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entry been "non-resumable", the same presumptive weight would have attached to it, and the burden would have rested on the defendant zamindar: here also the zamindar has the duty of proving his claim, in face of the record-of-rights.

FOSTER, J.

I have examined the oral evidence in this case. In my opinion the judgment of the learned Subordinate Judge is careful and well founded. [His Lordship then proceeded to analyse the plaintiff's oral evidence, and proceeded as follows.]

It may be mentioned here that it is not seriously contended that the term *zerat* as applied to the land in dispute is accurate; it should be probably *bakast malik* or *ghairmazrua malik*, according to its condition.

I would dismiss this appeal with costs.

DAS, J.—I agree.

*Appeal dismissed.*

## REVISIONAL CIVIL.

*Before Das and Ross, J.J.*

MUHAMMAD IBRAHIM

*v.*

CHHATTOO LAL.\*

*Code of Civil Procedure, 1908 (Act V of 1908), section 41—Court to which a decree has been sent for execution, jurisdiction of, when ceases.*

The jurisdiction of the court to which a decree has been sent for execution ceases as soon as the court takes action under section 41, Code of Civil Procedure, and certifies to the court which passed the decree the circumstances attending the failure on the part of the transferee court to execute the decree.

*J. G. Bagram v. J. P. Wise* (1), distinguished.

*Manorath Das v. Ambika Kant Bose* (2), followed.

\* Civil Revision no. 328 of 1925, from an order of the Munsif of Muzaffarpur, dated the 29th June, 1925.

(1) (1868) 10 W. R. 46, F. B. (2) (1908-09) 13 Cal. W. N. 533.

## Application by the decree-holders.

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This application was directed against an order of the Munsif of Muzaffarpur, dated the 29th June, 1925. The circumstances were these: On the 18th May, 1925, the petitioners obtained a decree for Rs. 1,449-5-9 against Chhattoo Lal in the Court of Small Causes in Calcutta. On the application of the petitioners, the Small Cause Court, Calcutta, sent the decree for execution to the Muzaffarpur Court under the provision of section 39 of the Code of Civil Procedure. The petitioners applied for execution in accordance with law; but ultimately on the 21st May, 1924, the execution case was dismissed for default and the Munsif in seisin of the matter certified to the Calcutta Small Cause Court the circumstances attending the failure to execute the decree. The order of the Munsif was not before the High Court but apparently the Munsif acted under section 41 of the Code of Civil Procedure. Thereafter certain properties belonging to the judgment-debtors were sold at the instance of Mohan Prosad Sahu who had obtained a decree as against the judgment-debtors, and, there being assets of the judgment-debtors in the hands of the Muzaffarpur Court, the petitioners applied on the 20th April, 1925, for attachment of the surplus sale-proceeds which amounted to Rs. 3,436-15-3. On the 27th April, 1925, Rs. 1,432-15-9 out of the surplus sale-proceeds in the hands of the Muzaffarpur Court was attached at the instance of the petitioners, the court at the same time directing that the petitioners should obtain another order from the Calcutta Small Cause Court transferring the decree for execution to that court. The order of the Calcutta Small Cause Court transferring the decree for execution to the Muzaffarpur Court was received on the 30th April, 1925. Thereafter other decree-holders who had obtained decrees as against the judgment-debtors came in and the surplus sale-proceeds were attached at the instance, first, of Mohan Prosad, then of Bihari Lal, and, lastly, of Sham Narain Singh. On the 24th June 1925, the petitioners

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applied for liberty to withdraw Rs. 1,432-15-9 out of the surplus sale-proceeds. They contended that their attachment was first in order of time and that they were entitled to withdraw the sum attached without reference to the rights of the other attaching creditors. Similar applications were presented on behalf of the other attaching creditors and they applied for rateable distribution of the assets. The Munsif took the view that section 73 of the Code of Civil Procedure did not apply to the facts of the case and that the distribution of the assets could only be made in order of respective attachments. That being the position, the petitioners contended that their attachment being first in point of time, they were clearly entitled to withdraw the sum of Rs. 1,432-15-9 from the court. In dealing with that application, the Munsif came to the conclusion that the attachment at the instance of the petitioners was wholly irregular inasmuch as the Muzaffarpur Court was no longer in seisin of the execution case. It was the propriety of this order which was the subject-matter of the present application.

*Khurshaid Husnain and Syed Ali Khan*, for the petitioner: The court to which a decree has been sent for execution under section 39, Code of Civil Procedure, retains its jurisdiction so long as the decree is not completely executed or has not become impossible of execution, and the executing court certifies that fact to the court which passed the decree. The mere striking off the execution for default does not terminate the jurisdiction, even if the court executing the decree informs the court which passed the decree of the result of that execution. Section 41, Code of Civil Procedure, may be construed to empower the executing court to keep the court which passed the decree regularly informed of the result of each execution but the jurisdiction comes to an end only when that court certifies under section 41 that it is unable to execute the decree that has been sent to it any further, either because it has been fully executed or there is no possibility of executing it, in other words, when

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it certifies the fact of complete execution or final failure. I rely on *J. G. Bagram v. J. P. Wise*<sup>(1)</sup>, *Abda Begum v. Muzaffar Husen Khan*<sup>(2)</sup> and *R. B. Indra Raj Singh v. Murad Khan*<sup>(3)</sup>.

