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immediately upon the conviction of an accused, and it was held that the order of restoration must have been passed simultaneously. In view of those decisions one month's time is now given to the Magistrate to pass an order of restoration after the conviction of an accused. The order in the present case is, no doubt, more than six weeks after the conviction of the accused. Strictly speaking therefore the order will be beyond the power of the Magistrate But clause (*3*) of the section is a new provision added in 1923 whereby an order under the section may be made by any Court of appeal, confirmation, reference or revision.

Thus, the order may be passed by the Courts of appeal, confirmation, reference or revision at any time howsoever long after the conviction by the Magistrate. The matter has come to this Court in revision. This Court is, therefore, competent to pass an order restoring the property to the complainant of which he has been dispossessed by forcible criminal trespass committed by the accused. In the circumstances of the case I exercise my power to pass an order under section 522 of the Code of Criminal Procedure, which virtually is confirmation of the order passed by the Magistrate.

REVISIONAL CIVIL.

Before Jwala Prasad and Kulwant Sahay, J. J.

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Nov., 4, 14; Jan., 19.

GAJADHAR PRASAD

v.

FIRM MANULAL JAGARNATH PRASAD.*

Adjournment—signature of parties or pleaders to be taken—Ex-parte *execution ,proceedings, duty of Court in*—*Transfer of decree, for execution—decree silent as to future interest—interest included in certificate of transferring Court and allowed by executing Court, illegality of—Civil Procedure Code,* 1908 (*Act V of* 1908), *sections* 38 *to* 42, *Order XXI, rules* 3 *to* 9—Res judicata.

* Civil Revision no. 266 of 1924, from the order of B. Harihar Charan, Subordinate Judge, Motihari, dated the 8th March, 1924.

When a case is adjourned the signature of the parties or their pleaders must be taken on the order sheet in token of the communication to them of the date to which the case is adjourned. A mere statement in the order sheet that the case was adjourned at the request of the pleaders of the parties does not necessarily imply that they were informed of the date fixed.

In an *ex-parte* proceeding for execution of a decree it is the duty of the executing Court to see that the decree-holder does not realize more than what the decree has awarded him.

Where a decree is sent for execution to another Court and neither the decree nor the certificate required by Order XXI, rule 6, Civil Procedure Code, states that the decree-holder is entitled to future interest, the executing Court should not allow such interest to be realized in execution even though the judgment-debtor does not appear to oppose the execution proceedings.

The Court of the Additional Subordinate Judge of Benares in the United Provinces, passed a decree directing the judgment-debtor to deliver to the decree-holder Government Promissory Notes of the face value of Rs. 200, with interest thereon amounting to Rs. 360, within a month from the date of the decree, failing which the decree-holder would be entitled to recover from the judgment-debtor Rs. 1,630 *plus* Rs. 287-8-0 as costs. The judgment-debtor having failed to comply with the order the decree was transferred for execution, on the application of the decree-holder, to the Court at Champaran in Bihar, with a certificate stating that the amount due to the decree-holder on the date of the certificate was Rs. 2,281-12-0 *plus* Rs. 4 as costs of obtaining the certificate. The judgment-debtor objected to the execution of the decree on two grounds, *viz.*, (*i*) that the decree awarded only Rs. 1,630 *plus* Rs. 287-8-0, as costs and that the amount of Rs. 281 mentioned in the certificate was wrong, and (*ii*) that the decree-holder was not entitled to future interest. The Court held, on the merits, that the decree-holder was not entitled to more than Rs. 1,630 *plus* Rs. 287-8-0, but directed that the proper Court to entertain the objection was the Benares Court, and two weeks' time was allowed to the judgment-debtor to apply to that Court. Subsequently the judgment-debtor filed another certificate stating that the decree-holder was not entitled to interest after the date of the certificate. This petition was disallowed on the ground that the former order operated as

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res judicata. On appeal the District Judge set aside the order rejecting the second petition on the ground that the objection as to interest after the issue of the certificate was not covered by the first order. The case was remanded for determination of the judgment-debtor's objection and eventually an *ex-parte* order was passed against the judgment-debtor allowing the decree-holder's entire claim.

