do not think this is a case of transfer. The expression used in the Notification is "made over to be tried" and section 9 of the Code of Criminal Procedure simply gives jurisdiction to all Judges and Additional Sessions Judges of each court of Session to which they may be appointed. If this appeal had been heard by a Judge who was not a Judge of the Sessions Division of Gorakhpur, section 531 of the Code of Criminal Procedure would have prohibited interference except upon the ground that a failure of justice had been occasioned by the hearing of the appeal in the wrong Sessions Division. We see no reason whatever for holding that there has been a failure of justice in this case. From one point of view it might be said that the provisions of section 531 aforesaid applied *a fortiori* to the present case. We are more inclined to hold that the absence of any corresponding provision in respect of cases tried within the same Sessions Division by a lawfully appointed Judge of that Sessions Division, whether he be the Sessions Judge or an Additional Sessions Judge, shows that the Legislature did not think that any doubt as to the jurisdiction of such Judges could arise in view of the wording of section 9 of the Code. We are satisfied that there is no cause for our interference. We dismiss this application.

Application dismissed.

APPELLATE CIVIL.

Before Mr. Justice Gokul Prasad and Mr. Justice Sulaiman.

SHEO MANGAL (DECREE-HOLDER) *v.* MUSAMMAT HULSA AND OTHERS (JUDGMENT-DEBTORS)*.

1921 *November*, 5.

Execution of decree—Res judicata—*Estoppel*—*Application of doctrine of* res judicata *or estoppel to proceedings in execution.*

A decree was passed in a pre-emption suit awarding possession to the plaintiff upon payment of Rs. 1,200 within two months. On appeal the amount payable by the plaintiff was increased by Rs. 380-15-0 and the time for payment was extended to five months from the appellate court's decree. The plaintiff deposited the amount declared by the original decree to be payable and obtained possession of the property in suit. The additional sum

* Second Appeal No. 641 of 1920, from a decree of B. J. Dalal, District Judge of Allahabad, dated the 22nd of April, 1920, reversing a decree of Lal Gopal Mukerji, Judge of the Court of Small Causes, exercising the powers of a Munsif of Allahabad, dated the 26th of November, 1919.

1921

SHEO MANGAL v. MUSAMMAT HULSA.

made payable by the appellate court's decree not having been paid, the vendees applied for execution of the decree. Their first application was dismissed for default. On the second application, which was for realization of the sum of Rs. 380-15-0 and costs, the plaintiff appeared and offered to pay Rs. 260 at once and the balance in two months, and this was accepted by the court, which passed orders accordingly notwithstanding the vendees' objection. Before the time so allowed had expired, the vendees put in a further application asking that the property in suit might be returned to them because the plaintiff had not complied with the terms of the appellate decree. The plaintiff thereupon deposited the balance of the sum due from him under the last order of the Court.

Held that neither the principle of *res judicata* nor the principle of estoppel debarred the vendees from taking up the position that, by reason of the plaintiff's failure to deposit the amount of the appellate court's decree within time, the suit *ipso facto* stood dismissed.

Ram Kirpal v. *Rup Kuari (1)*, *Lakshmanan Chetti* v. *Kuttayan Chetti (2)*, *Sheoraj Singh* v. *Kanshar Nath (3)*, *Dambar Singh* v. *Munawar Ali Khan (4)* and *Kalyan Singh* v. *Jagan Prasad (5)* referred to.

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

Babu *Piari Lal Banerji*, for the appellant.

Munshi *Shiva Prasad Sinha* for the respondents.

GOKUL PRASAD and SULAIMAN, JJ. :—This appeal arises out of an execution matter. It appears that the plaintiff appellant brought a suit for pre-emption against the defendants. That suit was decreed on the 29th day of February, 1916, by the court of first instance and the decree provided that on payment of Rs. 1,200 within two months the plaintiff would be entitled to get possession of the property. The vendee appealed to the District Judge and the plaintiff appellant filed cross-objections. The learned District Judge on the 12th day of August, 1916, allowed the vendee's appeal in part and increased the amount awarded to him by a sum of Rs. 380-15-0 and directed that in case the Rs. 1,200 awarded by the first court had not already been deposited the time for payment of the whole or the balance be extended by five months from the date of his decree. There was a second appeal to this Court which was dismissed.

