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be a landholder. If that had been so, the section would have said "or any person claiming as his landholder". But the word "his" is omitted and therefore we consider that the latter part of this sub-section is intended to cover a case like the present where the defendant claims not to be the immediate landholder of the plaintiff but to be the landholder-in-chief.

Similarly under section 121 the suit may be brought against "*the* landholder or any person claiming to hold through the landholder"; that is, the suit may be brought against the landholder-in-chief or against any person claiming to hold through the landholder-in-chief. We think, therefore, that there is ample provision in the Tenancy Act for a suit such as the present. The lower appellate court has allowed the plaintiff a period to amend his plaint. He has not taken advantage of that period as he desired to file a second appeal.

We dismiss this second appeal with costs throughout and we allow the plaintiff one month from the date of this order to amend his plaint, in which case the order of dismissal will be replaced by an order that the plaint should be returned to the plaintiff for presentation to the proper court, if the plaint is amended as directed by the lower appellate court.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Bennet

OFFICIAL RECEIVER, ALIGARH (DECREE-HOLDER) *v.* HIRA LAL (JUDGMENT-DEBTOR)*

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February, 28

Limitation Act (IX of 1908), article 182(5)—"Application in accordance with law"—Vakalatnama not containing name of pleader nor signed by him—Application for execution filed by such pleader not in accordance with law—Judgment-debtor not appearing and objecting—Order for execution passed ex parte*—Subsequent application for execution—Limitation—Whether open to judgment-debtor to show that former application was not in accordance with law and did*

*Appeal No. 73 of 1934, under section 10 of the Letters Patent.

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not save limitation—Res judicata—*Constructive* res judicata *in execution proceedings.*

An application for execution filed through a pleader, whose name was not entered in the body of the vakalatnama and who did not sign it, is not an application in accordance with law within the meaning of article 182(5) of the Limitation Act.

Where such an application was filed, but the defect was not brought to the notice of the court by the office nor did the judgment-debtor to whom notice had been issued appear and object, and an order for execution was passed *ex parte*; then a subsequent application for execution being made, the judgment-debtor objected that it was barred by limitation inasmuch as limitation was not saved by reason of the former application as it was not in accordance with law: *Held* that the judgment-debtor was not barred by the principle of *res judicata* from raising such objection. He was not challenging any order passed on the former application, but was contending that the defective application could not serve as a fresh starting point for limitation. In the absence of any objection the court had automatically passed the order on the former application and could not be deemed to have finally made a decision, as to the application being in every way valid and proper, so as to operate as *res judicata*.

Mr. *Kamta Prasad*, for the appellant.

Miss *L. W. Clarke*, for the respondent.

SULAIMAN, C.J. and BENNET, J.:—This is an appeal by the decree-holder arising out of an execution proceeding. A simple money decree was passed on the 1st August, 1924, and an application, which was in accordance with law, was made on the 23rd July, 1927, for execution, but had become infructuous because the decree-holder was unfortunately murdered. On the 18th June, 1930, an application was made on behalf of his three sons for substitution of their names and for execution of the decree. The application was signed by a pleader and was accompanied by a vakalatnama in which, however, the place meant for the name of the pleader was left blank, and the vakalatnama did not bear any signature of the pleader showing that he had accepted it. These facts were overlooked by the office, and the court ordered notices to issue to the

judgment-debtor. He did not appear to show cause or raise objections. The court accordingly ordered that the names of the sons of the deceased decree-holder should be brought on the record in his place and that execution should proceed. The proceeding, however, did not fructify and the execution case was ultimately struck off.

On the 14th November, 1930, a fresh application for execution of the same decree was made and notice ordered to issue. The judgment-debtor on this occasion appeared and objected that the present application was barred by time inasmuch as the previous application of the 18th June, 1930, was not an application in accordance with law. The courts below disallowed the objection on the ground that it was no longer open to the judgment-debtor to raise any such plea. In second appeal a learned Judge of this Court has come to the conclusion that the judgment-debtor is not prevented from raising this matter.

So far as the defect in the vakalatnama is concerned, the point is covered by the authorities of this Court, namely, *Muhammad Ali Khan* v. *Saktu* (1), *Chhita* v. *Mt. Jaffo* (2). The application as filed had not been filed by a duly authorised person and was not in accordance with law.

The only question that remains for consideration is whether it is open to the judgment-debtor to raise this objection now when he failed to appear on the previous occasion.

Four cases have been referred to in this connection. The case of *Mangul Pershad Dichit* v. *Grija Kant Lahiri* (3) was a case under the corresponding section of Act IX of 1871; but in that case, as pointed out by their Lordships of the Privy Council at page 60, the attachment of the property in pursuance of the order

(1) (1913) 11 A.L.J., 458. (2) A.I.R., 1931 All., 767.
(3) (1881) I.L.R., 8 Cal., 51.

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in execution was continuing and the judgment-debtor had consented to such continuance. The second application was to give effect to that continuing attachment. Accordingly it was laid down that the judgment-debtor was estopped from contesting that the attachment itself was invalid because the order for attachment had been made on an application which itself had been barred by time. The case is accordingly clearly distinguishable. Similarly the case of *Dwarka Das* v. *Muhammad Ashfaq-ullah* (1) was a case where the court had actually ordered the substitution of the name of the transferee of the decree-holder, and it was held that at a subsequent stage the judgment-debtor could not be allowed to say that the order directing substitution of names was invalid because no valid transfer had in fact taken place. There the judgment-debtor was impugning the validity of the order directing substitution of names itself. Again in the case of *Dip Prakash* v. *Bohra Dwarka Prasad* (2), the order passed for execution was fully carried out and the platform which the decree-holder wanted to have demolished was actually demolished by the amin of the court in pursuance of the order. The judgment-debtor was therefore not allowed to come up at a later stage and claim compensation on the ground that the previous application on which the order had been made was defective.

