Before Sir Shah Muhammad Sulaiman, Acting Chief Justice and Mr. Justice Niamat-ullah.

SHEO TAHAL RAM (DECREE-HOLDER) *v.* BINAIK SHUKUL (JUDGMENT-DEBTOR)*

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March, 19.

Foreign judgment—Ex parte *decree—Transferred for execution in British India—Execution court competent to decide whether decree was passed without jurisdiction—Submission to jurisdiction—Whether conduct of defendant after decree can constitute such submission*—Res judicatain *execution proceedings—Constructive* res judicata—*Estoppel—Civil Procedure Code, sections* 13 *and* 44.

A suit, based on a claim *in personam*, was decreed *ex parte* by the Bhadohi court in the Native State of Benares, in 1916. The decree-holder got the decree transferred to the Mirzapur court in British India, under section 44 of the Civil Procedure Code, and attempted to execute it from time to time. In 1926 the judgment-debtor appeared in the Mirzapur court, deposited Rs. 100 in part payment and prayed for and obtained 3 months' time to pay up the balance. No objection as to the want of jurisdiction of the foreign court to pass the decree was then raised. In 1928 the decree, which had in the meantime gone back to Benares, was again transferred to Mirzapur and application was made for attachment of fresh property. Objection was then taken about the want of jurisdiction of the Bhadohi court. It was found that the defendants neither owed allegiance to the Benares State nor were residing within that State when the suit was instituted. *Held*—

It is open to a judgment-debtor, against whom a decree has been passed by a foreign court, to raise, in the court in British India to which the decree has been transferred for execution, an objection to the validity of the decree on the ground of want of jurisdiction of the foreign court to pass it, and the execution court is competent to decide such question. There is nothing in section 44 of the Civil Procedure Code which compels the British Indian court to execute a decree transferred to it by a Native States court even if it is satisfied that the decree was passed without jurisdiction. Section 44 does not override section 13 of the Code; it only confers

*Second Appeal No. 1928 of 1929, from a decree of Muhammad Taqi Khan, Subordinate Judge of Mirzapur, dated the 18th of July, 1929, confirming a decree of Niraj Nath Mukerji, Munsif of Mirzapur, dated the 18th of May, 1929.

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authority to execute a decree which is in every other way a valid and enforceable decree.

The plea regarding the want of jurisdiction was open to the judgment-debtor under section 44 of the Evidence Act and could be raised at any stage of the proceedings, unless there was a bar of *res judicata* or of estoppel.

The failure to raise any objection regarding the validity of the decree on the ground of jurisdiction on the occasion when the judgment-debtor first appeared and paid Rs. 100 could not bar him, by the principle of constructive *res judicata*, from raising such objection on a fresh application for execution. The principle of constructive *res judicata* has not been applied to execution proceedings unless the point must be deemed to have been decided by necessary implication. For example, if any property had been sold in execution and the sale confirmed by the court, it might be said that the question of validity of the decree had been decided by necessary implication. But the mere fact that Rs. 100 were deposited in part payment or that 3 months' time was taken would not amount to an adjudication of the rights of the parties so as to operate as constructive *res judicata* on the question of validity of the decree.

As there was nothing to show that the extension of time obtained by the judgment-debtor was the result of an agreement between him and the decree-holder and that there was some representation made by the judgment-debtor which was acted upon by the decree-holder to his prejudice in any way, there was no estoppel against the judgment-debtor's raising the plea of want of jurisdiction.

[*Per* SULAIMAN, A. C. J.—The mere fact that the defendant allowed the suit to be decreed *ex parte* would not amount to his submitting to the jurisdiction of the Bhadohi court. Nor would his subsequent conduct in making part payment and obtaining time in the execution court be any evidence to show that he had submitted to the jurisdiction of the trial court before the decree was passed. The submission to jurisdiction must be to the foreign court itself, and probably prior to the pronouncement of the judgment, in order to make the decree a valid one.]

