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It was rather an application which had the effect temporarily at all events of retarding the execution. Without going so far as to say that no case could occur in which an application which had that effect might not still be in furtherance of execution at some future period, we may say that this was not the case here. There is nothing in the nature of the application to show that it would have that effect, or that it was in any way either immediately or in the future in aid of the execution of the decree. No decision of this Court which has any bearing on the present case has been cited to us. The case of *Nukanna v. Ramasami* (1) at first sight seemed to be applicable. There an application to stay the sale and continue the attachment was held to be a step which would keep the decree in force. That decision was, however, under the old Limitation Act, the language of which is different from that of the present Act. Some cases have also been cited from the Allahabad series, but they do not appear to us to affect the present question. The mere continuance of the attachment in the present case, even supposing that to be a substantive application apart from the other prayers contained in it, had merely the effect of leaving things precisely as they were, and not advancing the execution in any respect whatsoever.

There is a further question whether the execution of the decree is not also barred by a compromise between the parties. In the view which we take on the question of limitation it is unnecessary to consider this. The appeal is dismissed with costs.

H. T. H.

*Appeal dismissed.**Before Mr. Justice Macpherson and Mr. Justice Banerjee.*

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August 24.

KRISHNA ROY (PLAINTIFF) v. JAWAHIR SINGH AND OTHERS  
(DEFENDANTS).\*

*Civil Procedure Code (Act XIV of 1882), s. 244—Question in execution of decree—Parties to suit—Alteration of decree by Court executing decree.*

The plaintiff purchased a one-gunda share in estate No. 831 and obtained a decree for possession against the defendants. While the plaintiff's

\* Appeal from Appellate Decree No. 1731 of 1890, against the decree of Baboo Poresh Nath Banerjee, Subordinate Judge of Bhaugulpore, dated the 9th of September 1890, reversing the decree of Baboo Shoshi Bhusun Chowdhry, Munsiff of Begusarai, dated the 10th of August 1889.

suit was pending, and before he took out execution under the said decree, partition proceedings took place. By the partition proceedings the defendants' interest in the estate No. 831 was converted into a smaller estate, No. 2218, in lieu of their share of the whole estate. The plaintiff then brought a separate suit to have it declared that the defendants' interest in estate No. 831 had passed to estate No. 2218. *Held*, that the suit was not barred by s. 244 of the Civil Procedure Code. The required transformation of the defendants' interest could not be effected without altering the decree which was given in the former suit. The question that arose in the suit, although it was one between the same parties as those in the former suit, could not be regarded as a question relating to the execution of the decree in the former suit, and therefore the Court in execution proceedings had no authority to make the necessary alteration in the decree.

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THE facts of this case were as follows :—

On the 25th September 1872 one Rangit Sing sold a two-gundas share of an estate to the plaintiff and to the father of the defendants, each of them acquiring a one-gunda share. The vendor not having given possession, the purchasers sued to recover possession and obtained a decree on the 20th November 1872.

Subsequently the plaintiff was kept out of possession of his one-gunda share by the defendants, and sued to recover possession of his one-gunda share of taluka Khun Karampore. He got a decree on the 30th November 1885, and that decree was confirmed on the 11th January 1887. The plaintiff then applied for the execution of his decree and thereon for the possession of the one-gunda share of 17 mouzas which fell into the defendants' *patti*. In the meantime partition proceedings had been started and completed before the plaintiff's application for execution could be heard. The partition proceedings resulted in the formation of a separate *patti* for the defendants' share, including within it the share purchased from Rangit. The former suit brought by the plaintiff, as already stated, was for a one-gunda share in the 17 mouzas of taluka KHun Karampore which was after the partition proceedings not in the defendants' possession. The application for execution having failed, the plaintiff brought this suit to have it declared that the share sued for in the first suit had by the partition proceedings been included in the defendants' *patti*. The Munsiff held that it came within the defendants' *patti*. The Subordinate Judge held that the

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plaintiff was precluded from bringing such a suit by the terms of section 244 of the Civil Procedure Code, as amended by Act VII of 1888, on the ground that the point in question was a "question arising between the parties to the suit in which the decree was passed and relating to the execution thereof." He was of opinion that it should have been decided finally in the execution of the decree already obtained by the plaintiff; and that if the lower Court decided against the plaintiff decree-holder, he had a right of appeal which he was bound to exercise without resorting to a separate suit. He therefore decreed the appeal without costs and dismissed the suit.

From this decree the plaintiff appealed to the High Court.

Baboo *Umakali Mookerjee* for the appellant.

Mr. *C. Gregory* and Baboo *Atool Krishna Ghose* for the respondents.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows:—

The only question that arises in this appeal is whether the suit is barred under section 244 of the Code of Civil Procedure.

