

heir. He and his son successively remained in adverse possession during the widow's lifetime, a period of more than twelve years. On suit by the daughter, on her mother's death, it was held that the rule of limitation applicable was article 141, which was said to be naturally applicable to it. The facts of the two cases are so similar that when writing my judgment in *Hannuman Prasad Singh v. Bhagawan Prasad* (1), I lost sight of the fact that while in Lachhan Kunwar's case article 144 of the Limitation Act was applied, in the Full Bench case of this Court article 141 was held to be applicable. This mistake caused me to consider these two cases to be inconsistent one with the other. In view of the latest ruling of their Lordships of the Privy Council in *Runchordas Vandravandas v. Parvatibai* (2), it is unnecessary for me to express any further opinion on this matter.

*Appeal decreed.*

*Before Mr. Justice Blair and Mr. Justice Banerji.*

SARAN AND OTHERS (JUDGMENT-DEBTORS) v. BHAGWAN (DECREE-HOLDER).\*  
*Civil Procedure Code, sections 588 and 244—Execution of decree—Application to recover money realized in execution of a decree subsequently set aside.*

In execution of a decree obtained *ex parte* the decree-holders realized from their judgment-debtor some Rs. 1,300. The judgment-debtor applied under section 108 of the Code of Civil Procedure to have the decree set aside. His application was at first dismissed, but on appeal the *ex parte* decree was set aside. The suit was re-heard, and was ultimately dismissed. Thereupon the successful defendant applied to the Court which had executed the decree against him for restitution of the money realized in execution of that decree.

*Held* that the defendant's proper remedy was that which he had sought, namely, by application in execution and not by separate suit. *Dhan Kunwar v. Mahtab Singh* (3) followed.

In this case Gajraj Kalwar and others obtained a decree against one Bhagwan Kalwar *ex parte*. The decree-holders put that decree into execution and realized a sum of Rs. 1,300 from Bhagwan. The judgment-debtor applied under section 108 of the Code of Civil Procedure to have the *ex parte* decree set aside. The first Court rejected the application, but in appeal it was granted. The *ex parte* decree was accordingly set aside

\* Second Appeal No. 1085 of 1902, from an order of W. Tudball, Esq., District Judge of Gorakhpur, dated the 5th of September 1902, confirming an order of Maulvi Muhammad Shafi Khan, Subordinate Judge of Gorakhpur, dated the 14th of July 1902.

(1) (1897) I. L. R., 19 All., 357.

(2) (1899) I. L. R., 23 Bom., 725.

(3) (1899) I. L. R., 22 All., 79.

1903

JHAMMAN  
 KUNWAR  
 v.  
 TILOTTI.

1903  
 March 31.

1903

---

 SARAN  
 v.  
 BHAGWAN.

and the suit reheard, and in the result dismissed. Thereupon Bhagwan applied to the Court which had executed the decree against him for restitution of the amount which had been realized from him in execution of that decree. The representatives of the decree-holders, Saran and others, raised various objections, but the Court of first instance (Subordinate Judge of Gorakhpur) dismissed them. An appeal was preferred to the District Judge, but that was also dismissed. The objectors then came in second appeal to the High Court.

Mr. *Karamat Husain*, for the appellants.

Munshi *Kalindi Prasad*, for the respondent.

BLAIR and BANERJI, JJ.—Mr. *Karamat Husain*, for the appellants, has relied upon a ground of appeal, the substance of which his clients have never tried to avail themselves of in the Court of first instance or in the lower appellate Court. The predecessors in title of the appellants obtained an *ex parte* decree against the respondent, Bhagwan Kalwar. They put that decree into execution and realized Rs. 1,300. Bhagwan applied under section 108 of the Code of Civil Procedure to have the *ex parte* decree set aside. The first Court rejected the application, but the Court of appeal granted it. The *ex parte* decree was accordingly set aside. The case was heard, and in the result dismissed. Thereupon Bhagwan Kalwar applied to the Court which had executed the *ex parte* decree for restitution of the money realized in execution of that decree. Mr. *Karamat Husain*, for the appellants, argues that he could not succeed by application to the execution Court, but that the respondent here, the defendant in the original suit, can obtain restitution by institution of a new suit. This matter has already been before a Bench of this Court, which held, in the case of *Dhan Kunwar v. Mahtab Singh* (1), that it was competent to a judgment-debtor, by application under section 244 of the Code of Civil Procedure, to recover a surplus improperly realized by the decree-holder. We see no reason to dissent from that ruling. The principle involved in that case is indistinguishable from the principle involved in this case.

The appeal is dismissed with costs.

*Appeal dismissed.*