In the case of *Raja of Ramnad* v. *Velusami Tevar* (3), when notice was issued to show cause why the applicant should not be brought on the record as an assignee of a partially executed decree, the judgment-debtors appeared, denied the assignment and objected that the right to execute the decree was barred by limitation and also questioned the liability of certain properties to attachment. These objections were overruled, the assignment was recognized and the decree-

(1) (1924) I.L.R., 47 All., 86. (2) (1925) I.L.R., 48 All., 201.
(3) (1920) 48 I.A., 45.

holder was allowed to execute the decree and was given permission to file a fresh application for attachment. After the order had become final and attachment of some properties was made, the judgment-debtor objected that the execution was barred by time. Their Lordships of the Privy Council overruling the Indian Court held that it was no longer open to the court subsequently to hold that execution was barred. It is noteworthy that in the last mentioned case the judgment-debtor had appeared and filed objections. The court therefore had to proceed under order XXI, rule 23(2) and had to consider the objection and make such order as it thought fit. Its order was therefore binding on the judgment-debtor and operated as an estoppel by judgment.

None of these cases was a case where the judgment-debtor had not appeared and the order was passed *ex parte*. The scheme of the provisions of order XXI seems to be that when an application for execution or for taking a step in aid of execution is made the court has to see *prima facie*, principally on the office report, whether the application is in accordance with law and not barred by time and is not otherwise improper. In the absence of the judgment-debtor, the court, not finding any apparent defect in the application or such defect not being brought to its notice, orders notice to issue to the judgment-debtor, under rule 22, where the application is made more than three years after the date of the decree, or when it is made against the legal representative of a party. In other cases notice is not even issued. Order XXI, rule 23 provides that where the person to whom notice is issued under the last preceding rule does not appear or does not show cause to the satisfaction of the court why the decree should not be executed, the court shall order the decree to be executed. It is, therefore, apparent that when after notice has been issued the judgment-debtor does not

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appear and does not file objections, the court is not called upon to make any further investigation into the matter, but it is its duty to order the decree to be executed. The order has to be passed automatically and there is no occasion for the court to exercise its judgment as to the merits of any possible objection that might have been raised if the judgment-debtor had appeared. In such circumstances it is difficult to say that when the court has no discretion in the matter, its order directing the decree to be executed is an adjudication of the dispute between the parties which operates as *res judicata* by implication.

If the order directing the decree to be executed were continuing and were operative and proceedings were being taken in pursuance of it, the judgment-debtor would not be allowed to go behind that order and challenge its propriety when he had not appeared. But if the proceedings somehow or other terminated, it would be difficult to say that the *ex parte* order made by the court at the time when the notice was issued, or the necessary order which had to be made by the court when he did not appear, operates as *res judicata* and must be deemed to have finally decided that the application filed before the court had been in every way proper and valid.

In the present proceeding the judgment-debtor is not saying that the order for substitution of names made by the court was invalid. As a matter of fact, under order XXII, rule 12, no application for substitution of names in an execution proceeding is at all necessary. There being no bar of limitation, it would have been open to the execution court to have the defect in the vakalatnama rectified and to order substitution forthwith. But what the judgment-debtor now contends is that the defective application which had been made on the 18th June, 1930, cannot serve as a fresh starting point for purposes of limitation.

He does not challenge the order directing substitution of names, but urges that the application on which the order was made not having been in accordance with law does not save limitation. We find it difficult to hold that the judgment-debtor in this fresh proceeding is barred from raising this objection. The view taken by the learned Judge is correct We accordingly dismiss this appeal with costs.

MISCELLANEOUS CIVIL

Before Mr. Justice Niamat-ullah and Mr. Justice Bennet

SHIVANATH PRASAD (APPLICANT) *v.* COMMISSIONER OF INCOME-TAX (OPPOSITE PARTY)*

1935 *March*, 1

Income-tax Act (XI of 1922), sections 30(2), 31, 66(2) and (3)—Rejection of appeal as barred by limitation—Not equivalent to an order of confirmation of assessment—No reference to High Court lies, nor can High Court call for a case to be stated.

Under section 66(3) of the Income-tax Act the High Court can require the Income-tax Commissioner to state a case only if the conditions required by section 66(2) are made out, and one of those conditions is that an order under section 31, or 32, or 33A has been passed in the case.

The rejection of an appeal against an assessment on the ground that the appeal is barred by time is an order refusing to entertain the appeal and is not an order confirming the assessment, within the meaning of section 31 of the Income-tax Act; it, therefore, does not come under section 66(2) of the Act, and consequently section 66(3) does not apply; hence, the High Court can not require a case to be stated and referred to it.

Under section 30(2) the Assistant Commissioner, to whom an appeal has been preferred beyond time, is authorised to condone the delay; but where, on hearing the appellant, he is not satisfied that there was sufficient cause for the delay and refuses to admit the appeal, there is no appeal which has to be disposed of under section 31 and the Assistant Commissioner does not function under that section at all. The rejection of the appeal under section 30(2) as being barred by limitation can

*Miscellaneous Case No. 677 of 1934.