[*Per* NIAMAT-ULLAH, J.—If the conduct of the defendant does not amount to a submission to the jurisdiction of the foreign court before the pronouncement of judgment and the

judgment is as a nullity, then no subsequent conduct of his can make it otherwise. At the same time, there is nothing in law which makes it necessary that the submission to jurisdiction can only be by some overt act. It was possible that the defendant did not appear to defend the suit because he submitted to the jurisdiction of the court in the belief that the plaintiff's claim was a just one. Again, the subsequent payment by him might be an important circumstance indicative of his intention to submit to the jurisdiction of the court at the time when the suit was pending. It was only a piece of evidence to be taken into consideration in arriving at a finding on the question of submission.]

Mr. *Ambika Prasad*, for the appellant.

Mr. *A. P. Bagchi*, for the respondent.

SULAIMAN, A. C. J.:—This is a decree-holder's appeal arising out of execution proceedings consequent upon the transfer of a decree by a court of a Native State. The decree-holder brought a suit in the Bhadohi court within the Benares State against three defendants, including Binaik Shukul the present respondent and his deceased father Parsidh Narain. The summonses were served personally, but they did not appear to contest the claim. The plaintiff led some evidence and the suit was decreed on the merits on the 27th of July, 1916. The other execution records are not before us and the whole history of the execution for this long period is not quite clear. Certain facts, however, have been definitely found by the courts below and they are as follows. The objector, although served personally, did not choose to appear in the court of the Native State, the decree was passed on the merits, the decree-holder executed his decree within British India several times; apparently in 1926 the decree was transferred to the Mirzapur court for execution, the decree-holder got certain movable properties of the judgment-debtor attached, the judgment-debtor appeared in the Mirzapur court, deposited Rs. 100 in part payment and asked for three months more time so that he might pay the whole decretal amount; apparently time was given to him, though

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it is not clear whether the decree-holder had expressly consented to this arrangement; but it is perfectly clear that up to that time the judgment-debtor raised no objection as to want of jurisdiction; apparently execution was retransferred to Benares.

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On an application of the decree-holder the execution of the decree was transferred to the Mirzapur court a second time. After the receipt of the record the decree-holder applied on the 13th of November, 1928, for the execution of the decree by the attachment and sale of fresh property. On the 11th of December, 1928, the judgment-debtor objected that the Bhadohi court had no jurisdiction to pass the decree against him when he was not a resident of the Native State and the said decree was not capable of execution.

The first court distinctly found that the decree of the foreign court was pronounced against an absent foreigner and was therefore an absolute nullity unless it could be shown that the defendant had in any way submitted to the jurisdiction of the said court. In the grounds of appeal before the lower appellate court the decree-holder did not question the finding that the decree was against an absent defendant, but urged other pleas. The lower appellate court has agreed with the view of the trial court and affirmed its decree.

It seems to me that it is open to a judgment-debtor against whom a decree has been passed by a Native State court to object to its validity on the ground of want of jurisdiction, in the court to which the execution has been transferred. If the decree passed is without jurisdiction and therefore a nullity, he can certainly claim that he is not bound by it. It is not incumbent upon him to go to the court of the Native State and ask that court to review its order. By doing so he may be said in one sense to subject himself to the jurisdiction of that court and bind himself by an adverse order, in case it is passed. His remedy obviously is to object to

the execution in the court to which the decree has been transferred and which is now executing it.

Section 44 of the Civil Procedure Code merely lays down the method of procedure for the execution of decrees passed by courts in certain Native States as to which there is a Notification by the Governor-General in Council. It does not make a decree of such court for all purposes a decree by a court in British India. All that it provides is that the decree "may" be executed as if it were a decree by such court. There is nothing in the section which compels the British Indian court to execute a decree transferred to it by a Native State court even if it is satisfied that the decree was passed without jurisdiction. I am clearly of opinion that it has ample discretion to refuse to execute the decree.

It is doubtful whether the omission of the words "or the jurisdiction of the court" from the old section (225) corresponding to the present order XXI, rule 7, necessarily implies that the court to which the decree has been transferred cannot question the validity of the decree on the ground of want of jurisdiction. In any case such a contention cannot be urged with regard to a decree of a Native State court, which is a foreign court, transferred under section 44 of the Civil Procedure Code.

The point is covered by the authority of the Madras and Calcutta High Courts in *Veeraraghava Ayyar* v. *Muga Sait* (1) and *Panchkari Majumdar* v. *Giridharimal Moheshri* (2). I fully agree with the opinions expressed therein on this point.

