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JUGESHAH  
MISHRA  
v.  
NATH  
KOERL.

DAWSON  
MILLER,  
C. J.

Special Bench of the Calcutta High Court in *Chandra Benode Kundu v. Ala Bux*<sup>(1)</sup>, the case was referred on appeal to this Court for decision by a Full Bench. The question for determination is whether a landlord who has sued his tenant and obtained against him a money decree can in execution thereof sell the non-transferable occupancy holding of his tenant without the latter's consent.

This question is precisely that which arose for determination in *Chandra Benode Kundu's* case<sup>(1)</sup> and with which I have already expressed my concurrence in the above judgment. I would therefore answer the question in the affirmative and hold that *Macpherson v. Debibhusan Lal*<sup>(2)</sup> was wrongly decided. The appeal should be decreed and the application for execution allowed with costs in all the lower courts including the costs of the appeal to the High Court but not of this reference in which the parties did not appear.

DAS, J.—I agree.

ADAMI, J.—I agree.

*Appeal decreed.*

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## LETTERS PATENT.

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*Before Dawson Miller, C. J., and Jwala Prasad, J.*

1922.  
Jan. 17.

RAMCHANDRA MARWARI

v.

KRISHNA LAL MARWARI.\*

*Execution of Decree—Step-in-aid of, application for the issue of notice to judgment-debtor is—Code of Civil Procedure, 1908 (Act V of 1908), sections 39 and 42 Order XXI, rule 22—Limitation Act, 1908 (Act IX of 1908), Schedule 1, Article 132—Application for transfer of decree to another court for execution granted—copy of decree not transmitted—further application for execution, whether lies to first court.*

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\* Letters Patent Appeal No. 42 of 1921.

(1) (1921) I. L. R. 48 Cal. 184 (F.B.). (2) (1917) 2 Pat. L. J. 530.

An application for the issue of notice under Order XXI, rule 22, of the Code of Civil Procedure, 1908, is a step-in-aid of execution.

Where the court which passed a decree has granted an application by the decree-holder under section 39, praying that the decree should be sent for execution to another court but a copy of the decree has not in fact been transmitted to the latter court, a further application for execution is within time if made to the first court within three years from the date of the application for transfer.

Appeal by the judgment-debtor.

The facts of the case material to this report are stated in the judgment of Dawson Miller, C. J.

*Jalgebind Prasad*, for the appellant.

*Rai Guru Saran Prasad and Tribhuan Nath Sahai*, for the respondents.

DAWSON MILLER, C. J.—This is an appeal on behalf of the judgment debtor from a decision of Mr. Justice Ross, dated the 23rd May, 1921.

The respondent obtained a decree against the appellant on the 23rd May, 1911, in the court of the Munsif at Bhagalpur. Within three years of that date, viz., on the 1st May, 1914, the decree-holder applied for a certificate to execute the decree in Monghyr where it appeared the judgment-debtor had certain property. At the same time he asked for issue of a notice under Order XXI, rule 22, of the Civil Procedure Code. The issue of such a notice at that stage of the proceedings was not necessary. However, the application was allowed and the notice was issued and the certificate he asked for was granted. The matter, however, was not in fact transferred to the Monghyr court and no further steps were taken on that application. On the 22nd November, 1916, that is about two years and six months later, the decree-holder again applied for the same relief and both his prayers were allowed. He again failed to take any further steps. On the 3rd

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September, 1919, that is within three years of the last application, the decree-holder applied a third time, and on this occasion the judgment-debtor objected that his application was time barred.

The first point made by the appellant whose objection was not allowed either by the Munsif or the District Judge or by the Judge of this Court is that the applications made on the 1st May, 1914, and again in 1916, were not steps taken in aid of execution and were not in themselves applications for execution within the meaning of the 182nd Art. of the Limitation Act. We are not concerned to enquire whether applications of the nature referred to were applications in execution. The better view appears to be that they are not. I have no doubt whatever however that such an application is a step-in-aid of execution and it is a step which is always necessary where the decree-holder desires to obtain execution against property situate outside the territorial limits of the jurisdiction of the Court which made the decree. In fact there are certain decisions to the effect that such an application is a step-in-aid of execution whereas the learned Vakil for the appellant has been unable to put before us any case in which the contrary view has been expressed. I should have thought myself that there could be no question upon this point.

