of this case. But where no such explanation is given the doctrine will apply; as in the two cases to which I alluded in my order of reference it has been laid down that *res judicata* is applicable to orders made in execution proceedings. But this is no longer an open question for the Courts in India, after the expression of opinion of their Lordships of the Privy Council that the law of *res judicata* is applicable to execution proceedings. I have said so much about the rule of *res judicata* because, so far as I can see, the operation of other pleas in bar of an application or a suit, such as ss. 373 and 374 of the Civil Procedure Code contemplate, and upon which sections my brother has already fully dwelt, fall under the same category as the plea of *res judicata*, because they are all pleas *in limine* barring the action. My learned brother has already said that the operation of those two sections is almost imperatively required, not only by the express terms of s 647 of the Civil Procedure Code, but also by the general principles of convenience and regularity of proceedings. There is, of course, a conflict of decisions, to which my referring order alludes, and it simply comes to this, that the learned Judges who decided the case of *Pirjade* v. *Pirjade* (1), and which was followed by Mr. Justice Oldfield and myself in the case of *Kifayat Ali* v. *Ram Singh* (2), took one view of the matter—a view approved by my learned brother Straight—and the Madras case of *Ramanandan Chetti* v. *Periatambi* (3) and the present Chief Justice of Bombay took the opposite view. It was, indeed, out of respect due to the learned Chief Justice of Bombay, and also to the view taken by the Madras Court, that I did not undertake

(1) I. L. R., 6 Bom. 681. (2) I. L. R., 7 All. 359.

(3) I. L. R., 6 Mad. 250.

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the responsibility of deciding the case myself. I have, however, no longer any doubts left now. If it is a true doctrine, regulating the principle upon which the rules of procedure should proceed, that those rules aim at facilitating the administration of justice by promoting the convenience of the parties by preventing recurrence and repetition of points already adjudicated upon, there is no reason why all the principles contained in Chapter XXII of the Civil Procedure Code should not be applied to execution proceedings. Indeed, as one who has acted as a Court of first instance in the mufasal for some time, I have applied the provisions contained in that chapter to proceedings in execution. And if that chapter were not applicable to such proceedings, there would scarcely be any provisions to enable the parties to a decree to enter into any compromise. I have added these few remarks simply because the case has taken up the time of two Judges instead of one. I entirely concur in the order of my learned brother Straight.

Appeal allowed.

1885
November 3.

APPELLATE CIVIL.

Before Mr. Justice Straight.

KIRPA DAYAL (PETITIONER) *v.* RANI KISHORI AND OTHERS (OBJECTORS).*

Temporary injunction—Civil Procedure Code, s. 492—"Wrongfully" sold in execution of decree.

An objection made under s 278 of the Civil Procedure Code to the attachment in execution of a decree of a mortgage bond of which the objector claimed to be the assignee from the judgment-debtors under an instrument dated prior to the attachment was disallowed; and the objector then brought two suits against the decree-holder and the judgment-debtors, in which he claimed (*a*) a declaration of his right to the bond, and (*b*) to recover a sum of money from the judgment-debtors on the basis of the assignment. The first Court dismissed both suits, on the ground that the alleged assignment was a collusive transaction entered into after the attachment between the objector and the judgment-debtors for the purpose of defeating the attachment. Pending an appeal to the High Court, the objector applied to that Court for a temporary injunction under s 492 of the Code, restraining the decree-holder from bringing the bond to sale in execution of the decree.

Held that although in such cases the provisions of s. 492 should be applied with the greatest care, one of the objects of the Legislature in passing that section was to guard as far as possible against multiplicity of suits, and as

* Application in F. A. No. 107 of 1884 under s. 492 of the Civil Procedure Code.