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court it was not within the competence of this Court in second appeal to remand the case for a re-hearing upon this very issue. Had the issue not been determined then obviously it would have been within the competency of this Court to remand the case for that purpose. But where you have an issue raised which is quite sufficient for the purpose, and you have evidence upon that issue and you have a distinct finding both by the trial court and the first appellate Court, I do not think, with great respect to the learned Judge, that it is any longer open to him to refer the case back for re-hearing upon that very point. In my opinion these appeals should be allowed, the decrees appealed from should be set aside and the decrees of the learned District Judge on first appeal should be restored. The appellant is entitled to his costs throughout.

MULLICK, J.—I agree.

Appeals allowed.

APPELLATE CIVIL.

Before Jwala Prasad and Bucknill, J.J.

JADUNANDAN SINGH

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v.

SHEONANDAN PRASAD SINGH.*

May, 5.

Code of Civil Procedure, 1908 (Act V of 1908), section 47, Order XXI, rule 2, section 103—Adjustment of decree—application by judgment-debtor during execution proceedings, rejection of—Appeal, whether maintainable—Second Appeal—issues left undecided by lower court—power of High Court to

* Appeal from Appellate Order No. 195 of 1921, from an order of R. L. Ross, Esq., District Judge of Patna, dated the 8th August, 1921, confirming an order of Babu Nut Bihari Chattarji, Subordinate Judge of Patna, dated the 30th April, 1921.

decide—Witnesses, duty of court to secure attendance of—Adjournment, practice regarding.

An order dismissing an application made under Order XXI, rule 2(2), of the Code of Civil Procedure, 1908, for certifying a payment alleged to have been made to the decree-holder out of court is appealable.

Where such an application is made by the judgment-debtor within time during the course of execution proceedings it cannot be rejected under rule 2(3) on the ground that the payment has not been certified.

Where a party applied for a summons to be issued to an expert of the Finger-Print Bureau and the person sent from the Bureau was not able to give an opinion in the matter for which his testimony was required, and the party therefore applied that another summons should issue for a competent expert to be sent as a witness, and was prepared to pay the necessary expenses, *held*, that it was the duty of the court to enforce the attendance of the expert and omission to do so was a grave irregularity.

Where the question before the lower appellate court was whether the first court had exercised its discretion in a certain matter properly and the lower appellate court left the question undecided, *held*, that the High Court had power under section 103 to decide the matter in second appeal.

The practice of refusing to proceed with a case on rejection of an application for adjournment deprecated.

Appeal by the judgment-debtor.

The facts of the case material to this report are stated in the judgment of Jwala Prasad, J.

Shiveshwar Dayal, for the appellant.

Noresh Chandra Sinha and *Anand Prasad*, for the respondents.

JWALA PRASAD, J.—This appeal arises out of an order of the District Judge of Patna, dated the 8th August, 1921, whereby he dismissed an appeal preferred before him against an order of the Subordinate Judge, dated the 20th April, 1921. The appellant is the judgment-debtor before us against whom an execution of a decree was levelled. In the

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course of this execution he filed an application under Order XXI, rule 2, of the Code of Civil Procedure in which he stated and prayed that a certain sum be duly recorded and certified as payment of the decree in question. He also filed a receipt granted by the decree-holder, Sukhan Singh, purporting to bear his thumb impression, his (Sukhan's) grandson, Sheonandan Singh, having signed the said receipt for him. The decree-holder denied having received the money or granted the receipt in question. He also stated that the thumb impression on the receipt was not his. In order to prove that the thumb impression was that of the decree-holder, the judgment-debtor applied for examination of a finger-print expert. The expert was accordingly examined, who took sample thumb impressions of the decree-holder, but he could not give any definite opinion inasmuch as the impression on the receipt appeared to be blurred. He got the impression enlarged and photographed and then the thumb impressions of the decree-holder which were taken by him were compared in the Government Finger-Print Bureau and a report was submitted to the court by the Inspector-General of Crimes. That report stated that the thumb impression on the receipt in question was similar to those on the bonds *B* and *C* which were the admitted thumb impressions of the decree-holder. The judgment-debtor then applied to the court for summoning an expert from the Government Finger-Print Bureau who could prove the opinion embodied in the report of the Inspector-General; and accordingly summons was served upon the Inspector-General to send the expert who could prove the opinion stated in the report. But unfortunately the person sent from the Bureau was not able to give any opinion and he does not appear to be connected with the examination of the thumb impressions upon which the report was based. He was not able to give any opinion in the case and accordingly his evidence was useless. The judgment-debtor then applied for summoning the proper person, namely, the person who was competent to prove the opinion set forth in the report of the