The plaintiff on the 29th day of April, 1916, deposited Rs. 1,200 in court and on the 30th day of May, 1916, obtained

(1) (1883) I. L. R., 6 All., 269.
(2) (1901) I. L. R., 24 Mad., 669.
(3) (1902) I. L. R., 24 All., 282.
(4) (1915) I. L. R., 37 All., 591.
(5) (1915) I. L. R., 37 All., 589.

possession of the property. He, however, did not deposit the balance of Rs. 380-15-0 within five months allowed by the court of first appeal. On the 17th day of July, 1918, the vendees applied for execution of their decree for costs. This application was ultimately dismissed for default. After this, on the 16th day of June, 1919, the vendees put in a second application for execution of the decree in their favour and claimed to recover a sum of Rs. 380-15-0 allowed by the District Judge, as well as costs to which they were entitled, and prayed for the execution of the decree by arrest of the judgment-debtor. An order issuing process was made on that day. Before the order could be executed, the judgment debtor appeared in court on the 13th day of July, 1919, and offered to pay Rs. 260 at once and prayed for two months' further time. The vendees' pleader objected to any further extension of time, but the court thought fit to direct that the judgment-debtor should deposit Rs. 260 on that date and should be allowed two months' further time to pay the balance. Before the two months had expired and before the balance had been deposited, the vendeee, on the 22nd day of August, 1919, put in an application, out of which this appeal arises, and which in effect was one for restitution of the property on the ground that, the pre-emption money not having been deposited within the time allowed by the decree, the suit stood dismissed. Two days before the date fixed for hearing of this application, namely, on the 18th day of September, 1919, the plaintiff appeared in court and deposited the balance of the amount.

Various objections were raised by the plaintiff to the vendees' application for restitution. The court of first instance was of opinion that this application was barred by the principle of *res judicata* as well as by the principle of estoppel, and it accordingly dismissed the application. On appeal the learned District Judge has differed from the views of the court of first instance, and having allowed the appeal, has granted the application for restitution of the property.

In the courts below there was some dispute as to the actual interpretation of the decree passed by the learned District Judge. The decree modified the decree of the court of first instance to this extent only that the period of payment be extended to five

1921

SHEO MANGAL v. MUSAMMAT HULSA.

months and the amount of the pre-emption money be increased by Rs. 380-15-0. In other respects the decree of the court of first instance had not been modified. It is obvious, therefore, that the clause in the first court's decree, which said that in case of default of payment the suit should stand dismissed, held good and in our opinion there can be no doubt that on the failure of the plaintiff to deposit the full decretal amount within the time allowed by the learned District Judge his suit did stand dismissed.

On behalf of the plaintiff, however, two points have been strongly urged before us. One is that of *res judicata* and the other of estoppel. It is urged that when at the instance of the vendees the execution court ordered process to issue and also directed that the judgment-debtor should deposit the balance of the amount within two months, it substantially decided that the decree was executable and that the vendee's remedy was to recover the pre-emption money by execution of his decree, that therefore this point must be taken as having been decided by a competent court and the present application is barred by the principle of *res judicata*.

In is clear, however, that there is no express order to the effect that the decree could be executed even after the expiry of the five months. The order of the 16th day of June, 1919, is simply an order directing that process should issue. On that date there was the amount of costs actually due to the vendees and there can be no doubt that the execution court had jurisdiction to execute the decree. It is true that in the application for execution a larger amount than was actually due to the vendees was put in, but this circumstance in our opinion cannot oust the jurisdiction of the execution court so far as the amount actually due was concerned. It is clear, therefore, that the order of the 16th day of June, 1919, can in no way operate as *res judicata*. Coming to the incident of the 13th day of July, 1919, it will be noticed that, although on that date the vendees seem to have been willing to accept the whole of the decretal amount in case it was paid to them then, they were not willing to allow any further grace to the plaintiff. The court, however, in spite of the vendees' objection, granted two months' further time for

