

## APPELLATE CIVIL.

1902  
February 14.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Burkitt.

SHEORAJ SINGH (JUDGMENT-DEBTOR) v. KAMESHAR NATH  
AND ANOTHER (DECREE-HOLDERS).\*

*Execution of decree—Limitation—Res judicata.*

Although the execution of a decree may have been actually barred by time at the date of an application made for its execution, yet if an order for execution is made by a competent Court, having jurisdiction to try whether such execution is barred by time or not, such order, although erroneous, must, if unreversed, be treated as valid.

An application for execution of a decree was struck off on the 15th of January, 1894. The next application for execution was not made until the 29th of May, 1897. Notice of this application was served on the judgment-debtors, and they filed objections, but on the day fixed for hearing failed to support them, and they were dismissed. The application for execution was, however, ultimately struck off by reason of the non-payment of process fees by the decree-holders. Held that it was not open to the judgment-debtors on a subsequent application for execution being made to plead limitation in respect to the application of the 29th of May, 1897, as a bar to the execution of the decree. *Mungul Pershad Dicht v. Grija Kant Lahiri Chowdhry* (1), *Behari Lal v. Abdul Majid* (2), *Lakshmanan Chetti v. Kuttayan Chetti* (3), *Bholanath Dass v. Prafulla Nath Kundu Chowdhry* (4) and *Dhonkal Singh v. Phakkar Singh* (5) referred to. *Tilashar Rai v. Parbati* (6) and *Onkar Singh v. Mohan Kvar* (7) distinguished.

THE facts of this case are fully stated in the judgment of the Court.

Babu Durga Charan Banerji, for the appellant.

Pandit Sundar Lal, Pandit Moti Lal Nehru and Pandit Tej Bahadur Sapru, for the respondents.

STANLEY, C.J. and BURKITT, J.—This is an appeal from the order of the Subordinate Judge of Aligarh disallowing the objections of Raja Sheoraj Singh to the execution of a decree recovered by the respondent against the late Raja Shankar Singh, the father of Raja Sheoraj Singh. A number of proceedings in execution of this decree were taken, which it is unnecessary to state in detail. Suffice it to give the following

\* First Appeal No. 166 of 1900 from a decree of Munshi Ahmad Ali Khan, Subordinate Judge of Aligarh, dated the 14th May, 1900.

(1) (1881) L. R., 8 I. A., 123.	(4) (1900) I. L. R., 28 Calc., 122.
(2) Weekly Notes, 1897, p. 29.	(5) (1893) I. L. R., 15 All., 84.
(3) (1901) I. L. R., 24 Mad., 669.	(6) (1893) I. L. R., 15 All., 198.
(7) Weekly Notes, 1898, p. 96.	

particulars :—On the 31st of January, 1890, the first application for execution was made, and two villages were attached in execution. Raja Shankar Singh died on the 24th of August, 1891, and the names of his sons, Raja Sheoraj Singh and Raja Maharaj Singh, were substituted as his legal representatives. On the 2nd of April, 1892, an arrangement was come to between the decree-holders and Raja Sheoraj Singh, whereby it was agreed that the amount of the decree should be paid off by six instalments, and that in default of payment of any instalment the execution proceedings should be revived and carried out. It was also agreed that the two villages which had been attached should remain hypothecated (this is the word used) until the instalments had been paid. The decree had been sent for execution to the Collector of Etah, and on the 16th of May, 1892, the execution proceedings were sent back to the Civil Court. Raja Sheoraj Singh, upon the compromise being effected, paid the sum of Rs. 3,231 into Court in satisfaction of interest due on foot of the decree. A payment order was passed in favour of the decree-holders on the 18th of June, 1892, and on the 13th of July, 1892, they obtained payment of this amount. The sanction of the Court which passed the decree was not obtained to the compromise as required by section 257A of the Code of Civil Procedure, and consequently it was void. Two instalments of Rs. 5,000 each were paid on foot of the decree, and in accordance with the compromise arrangement on the 24th of March, 1893 and 15th of January, 1894, but no further instalment was paid; and in consequence of this default on the 29th of May, 1897, the decree-holders made a further application to the Court for execution of the decree. Notice was duly given to the judgment-debtors under section 248 of the Code of Civil Procedure, and Raja Sheoraj Singh, as also his brother, filed objections. The objectors failed to appear in support of their objections on the day fixed by the Court for the disposal of them, namely, the 29th of December, 1897. Their pleader stated to the Court that he had no instructions, and the objections were dismissed. There has been no appeal from this order. The process fees, which were directed to be paid for issue of further execution, not having been paid in due course, the execution