Held, in revision, (*i*) that the lower Courts were wrong in holding that the Benares Court was the proper Court to entertain the objection and that they had refused to exercise the jurisdiction which was vested in them by law; (*ii*) that the order on the first petition did not operate as *res judicata* so as to bar the second petition which reiterated the objections contained in the first petition, as it was made in the same execution proceeding which was still pending; and (*iii*) that in allowing the decree-holder to execute the decree for more than Rs. 1,630 *plus* Rs. 287-8-0, the executing Court had gone behind the decree, and that its order was therefore *ultra vires*.

Application by the judgment-debtor.

The opposite party obtained a decree against the petitioner on the 10th March, 1923, in the Court of the Additional Subordinate Judge of Benares. The decree directed the defendant to deliver to the plaintiff $3\frac{1}{2}$ *per cent*. Government Promissory Notes of the face value of Rs. 200 with interest upon the face value amounting to Rs. 360, within a month from the date of the decree, failing which the decree-holder would be entitled to recover from the judgment-debtor Rs. 1,630, *plus* costs of the suit Rs. 287-8-0. The Government Promissory Notes were not delivered nor was the amount mentioned above paid. The decree-holder, therefore, obtained an order transferring the decree from the Benares Court to the Court at Champaran with a certificate as required under sections 38 to 42 read with Order XXI, rules 3 to 9, of the Code of Civil Procedure. That certificate stated that the amount due to the decree-holder on the date of the certificate was Rs. 2,281-12-0, with costs of Rs. 4 odd for obtaining the certificate. The decree was consequently put in and executed in the Court of the Subordinate Judge of Motihari. The judgment-debtor objected to the

execution of the decree and the amount for which the execution was levied, upon the ground that the decree did not allow to the decree-holder more than Rs. 1,630, *plus* costs Rs. 287-8-0, and that the amount of Rs. 281, odd, etc., mentioned in the certificate was wrong. He further objected to the charge of interest in execution of the decree as being contrary to the terms of the decree. These objections were disallowed by the Subordinate Judge on the 10th September, 1923, he holding that the proper Court for giving relief to the judgment-debtor was the Benares Court. On the merits the Subordinate Judge accepted the interpretation of the decree in accordance with the contention of the judgment-debtor holding that the decree-holder was not entitled to more than Rs. 1,630, *plus* Rs. 287-8-0, as costs. He gave two weeks' time to the judgment-debtor to apply to the Benares Court. On the 12th September, 1923, the judgment-debtor put in another petition stating that the decree-holder was not entitled to charge further interest after the issue of the certificate. In this petition he also reiterated all the objections embodied in his first petition as regards the inaccuracy in the amount mentioned in the certificate. This was rejected on the 15th September, 1923, by the Subordinate Judge on the ground that his former order of the 10th September 1923 operated as *res judicata*.

The matter was then taken to the District Judge in appeal, who, by his order of the 28th January 1924, set aside the order of the Subordinate Judge, holding that the objection as to further interest after the date of the certificate was not covered by the previous order of the Subordinate Judge, dated the 10th September 1923. He also observed that the objection as to further interest was taken in the previous objection of the judgment-debtor.

As regards the objection as to the amount mentioned in the certificate, the District Judge observed that the Subordinate Judge rightly directed that the petitioner should have gone to the Benares Court.

