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book. This last-mentioned Act also contains a section devoted to interpretation of the language contained in it, *viz.*, s. 32. Now s. 32 of Act No. XXXIV and s. 23 of Act No. XXXV are almost word for word the same, with one striking exception. In s. 32 is to be found this sentence "words importing the singular number shall include the plural number, and words importing the plural number shall include the singular." This sentence is absent from s. 23 of Act No. XXXV, and I am unable to consider the omission an accidental one. Under these circumstances I am unable to interpret the word "the legal heir" as including the plural number. As however I agree in the order proposed, it is unnecessary for me to consider the question further.

Appeal decreed.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell and Mr. Justice Blair.

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PHEKU (JUDGMENT-DEBTOR) *v.* PIRTHI PAL SINGH AND OTHERS (DECREE-HOLDERS).*

Civil Procedure Code, s. 158—Act VI of 1892, s. 4—Execution of decree—Application for execution struck off in consequence of non-payment of taltana—Subsequent application for execution.

An application for execution of a decree by attachment of immovable property having been presented by a decree-holder, the Court executing the decree ordered that the costs of such attachment should be deposited by the decree-holder on or before a certain specified date. The costs of attachment were not deposited by the day named in the order above referred to and the Court thereupon passed the following order:—"This case came on for hearing to-day; as the decree-holder has not deposited the costs of attachment, &c., therefore it is ordered that the case be struck off for default."

Held that whether this second order was an order under s. 158 of the Code of Civil Procedure deciding the application for attachment, or whether its effect was merely to remove the application from the file of pending applications without deciding it, in either case no fresh application (being of a precisely similar nature) was entertainable, though in the latter case, possibly the former application might be renewed.

This appeal originally came before a Bench consisting of Straight and Tyrrell, JJ. who, in view of certain difficulties as to the effect of an order under s. 158 of the Code of Civil Procedure, desired that

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* First appeal No. 7 of 1891 from a decree of Mau'vi Shah Ahmad-ullah, Subordinate Judge of Allahabad, dated the 23rd November 1891.

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the case might be laid before a Bench consisting of the Chief Justice and themselves. The facts of the case are very fully stated in the referring order, which is as follows :—

STRAIGHT and TYRRELL, JJ.—This is an appeal on the execution side and the judgment-debtor is the appellant. The decree obtained by the decree-holder, respondent, was dated the 7th of July 1884, and was passed upon a mortgage-bond of the year 1870, executed by Musammat Resham Bibi, the wife of the appellant, in respect of a zamíndári share of her's, which she had acquired from her father. The decree ordered sale of the hypothecated property. The first application for execution was made upon the 11th of June 1887, and, the decree then being more than one year old, notice was issued to the judgment-debtor to show cause as required by law. On the 29th of June 1887, that being the date fixed for the judgment-debtor to appear and show cause, the following order was passed :—"To-day the case came on for hearing and the judgment-debtor being called did not appear, and the service of process being proved by the report of the Nazir; ordered that the decree-holder do pay the costs of attachment, &c., by the 6th of July 1887, and let the pleader be informed." To this order there is attached the signature of the decree-holder's pleader. Upon the 6th of July 1887, that being the date fixed by which *talbana* was to be paid in, the following order was passed :—"This case came on for hearing to-day; as the decree-holder has not deposited the costs of attachment, &c., therefore it is ordered that the case be struck off for default."

The second application for execution out of which this appeal before us arises was made upon the 20th of March 1890, and it was refused by the Munsif upon the 19th of July 1890, in the following terms :—

"In reference to the observations of Sir John Edge, C. J., reported in page 119 of the *Weekly Notes*, for 1890, I cannot but hold that this application for execution cannot be allowed. The order was to file *talbana* within a specified time, and when it was not filed the case was struck off. That order for filing the *talbana* bears the

decree-holders' pleader's signature. Application for execution refused without costs."