There can also be no doubt that section 44 does not override section 13 of the Code. It only confers authority to execute a decree which is in every other way a valid and enforceable decree. In a suit on a foreign judgment objection as to the conclusiveness of the judgment can be raised on the grounds mentioned in section 13. If the decree is not binding on the judgment-debtor

(1) (1914) I.L.R., 39 Mad., 24. (2) (1924) 41 C.L.J., 508.

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on any of these grounds it seems to me that the execution court is entitled to take the fact into consideration.

It is now well settled by the pronouncement of their Lordships of the Privy Council in the case of *Gurdyal Singh* v. *Raja of Faridkot* (1) that the jurisdiction of a foreign court is territorial and attaches upon all persons either permanently or temporarily resident within the territory, while they are within it, but it does not follow them after they have withdrawn from it, and that even territorial legislation cannot give jurisdiction to a foreign court against persons not owing allegiance to the legislating authority. To quote the words of their Lordships: "In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced *in absentem* by a foreign court, to the jurisdiction of which the defendant has not in any way submitted himself, is by International Law an absolute nullity. He is under no obligation of any kind to obey it, and it must be regarded as a mere nullity by the courts of every nation, except (when authorised by special local legislation) in the country of the *forum* by which it was pronounced."

It is not disputed that the defendants were not residents of Bhadohi and were not in the Native State when the suit was instituted. It follows that the Bhadohi court had no jurisdiction to pass a decree against the defendants. Both the courts below have found this point in favour of the judgment-debtor, and that finding is not challenged in the grounds of appeal.

The rule regarding jurisdiction in actions *in personam* has been clearly stated by Dicey in his Conflict of Laws, chapter 13, as follows:—

"In an action *in personam* in respect of any cause of action, the courts of a foreign country have jurisdiction in the following cases:—

"Case 1. Where at the time of the commencement of the action the defendant was resident (or present?)

(1) (1884) I.L.R., 22 Cal., 222 (238).

in such country, so as to have the benefit, and be under the protection, of the laws thereof.

"Case 2. Where the defendant is, at the time of the judgment in the action, a subject of the sovereign of such country.

"Case 3. Where the party objecting to the jurisdiction of the courts of such country has, by his own conduct, submitted to such jurisdiction, i.e. has precluded himself from objecting thereto, (*a*) by appearing as plaintiff in the action or (*b*) by voluntarily appearing as defendant in such action without protest, or (*c*) by having expressly or implicitly contracted to submit to the jurisdiction of such court."

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The rule is stated in the same way in Halsbury's Laws of England, Vol. 6, Conflict of Laws, Part X.

The present case does not come under the first two heads. The only question for consideration is whether the defendant by his own conduct submitted to such jurisdiction and has therefore precluded himself from objecting.

While the suit was pending in the Bhadohi court the defendant respondent, in spite of personal service on him, did not appear. The mere fact that he allowed the suit to be heard *ex parte* and decreed against him would not amount to his submitting to the jurisdiction of the Bhadohi court. Nor do I think that his subsequent conduct in depositing Rs. 100 in the Mirzapur court some years afterwards and asking for further time would be any evidence to show that he had submitted to the jurisdiction of the Bhadohi court before the decree was passed. I cannot give to his subsequent conduct such a retrospective significance.

As the rule has been stated by Dicey, it would seem that the submission to the jurisdiction must be to the foreign court itself and probably before the judgment is pronounced; for if there was no such submission the

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judgment is a nullity. The illustrations given by Dicey of submission to jurisdiction by voluntarily appearing as defendant in such action without protest all relate to appearance in the foreign court itself.

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I have accordingly grave doubt as to whether any appearance in a court in British India to which the execution has been transferred can amount to a submission to the jurisdiction of the foreign court within the meaning of the rule cited above. But of course there may possibly be a waiver amounting to an estoppel independently of that rule.

There is no doubt that when on the previous occasion the decree was transferred to the Mirzapur court and his movable properties were attached, the judgment-debtor appeared before the Mirzapur court, deposited Rs. 100 and took three months' time. On that occasion he did not object to the validity of the decree.