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The case was then remanded to the Subordinate Judge for determination of the judgment-debtor's objection of the 12th September, 1923, as to further interest. The record was received by the Subordinate Judge on the 8th February, 1924, and he directed that information of this be given to the pleaders, fixing the 23rd February, 1924. On the latter date the Subordinate Judge noted that both parties were absent, but at the request of the pleaders of the parties the case was adjourned to the 8th March, 1924. On the 8th March, 1924, the Subordinate Judge passed the following order:—

"The parties are absent on call. Then Babu Rajesheri Prasad, Pleader, states he appears for the decree-holder. The judgment-debtor does not appear on call. His pleader, Babu Jagarnath, stated that the client must be called out. As the judgment-debtor does not appear this objection is dismissed for default as he did not appear on the previous date too. The judgment-debtor has filed a petition for time on the ground that Nand Lal Banerjee, his pleader, has gone to Benares. This is frivolous as it is quite uncertain when the latter pleader would return or would give up the practice altogether."

Cur. adv. vult.

Lakshmi Kant Jha, for the petitioner.

Murari Prasad and *Aniruddhaji Burman*, for the opposite party.

Jan., 19.

JWALA PRASAD, J. (after stating the facts set out above, proceeded as follows): There can hardly be any doubt that the order is illegal and the learned Subordinate Judge refused to exercise jurisdiction vested in him by law.

The record was received by the Subordinate Judge of Motihari on the 8th February, 1924, in the absence of the parties and the pleaders were informed. On the 23rd February, 1924, the parties were absent and at the request of the pleaders present, the case was adjourned to 8th March, 1924. The order sheet is signed only by Mr. R. Prasad. He is not the judgment-debtor's pleader. The judgment-debtor's pleader was Mr. Nand Lal Banerjee and probably Babu Jagarnnath. But the order sheet does not appear to have been signed by any of them. On the 8th

March, when the case was disposed of, the Subordinate Judge noted that the parties were absent and the judgment-debtor's pleader Mr Nand Lal Banerjee was also away to Benares. Babu Jagarnnath Prasad on behalf of the judgment-debtor accordingly filed a petition for an adjournment of the case. The learned Subordinate Judge refused it. In the circumstances of the case he could not refuse the application, for it does not appear that any information of the date fixed was communicated either to the judgment-debtor or his pleader. The form of the order sheet, as pointed out in several cases, especially requires that signatures of the parties or their pleaders should be taken on the order sheet in token of the information of the order having been communicated to them. The statement in the order sheet that the case was adjourned at the request of the pleaders does not necessarily imply that they actually came to know of the date fixed. If the signatures of the parties or their pleaders had been taken on the order sheet there would have been no room for such a contention. I therefore hold that the order was passed without any information to the judgment-debtor and consequently the order cannot be sustained and his objection remains undisposed of.

The learned Subordinate Judge was fully cognizant of the case and upon merits he ought to have held that the decree-holder was not entitled to levy execution for an amount in excess of what was allowed to him by the decree. Suppose for the sake of argument that the parties were absent, yet it was the duty of the Subordinate Judge to see that in *ex-parte* execution even the decree-holder does not realize more than what the decree allowed him. In the present case there was no order as to interest either prior to or after the decree was passed. There was nothing mentioned in the certificate as to future interest Therefore on the face of the decree and the certificate the decree-holder was not entitled to charge future interest. The learned Subordinate Judge has himself held on the previous occasion that the decree-holder was not entitled to more than Rs. 1,630 *plus* Rs. 287-8-0.

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Therefore he ought not to have allowed future interest whether the judgment-debtor did or did not appear before him. In this view also the order of the Subordinate Judge is wrong.

The learned Subordinate Judge is also wrong, and so is the learned District Judge, in holding that although under the decree the decree-holder was not entitled to more than Rs. 1,630 *plus* Rs 287-8-0, the judgment-debtor ought to have gone to the Benares Court for his relief as to the interest charged by the decree-holder in execution, and to have got the certificate amended. The Court was executing the decree, and not the certificate, and the executing Court at Motihari was competent to construe the decree. Order XXI, rule 6, clause (*b*), runs as follows:

"The Court sending a decree for execution shall send a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unsatisfied."

