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plaintiff and defendant was framed and referred to the revenue court for trial. The judgment of the lower appellate court is entirely confined to a consideration of that very point. It is clear therefore that the appellant is not raising any new point which he had not raised in the court below.

For the reasons given above we allow this appeal, and, setting aside the decrees of this Court and of the lower appellate court, restore that of the trial court. The appellant shall have his costs in all the courts.

APPELLATE CIVIL

Before Mr. Justice Iqbal Ahmad

SITA RAM RAI AND ANOTHER (DECREE-HOLDERS) *v.*

MADHO PRASAD (JUDGMENT-DEBTOR)*

1938 *September*, 27

Civil Procedure Code, section 39—Transfer of decree for execution—Jurisdiction—Court to which decree is transferred must be of competent jurisdiction—Limitation Act (IX of 1908), article 182(5)—Application "in accordance with law"—Application asking court to take a step which it has no jurisdiction to take.

Under section 39 of the Civil Procedure Code a decree cannot be transferred by the execution court, on the application of the decree-holder, to another court for execution if the latter court has not pecuniary jurisdiction, i.e. if the suit in which the decree was passed was beyond its pecuniary limits. The execution court has no jurisdiction to make such a transfer.

An application by the decree-holder to transfer the decree for execution to another court, which is not a court of competent jurisdiction, is not an application "in accordance with law" within the meaning of article 182(5) of the Limitation Act, as the prayer asked for is one which the court has no jurisdiction to grant; such an application, therefore, cannot save limitation.

Mr. *Shiva Prasad Sinha*, for the appellants.

Sir *Syed Wazir Hasan* and Mr. *B. N. Misra*, for the respondent.

IQBAL AHMAD, J.:—This appeal was heard *ex parte* and allowed by me on the 16th of April, 1937. But, on an

*First Appeal No. 160 of 1936, from a decree of S. M. Mir, Civil Judge of Agra, dated the 25th of January, 1936.

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application for the setting aside of the *ex parte* decision being made, that decision was set aside and the appeal was restored to its original number and is for disposal before me today.

After hearing the learned counsel for the parties I have come to the conclusion that my *ex parte* decision was erroneous and that this appeal must fail.

The facts that gave rise to the questions of law that have to be decided in the present appeal are undisputed and are as follows. A decree for costs was passed in favour of the appellants by the court of the Civil Judge of Azamgarh on the 16th of July, 1928, and within three years of that date, viz., on the 14th of July, 1931, the decree-holders filed an application in that court under section 39 of the Civil Procedure Code. The application was on a form prescribed by order XXI, rule 11 of the Civil Procedure Code and the prayer contained in the application was as follows: "The property of the plaintiff judgment-debtor lies within the jurisdiction of the court of the Munsif of Bansgaon in district Gorakhpur. A certificate may, therefore, be drawn up for sale of the property of the judgment-debtor by auction." This prayer was contained in column 10 of the application, in which column an entry is to be made as to the "Mode in which the assistance of the court is required."

On the application being filed the court forthwith directed that a certificate of transfer of the decree be prepared and be sent to the court concerned. After the preparation of the certificate the case was again put before the court with a note that the certificate had been prepared and the court then ordered that the certificate be sent to the "court concerned". The certificate was then sent to the court of the Munsif of Bansgaon. It is admitted that no proceedings in execution were taken by the Munsif of Bansgaon and the decree remained wholly unsatisfied.

A fresh application to execute the decree was made by the decree-holders on the 20th of July, 1934, and this

application was successfully opposed by the judgment-debtor in the court below on the ground that the application was barred by limitation.

The question that I have to decide is whether the application dated the 20th of July, 1934, was or was not within time.

It is clear that the application dated the 20th of July, 1934, was within three years of the 27th of July, 1931, the date on which the Civil Judge of Azamgarh disposed of the application dated the 14th of July and ordered the certificate about the transfer of the decree to be sent to "the court concerned". The application dated the 20th of July, 1934, was, therefore, within time if the application dated the 14th of July, 1931, amounted to a step in aid of execution and was an application in accordance with law.