The learned advocate for the decree-holder contends that his omission to do so brings in the operation of the principles of both *res judicata* and estoppel. As to *res judicata* I am clearly of opinion that there is no such bar. Section 11 of the Civil Procedure Code does not in terms apply to execution proceedings, as they are not in a separate suit. The principle underlying that section has no doubt been applied to execution proceedings, but the principle of constructive *res judicata* has not been applied unless the point was expressly raised and decided or must be deemed to have been decided by necessary implication. If any property had been sold and the sale had been confirmed by an order of the court, one might have said that there was a decision on the question of the validity of the decree by necessary implication. But the mere fact that Rs. 100 were deposited in part payment of the decree or that three months' time was taken for the payment of the balance would not amount to an adjudication of the rights of the parties by

the court so as to operate as *res judicata* against the judgment-debtor in all subsequent proceedings, even though they arise out of a fresh transfer of the execution and relate to an entirely different set of properties. I accordingly overrule this plea.

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The next question is as to estoppel. Had there been anything on the record to show that the extension of time was a result of an agreement between the decree-holder and the judgment-debtor, I might possibly have been inclined to hold that such an agreement was for consideration and was binding on the parties. The record however does not show any compromise with the decree-holder. In order to amount to an equitable estoppel, it must be shown that there was some representation made by the judgment-debtor which was acted upon by the decree-holder and by which his position has been compromised. If the decree-holder has not been prejudiced in any way. the judgment-debtor cannot be estopped from raising the question of jurisdiction, which goes to the very root of the matter. The decree was of the year 1916. A fresh suit in a British Indian court was already barred by time. Even a suit on the basis of the foreign judgment had become barred after the lapse of six years. If the payment of Rs. 100 on the 24th of August, 1926, gave a fresh start for the limitation, then the decree-holder's remedy had not become barred by time when the judgment-debtor on the 11th of December, 1928, took the objection that there was want of jurisdiction. It is therefore obvious that the decree-holder did not suffer in any way by the fact that Rs. 100 were paid to him and the execution was postponed for three months. The decree being a nullity, he was lucky in getting even this amount.

The plea that the decree passed against the objector was passed without jurisdiction is open to him under section 44 of the Indian Evidence Act and can be raised at any stage of the proceedings unless there is a bar of

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res judicata or any rule of equitable estoppel against him. Mere delay in raising it cannot itself be a fatal objection when a fresh execution is sought and fresh properties are attempted to be seized and an additional amount by way of interest also is claimed. Although ignorance of law is no excuse, yet it may explain the reason why the objection is taken at a belated stage. I am therefore of opinion that there is nothing to prevent the judgment-debtor from raising the objection; much less is there anything to prevent the courts below from going into that matter *suo motu* and refusing to execute the decree.

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I would accordingly dismiss the appeal.

NIAMAT-ULLAH, J. :—The facts of the case are fully stated in the judgment of my learned colleague, and I do not consider it necessary to recapitulate them. It is sufficient to say that the decree in question was passed by a court in the Benares State as far back as the 27th July 1916, and several attempts were made to execute it by obtaining certificates of transfer to the courts in Mirzapur and Benares. On one occasion in 1926, Rs. 100, part of the decretal amount, was paid by one of the judgment debtors and time was obtained for payment of the rest. It does not appear quite clearly from the record as to whether the present objector made the payment. The court of first instance mentions the fact as if it were he who did it, and so does the lower appellate court. It should, therefore, be accepted for the purpose of this case that the objector satisfied the decree in part sometime in 1926. Subsequently, in 1928, when execution was taken out he took objection to attachment of his property on the ground that he was a British Indian subject residing in the Mirzapur district and the court in the Benares State which had passed the decree had no jurisdiction to pass it. It should be mentioned that the suit which resulted in the aforesaid decree was based on a claim *in personam* against the defendant.

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I agree with my learned colleague, for the reasons given by him, that the objection is not barred by *res judicata*.