Under it where no satisfaction of the decree has been obtained the certificate is to state that "satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed." Under it the Court has not to state the amount due under the decree or the relief to which the decree-holder is entitled. The decree will be the guide in these matters for the executing Court. Under the latter part of the clause referred to above "where the decree has been executed in part," the Court has to state the extent to which satisfaction has been obtained and what part of the decree remains unsatisfied. This does not apply to the present case as no part of the decree was realized in the Court which transferred the decree. Under section 42 read with Order XXI, rule 9, of the Code of Civil Procedure the Court to which the decree is transferred for execution has the same powers in executing the decree "as if it had been passed by itself" Thus the Court at Motihari to which the decree was transmitted for

execution was competent to decide the objection of the judgment-debtor and that the decree-holder was not entitled to get more than Rs. 1,630 *plus* Rs. 287-8-0. The learned Subordinate Judge was wrong in holding that the judgment-debtor ought to have gone to the Benares Court for the reliefs he sought. Therefore the order passed by the learned Subordinate Judge and so also by the learned District Judge that the judgment-debtor should have gone to the Benares Court for the reliefs sought by him amounts to a refusal to exercise the jurisdiction vested in them by law. The order is *ultra vires;* and it cannot operate as *res judicata* for the second application of the judgment-debtor, dated the 12th September, 1923, wherein he reiterated his objection, was in the course of the same execution which was yet pending and not disposed of. In this view of the case the learned Subordinate Judge is wrong in executing the decree for a sum in excess of what the decree allowed to the decree-holder, namely, Rs. 1,630 *plus* Rs. 287-8-0. The Court was bound to construe the decree and in giving effect to the certificate of the Benares Court was going behind the decree which is not cognizable by law. Therefore the orders of the Subordinate Judge, dated 10th and 15th September, 1923, and 8th March, 1924, are all wrong and without jurisdiction. The decree-holder is entitled only to the aforesaid sum, and the learned Subordinate Judge is wrong in executing the decree for a higher sum, that is, for the interest prior to or after the decree or certificate. These orders will be vacated.

It has been brought to light that the property of the judgment-debtor has been sold for a sum in excess of the amount in the decree and the sale has fetched a price much more than the amount of the decree. This order would affect the sale and would entitle the decree-holder to execute the decree afresh. In order to avoid further harassment and expense in connection with this small decree the parties have now come to terms that the sale should stand and the decree-holder will pay in cash to the judgment-debtor Rs. 400 within

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two months from this date (19th January, 1925), failing which the judgment-debtor will be entitled to execute this order as a decree. There will be no order as to costs of this application.

The result is that the judgment-debtor will be entitled to get Rs. 400 from the decree-holder within two months failing which this order will be executed by the judgment-debtor as a decree.

S. A. K. *Order set aside.*

APPELLATE CIVIL.

Before Dawson Miller, C.J. and Foster, J.

1924-25.

Dec., 1, 8, 3, 4; Jan., 19.

TOFA LAL DAS

v.

SYED MOINUDDIN MIRZA.*

Limitation Act, 1908 (*Act IX of* 1908), *Schedule I, Articles* 62 *and* 96—*Two Articles applicable to a suit, one giving a longer period than the other—recovery of excess amount of cess paid, suit for—limitation*—terminus a quo.

In giving effect to a statute of limitations, if two Articles limiting the period for bringing a suit are wide enough to include the same cause of action and neither of them can be said to apply more specifically than the other, that which keeps alive rather than that which bars the right to sue should, generally, and apart from other equitable considerations, be preferred.

In cases where the relief is based on mistake the period of limitation should run from the time when the mistake is first discovered even if some other Article in the Limitation Act should be wide enough to include the cause of action.

Where, therefore, a *patnidar* brought a suit to recover from the landlord a sum of money paid in excess of the amount demandable for cess, the relief being based on mistake, *held*, that Article 96, and not Article 62, was applicable.

* First Appeal no. 208 of 1922, from a decision of B. Suresh Chandra Sen, Subordinate Judge of Purnea, dated the 31st May, 1922.