The decision in *Todar Mal* v. *Phola Kunwar*(1) puts it beyond doubt that an application made to the court that passed the decree to transfer the same for execution to another court is a step in aid of execution. The question however remains whether the application dated the 14th of July, 1931, was an application in accordance with law.

In *Chattar* v. *Newal Singh*(2) it was held that the expression "applying in accordance with law" means applying to the court to do something in execution which by law that court is competent to do. It was further observed in that case that the expression "does not mean applying to the court to do something which, either to the decree-holder's direct knowledge in fact, or from his presumed knowledge of the law, he must have known the court was incompetent to do." This case was followed in *Munawar Husain* v. *Jani Bijai Shankar*(3). The same interpretation was put on the phrase by the Patna High Court in *Amrit Lal* v. *Murlidhar*(4).

(1) (1913) I.L.R. 35 All. 389.
(2) (1889) I.L.R. 12 All. 64.
(3) (1905) I.L.R. 27 All. 619.
(4) (1922) I.L.R. 1 Pat. 651.

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In *Pitambar Jana* v. *Damodar Guchait*(1) it was held that the expression "in accordance with law" in article 182(5) of the first schedule to the Limitation Act should be taken to mean that the application though defective in some particulars was one upon which execution could lawfully be ordered. It was further held in that case that if the application was such as to make it impossible for the court to issue execution upon it the application cannot be deemed to be in accordance with law.

It follows from the authorities mentioned above that the application or step in aid of execution of the nature referred to in article 182(5) of the Limitation Act can be in accordance with law only if the application is made or the step in aid of execution is taken in a court of competent jurisdiction and if the prayer that is made by the decree-holder is one which the court can lawfully grant.

In the case before me I find that the prayer contained in column 10 of the application dated the 14th of July, 1931, was one which the learned Civil Judge of Azamgarh was not competent to grant. The prayer has been quoted above and the only possible interpretation that can be put on the same is that the decree-holders prayed that the decree be transferred for execution to the court of the Munsif of Bansgaon. The Munsif of Bansgaon was, however, not competent to try the suit in which the decree under execution was passed. I am informed that the suit in the Civil Judge's court that culminated in the decree under execution was valued at Rs.5,000 and it has been conceded in argument that the Munsif of Bansgaon was not invested with the pecuniary jurisdiction to try suits of the value of Rs.5,000. He, therefore, had not the jurisdiction to execute the decree in question; vide *Durga Charan Mojumdar* v. *Umatara Gupta*(2) and *Amrit Lal* v. *Murlidhar* (3). It follows that the prayer contained in the application dated the 14th of July, 1931, was one which could not be granted by the Civil Judge of Azamgarh.

(1) (1926) I.L.R. 53 Cal. 664. (2) (1889) I.L.R. 16 Cal. 465
(3) (1922) I.L.R. 1 Pat., 651.

But it is contended by the learned counsel for the appellants that the last two cases just mentioned were wrongly decided and it is maintained that it is open to the court which passed a decree to send it for execution to another court irrespective of the limits of the pecuniary jurisdiction of the court to which the decree is transferred, and in support of this contention reliance is placed on the decisions in *Narasayya* v. *Venkatakrishnayya*(1) and *Shanmuga Pillai* v. *Ramanathan Chetti*(2). It was held in these cases that section 223 of the Civil Procedure Code, 1882, "gives jurisdiction to a Munsif's court to execute a decree in a suit beyond its jurisdiction which has been transferred to it for execution by a district court."

Section 223 of the Code of 1882 corresponds to sections 38, 39, 41 and to certain other sections of the Code of 1908. In the present case I am concerned with only that portion of section 223 of the Code of 1882 that has been re-enacted in section 39 of the Code of 1908. Section 39(1) prescribes the circumstances in which the court passing the decree may, on the application of the decree-holder, send the same for execution to another court. Clause (2) of section 39 of the Civil Procedure Code empowers the court of its own motion to send the decree for execution to any subordinate court "of competent jurisdiction". A comparison of section 39 of the present Code with the relevant portion of section 223 of the former Code shows that section 39 has reproduced the relevant portion of section 223 verbatim except in one respect. In the former Code it was provided that "The court which passed a decree may of its own motion send it for execution to any court subordinate thereto." But in clause(2) of section 39 the words "of competent jurisdiction" have been added. This addition must have been deliberate and intentional and was presumably with a view to set at rest the conflict between the Calcutta and the Madras High Courts on the point.