In appeal to the Subordinate Judge he was of opinion that the Munsif's decision was wrong, and he expresses himself in the following terms :—

"The Munsif by the High Court decision alluded to in his judgment probably understands that the procedure under s. 158 of the Civil Procedure Code is applicable to the first rejected application; but in my opinion this is a mistake. The procedure under the said section would have been applicable had the decree-holders on their application been granted time for further proceeding, but such was not done in the present case. On the former application of the decree-holders a notice was issued to the judgment-debtors, and after the service of this notice the Court itself gave the decree-holders in their absence further time for depositing the costs of attachment, but on proof of their failure to do this, the said application was &c., rejected. The aforesaid proceeding therefore was not one under s. 158 of the Civil Procedure Code. I have taken this meaning of the said section in accordance with the view expressed by the Madras High Court in their decision published on page 41 of I. L. R., Vol. VII."

The Subordinate Judge therefore reversed the decision of the Munsif and remanded the execution-proceedings to the Munsif for restoration to the file of pending proceedings. It is this order of remand that is subject of this first appeal to this Court. It is strenuously contended by Mr. *Srish Chandra* on behalf of the judgment-debtor appellant that the portion of the learned Chief Justice's judgment to which reference is made by the Munsif in his decision is directly applicable to the circumstances of this case, and that this Bench is bound by that Full Bench decision. Mr. *Srish Chandra* has also urged that assuming the decision of the 6th of July 1887 in the execution-application to have been given under s. 158 of the Code of Civil Procedure that makes not only the present application one barred by the former decision, but precluded the decree-holder from making any subsequent application for execution of his decree.

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As at present advised we are disposed to hold that the decision of the 6th of July 1887 was a decision under s. 158, Civil Procedure Code. By the order of the 29th of June 1887, time had been given to the decree-holder, notice of which had reached his pleader, to perform an act necessary to the further progress of the application towards an order for attachment, if necessary, or for sale, by deposit of *talbana*, that is to say, the necessary expenses incidental to such attachment or sale, and that having failed to do this act for which time had been given him, the decree-holder was in default in the sense of s. 158 which, by s. 647 of the Code, is made applicable to proceedings in execution. We see nothing in the section to justify the view taken by the learned Subordinate Judge that it was essential that the order of the 29th of June 1887 should have been made upon the application of the decree-holder or his pleader. It is in our opinion enough that it was made and that it was brought to the knowledge of the decree-holder's pleader, and that there was default in the sense of s. 158 of the Code. Our minds however are not without difficulty as to the precise effect of the order passed under s. 158, *viz.*, as to whether it can be regarded as a bar to all subsequent applications. As the question involved is one that more or less arises out of an expression used in the course of the judgment of the learned Chief Justice in the Full Bench case, we both feel that it is desirable we should have the benefit of his assistance in disposing of this appeal, and we therefore refer the hearing and disposal of this appeal to a Bench consisting of the learned Chief Justice and ourselves.

The reference came on for hearing before a Bench consisting of Edge, C. J., and Tyrrell and Blair, JJ. and the following judgment swere delivered :—

Mr. *J. Simeon*, for the appellant.

Babu *Durga Charan Banerji*, for the respondents.

EDGE, C. J.—The appellant here is the judgment-debtor. The decree-holders applied for execution of their decree. Notice was served upon the judgment-debtor, and on the 29th of June 1887

the Munsif passed an order giving the decree-holders time up to the 6th of July 1887, to pay into Court the costs of the attachment. On the 6th of July 1887 the Munsif passed an order striking off the application for attachment on the ground that the decree-holders had not paid into Court the costs of the attachment. On the 20th of March 1890, the application out of which this appeal has arisen was made. It was a substantive application for execution of the decree and did not purport to be, and was not, an application for revival of the previous proceedings. The Munsif dismissed the application relying on some observations of mine in my judgment in *Radha Charan* v. *Man Singh* (1). On appeal the Subordinate Judge set aside the order of the Munsif and made an order of remand relying on the case of *Sri Raja Venkataramaya Appa rau Bahadur* v. *Anumukonda Rangaya Nayudu* (2). In my opinion the Madras case is absolutely inapplicable to the present. That was a case in which s. 158 of the Code of Civil Procedure could not apply on the facts as stated therein. The judgment-debtor appealed against the order of the Subordinate Judge. Now it has been argued that the Munsif proceeded under s. 98 of the Code of Civil Procedure when he passed his order of the 6th of July 1887. That argument cannot be supported. The 6th of July 1887 was not a date fixed for the defendant to appear and answer, nor was this a case in which neither party appeared on a subsequent date to which the hearing of the application had been adjourned, nor was the absence of the parties, or either of them, the cause of the Court's action. The cause of the Court's action was the non-payment by the decree-holders by the date fixed for that purpose of the costs of the attachment. It was a case to which in my opinion s. 158 of the Code of Civil Procedure would apply. It is not necessary to express an opinion as to whether what the Munsif did was a deciding of the application or merely a putting of the application aside from the list of pending applications leaving it undecided. Probably the Munsif by his order intended to express a dismissal of the application. If the order of the 6th of July operated as a dismissal

