

therefore of opinion that the appeal should be decreed, the decrees of the Courts below reversed, and the suit consequently dismissed with costs.

STRAIGHT, J.—I am of the same opinion.

Appeal allowed.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr Justice Straight.

JAWAHIR SINGH (JUDGMENT-DEBTOR) v. JADU NATH AND OTHERS
(DECREE-HOLDERS).*

Execution of decree—Order for sale—Application for execution struck off—Application for restoration—Finality of order.

A decree for money was passed on the 19th March, 1865. The first application for its execution, made after Act X of 1877 came into force, was dated the 16th December, 1878. On this application an order was made by the Court executing the decree (Munsif) for the sale of certain property belonging to the judgment-debtor. The latter objected to execution of the decree, on the ground of limitation, and the decree-holders filed an answer to the objection. On the 14th Jul, 1879, the case was struck off, because the decree-holder had not deposited certain process-fees, without the disposal of the objection. On the 1st October, 1879, the decree-holders again applied for the sale of the property, and it was ordered to be sold. On the 17th February the judgment-debtor presented a petition repeating the objection, which on the 13th March, 1880, the Munsif entertained and disallowed. This order was affirmed in appeal by the District Judge, and again by the High Court. Meanwhile the Munsif had struck off the case from the file of execution-cases pending in his Court, on the ground that the records had been despatched to the Appellate Court. On the 18th September, 1882 the decree-holder again applied for execution of the decree, praying that "the suit might be restored to its number, and that the judgment-debt might be caused to be realized by attachment and sale of the judgment-debtor's property specified in the former schedule."

Held that the decree-holder was entitled to execution of the decree, and that he could get it under the application which was made on the 1st October, 1879, inasmuch as the matter was made *res judicata* by the decree of the High Court in appeal, and it must be taken that that decree was correctly passed, and that the order for sale passed upon it was properly made, and that the sale ought to have taken place.

Held also that the proper application for the decree holder to have made in September, 1882, was that the case might be restored to the Munsif, and that the present application might be so dealt with as to effect the same result, because the prayer contained therein referred to the number of the proceedings of October, 1879, and to the schedule of the property then ordered to be sold.

* Second Appeal No. 93 of 1884, from an order of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 6th May, 1884, reversing an order of Maulvi Abdul Razaq, Munsif of Basti, dated the 18th September, 1882.

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THE decree of which execution was sought in this case was one for money, bearing date the 19th March, 1865. The first application for its execution, made after Act X of 1877 came into force, was dated the 16th December, 1878. On this application an order was made by the Court executing the decree (Munsif of Basti) for the sale of certain property belonging to the judgment-debtors. On the 21st February, 1879, the judgment-debtor objected to the execution of the decree on the ground of limitation. On the 21st February, 1879, in obedience to an order of the Munsif, the decree-holders filed an answer to the judgment-debtor's objection. On the 14th July, 1879, the case was struck off, because the decree-holders had not deposited certain process-fees, without the disposal of the judgment-debtor's objection. On the 1st October, 1879, the decree-holders again applied for the sale of the property, and it was eventually ordered to be sold on the 20th March, 1880. On the 17th February, 1880, the judgment-debtor preferred a petition to the Munsif, in which he complained that his objection to the execution of the decree, dated the 21st February, 1879, on the ground of limitation, had not been disposed of, and prayed that the Court would dispose of the same. On this application the Munsif ordered the decree-holders to file an answer to the judgment-debtor's objection. On the 2nd March, 1880, the decree-holders filed a petition, in which they stated that they had already filed an answer. Eventually, on the 13th of March, 1880, the Munsif entertained the judgment-debtor's objection, and disallowed it. The judgment-debtor appealed to the District Judge of Gorakhpur from the Munsif's order, who, on the 9th November, 1880, affirmed it. In the meantime the Munsif had struck off the case from the file of execution-cases pending in his Court, on the ground that the records had been despatched to the appellate Court. On the 19th April, 1881, the second appeal preferred by the judgment-debtor to the High Court, from the District Judge's appellate order, was dismissed, and the latter order was affirmed.