(1) (1884) I.L.R. 7 Mad. 397. (2) (1894) I.L.R. 17 Mad. 309.

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The addition of the words "of competent jurisdiction" in clause (2) of section 39 unmistakably points to the conclusion that the legislature intended to lay down that it is not open to any and every court to execute a decree irrespective of its pecuniary jurisdiction and that the competence of a court to execute a particular decree must be determined by reference to its competence to try a suit of similar valuation in which the decree under execution was passed. Accordingly the Madras cases can no longer be deemed to be laying down the correct law and I must hold that the Munsif of Bansgaon had no jurisdiction to execute the decree held by the appellants.

Great reliance was placed by the learned counsel for the appellants on the decision in *Hafeez Uddin* v. *Ram Chander Das* (1). It was held in that case that if an application under section 39 of the Civil Procedure Code gives sufficient particulars of the decree sought to be transferred the application cannot be considered to be otherwise than one in accordance with law. On the basis of this decision it was argued that as the application dated the 14th of July, 1931, indicated with precision the decree which was sought to be transferred, that application must be deemed to be an application in accordance with law. I find it impossible to accede to this contention. In *Hafeez Uddin's* case the particulars of the decree were correctly mentioned in the application filed by the decree-holder. There was, however, slight error in the name of one of the parties and it was held that that error did not make the application otherwise than one in accordance with law. In the case before me the facts are essentially different. The prayer contained in the application under section 39 was to transfer the decree for execution to a court that had no jurisdiction to execute the same. The learned Civil Judge of Azamgarh had, therefore, no jurisdiction to grant the prayer contained in the application. The application was not, therefore, in accordance with law and cannot give a fresh start to the period of limitation.

(1) [1937] A.L.J. 278.

For the reasons given above I hold that the decision appealed against is perfectly correct and I dismiss this appeal with costs.

Before Mr. Justice Harries and Mr. Justice Misra

BADRUDDIN KHAN AND OTHERS (DECREE-HOLDERS) *v.* MAHYAR KHAN AND OTHERS (JUDGMENT-DEBTORS)*

1938 *September*, 28

Civil Procedure Code, section 144*—Restitution, scope of—Damages which are "properly consequential"—Limitation—Suspension of limitation, general principles of—Right to execute decree, or to obtain restitution, ceasing for an interval of time, during which the decree ceases to exist—Limitation Act (IX of* 1908)*, sections* 9, 14, 15*—Suspension of limitation in cases not covered by any specific provision of the Act—Civil Procedure Code, section* 151*—Inherent power to make restitution, scope of.*

A suit for specific performance of a contract of sale was dismissed with costs, and the defendants realised their costs by execution. On appeal the suit was decreed on the 24th of July, 1930, on the terms that half of the price together with the cost of the stamp were to be deposited by a specified date and the balance of the price by another specified date; in default of which, however, the suit was to stand dismissed with costs. The plaintiffs made certain deposits and claimed to execute their decree, but the defendants raised an objection that the deposits were defective and had not been made as required by the terms of the decree. This objection was upheld by the court of first instance on the 14th of February, 1931; and consequently the effect was that according to the terms of the decree the plaintiffs' suit was deemed to stand dismissed with costs; and therefore the plaintiffs' application for execution was dismissed. The plaintiffs appealed and their appeal was decreed on the 6th of February, 1935, the court holding that the deposits had been made in accordance with the terms of the decree and the plaintiffs were therefore entitled to execute it. On the 9th of December, 1935, the plaintiffs made an application under section 144 of the Civil Procedure Code praying for refund, with interest, of the costs which had been realised by the defendants, and also for compensation on the ground that by reason of their invalid objection the defendants had delayed the completion of the sale and

*First Appeal No. 400 of 1936, from a decree of Muhammad Zamiruddin, Civil Judge of Ghazipur, dated the 25th of July, 1936.