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to entitle the plaintiffs to a decree for possession, not only of their own share but also of the share of the three daughters of Dulari. Shafia did not appear to defend the suit. I am of opinion that the view of the case taken by the lower Courts was erroneous in law. I take it as a fundamental proposition connected with our system of administering justice that a plaintiff cannot sue for more than his own right, and that no defendant can, by an admission or consent of this kind, convey the right, or delegate the authority, to one for more than his own share in property. A similar question was decided in the case of *Lachman Singh* v. *Tansukh* (1) in which I concurred in the views of my learned brother Oldfield. I still entertain the same opinion upon this question of law, and if it were necessary to add anything to what was said by my learned brother in that case, I should say that one reason for not giving effect to such admissions against a co-defendant is, that it deprives the defendant against whom such admissions are used of the opportunity of raising pleas which might be raised, if the defendants making the admission appear in Court as plaintiffs suing for their rights.

Under this view of the case the decree of the lower Courts should be modified by dismissing the suit to the extent of the share of the three daughters of Dulari.

OLDFIELD, J., concurred.

The case was remanded to the lower appellate Court for a finding on the following issue:—

"What is the exact extent of the share of the plaintiffs, exclusive of the shares of Kulsum, Khadija, and Shafia ?"

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

1885
January 24.

KIFAYAT ALI AND ANOTHER (JUDGMENT DEBTORS) *v.* RAM SINGH (DECREE-HOLDER).*

Execution of decree—Application withdrawn by decree-holder—Limitation—Act XV.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

The holder of a decree for money dated the 7th June, 1879, applied on the 20th July, 1880, for execution thereof, but it appeared that in certain particulars

* Second Appeal No. 96 of 1884, from an order of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 22nd May, 1884, reversing an order of Pandit Ratan Lal, Munsif of (Haveli) Moradabad, dated the 31st March, 1884.

(1) I. L. R., 6 All., 395.

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the decree required correction, and it was therefore ordered, at the request of the pleader for the decree-holder, that the application should be dismissed, and the decree returned to him for amendment. The next application for execution of the decree was made by the decree-holder on the 19th February 1883.

Held that the application of the 20th July, 1880, having been put in and afterwards taken back by the decree-holder, the proceeding became to all intents and purposes as though no application had been made; that therefore it could have no effect as an application made in accordance with law for execution within the meaning of art. 179, sch. ii. of the Limitation Act; that applying the rule contained in s. 374 of the Civil Procedure Code, in accordance with s. 647, to the application for execution of the 19th February, 1883, the question of limitation must be determined as if the first application had never been filed; and that the application now in question was consequently barred by limitation. *Ramanadan Chetti* v. *Periatambi Shervai* (1) dissented from. *Pirjade* v. *Pirjade* (2) referred to.

THE decree of which execution was sought in this case was one for money passed against Kifayat Ali and Wilayat Ali as the sons and heirs of Hidayat-ullah, deceased debtor, and Muhamdi Begam, as widow of Hidayat-ullah, and was dated the 7th June, 1879. On the 20th July, 1880, the decree-holder applied for execution of the decree, asking for attachment and sale of certain immoveable property. The muharrir in charge of execution of decree cases reported to the Court that Muhamdi Begam was not personally liable under the decree, yet execution was sought against her; and that whereas Kifayat Ali and Wilayat Ali were stated in the decree to be the sons and heirs of Hidayat-ullah, deceased debtor, they were stated in the application to be the sons and heirs of Inayat-ullah, deceased debtor, and the property sought to be attached appeared to be Inayat-ullah's property. It appeared that the decree erroneously stated that Kifayat Ali and Wilayat Ali were the sons and heirs of Hidayat-ullah, they being the sons and heirs of Inayat-ullah. On the 3rd August, 1880, the Court passed the following order on the application :—

"To-day, at the hearing of the report, the pleader for the decree-holder stated that he would execute the decree after it had been corrected, and it might be returned. Therefore ordered, that according to the request of the pleader for the decree-holder the case be dismissed, and the decree returned to him." The decree-holder subsequently applied for amendment of the decree, and on the 28th April, 1882, the decree was amended. On the 19th February,

(1) I. L. R., 6 Mad., 250. (2) I. L. R., 6 Bom., 681.