payment of the balance. This in effect was an order extending the time fixed by the decree. Section 148 of the Code of Civil Procedure has no application to time fixed by a decree, and it is obvious that the court really had no jurisdiction against the will of the vendees to extend the time for payment of the pre-emption money. In our opinion this order, too, cannot be said to amount to an adjudication that the decree was really executable. The fact seems to be that it did not occur to either of the parties or to the court that by lapse of time the suit stood dismissed. It is strongly urged by Mr. *Banerji* on behalf of the plaintiff that if the court did not intend to decide that the only remedy of the vendees was to recover the amount by execution of their decree it would not have passed this latter order. He relies on the cases of *Ram Kirpal* v. *Rup Kuari* (1), *Lakshmanan Chetti* v. *Kutiayan Chetti* (2), *Sheoraj Singh* v. *Kameshar Nath* (3) *Dambar Singh* v. *Munawar Ali Khan* (4), *Tameshar Prasad* v. *Thakur Prasad* (5), and *Lachhmi Narain* v. *Ram Chandra* (6).

There can be no doubt that if an executing court expressly decides a point *inter partes*, that decision becomes final according to the general principles of law, though the question whether the law of *res judicata* applies would be irrelevant, as the term refers to a matter decided in another suit. This is all that was held by their Lordships of the Privy Council in the case of *Ram Kirpal* v. *Rup Kuari* (1). In the case of *Lakshmanan Chetti Kuttayan Chetti* (2) there was an application for execution to which certain objections were raised and an order for the issue of warrant was issued. The application for some reason or other was struck off and, on a second application for execution having been made, a plea was raised that the previous application having been filed beyond time was not according to law. It was held that such a plea was barred by the principle of *res judicata*. That case is really distinguishable, inasmuch as certain objections had actually been raised by the judgment-debtor and for some reason or other had not been pressed and process

(1) (1883) I. L. R., 6. All, 269.
(2) (1901) I. L. R., 24 Mad., 669.
(3) (1902) I. L. R., 24 All., 282.
(4) (1915) I. L. R., 37 All., 531.
(5) Weekly Notes, 1903, page 99.
(6) (1907) 4 A. L. J., 117.

1921

SHEO MANGAL v. MUSAMMAT HULSA.

had been ordered to issue. In the case of *Sheoraj Singh* v. *Kameshar Nath* (1) also, the objections, including an objection as to limitation, had been raised to an application for execution, but the judgment-debtor failed to appear in support of those objections, which were accordingly dismissed. On a second application for execution being made the plea of the previous application having been barred by time was disallowed on the obvious ground that the point had been expressly raised on the previous occasion and not pressed. In the case of *Dambar Singh* v. *Munawar Ali Khan* (2) it appears that in the course of the execution proceedings a compromise had been arrived at, which was made the basis of an order by the court that the respondents were not liable for the decretal amount and that their property should be released. This order was also subsequently upheld. In spite of this, however, the decree-holder's transferees put the decree in execution and re-attached the same property. Objections were filed to the effect that the respondents were not liable and that their property could not be attached, but these objections were allowed to be dismissed for default. It was then held that the latter of these two orders operated as *res judicata*. In this case it will also be noticed that objections had expressly been raised and allowed to be dismissed and the order dismissing those objections had become final. From these rulings it does not necessarily follow that the principle of implied *res judicata* would apply to execution proceedings. On the other hand, it has been laid down in the case of *Kalyan Singh* v. *Jagan Prasad* (3), that if a judgment-debtor does not take any objection as to the decretal amount entered in the application for execution, that does not preclude him from raising the point at a subsequent stage.

All that happened was that on the 16th day of June, 1919, the vendees included an item of Rs. 380-15-0 to which they were not entitled. The judgment-debtor for some reason or other did not take any objection that this amount was not payable by him. The court also proceeded on the assumption that the amount was due and process was ordered to be issued. The

(1) (1902) I. L. R., 24 All., 282. (2) (1915) I. L. R., 37 All., 531.

