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I allow the appeal, set aside the order of the Additional Subordinate Judge dated the 23rd of August, 1930, and restore the decree passed by the Munsif dated the 23rd of January, 1930. The appellants are entitled to have their costs of this Court and of the lower appellate court.

Before Justice Sir Shah Muhammad Sulaiman and Mr. Justice Young.

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LACHHMAN DAS (APPLICANT) *v.* LAKSHMI NARAIN AND OTHERS (OPPOSITE PARTIES).*

Costs—Insolvency—Receiver's suit against a third party dismissed with costs—No direction that costs are to come out of insolvent's assets—Costs payable by receiver personally—Res judicata—*Dismissal of application to execute costs of trial court—Subsequent application to execute appellate court's decree awarding costs of both courts.*

A receiver in insolvency instituted a suit for a declaration that certain property was owned by the insolvent and not by the defendant. The suit was dismissed with costs; there was no direction that the costs were to be recovered from the assets of the insolvent. An appeal by the receiver was also dismissed with costs; the decree of the appellate court specified separately about the costs of each court. The defendant's application to the trial court for execution of the decree for costs of that court was dismissed, as the court was of opinion that the costs were not recoverable personally from the receiver. Subsequently the defendant put the decree of the appellate court for costs in execution.

Held that as the decree passed against the receiver was not an order passed by the insolvency court, whose orders for costs against the receiver ordinarily imply that they ordinarily are to be paid out of the assets of the insolvent, but was passed by the civil court in a suit brought by the receiver against the defendant, and there was no direction or indication that the costs would be recovered only from the assets, the receiver was personally liable to the defendant to pay the costs. Of course it might be open to the receiver to apply to the insolvency court to be reimbursed out of the assets of the insolvent.

*Execution First Appeal No. 270 of 1930, from a decree of Makhan Lal, Subordinate Judge of Moradabad, dated the 15th of February, 1930.

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Held, also, that the previous order of the trial court dismissing the application for execution of that court's decree for costs could not operate as *res judicata* when subsequently the question arose as regards the interpretation and execution of the appellate court's decree, which was passed subsequent to that order and directed the payment of the costs afresh.

Mr. *B. Malik*, for the appellant.

Dr. *N. C. Vaish* and Mr. *P. M. L. Verma*, for the respondents.

SULAIMAN and YOUNG, JJ. :—This case has been referred to a Division Bench because of an important point of law involved in it. Ganeshi Lal was the receiver of the estate of an insolvent, Jagpal Saran. He brought a suit against one Mst. Bhagwati for a declaration that a will in her favour was not genuine and the property devised by the testator passed to the insolvent and not to her. The suit was dismissed with costs, the order being that "the plaintiff do pay Rs. 323-12-0 to the defendant as costs". An application for executing the decree for costs against Ganeshi Lal personally was dismissed by the execution court on the 12th of January, 1924. The receiver had in the meantime appealed to the High Court and on the 14th of February, 1927, the High Court dismissed the appeal. The order for costs as entered in the decree was in the following words : "And it is further ordered that the appellant aforesaid do pay to the respondent No. 1 aforesaid a sum of Rs. 481-11-0 only, the amount of the costs incurred by the latter in this court, and it is further ordered that the costs incurred in the lower court be paid as awarded by the said court."

The defendant decree-holder executed the decree of the High Court for costs against Ganeshi Lal personally. The application was resisted on the ground of *res judicata* on account of the previous dismissal of a similar application, and the non-liability of the receiver in his personal capacity. The court below has dismissed the application, holding that the decree could not be executed personally against Ganeshi Lal.

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There is no force in the plea of *res judicata*. The previous application was for the execution of the decree of the first court against Ganeshi Lal. That application was dismissed. The present application is for the execution of the decree of the High Court which was passed subsequent to that order and which directed the payment of the costs afresh. The previous order of the Subordinate Judge cannot therefore operate as *res judicata* when the question is as regards the interpretation of the High Court's decree. We accordingly overrule this plea.'

The court below is of opinion that inasmuch as Ganeshi Lal was litigating not in his personal capacity but in that of the receiver of the estate, he could not be made liable for the costs personally. It seems to think that the decree in favour of the defendant for costs can be executed only as against the assets of the insolvent, if any.