*Rai Tribhuan Nath Sahai* (with him *Aditya Narain Lal*), for the opposite party: When a court executing the decree sent to it for execution informs the court which passed the decree of the result of an execution it acts under section 41, Code of Civil Procedure, and when once the court takes action under that section its jurisdiction ceases to exist. Section 41 does not contemplate that the court has only to certify complete execution and final failure. If the proceeding is struck off the file, or is dismissed, the court fails to execute the decree within the meaning of section 41 and when this fact is certified to the court which passed the decree the jurisdiction of the executing court is extinguished. *J. G. Bagram v. J. P. Wise*<sup>(1)</sup> and all the cases that follow that decision are distinguishable inasmuch as they do not decide the question whether the court retains its jurisdiction even after it has reported the fact of failure to the court which passed the decree. *R. B. Indra Raj Singh v. Murad Khan*<sup>(3)</sup> was wrongly decided as the reasons given for the decision are unsound. On the other hand, there is a decision of the Calcutta High Court in *Manorath Das v. Ambika Kant Bose*<sup>(4)</sup> which supports my contention. I also rely on *Maharaja of Bobbili v. Sree Raja Narasaraju Peda Belliar Simhulu Bahadur Garu*<sup>(5)</sup>.

*Syed Ali Khan*, in reply: I adopt the reasoning in *R. B. Indra Raj Singh v. Murad Khan*<sup>(3)</sup> and *Abda Begum v. Muzaffar Husen Khan*<sup>(2)</sup>. The cases of *Manorath Das v. Ambika Kant Bose*<sup>(4)</sup> and *Maharaja of Bobbili v. Sree Raja Narasaraju Peda Belliar Simhulu Bahadur Garu*<sup>(5)</sup> are distinguishable as has been pointed in *R. B. Indra Raj Singh v.*

(1) (1868) 10 W. R. 46, F. B. (3) (1922) A. I. R. Nag. 210.

(2) (1898) I. L. R. 20 All. 129. (4) (1908-09) 13 Cal. W. N. 533.

(5) (1913) I. L. R. 37 Mad. 231.

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*Murad Khan*<sup>(1)</sup> inasmuch as the fact of failure of the infructuous application had apparently not been certified to the court which passed the decree.

S. A. K.

DAS, J. (after stating the facts set out above, proceeded as follows): I am of opinion that the view taken by the learned Munsif is correct and that this application must be dismissed. I entirely agree that the court executing a decree sent to it has the same powers in executing such decree as if it had been passed by itself; but the point is whether on the 27th April, 1925, the date of the order of attachment of Rs. 1,432-15-9 the Muzaffarpur Court had any jurisdiction over the matter. It will be remembered that on the 21st May the Muzaffarpur Court had not only dismissed the execution case for default but acted under the provision of section 41 of the Code of Civil Procedure. Various cases have been cited before us by Mr. Khurshaid Husnain but those cases decide that the mere striking off an application for execution does not terminate the jurisdiction of the court to which the decree is sent for execution to execute the decree; but at the same time those cases recognize that the jurisdiction ceases as soon as the court takes action under section 41 of the Civil Procedure Code and certifies to the court which passed the decree the circumstances attending the failure on the part of the transferee court to execute the decree. In the Full Bench case of *J. G. Bagram v. J. P. Wise* <sup>(2)</sup> the question was whether or not a court to which a decree passed by another court had been transmitted under the provision of section 286 of Act VIII of 1859 was competent of its own authority to entertain a fresh application for execution after the first application had been struck off by itself for default. It will be noticed that in the Code of 1859 there was no provision similar to the one contained in section 223 of the Code of 1882 or section 41 of the present Code. In dealing with this point Mitter, J., said as follows:—

“ It will be further observed that the law does not

(1) (1922) A. I. R. Nag. 210.

(2) (1868) 10 W. R. 46, F. B.

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contain any express provision as to how and when the execution records are to be retransmitted to the court by which the decree was passed. I do not mean to say that such a thing cannot be done at all, but all that I mean to say is that it can be done only when an order to that effect has been received from the said court, or from some other court exercising appellate jurisdiction over the matter." It was clearly recognised by Mitter, J., in the Full Bench case to which I have referred, that the jurisdiction to execute a decree by a court to which the decree is sent for execution ceases when an order is passed by that court to the effect that it is unable to execute the decree. In delivering the judgment of the Full Bench, Peacock, C. J., said:—"The order for striking off the application for execution of the decree did not strike the copy of the decree off the records of the court to which it was sent for execution; and as long as it remains there, the court to which it was sent may deal with it, and any application for execution of it as if it was a judgment of that court." But in this case the decree was no longer in the record of the Muzaffarpur Court on the 27th April, 1925. This was the view which I think was taken by Mukherji, J., in *Manorath Das v. Ambika Kant Bose*(<sup>1</sup>). That learned Judge said that the court to which a decree is transferred for execution retains its jurisdiction to execute the decree until the execution had been withdrawn from it or until it had fully executed the decree and had certified the fact to the court which sent the decree, or had executed it so far as that court was able to do within its jurisdiction and certified that fact to the court which sent the decree. In my opinion section 41 of the Code makes it quite clear that the court to which a decree is sent for execution has no jurisdiction to deal with the execution case after it takes action under section 41 of the Code.

I would dismiss this application with costs.

Ross, J.—I agree.