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proceedings were struck off on the 8th of June, 1898. This necessitated a further application for execution, which was made on the 14th of October, 1898, and granted. Again the execution proceedings were struck off owing to the neglect of the decree-holders to file some khewats, and on the 19th of December, 1898, the application for execution, which is now being resisted by the judgment-debtors, was made. Of the objections which Raja Sheoraj Singh has filed, three only have been pressed, and they are these:—(1) That the application for execution of the decree made on the 29th of May, 1897, having been made more than three years after the previous application of the 13th of January, 1890, was barred by limitation; (2) that the decree was incapable of execution by reason of the compromise of the 2nd of April, 1892, and (3) that the attachment was made after the death of the judgment-debtor, Raja Shankar Singh, and consequently was not binding on the appellant, who took the property by right of survivorship and not by right of inheritance. These same objections were raised by Raja Sheoraj Singh on the occasion of the application for execution which was made on the 29th of May, 1897, and were dismissed; and it is now contended on the part of the decree-holders that, inasmuch as these objections have already been disposed of by an order against which there has been no appeal, the matter is *res judicata*, and the objections cannot be reagitated. Reliance is placed upon several authorities to which we shall refer. In the case of *Mungul Pershad Dicit v. Grija Kant Lahiri Chowdhry*, (1) their Lordships of the Privy Council held that, although the execution of a decree may have been actually barred by time at the date of an application made for its execution, yet if an order for such execution has been made by a competent Court having jurisdiction to try whether it was barred by time or not, such order, although erroneous, must, if unreversed, be treated as valid. Sir Barnes Peacock in delivering the judgment of their Lordships in the course of his judgment observed:—“The Subordinate Judge had jurisdiction upon the petition of the 8th of October, 1874 (*i.e.* a petition to attach properties), to determine whether the decree was barred on the 8th of October, 1871, and he made an order

(1) (1881) L. R., 8 I. A., 123.

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that an attachment should issue. He, whether right or wrong, must be considered to have determined that it was not barred. A Judge, in a suit upon a cause of action, is bound to dismiss the suit or to decree for the defendant if it appears that the cause of action is barred by limitation. But if, instead of dismissing the suit, he decrees for the plaintiff, his decree is valid, unless reversed upon appeal, and the defendant cannot, upon an application to execute the decree, set up as an answer that the cause of action was barred by limitation." Now in the case before us the Subordinate Judge dismissed the plaintiff's objections on the 20th of December, 1897. Whether rightly or wrongly, he must have considered that the application was not barred by limitation, for he allowed execution to issue, and by a subsequent order of the 17th of March, 1898, directed the pleader for the decree-holders to pay the costs of attachment on or before the 21st of March, 1898. The order of the 20th of December, 1897, was acquiesced in by the appellant and was acted on. It appears to us that the ruling of their Lordships is applicable to and governs this case.

In a case which was decided in this Court a similar question arose, namely, the case of *Behari Lal v. Majid Ali* (1). In that case one Gauri Shankar obtained a money decree against Majid Ali. Gauri Shankar having died, one Behari Lal alleging that he was the brother of Gauri Shankar, and one Musammat Sonkali alleging that she was the widow of a deceased brother of Gauri Shankar, applied for execution of the decree by arrest of Majid Ali. Notice was issued to Majid Ali under section 248 of the Code of Civil Procedure, and was served upon him, but he failed to appear, and an order for arrest was made. Majid Ali could not be found, and the warrant was not executed. Subsequently, on the 2nd of August, 1893, Behari Lal and Musammat Sonkali presented another application for execution of the decree by the arrest of Majid Ali. On this occasion Majid Ali appeared and filed objections to the right of Behari Lal and Musammat Sonkali to have execution of the decree. The first Court made an order for execution. The second Court allowed the objections of Majid Ali and dismissed the application. On second appeal to the High Court, Edge, C.J. and Blair, J., held, upon the principle laid

(1) *Weekly Notes*, 1897, p. 29.

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down by their Lordships of the Privy Council in the case of *Ram Kirpal v. Rup Kuari* (1), that Majid Ali was not, upon the second application made for execution, entitled to dispute the right and competence of Behari Lal and Musammat Sonkali to have execution of the decree as representatives of Gauri Shaunkar; that their right to execute the decree was established when an order for execution was passed on the first application, and that the principle of *res judicata* applied. So in the case before us, the objector having failed to appear and support his objections on the 29th of December, 1897, and the same having been dismissed, he is estopped from now setting up the same objections. In the case of *Lakshmanan Chetti v. Kuttayan Chetti* (2), this question was considered. In that case a decree had been obtained on the 16th of March, 1893, and a petition in execution was presented on the 8th of February, 1894. On the 2nd of July, 1897, that is, more than three years after the presentation of the petition of the 8th of February, 1894, the next petition in execution was presented, when the judgment-debtor, though he had notice of the application, did not raise the defence of limitation. An order was passed on the petition for the issue of a warrant for the arrest of the defendant, and the warrant was duly issued. Within three years of the making of this application a further application in execution was made, when it was objected that as the application in 1897 had been presented more than three years after the previous application in 1894 it was barred, and that in consequence the further application must also be barred. It was held by Davies and Moore, JJ., that it was not open to the judgment-debtor then to raise the objection that the application of 1897 was barred and that this question was *res judicata*. These decisions are based on the ruling of their Lordships of the Privy Council in the case to which we have referred. On behalf of the appellant two decisions of this High Court have been relied on. The first is the concluding paragraph (at page 204) of the judgment pronounced by one of us in the case of *Tilashar Rai v. Parbati* (3). That case, however, is distinguishable, as it appears that the date fixed for hearing the objections of the judgment-debtors

(1) (1888) I. L. R., 6 All., 269.