The suit was brought by the plaintiff-appellant to recover possession of a one-gunda share out of a nine-and-half-gundas share which has been formed into estate No. 2218 of the Collector's *towsi*, on the allegation that the plaintiff had obtained a decree for a one-gunda share out of the share possessed by the defendants in the estate out of which the said estate No. 2218 has been formed and which was No. 831 in the Collector's *towsi*; that before the decree obtained by the plaintiff could be executed, the parent estate No. 831 had been partitioned by the Collector and the defendants' share in the same had been formed into a separate estate, No. 2218; and that the plaintiff's prayer for execution of the decree obtained by him was opposed by the defendants, on the ground that he could not obtain the relief that he asked for in execution of his decree.

The defendants raised various objections in their defence, but they were disallowed by the first Court, and the plaintiff's claim was decreed by that Court.

On appeal by the defendants, the lower Appellate Court, without going into the merits of the case, has thrown out the suit

on the ground that it is barred by section 244 of the Civil Procedure Code, and that the proper course for the plaintiff was to have sought for the relief he now asks for, in execution of the decree obtained by him in the former suit.

In second appeal it is contended on behalf of the plaintiff that this judgment is wrong, and that the Court executing the former decree could not give the plaintiff the relief he now seeks to obtain by reason of the altered state of things that had resulted from the partition by the Collector.

We think that this contention is valid. The decree in the former suit gave the plaintiff a one-gunda share of mehal No. 831, which consisted of 17 mouzahs, in every one of which the defendants had a share before the partition, and out of that share the plaintiff's one-gunda share was to come. The result of the partition has been to give the defendants the entire 16 annas of a certain number out of those 17 mouzahs, and in the remaining mouzahs the defendants have no longer any right. The undivided one-gunda share in the parent estate, which represented the plaintiff's share before the partition, according to the decree obtained by him, must now find its equivalent out of the estate No. 2218, that is, the particular mouzahs or parts of mouzahs to which the right of the defendants has now been limited; and though this mode of reduction has not involved any change in the value of the plaintiff's interest, it certainly does involve a change in the subject-matter of that interest; for whereas under the decree obtained by the plaintiff in the former suit he was entitled to a one-gunda or a 1-320th part of estate No. 831, which comprised a large tract of land, the result of the partition has been to transform that share into a larger share, *i.e.*, according to the plaintiff to a 2-19ths share of a smaller tract of land within defined boundaries and forming the present estate No. 2218. This transformation could not be effected without altering the decree that was given in the former suit. The question therefore that arises in the present suit, though it is a question between the same parties as those in the former suit, cannot be regarded as a question relating to the execution of the decree in the former suit. If anything, it is a question relating to the alteration of the decree in the former suit now rendered necessary by the altered state of things brought

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about by the Collector's partition; and no Court of execution has any authority so to alter the decree that is sought to be executed in the execution proceedings. The decision of the lower Appellate Court is, therefore, in our opinion wrong in law and must be set aside, and the case sent back to that Court to be tried with reference to the other questions arising in it. The appellant will have his costs in this Court.

*Appeal allowed and case remanded.*

G. S.

*Before Mr. Justice Pigot and Mr. Justice Banerjee.*

1891  
 July 8.

GIRJANATH ROY CHOWDHRY AND ANOTHER (TWO OF THE DEFENDANTS) v. RAM NARAIN DAS (PLAINTIFF), WHO APPEARED, AND OTHERS (DEFENDANTS), WHO DID NOT APPEAR IN THIS APPEAL.\*

*Public Demands Recovery Act (Bengal Act VII of 1880), s. 8 (b), cl. 3, and s. 10—Certificate, Suit to set aside—Amount not "due"—Limitation Act (XV of 1877), s. 14.*

Where rent was payable jointly to certain wards of Court, and another proprietor, whose guardianship under the Court of Wards had ceased, and the Collector issued a certificate, under Bengal Act VII of 1880, for a proportionate share of the rent due to the wards. *Held*, that there being no right at law to claim any separate share of the rent, there was no sum "due," and therefore under section 8 of the Act the certificate was invalid and must be cancelled.

The plaintiff was allowed under s. 14 of the Limitation Act to deduct the period during which he was *bonâ fide* seeking redress from the Revenue authorities, who had no jurisdiction to deal with the questions raised by him, and the suit was held to be not barred by lapse of time.

THIS suit was brought to cancel a certificate made by the Collector of the 24-Parganas, under Bengal Act VII of 1880, and to set aside a sale under that Act of the plaintiff Ram Narain's share in a certain *ganti* tenure.

The tenure in question was owned in equal moieties, one moiety by the defendant No. 1, Girjanath, the defendant No. 2 Satendra Nath, and Manmotha Nath (who was not a party to the suit), the

\* Appeal from Appellate Decree No. 284 of 1890, against the decree of H. F. Matthews, Esq., Officiating Judge of Jessore, dated the 17th December 1889, affirming the decree of Baboo Krishno Mohun Mookerjee, Subordinate Judge of Khulna, dated the 31st of December 1888.