Inspector-General. The learned Subordinate Judge refused this application in the following words:

"The applicant then put in a petition for time to take further steps to call another witness from the Bureau. The petition cannot be granted. The expert was here and has been examined and he does not prove the applicant's case. There is no reason for adjourning the case again. The applicant is called upon to examine his other witnesses but he does not examine any witness and his pleader informs me that he has no further instructions after the petition for time is rejected as no further adjournment will be given as prayed for by him. The application is therefore dismissed for want of prosecution."

Against this order the judgment-debtor appealed to the District Judge of Patna. He was of opinion that no appeal lay from the order of the Subordinate Judge inasmuch as the application of the judgment-debtor was dismissed for default. He also held that the application of the judgment-debtor under Order XXI, rule 2, clause (3), could not be entertained in execution proceedings inasmuch as the alleged payment was not certified.

Both these grounds upon which the learned District Judge dismissed the appeal appear to me to be untenable. The application of the judgment-debtor for certifying payment under Order XXI, rule 2, clause (2), could not be dismissed for default inasmuch as some evidence was given in court and the court held that the evidence was useless and dismissed the application. It is obvious that the learned Subordinate Judge is wrong in using the words "for want of prosecution". Virtually his order amounts to a dismissal of the application for the reason that the evidence adduced was worthless. The application of the judgment-debtor for certifying payments by him to the decree-holder out of court was an application in course of the execution of the decree obtained by the decree-holder. That application was therefore an application under section 47, Code of Civil Procedure, for it raised the question as to the execution and satisfaction of the decree sought to be executed. The dismissal of that application certainly gives rise to a right of appeal to the judgment-debtor. If an order of dismissal for want of prosecution is passed in a

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suit, it is conceded that an appeal does lie; but it is contended that an order of dismissal for default in execution proceedings is unappealable. That may be so, but here is the dismissal of an application for certifying payment said to have been made by the decree-holder out of court; the order amounts to a decree passed in a proceeding under section 47 of the Code and as such it is appealable. In any case the order in the present case disposed of the application on merits upon the finding that the evidence adduced by the judgment-debtor was useless and of no avail to him. Undoubtedly such an order is appealable.

The second ground urged by the learned District Judge is equally unsubstantial for an application for certifying a payment in the present case was made under Order XXI, rule 2, clause (2), within the period prescribed for making such an application; the application may be made either to the court which passed the decree or to the court whose duty is to execute the decree as is expressly stated in clause (1), rule 2, of that Order. The judgment-debtor could, therefore, make his application either to the court which passed the decree or to the court which was executing the decree. In the present case the decree was under execution and the application was properly made to the court which was executing the decree. In the present case the court executing the decree was the court that passed the decree. The enquiry was therefore invited by the judgment-debtor as to the payment alleged to have been made by him to the decree-holder during the pendency of the execution proceedings; therefore his application could not be thrown out upon the ground that it was not certified under clause 3 of that rule. The application was made for the purpose of having the payment certified and until that question was decided, the stage of clause (3) did not arise. The learned District Judge was therefore wrong in throwing out the application on the above technical grounds. He ought to have gone into the merits of the appeal. The appeal before him was, therefore, not legally dis-

posed of and he failed to exercise the jurisdiction vested in him by law. The decision of the District Judge is therefore set aside.