The most important question is whether the decree sought to be executed was passed by a court which had no jurisdiction. Section 14 of the Code of Civil Procedure provides that the court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a court of competent jurisdiction, unless the contrary appears on the record. Such presumption, however, can be displaced by proving want of jurisdiction. It was not disputed in the courts below that the defendants were residents of the Mirzapur district. There is no suggestion, much less evidence, that they resided temporarily in the Benares State at the time the suit was brought. Therefore the presumption raised by section 14 is *prima facie* rebutted, and as held by their Lordships of the Privy Council in *Gurdyal Singh* v. *Raja of Faridkot* (1), the decree passed by the foreign court should be considered to be a nullity, having been passed by a court having no jurisdiction. In the leading judgment delivered by my learned colleague, copious reference has been made to the law bearing on the subject. It is clear that even a judgment of a foreign court will be considered to be binding if the defendant submitted to the jurisdiction of such court. What amounts to a submission to the jurisdiction of a foreign court is a question of some nicety in many cases. Where in answer to a summons issued by a foreign court the defendant appears and contests the suit, without raising any question as to jurisdiction, there is no doubt that he submits to the jurisdiction of that court. Again, where he so appears and repudiates the jurisdiction of a court without entering into his defence, it is clear that he does not submit to the jurisdiction of that court. Between these two extremes is the case where on receipt

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(1) (1884) I.L.R., 22 Cal., 222.

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of the summons he puts in no appearance and an *ex parte* decree, otherwise open to no objection, is passed against him. His conduct in such circumstances is accountable on two hypotheses. He might have refrained from putting in an appearance because he was sanguine that the decree, if passed, would be ineffective for want of jurisdiction of the court passing it; or he might have submitted to the jurisdiction of the court in the belief that the plaintiff's claim was a just one and he did not object to the decree being passed by the foreign court. I find nothing in law which makes it necessary that the submission to jurisdiction can only be by some overt act in court. If his attitude as regards the jurisdiction of the court in which a suit is brought against him can be established by evidence to have been one of submission to the jurisdiction of the court the decree will be binding. Subsequent payment towards part satisfaction of the decree is, in my opinion, an important circumstance from which submission on his part to the jurisdiction of the court may be inferred. Much, however, will depend on the circumstances under which the payment of the decretal amount is made. In each case it is a piece of evidence entitled to more or less weight. I should not be understood as implying that payment of decretal amount in part is itself a submission and acts retrospectively. If the decree when passed was a nullity for want of jurisdiction in the court which passed it, no subsequent act of the defendant can make it otherwise. Subsequent conduct of the defendant may, however, be an indication of his intention to submit to the jurisdiction of the court at the time when the suit was pending. As already stated, it is only a piece of evidence bearing on the question whether the defendant submitted to the jurisdiction of a foreign court. The lower appellate court has categorically stated facts which it found established by evidence. The fact that the objector paid Rs. 100 in 1926 is one of them. The learned Subordinate Judge thereafter recorded a clear

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finding that the objector did not submit to the jurisdiction of the court. This, in my opinion, is a finding of fact, in arriving at which no error of law can be attributed to him. I would content myself with deciding that part of the case on that finding.

Niamat-ullah, J.

Another question which requires consideration is whether the objector, having once made payment, was estopped from questioning the jurisdiction of the court which passed the decree. No such question was raised in either of the two courts below. The plea of estoppel ordinarily rests on a question of fact, namely, whether the person sought to be estopped "intentionally caused or permitted another person to believe a thing to be true and to act upon such belief." In general the person pleading estoppel has to establish that in consequence of the representation or conduct of the person against whom estoppel is pleaded he was induced to act in a particular manner. In the absence of any plea and the evidence of the decree-holder it is not permissible to disallow the objection taken by the judgment-debtor to the jurisdiction of the court passing the decree.

With the foregoing observations I concur with my learned colleague in dismissing the appeal.

REVISIONAL CIVIL.

Before Sir Shah Muhammad Sulaiman, Acting Chief Justice, and Mr. Justice Bajpai.

NARAIN PAL SINGH (AUCTION PURCHASER) *v.* RUDRA BHAN SINGH AND OTHERS (DECREE-HOLDERS)*

1931 *March*, 24.

Civil Procedure Code, order XXI, rule 90—"Person whose interests are affected by the sale"—Holder of another decree who had attached in another court the property sold—Another decree-holder who had attached before judgment—Civil Procedure Code, section 64; order XXXVIII, rule 7.

The expression, "whose interests are affected by the sale", in order XXI, rule 90 of the Civil Procedure Code does

*Civil Revision No. 91 of 1930.