On the 18th September, 1882, the decree-holders again applied to the Munsif for execution of the decree. They prayed in this application that "the suit may be restored to its number, and that the judgment-debt may be caused to be realized by attachment.

and sale of the judgment-debtor's property specified in the former schedule."

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The Munsif rejected this application on the 18th September, 1883, on the ground that the decree was more than twelve years' old, and therefore, under s. 230 of the Civil Procedure Code, execution could not be allowed. It appeared that at the time the application was preferred the records of the case had not been returned to the Munsif's office, and that they were not returned to it till some time subsequently in 1883.

On appeal by the decree-holders the lower appellate Court (Subordinate Judge of Gorakhpur) was of opinion that the application should be allowed, as the decree-holders had applied within the period of three years' grace allowed by Act X of 1877 for execution, and had been prevented from prosecuting that application, not by reason of any default of their own, but by reason of the appeal preferred by the judgment-debtor and the removal of the case from his files by the Munsif.

The judgment-debtor appealed to the High Court.

Munshi *Sukh Ram* and Lala *Lalta Prasad*, for the appellant.

Munshi *Kashi Prasad* and Maulvi *Mehdi Hasan*, for the respondents.

PETHERAM, C. J.—I think the decree-holder is entitled to execution of his decree, and that he can get it under the application which was made on the 1st October, 1879. It is possible that a difficulty may then arise as to whether he is entitled to make a second application for execution within the three years allowed to him under s. 230 of the Civil Procedure Code; the first application having been made in 1878. But that point does not really arise now, because to my mind the question is, whether execution can now be had under the proceedings of the 1st October, 1879. The decision then arrived at appears to me to make the matter *res judicata*, because the same issue was decided by the Court, and between the same parties. The decree was passed by this Court in appeal, and we are bound to consider that it was correctly passed, and that the order for sale passed upon it was properly made, and that the sale ought to have taken place. The appeal was decided in

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April, 1881, and then the matter seems to have slept. The Munsif's file was apparently over-laden, and the case was transferred from his file to that of the District Judge, who does not appear to have taken any action in the matter. The proper application for the decree-holder to have made in September, 1882, was, that the case might be restored by the Munsif. The only question we have now to consider is, whether the present application can be so dealt with as to meet this state of things.

I think that it can, because the prayer contained in the application is, "that the suit may be restored to its number, and that the judgment-debt may be caused to be realized by attachment and sale of the debtor's property specified in the former schedule of property." Now the "number" here referred to is the number of the proceedings of October, 1879, and the "schedule of property" means the schedule of the property then ordered to be sold. Under the circumstances, I think that the appeal should be dismissed with costs, but that the order should be modified by making it an order to the Munsif to restore the proceedings of the 1st October, 1879, to his file, and to proceed to levy the debt under that order.

STRAIGHT, J.—I am of the same opinion.

Appeal dismissed.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

THAMMAN SINGH (PLAINTIFF) v. JAMAL-UD-DIN AND OTHERS

(DE FENDANTS)*

Pre-emption—Partition of property sold on application of vendee—Silence of pre-emptor—Waiver—Estoppel.

Subsequently to the sale of a one-third share in a village, the vendee applied for partition of the share. A co-sharer, who had a right of pre-emption in respect of the sale, made no objection to this application, and the partition was effected. The co-sharer afterwards set up a claim to pre-emption.

Held that there was nothing in the conduct of the pre-emptor which could amount to estoppel, or to a waiver of his right of pre-emption.

Motee Sah v. Goklee (1) distinguished and dissented from, and *Bhairon Singh v. Lalman* (2) referred to by MAHMOOD, J.

* Second Appeal No. 476 of 1884, from a decree of T.B. Tracy, Esq. Offg. District Judge of Bareilly, dated the 15th January, 1884, affirming a decree of Maulvi Muhammad Abdul Quyum, Subordinate Judge of Bareilly, dated the 19th September, 1883.

(1) N.-W. P. S. D. A. Rep., 1861, p. 506. (2) Weekly Notes, 1884, p. 216.

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