(3) (1915) I. L. R., 37 All., 589.

judgment-debtor appeared and offered to pay Rs. 260 and to pay the balance in two months. To this request of his the court acceded. In our opinion neither of these proceedings can be said to amount to an express adjudication by the court that the proper remedy of the vendees was to recover the amount of Rs. 380-15-0 by execution or that any such amount was actually due to him. The rule of *res judicata*, therefore, does not apply and the present application is not barred by such principle.

It has next been very strongly contended that the conduct of the vendees estops them from taking up a new position. It is urged that the vendees deliberately took up the position that their remedy was to recover the sum of Rs. 380 15-0 by execution of their decree and persuaded the court to pass orders in their favour, and that they by their conduct put the judgment-debtor to a great disadvantage in compelling him to find a sum of Rs. 260 and asking for time to pay the balance in two months. This point is certainly not free from some difficulty, because the conduct of the vendees is reprehensible and it is also clear that they are now trying to shift their position and go behind the previous application. We are, however, to be satisfied whether there is any rule of law which precludes them from claiming restitution. It is obvious that after the expiry of the five months allowed by the decree the suit stood dismissed, and it cannot be urged on behalf of the plaintiff that by any act or misrepresentation of the vendees the plaintiff was prevented from depositing the full amount within the time allowed by the decree. Without any fault of the vendees the plaintiff allowed the time fixed to expire and allowed the suit to stand dismissed. The subsequent conduct of the vendees cannot in our opinion amount to any misrepresentation on their part which has deceived the plaintiffs. Their conduct did put the plaintiff to a great disadvantage for which the plaintiff may have another remedy but in our opinion the circumstance that the vendees wanted to realize a sum of Rs. 380-15-0 by execution of the decree, which sum admittedly was not due to them, does not estop them from now coming to court and saying that they were pursuing a wrong remedy and that their real remedy is to recover possession of the property which has been wrongly taken by the plaintiff.

1921

SHEO MANGAL v. MUSAMMAT HULSA.

In our opinion the order of the court giving the plaintiff two months' further time to deposit the pre-emption money was without jurisdiction and it was passed against the consent of the vendees. On that day the vendees seemed prepared to waive their right to some extent and were ready to accept the amount provided the whole amount was paid to them. This, however, was not done, and we can by no stretch of language say that the vendees ever agreed to accept the whole amount within two months after the 13th day of July, 1919. They are, therefore, entitled to insist that, inasmuch as the plaintiff did not deposit the whole amount on that day they cannot now be compelled to accept it. In our opinion the effect of the default of payment made by the plaintiff was to dismiss his suit *in toto*, and he is, therefore, wrongfully in possession of the property. The vendees are entitled to a full restitution. We understand that the sum of Rs. 1,200 which had been deposited by the plaintiff and taken out by the vendees has already been re-deposited and that a further sum of Rs 380-15-0 is still lying in court. In these circumstances we are of opinion that the order of the learned District Judge granting the application was correct.

Having regard to the circumstances of the case and the peculiar attitude taken up by the vendees we direct that the parties should bear their own costs of the execution proceedings throughout. With this modification the appeal is dismissed.

Appeal dismissed.

1921

November, 8.

Before Mr. Justice Ryves and Mr. Justice Gokul Prasad.

RAM BRICHH RAI (JUDGMENT-DEBTOR) *v.* DEOO TIWARI (DECREE-HOLDER)*.

Act No. IX of 1908 *(Indian Limitation Act), schedule I, article* 182 *(5), —Execution of decree—Limitation—Decree in part a mortgage decree and in part a simple money decree.*

In a suit against the members of a joint Hindu family based on a mortgage of the family property, it was found that a portion only of the mortgage debt was incurred for legal necessity. As to such portion as was supported by legal

* Second Appeal No. 144 of 1921, from a decree of Brij Nath Das, District Judge of Ghazipur, dated the 14th of July, 1920, confirming a decree of Kameshwar Nath, Subordinate Judge of Ghazipur, dated the 22nd of July, 1919.