Now, the District Judge has not gone into the merits of the case, and the issue before him was whether the application was properly and legally disposed of by the Subordinate Judge; in other words, whether the Subordinate Judge was right in refusing the application for the judgment-debtor for the adjournment of the case and for summoning the proper person from the Finger-Print Bureau in order to prove the opinion set forth in the report of the Inspector-General as to the identity of the thumb impressions on the receipt in question and on the bonds *B* and *C*. The judgment-debtor had been making strenuous efforts and taking all possible steps in order to have a definite opinion and evidence of a Finger-Print Expert as to the thumb impression of the decree-holder on the receipt in question. He paid the necessary expenses and the expert who first came was not able to give definite opinion unless the impression were enlarged and photographed. To this also the judgment-debtor submitted and paid all the necessary expenses. This was done with the result that an opinion decidedly in his favour was obtained. He was therefore naturally anxious to place upon the record the testimony of the witness who could prove the opinion contained in the report. He put in all the necessary expenses and necessary summons was issued upon the Department to send the person cognizant of the opinion expressed in the letter. Through no fault of his the man sent from the Bureau turned out to be not the proper person and was not able to give any relevant evidence in the case. He accordingly applied to the court and expressed his willingness to defray all the necessary expenses for summoning the proper person from the Bureau. When once the Court issued the summons it was the duty of the court, unless the judgment-debtor was guilty of gross laches, to assist the judgment-debtor and to enforce the attendance of the proper

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person who could give evidence relevant to the case. The refusal to grant the prayer of the judgment-debtor on the 30th April was a grave irregularity and contravened the recognized principles embodied in the Code of Civil Procedure regarding the enforcement of the attendance of witnesses. The order of the Subordinate Judge therefore contravened the rules of procedure in the Code and the recognized principles which produced error in the decision of the case on the merits.

The question before the lower appellate court was whether the discretion was properly used by the Subordinate Judge in refusing the application of the judgment-debtor for enforcing the attendance of the witness from the Bureau. This question was, as observed above, left undecided by him. The question affects the merits of the case and we are entitled in second appeal, under section 103 of the Code of Civil Procedure, to determine the question which the District Judge ought to have determined. We, therefore, hold that the order of the District Judge dismissing the appeal was illegal. We also hold that the order of the Subordinate Judge dismissing the application of the judgment-debtor and refusing him an adjournment of the case so as to enable him to produce evidence was also improper.

We, therefore, set aside both the judgments of the courts below and remand the case to the Subordinate Judge for disposal of the original application of the judgment-debtor under section 47 and Order XXI, rule 2, of the Code of Civil Procedure in accordance with law.

The judgment-debtor in this case, however, acted indiscreetly and foolishly in not examining witnesses present on the date when the court called upon him to give evidence after having rejected his application for adjournment. The practice of not going on with the case after the rejection of an application of this kind is fast creeping into the courts below and must be put

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a stop to. The judgment-debtor would have been in a far better position, and so also the courts, if he had examined the witnesses present in court on the 30th April. Perhaps much of the time and harassment of the opposite party would have been saved. I have no hesitation in holding that the conduct on the part of the judgment-debtor or his legal representative was improper in refusing to go on with the case when the witnesses were present, simply because the court rejected the application for summoning the expert. Besides the costs awarded to the decree-holder by the courts below, the judgment-debtor must pay to the decree-holder Rs. 64 as cost of hearing in this Court, as a condition precedent to the hearing of the case in the court below, within a fortnight from the notice given to the judgment-debtor by the Subordinate Judge on the arrival of the records in his Court.

BUCKNILL, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Jwala Prasad and Bucknill, J.J.

AMRIT LAL

v.

MURLIDHAR.*

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May, 9.

Limitation Act, 1908 (*Act IX of* 1908), *Schedule* 1, *Article* 182(5)—*Step-in-aid of execution, when application for transfer of decree is not—Code of Civil Procedure*, 1908 (*Act V of* 1908), *section* 39.

An application for the transfer of a decree to another court for execution is not a step-in-aid of execution within the meaning of Article 182(5) of the Limitation Act, 1908, if

* Appeal from Appellate Order No. 221 of 1921, from an order of J. A. Sweeney, Esq., District Judge of Gaya, dated the 18th July 1921, affirming an order of Babu Abinash Chandra Nag, Subordinate Judge of Gaya, dated the 15th November, 1920.