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1883, the decree-holder made the next application for execution, being the one out of which this appeal arose. This application the Court of first instance (Munsif of Haveli Moradabad) rejected on the ground that it was barred by limitation. It held that limitation should be computed from the date of the decree, and not the date of the previous application of the 20th July, 1880, as that application was not one for execution of the decree within the meaning of art. 179 of the Limitation Act. On appeal by the decree-holder, the lower appellate Court (Subordinate Judge of Moradabad) held that limitation should be computed from the date of the previous application, and that therefore the present application was within time.

The judgment-debtors appealed to the High Court, contending that the present application was barred by limitation, as the first Court had held.

The *Senior Government Pleader* (*Lala Juala Prasad*), for the appellants.

The respondent did not appear.

The judgment of the Court (OLDFIELD and MAHMOOD, JJ.), after stating the facts, continued as follows :—

OLDFIELD, J.—It appears to us that the application of the 20th July, 1880, can have no effect as an application made in accordance with law for execution within the meaning of art. 179. It cannot be said to have been made at all, having been put in and afterwards taken back,—in fact, what was done in the matter by the decree-holder had been undone by him, and the proceeding became, to all intents and purposes, the same as though no application had been put in.

We are unable to concur in the view taken by the learned Judges of the Madras High Court in *Ramanadan Chetti* v. *Periatambi Shervai* (1). A similar case has been brought to notice, decided by the Bombay High Court—*Pirjade* v. *Pirjade* (2). It was there held that the rule in s. 374 of the Civil Procedure Code is made applicable by s. 647 to applications, and that cl. 4, art. 179 of Act XV of 1877 must be read subject to the rules contained in ss. 374 and 647 of the Civil Procedure Code, and in this view

(1) I. L. R., 6 Mad., 250. (2) I. L. R, 6 Bom, 681.

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we concur. S. 374 is to the effect that "in any fresh suit instituted on permission granted under the last preceding section, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been brought;" and applying this rule to the application for execution of the 19th February, 1883, which is before us, the question of limitation must be determined as if the application of the 20th July, 1880, had never been filed, and the present application will in consequence be barred by limitation. We set aside the order of the lower appellate Court, and allow the appeal with costs.

Appeal allowed.

1885
February 2.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

NIHAL CHAND (DEFENDANT) *v.* AZMAT ALI KHAN (PLAINTIFF).*

Public highway—Diversion of road—Right of owners of land adjoining old road—Grant by Municipality of land forming old road—Act XV of 1873 (N.-W. P. and Oudh Municipalities Act), s. 38.

There is a presumption that a highway, or waste land adjoining thereto, belongs to the owners of the soil of the adjoining land.

S. 38 of Act XV of 1873 (N.-W. P. and Oudh Municipalities Act) was not intended to deprive persons of any private right of property they might have in the land used as a public highway, or to confer such rights on the Municipality, nor has the section any such effect.

In a case where such land ceased to be used as a public highway, and was granted by the Municipality to third persons, who proceeded to build thereon,—*held* that the owners had a good cause of action against such persons for the demolition of the buildings and restoration of the property to its original condition.

THE facts of this case, so far as they are material for the purposes of this report, were as follows. The plaintiff in this suit was one of the co-sharers in a patti in "*Qasbah*" Muzaffarnagar, that is to say, in the town of Muzaffarnagar. In this patti there was a plot of land numbered 2566 in the "*khasra abadi*" or list of town lands. The plaintiff, alleging that the defendant had wrongfully built on this plot, sued the latter for the demolition of the buildings and the restoration of the land to its original condition. The defence to the suit was that the land in suit formed a public road, and was therefore the property of the Municipality, under s. 38 of Act XV of 1873, and consequently the plaintiff had no

* Second Appeal No. 124 of 1884, from a decree of Maulvi Muhammad Maksud Ali Khan, Subordinate Judge of Saháranpur, dated the 10th December, 1883, modifying a decree of Maulvi Muhammad Ruhullah, Munsif of Shamli, dated the 22nd June, 1883.