impossible to give effect to the argument of the learned Vakil.

It was next contended that although the Revenue Courts may have failed to give him relief, the Civil Court independently of section 31 has power to go into the question and to hold that the landlord did not have good and sufficient cause to refuse his consent to the transfer and for this proposition a decision of this Court in *Giridhari Naik* v. *Kashi Tindi* (1) was cited. All that was laid down in that decision was that " it is fallacious to say that occupancy rights are not transferable in Orissa without the consent of the landlord. They are transferable without the landlord's consent unless it can be shown to the satisfaction of the Collector that the landlord has good reason for his objection." I entirely fail to see how this decision has bearing on the question which is before us.

DAS, J.

I would dismiss these appeals with costs.

ROSS, J.—I agree.

Appeals dismissed.

APPELLATE CIVIL.

Before Das and Ross, JJ.

RICHHARAM

v.

PASUPATI BANERJI.*

1928.

Feb. 3.

Execution of decree—Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXI, rule* 22, *issue of notice under —execution dismissed for default of decree-holder—limitation, objection as to, whether can be taken at a later stage of the proceeding.*

* Circuit Court, Cuttack. Appeal from Appellate Order no. 13 of 1927, from a decision of G. J. Monahan, Esq., I.C.S., District Judge of Cuttack, dated the 9th of July, 1927, confirming a decision of Babu Rangalal Chattarji, Munsif, 2nd Court of Cuttack, dated the 10th of January, 1927.

(1) (1917) 2 Pat. L. J. 476.

1928.

RICHHARAM v. PASUPATI BANERJI.

Where a notice under Order XXI, rule 22, Code of Civil Procedure, 1908, was served on the judgment-debtor, who did not appear, and the execution was subsequently dismissed for default of the decree-holder, and, in a later execution proceeding, the judgment-debtor contended under section 47 that the execution was barred by limitation,

Held, that inasmuch as the question of limitation was not decided in the previous execution, there was no bar to the adjudication of the objection when actually taken at a later stage of the proceeding.

Khosal Chandra Roy Chowdhury v. *Ukiluddi* (1), followed. *Jago Mahton* v. *Kherodhar Ram* (2), distinguished.

Appeal by the judgment-debtors.

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

B. N. Dutta, for the appellants.

S. C. Chatterji and *S. C. Bose*, for the respondents.

Ross, J.—This is an appeal against an order by the learned District Judge of Cuttack affirming the order of the Munsif dismissing an application under section 47 of the Code of Civil Procedure. It appears that there was a mortgage decree passed on the 22nd of August 1921 and that the first petition in execution was filed on the 20th of March 1925. The learned Munsif in directing the issue of notices under order 21, rule 22, required that special mention of the question of limitation should be made. The service was defective and substituted service was allowed and the decree-holders were ordered to take further steps but they did not do so, and the execution was dismissed. There was a later execution and the property was sold. After the sale the judgment-debtor made this application under section 47, contending that the execution was barred by time. It was held by both the Courts below that as this objection was not taken in the first execution case, it was *res judicata* on the principal of *Mangal Prasad Dikshit*'s case (3).

(1) (1910-11) 14 Cal. W. N. 114. (2) (1923) I. L. R. 2 Pat. 759.
(3) (1881) 8 Cal. 51, P. C.

1928.

RICHHARAM v. PASUPATI BANERJI.

ROSS, J.

In my opinion the decision of the Courts below is wrong. The learned Advocate for the appellant has referred to the decision in *Khosal Chandra Roy Chowdhury* v. *Ukiladdi* (1), where the facts were exactly similar to the facts of the present case and their Lordships observed that "nothing was done beyond the issue of notices under section 248 (Order XXI, rule 22) 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 notices the execution proceedings were dismissed for default of the decree-holders. There was no adjudication by the Court directly or indirectly that the decree-holders were entitled to proceed with execution." On behalf of the respondents it is sought to distinguish this decision from the present case on the ground that on the 28th of April, 1925, the learned Munsif passed the order

"To 29-4-25 for steps by D. H. R."

and the learned advocate contends that this amounts to an adjudication and that the execution was not barred by time. In my opinion, no such conclusion can be drawn and to draw such a conclusion would be to open the door to fraud, because in this case the decree-holders took no steps at all. It would be easy for the decree-holders to obtain a fictitious service and drop the proceedings and then, in a later proceeding, to urge that the matter was *res judicata*. The case in this Court upon which reliance is placed on behalf of the respondents is a totally different case: *Jago Mahton* v. *Khirodhar Ram* (2). There the judgment-debtor had appeared and had filed an objection contending that the execution was barred by limitation and, on the date fixed for the hearing of this objection, he failed to appear and so the matter went by default. That obviously was *res judicata;* but here nothing was done at all except to order the issue of notice under Order XXI, rule 22, and the Calcutta decision to which I have referred is a clear

(1) (1910-11) 14 Cal. W. N. 114. (2) (1923) I. L. R. 2 Pat. 759.

1928.

RICHHARAM v. PASUPATI BANERJI.

ROSS, J.

authority that that is not enough. In my opinion the judgment-debtor was entitled to raise the question of limitation and to have it decided.

I would therefore allow the appeal, set aside the judgments of the Courts below and remand the case to the Court of first instance to decide the objection according to law. Costs will abide the result.

DAS, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

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

1928.

Jan. 30, 31. Feb. 6, 7, 14.

SYED ALI ZAMIN

v.

SYED MUHAMMAD AKBAR ALI KHAN.*

Muhammadan Law—Wakf under Shia Law—Wakif, power of, to lay down rules of succession after formal dedication—Wakf, when becomes completed—appropriator, power of appointment is vested in, when rule of succession not laid down.

When property is devoted to religious and charitable purposes it is usual for the appropriator to lay down rules for succession to the office of trustee upon which the question of succession depends. But if no such rules are laid down the power of appointment is vested in the appropriator during his life.

Shah Ghulam v. *Mohammed Akber* (1), followed.

Under the Shia law a mere declaration of wakf does not constitute a valid dedication unless and until the founder divests himself of the proprietary interest in the dedicated property by transferance of possession.

Abadi Begam v. *Kaniz Zainab* (2), followed.

* First Appeal no. 223 of 1924, from a decision of Rai Bahadur Surendra Nath Mukerjee, Subordinate Judge of Patna, dated the 26th September, 1924.

(1) (1875) 8 M. H. C. R. 63.
(2) (1927) I. L. R. 6 Pat. 259, P. C.