which arose upon the reasons given by the learned Judge and as the appellants have to some extent succeeded in that respect we think that the proper order to make in this appeal is that both parties shall bear their own costs.

1923.

TATA IRON AND STEEL, CO., LTD., v. BAIDYANATH LAIK.

KULWANT SAHAY, J.—I agree.

Appeal dismissed.
Order affirmed.

APPELLATE CIVIL.

Before Dawson Miller, C. J. and Kulwant Sahay, J.

JAGO MAHTON
v.
KHIRODHAR RAM.*

1923.

May, 23.

Execution of Decree—objection to execution on ground of limitation—objection dismissed for default—Subsequent application for execution, whether former objection may be revived.

Where a judgment-debtor objects to the execution of a decree on the ground that the application is barred by limitation, and the objection is dismissed for default of the judgment-debtor, the latter is not entitled, when a subsequent application for execution is made, to object that the previous application was time-barred.

Mungal Parshad Dichit v. *Girja Kant Lahiri*(1), applied.

Sheoraj Singh v. *Kameshar Nath* (2), followed.

Bholanath Dass v. *Prafulla Nath Kundu Chowdhury*(3), and *Khosal Chandra Roy Chowdhury* v. *Ukiladdi*(4), distinguished.

Appeal by the judgment-debtor.

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

Siva Narayan Bose, for the appellant.

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* Miscellaneous Appeal No. 258 of 1922, from an order of H. F. Foster, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 8th September, 1922, reversing an order of Babu Nirmal Chandra Ghosh, Munsif of Giridih, dated the 12th January, 1922.

(1) (1882) I. L. R. 8 Cal. 51; L. R. 8 I. A. 123.
(2) (1902) I. L. R. 24 All. 282
(3) (1901) I. L. R. 28 Cal. 122.
(4) (1909-10) 14 Cal. W. N. 114.

1923.

JAGO MAHTON v. KHITODHAR RAM.

DAWSON MILLER, C. J.

Baikuntha Nath De, for the respondent.

DAWSON MILLER, C. J.—This is an appeal on behalf of the judgment-debtor from an order of the Judicial Commissioner of Chota Nagpur, passed in appeal, ordering an execution case to proceed. The facts in so far as it is necessary to state them for the purpose of this appeal are these :—

On the 10th November, 1910, an instalment order was passed against the appellant whereby he had to pay a certain sum in fourteen instalments. A number of these instalments were paid and then there was default. In 1921 the decree-holder applied for execution of the decree. In that execution case the judgment-debtor filed an objection contending that the execution was barred by limitation. Whether or not the execution was barred by limitation was purely and simply a question of fact depending upon whether the seventh instalment under the instalment order had been paid or not. It was contended by him that it had not been paid. It was contended by the decree-holder that it had. The hearing of this objection in the executing case was fixed for the 8th April, 1921. Upon that occasion the judgment-debtor did not appear in support of his objection and as there was nothing before the Court to show that the execution case was barred by limitation the Court dismissed the objection for default and on the same day passed an order that the decree-holder should take further steps and directed the case to be put up again on the 11th of the month for orders. On the 12th of the month no steps having been taken by the decree-holder his execution was dismissed for default of prosecution. The next execution case was filed in September following, that is to say well within three years of the last execution case. The appellant now objects that the case is barred by limitation on the ground that the previous execution case in which his objection was dismissed was itself barred by limitation. It seems to me that the case is governed by the decision of the Judicial

1923

JAGO MAHTON v. KHIRODHAR RAM.

DAWSON MILLER, C. J.

Committee in the case of *Mungal Parshad Dichit* v. *Girja Kant Lahiri* (1) where a very similar question arose although in that case there had been no direct adjudication in the previous execution case upon the question of limitation. In that case a sixth petition for execution was filed on the 5th September, 1874, the previous one having been filed on the 26th July, 1871. The sixth execution case came to nothing and on the 22nd September, 1877, a seventh application was presented. It was contended there that the last application was barred by limitation because upon the actual facts then disclosed it would appear that the previous petition had been barred by limitation although that question had never been directly decided. Their Lordships in that case refused to give effect to the contention of the judgment-debtor and it seems to me that the ground upon which they refused to allow the question to be raised was that the sixth petition for execution, even though it may have been out of time, had been treated by the Court as a valid and subsisting execution case. No objection had been taken by anybody and certain orders had been passed in that case and it did not, in the circumstances, lie in the mouth of the judgment-debtor to contend afterwards that that case was barred by limitation. Their Lordships pointed out that the Subordinate Judge had jurisdiction upon an application of the 8th October, 1874, which was an application in the sixth execution petition, to attach certain properties and to determine whether the decree was barred or not at that date and an order was made that the attachment should issue. I may point out that no point had been taken in that case by anybody as to whether or not the case was barred by limitation but their Lordships decided that, the question not having been raised the order made that the attachment must issue must be taken as having concluded the matter and that the orders so made were proper and valid orders and could not afterwards, in another execution case, be questioned on the ground

(1) (1882) I. L. R. 8 Cal. 51; L. R. 8 I. A. 123.

1923.

JAGO MAHTON v. KHIRODHAR RAM.

