

of the widow under section 234 of the Code. In that case the widow had sued to recover property as part of her husband's estate, of which she had been deprived, since her husband's death. The suit was dismissed with costs. The defendants took out execution for the costs against property, in which she had a life-interest, and she died while the execution proceedings were going on. The heirs of the husband were substituted in her place and objected that the property attached was not liable. It was held that as she sued as representing her husband's estate, and as the property, if recovered, would form part of that estate, the costs were a legal charge upon it, and that the objectors, having succeeded to the estate by right of inheritance, were liable to satisfy the decree as legal representatives under section 234 of the Code.

If in this case the Subordinate Judge had made, as he might have made, an order for costs payable out of the deceased plaintiff's estate, there could be no doubt, we think, that those costs would have been recoverable out of the estate, which she took as heir of her husband, and which on her death went to those heirs.

We must hold, therefore, that the order of the Subordinate Judge is wrong, and that it must be set aside; and that there must be an order directing that the petitioners be placed on the record in the place of the deceased plaintiff, and that they be allowed to proceed with the suit.

The petitioners will get their costs.

H. W.

Rule absolute.

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

DIANI RAM MAHTA (JUDGMENT-DEBTOR, APPELLANT) v. LUCHMESWAR SINGH (DECREE-HOLDER, RESPONDENT), AND MURLILAL MALTA (JUDGMENT DEBTOR, RESPONDENT.) *

1896
March 24.

Decree, Execution of—Questions to be decided in—Civil Procedure Code (1882), section 244.

In proceedings for execution of a decree one of the judgment-debtors opposed the application for execution under section 244 of the Civil Procedure Code on the ground that the person who was said to have consented to the decree had no authority to consent to it.

* Appeal from Original Order No. 28 of 1895, against the order of Babu Chakradhar Pershad, Subordinate Judge of Tirhoot, dated the 15th of December 1894.

1896
PREMMOYI
CHOUDHURANI
v.
PREONATH
DHUR.

1896

Held, that this is a question which could not be raised in execution.*Sudindra v. Budan* (1) approved.

DHANI
RAM MAHTA
v.
LUCHMESWAR
SINGH.

DHANI RAM MAHTA and his son Murlilal Mahta were the defendants in a rent suit brought by Luchmeswar Singh in the Court of the Subordinate Judge of Tirhoot. The decree passed ran in the following terms :—

"That this case be decreed according to the admission of the claim by the defendants and that the plaintiff do receive from the defendants Rs. 8,361-14-10½, principal and interest." * * *

On an application by the decree-holder for execution of this decree, the judgment-debtors filed separate petitions under section 244 of the Civil Procedure Code, objecting to the execution of decree. One of the objections raised by Dhani Ram was :—

"4. That your petitioner begs to submit that he did not at all take part in the admission of the claim ; and that the petition admitting the claim filed by the said Murlilal Mahta is not binding upon him. Murlilal Mahta filed the said petition without having any knowledge or information and without ascertaining the facts. Hence, it is not binding upon your petitioner."

Dhani Ram's prayer was that it might be declared that there was no decree against him, which could be executed, and that he was free from liability under the plaintiff's decree.

In answer the decree-holder said :—

"4. That Dhani Ram Mahta, father, and Murlilal Mahta, son of Dhani Ram aforesaid, are persons belonging to a joint family. It is not stated that there is any dispute, quarrel or enmity between him and his son. * * * Under the circumstances the said decree by all means is fit to be executed against each of the two judgment-debtors."

The decree-holder also said in para. 6 of his answer :—

"As regards the decree which has become final, the case cannot now be re-opened. * * * It is by all means fit to be executed against both the judgment-debtors."

The Subordinate Judge, in overruling the objections of the judgment-debtors, observed :—

"The judgment-debtors are father and son. The former says that he did not file the petition ; the latter says he filed the petition ; but it was filed on the understanding that the decree-holder shall settle other disputes and accounts. Both the petitioners' pleaders allego that their objection is under section 244 of the Civil Procedure Code. But I do not think that section will apply."

Dhani Ram appealed to the High Court.

Babu *Umakali Mukerjee* for the appellant.

Babu *Ram Charan Mitra* for the respondent (decree-holder.)

1896

DHANI
RAM MAHITA
v.
LUGHMESWAR
SINGH.

The judgment of the High Court (TREVELYAN and BEYERLEY, JJ.) was as follows:—

The only question in this case is whether it is competent to the appellant in these execution proceedings to oppose the application for execution on the ground that the person, who is said to have consented to the decree on his behalf, had no authority to consent to it. In our opinion this is a question which could not be raised in execution. We entirely agree with the view expressed by the Madras High Court in the case of *Sudindra v. Budan* (1). Mr. Justice Hutchins, at page 83, points out that under section 244 the questions to be decided in execution are questions relating to the execution, discharge or satisfaction of the decree. A question whether the decree was obtained by fraud or collusion is not one which relates to the execution of the decree, but which affects its very subsistence and validity. This case is in many respects similar. An application in execution assumes the validity of the decree sought to be executed. If it is competent to a judgment-debtor to raise in execution questions as to the validity of a decree, there seems very little reason why he should not question the propriety of the decree, and thus rip up the whole of the proceedings. We are of opinion that this is not a procedure allowed by law. The appeal is dismissed with costs.

S. C. C.

Appeal dismissed.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Rampini.

TROYLUCKHO NATH MOZUMDAR AND OTHERS (DEFENDANTS) v.
PAJIAR KHAN AND OTHERS (PLAINTIFFS.)*

1896
March 10.

*Public Demands Recovery Act (Bengal Act VII of 1880), sections 2 and 3—
Bengal Act VII of 1868, section 2—Sale for arrears of cesses—Suit to
set aside certificate and sale in execution thereof—Limitation.*

* Appeal from Appellate Order No. 105 of 1895, against the order of Babu Brojo Behari Shome, Subordinate Judge of Khulna, dated 28th of December 1894, reversing the order of Babu Ram Narain Sarkar, Munsif of Satkhira, dated the 21st of May 1894.