The next point urged by the appellant is that the Bhagalpur Court had no jurisdiction to issue a notice under Order XXI, rule 22, of the Civil Procedure Code. The Court did in fact issue such a notice but it was not necessary at that stage of the proceedings and it is not contended that any other notice was necessary. Whether the court issued such a notice or not and whether it had jurisdiction to do so or not does not seem to me to be a matter of any consequence in this appeal.

The third point and the substantial point made by the appellant was that the Bhagalpur Court having once purported to act under section 39 of the Civil

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Procedure Code had ceased to have any further jurisdiction in the matter and could not then make any further order which would be binding upon the parties and that such order if made could be treated as a mere nullity and that therefore it could not be contended that any step had been taken between the 1st May, 1914, and the 3rd September, 1919, when the third application was made, and that more than three years having elapsed the decree-holder's right to have his decree executed was barred by limitation. Assuming, without deciding, that where a court issuing a decree has made an order under section 39 of the Civil Procedure Code and has in fact transmitted a copy of the decree to the court in which the decree is to be executed, it ceases to have any further jurisdiction in the matter, that was not the case which arose here. All that was done in the present instance was that an application was made by the decree-holder and that application was granted. But the copy of the decree was never sent to the Monghyr Court and certainly never received by that Court. If that had been so the Monghyr Court undoubtedly would have had jurisdiction to execute the decree against the property of the judgment-debtor within its jurisdiction. But the Monghyr Court never in fact in my opinion got jurisdiction to do anything at all and that seems to me to be obvious upon considering what the effect of section 42 of the Civil Procedure Code is. That section says :—

“The court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself.”

In the present case the decree was never sent to the Monghyr court. The decree-holder having obtained his order, for some reason or other best known to himself, either because he was not satisfied as to the existence of the property or for some other reason, never carried out the order which he had obtained and the decree was never in fact sent. It seems therefore clear that no jurisdiction was ever transmitted from the Bhagalpur Court to the Monghyr Court and in my opinion this appeal fails.

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It is not necessary in this case to decide whether a Court having made a decree ceases to have jurisdiction in execution proceedings where it has once sent a copy of the decree and the other papers to another court for execution and I merely wish to state that it is not my intention that anything I have said in this judgment should lead to the conclusion that I consider the court which made the decree would in such circumstances lose all jurisdiction in the matter.

The appeal is dismissed with costs.

JWALA PRASAD, J.—I agree.

*Appeal dismissed.*

### APPELLATE CIVIL.

*Before Das and Adami, J.J.*

RAM NARAYAN SAH

v.

SAHDEO SINGH.\*

1922.

Jan. 17.

*Mortgage—final decree on prior mortgage—sale set aside on deposit of decretal amount—suit by puisne mortgagees, whether prior mortgage can be used as a shield in—Code of Civil Procedure, 1908 (Act V of 1908), Order XXXIV, rule 3—Transfer of Property Act, 1882 (Act IV of 1882), section 89.*

Where a final decree has been obtained on a prior mortgage and the sale in execution thereof has been set aside by deposit of the decretal amount, which the judgment-debtor has borrowed on the security of another mortgage, the holders of the latter mortgage are entitled, in a suit on a mortgage executed subsequently to the prior mortgage, to claim priority in respect of the amount deposited in court to set aside the sale under the decree on the prior mortgage.

*Het Ram v. Shadi Ram* (1), distinguished.

*Sukhi v. Ghulam Safdar Khan* (2), followed.

\* Appeal from Original Decree No. 115 of 1919, from a decision of M. Shah Muhammad Khalilur Rahman, Subordinate Judge of Patna, dated the 29th April, 1919.

(1) (1918) L. R. 45 I. A. 130; I. L. R. 40 All. 407.

(2) (1921) L. R. 48 L. A. 465; I. L. R. 43 All. 469.