DAWSON MILLER, C. J.

of limitation. Their Lordships further pointed out that whether the Judge was right or wrong he must be taken to have determined that the application for attachment was not barred. The judgment proceeds thus: "A Judge in a suit upon a cause of action is bound to dismiss the suit, or to decree for the defendant, if it appears that the cause of action is barred by limitation. But if, instead of dismissing the suit, he decrees for the plaintiff, his decree is valid, unless reversed upon appeal; and the defendant cannot, upon an application to execute the decree, set up as an answer that the cause of action was barred by limitation" It seems to me that what happened in the present case was this. When the judgment-debtor filed an objection to the execution that was a matter which the learned Judge had to decide and that was a matter which was to be determined upon questions of fact. The judgment-debtor had appeared in that execution case and had every opportunity of placing evidence in support of his objection before the Court. When the time came, however, he failed to take advantage of that opportunity. Nothing was done, and, therefore, the learned Judge dismissed his application and at the same time passed an order which was tantamount to this that the execution case should proceed. What he did really was to order that the decree-holder should take necessary steps to proceed with his execution case. That was according to the view I take of the ruling in the case of *Mungal Parshad Dichit* v. *Girja Kant Lahiri* (1) a determination by the Court that the execution case was not in fact barred by limitation and whether that decision was right or wrong it cannot afterwards, I think, be questioned in a subsequent proceeding, and, therefore, it is no longer open to the judgment-debtor to contend that that execution case was not valid.

The same point arose for determination in the Allahabad High Court in the year 1902 and the facts

(1) (1882) I. L. R. 8 C. 51; L. R. 8 I. A. 123.

1923.

JAGO MAHTON v. KHIRODHAR RAM.

DAWSON MILLER, C. J.

of that case were very similar to those of the present. In the case of *Sheoraj Singh* v. *Kameshar Nath* (1) the head-note is as follows :

" Although the execution of a decree may have been actually barred by time at the date of an application made for its execution, yet if an order for execution is made by a competent Court, having jurisdiction to try whether such execution is barred by time or not, such order, although erroneous, must, if unreversed, be treated as valid."

The facts of that case as I have said were very similar to the present. There an application for execution of a decree was struck off on the 15th January, 1894. The next application was not made until May 1907, more than three years later. Notice of this application was served on the judgment-debtors and they filed objections but on the day fixed for the hearing failed to support them and their objections were dismissed. The application for execution was, however, ultimately struck off by reason of the non-payment of process-fees by the decree-holder in that case. It was held that it was not open to the judgment-debtors on a subsequent application for execution being made to plead limitation in respect of the previous application as a bar to the execution of the decree. Almost precisely the same facts arose in that case as arose in the present and I confess I can see no reason for differing from the view taken by the Allahabad High Court in that case.

Two other cases were however referred to, which were decided in the Calcutta High Court and were relied upon by the appellant. The first was that of *Bholanath Dass* v. *Prafulla Nath Kundu Chowdhry* (2). In that case after several adjournments granted at the instance of the decree-holder neither party having appeared at the date of the hearing the Court by its order refused an application for execution and at the same time disallowed the objection of the judgment-debtor. On a subsequent application by the decree-holder the judgment-debtor again objected to the execution alleging that inasmuch as the previous

(1) (1902) I. L. R. 24 All. 282. (2) (1901) I. L. R. 28 Cal. 122.

1923.

JAGO MAHTON v. KHIRODHAR RAM.

DAWSON MILLER, C. J.

application was barred by limitation the subsequent application was also barred. It was held in such circumstances that the judgment-debtor was not precluded from raising the objection that the previous application was barred by limitation. It appears to me that that was an entirely different case from the present and one in which entirely different considerations arose because no decision of any sort was come to in that case by the Court in the previous execution case. An execution case was started no doubt and certain objections were taken by the judgment-debtor but nobody after that appeared and the Court came to no decision upon any question. All that the Court did was to dismiss the execution case and at the same time dismissed the objections. In fact having dismissed the execution case it was not necessary for the Court any longer to consider the objections. It cannot be said in such a case that the Court had determined whether the question of limitation was or was not a bar to the execution case proceeding. In the present case it must be taken that the Court had decided that there was no such bar because the very point was taken and decided. Although it was decided merely upon the default of appearance of the objector still at the same time the Court did make an order which showed that it considered that the execution case was a valid and subsisting execution case, and not barred.

The other case referred to of the Calcutta High Court was that of *Khosal Chandra Roy Chowdhury* v. *Ukiladdi* (1). Again the facts of that case were very different from the present. In that case it appears that in the previous execution case nothing was done, that is to say that no order for execution was made. Nor was any order made from which it could be judged that the Court had considered one way or the other that the execution case could proceed and the learned Judges there considered that it was clear that no order for execution was made in the course of the proceedings taken on the basis of the previous application for

(1) (1909-10) 14 Cal. W. N. 114.

1923.

JAGO MAHTON v. KHIRODHAR RAM.

DAWSON MILLER, C. J.

execution. Nothing was done beyond the issue of notice under section 248 of the Code of Civil Procedure requiring the judgment-debtors to show cause why the decree should not be executed against them. After service of notice the execution proceedings were dismissed for default of the decree-holder. There was no adjudication by the Court directly or indirectly that the decree-holder was entitled to proceed with the execution and on that ground the Court held that as there had been nothing in the previous execution case from which it could be said that the Court had decided one way or the other as to whether the proceedings were barred by limitation it was still open to the judgment-debtor in subsequent proceedings to take the point. Both those cases appear to me to be materially different from the facts of the present case. Once one arrives at the conclusion that the Court has decided either directly or indirectly that the previous execution case was a fit one to try and therefore not barred by limitation there is an end to the matter and it is not open to either of the parties thereafter to raise the same question in a fresh execution. For these reasons it seems to me that the present appeal must fail and is accordingly dismissed with costs.

KULWANT SAHAY, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Dawson Miller, C. J and Kulwant Sahay, J.

1923.

May, 29.

RAGHU SINGH

v.

MAHANT KRISHNA DEYAL GIR.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XLVII, rule* 1—"*other sufficient cause*", *omission of Court to refer to documentary evidence whether is cause for review.*

* Appeal from Original Order No. 154 of 1922, from an order of Babu Narendra Lal Basu, Subordinate Judge of Gaya, dated the 20th May, 1922.