The order passed against Ganeshi Lal was not an order passed by the insolvency court, whose orders for costs against the receiver ordinarily imply that they ordinarily are to be paid out of the assets in his hands. The order for costs was passed by the civil court in a suit brought by the receiver against the defendant respondent. It was like an ordinary action between two litigants, and there is no reason why the successful defendant should suffer if the insolvent has no assets at all. The order directed that Ganeshi Lal should pay the costs to the defendant respondent, and in the absence of anything to show that the costs would be recovered only from the assets of the insolvent, Ganeshi Lal was liable to the defendant to pay her costs. Of course, it would be open to Ganeshi Lal or his heirs to apply to the insolvency court for an order that he may be reimbursed out of the estate of the insolvent. If Ganeshi Lal were still continuing as the receiver, it might possibly have been open to him to recoup himself

out of the estate without even obtaining a previous order from the insolvency court.

It was pointed out by the Calcutta High Court in the case of *Re Suresh Chander Gooyee* (1) that if the Official Assignee brings an unsuccessful motion, however careful he may have been, the order that the court would make generally would be that he has to pay the respondent's costs, and he will have the right of indemnity given by the previous order of the court. Or he may obtain an indemnity from the creditor or other person in whose interest the motion is brought, before he starts proceeding. The order for the costs should not be directed to be limited to the assets in the hands of the official assignee when the respondent is not in any way in default for which he may be partially mulcted in costs. This case was followed by the Madras High Court in *Balakrishna Menon* v. *Uma* (2), in which it was held that "where a decree dismissing an official receiver's appeal directed him to pay the costs of the respondents, without stating that the costs should be paid out of the insolvent's estate, the costs are executable personally against the then receiver, though he had ceased to hold office at the time of execution". The learned Judges pointed out that in the absence of an express order to the contrary the receiver was personally liable to the opposite party who succeeds in the action, though the receiver may have a right to be reimbursed out of the insolvent's estate.

We think that the principle expounded in this case is sound. There seems to be no justification why the successful defendant should lose her costs if the insolvent has no assets. It was the duty of the receiver to ask the court to confine the execution of the decree to the assets of the insolvent, if that had been the real intention. If he wanted to safeguard his personal interest he should have obtained an indemnity from the creditor or other person in whose interest he was starting

(1) (1918) 23 C. W. N., 431. (2) (1928) I. L. R., 52 Mad., 263.

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the litigation. In the absence of any express direction in the decree, it must be held that the receiver was in the first instance personally liable for the costs.

We accordingly allow this appeal with costs and setting aside the order of the court below allow the decree-holder's application for the execution of the decree for costs against Lala Ganeshi Lal personally. As Lala Ganeshi Lal is dead, the decree will be executable against the assets of the deceased in the hands of the heirs, if any.

APPELLATE CIVIL.

Before Justice Sir Shah Muhammad Sulaiman and Mr. Justice Young.

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December, 17.

ASIA BIBI (DECREE-HOLDER) *v.* MALIK AZIZ AHMAD AND OTHERS (JUDGMENT-DEBTORS).*

Civil Procedure Code, order XXI, rule 16, proviso—Decree under order XXXIV, rule 6, against heirs of mortgagor—Decree-holder with others inheriting the estate of a deceased judgment-debtor—Right to execute the decree not extinguished thereby—Merger.

The proviso to order XXI, rule 16, of the Civil Procedure Code applies to the case where a decree for the payment of money which is passed against two or more persons who are jointly and severally liable to pay the amount is transferred to one of them. In such a case the person who acquires the decree becomes entitled to execute the whole decree and is also liable to pay the whole decree jointly with his co-judgment-debtors. In such an event, there being complete merger of co-extensive rights and liabilities, the execution cannot proceed against the other judgment-debtors. But the proviso does not apply to the converse case where the joint and personal liability of one of two or more judgment-debtors is not fastened upon the decree-holder, but the latter acquires either by private treaty or by operation of law a share in the estate of one of the judgment-debtors. In such an event there is no co-extensiveness of rights and liabilities, and therefore no merger; and at no time can the decree be said to have been transferred to a person who is one of two or more persons against whom

*First Appeal No. 318 of 1930, from a decree of Maheshwar Prasad, Subordinate Judge of Allahabad, dated the 20th of May, 1930.