(2) (1901) I. L. R., 24 Mad., 669.

(3) (1898) I. L. R., 15 All., 198.

to execution was a Sunday, and that their objections were rejected on the following day in their absence, they having had no notice to appear on that day. That was the reason why the Bench which heard that case held that the objection raised by the judgment-debtors had not been judicially disposed of. Had the attention of the Bench been called to the rule laid down in *Mungul Pershad Dicit v. Grijā Kant Lahiri Chowdhry* (1) it probably would have come to a different conclusion. The second case which is relied on for the appellant is the concluding portion (page 97) of the judgment in *Onkar Singh v. Mohan Kuar* (2) to which one of us was a party. That case also might be distinguished [as in the recent case of *Bholanath Dass v. Prāfulla Nath Kundu Chowdhry* (3)] from the present by the fact that on the day fixed for disposing of an objection to execution raised by the judgment-debtor, neither the latter nor the decree-holder appeared, and the objections were struck off without any judicial determination. As the case, however, was shortly afterwards transferred to the Collector under section 320 of the Code of Civil Procedure for execution by sale of the hypothecated property, the Subordinate Judge must be held to have made an order for execution of the decree, an order which, whether right or wrong, was valid, so long as it stood unreversed on appeal. Neither the then recent case of *Behari Lal v. Majid Ali* (1897, November 29th) mentioned above nor the judgment of their Lordships of the Privy Council mentioned above was cited in argument, and the Bench lost sight of the rule that once an execution Court has passed an order for execution in favour of the decree-holders the only remedy left to the judgment-debtor is by way of appeal. We are of opinion that the true principle applicable to objections to execution raised by judgment-debtors is that laid down in the case just cited, and that the principle on which the rule as to decree-holders in *Dhonkal Singh v. Phakkar Singh* (4) is founded, does not apply to the disposal of such objections. For the foregoing reasons we are of opinion that the appellant was not entitled to raise the objections which he filed to the execution of the decree of the defendants.

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(1) (1881) L. R., 8 I. A., 123.

(2) Weekly Notes, 1898, p. 96.

(3) (1900) I. L. R., 28 Cal., 122.

(4) (1893) I. L. R., 15 All., 84.

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On this ground his appeal fails. It is unnecessary for us to determine the other questions which have been discussed in the course of the arguments.

The appeal is accordingly dismissed with costs.

*Appeal dismissed.*

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February 15.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.*

LALTA PRASAD AND ANOTHER (PLAINTIFFS) v. SADIQ HUSEN

(DEFENDANT).\*

*Cause of action—Assignment of decree for costs—Costs realized by assignee—Decree reversed in appeal—Suit by successful appellants to recover from the assignee the costs realized by him.*

Certain appellants in the High Court obtained from that Court a decree dismissing the respondents' plaintiffs' suit with costs. That decree for costs was assigned by the decree-holders, and the assignee took out of Court in execution thereof the money which had been paid in satisfaction of it by the judgment-debtors. Subsequently that decree was reversed by the Privy Council, and the plaintiffs obtained a decree in their favour with costs in all Courts. After an infructuous attempt to get a portion of those costs from the assignee by way of execution of the order of the Privy Council, the decree-holders filed a separate suit against him for their recovery. *Held*, that the decree-holders had no cause of action for a suit to recover from the assignee the costs realized by him in the manner above described.

THE facts of this case will be found stated in the report of the case of *Sadiq Husain v. Lalta Prasad* (1), but briefly they were as follows:—

On the 21st of July, 1888, Lalta Prasad and Har Prasad obtained a decree for sale on a mortgage from the Court of the Subordinate Judge of Bareilly against Aziz-ud-din Ahmad and Hafiz-ud-din Ahmad. The defendants appealed, and on the 16th of March, 1891, the High Court set aside that decree, and dismissed the plaintiffs' suit with costs.

This decree for costs the defendants assigned to one Sadiq Husen, who applied for execution thereof, and realized the amount of costs decreed.

The plaintiffs appealed from the decree of the High Court to the Privy Council, and on the 5th of April, 1895, the Privy

\* First Appeal No. 61 of 1899, from a decree of Babu Madho Das, Subordinate Judge of Bareilly, dated the 3rd February 1899.

(1) (1897) I. L. R., 20 All., 139; S. C., W. N. 1897, p. 222.