(1) I. L. R., 12 All. 392; s. c. Weekly Notes, 1890, p. 119.

(2) I. L. R., 7 Mad. 41.

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of the application it was a decision under s. 158 of the Code, and whether erroneously made or not, it was a bar, so long as it existed, to a precisely similar application, as this was, on behalf of the same parties. If the order of the 6th of July did not operate as a decision of the application, then all that can be said is that in that event there having been no decision of the application, the application is as yet undisposed of. Now it is quite clear from s. 4 of Act No. 6 of 1892 that applications for execution of decrees are proceedings in suits, and I can find nothing to suggest that two precisely similar proceedings by the same party against the same party in respect of the same matter can be co-existent in a suit. The existence of the first proceeding undisposed of in my opinion precludes the entertainment of the second precisely similar proceeding: I mean by 'precisely similar,' similar in parties, similar in object, and similar in subject-matter; so that whether the order of the 6th of July 1887 is to be regarded as an order deciding the first application for execution of the decree, or whether it is to be regarded as an order merely removing that application from the list of pending applications and not deciding it, the present application is not one which can be entertained. I would allow this appeal and I would set aside the order of the Subordinate Judge and reinstate the order of the Munsif with costs in all Courts.

TYRRELL, J.—I entirely concur and will only add a word with reference to a decision of the learned Chief Justice and myself in *Bijai Singh* v. *Haiyat Begam* (1). The head-note in that case is somewhat misleading. It is to the effect that:—"Where an application for execution of decree is struck off the file on an adverse decision on law or on the merits, the order, if not set aside on review or appeal, will operate as *res judicata*. But where the application is struck off merely because *talbana* has not been paid or some other step is not taken, the order does not bar a further application." In fact our decree in that case was based on the following grounds:—"It is said that the striking off the application of the 3rd of November 1887, must be treated as analogous to the decision of a

(1) Weekly Notes, 1889, p. 103.

suit under s. 158 of the Civil Procedure Code. So we understand the argument. The application of the 3rd of November 1887 was struck off because the Court thought it was long enough on the file. It did this although *talbana* had been paid." It is clear that that was not a case falling under s. 158 of the Code of Civil Procedure, and that it does not in any way clash with the views which have been enunciated to-day in the appeal before us.

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BLAIR, J., I concur.

Appeal decreed.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

1892 *November 2.*

RAGHUNATH SINGH (PETITIONER) *v.* RAGHUBIR SAHAI (OPPOSITE PARTY).*

Application for restoration of an appeal dismissed for default—Vakálatnáma.

Where a vakíl had been duly empowered by a *vakálatnáma* drawn in the customary form to file and conduct an appeal in the High Court, and that appeal had been dismissed for default:—*Held* that such vakíl was competent without filing a fresh *vakálatnáma* to present an application for the restoration of the said appeal to the list of pending appeals.

This was an application to restore to the list of pending appeals a Second Appeal (No. 709 of 1891) filed by the petitioner which had been dismissed for default by an order of Straight, J., on the 24th of March 1892. The circumstances under which the said appeal was dismissed appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri* and Babu *Durga Charan Banerji*, for the applicant.

Babu *Rajendro Nath Mukerji*, for the opposite party.

EDGE, C. J. and TYRRELL, J.—This is an application to set aside a decree passed in default of appearance dismissing an appeal. We are satisfied that the non-appearance of the vakíl to represent the appellant at the hearing was caused by the accidental omission of the vakíl's name from the printed cause-list. The gentleman in question in our experience invariably attends to his clients' cases and follows the practice of the Court with regularity. We consider that this is a case in which the decree should be set aside and the appeal

* Miscellaneous application in Second Appeal No. 709 of 1891.