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tauzi no. 214/7; that his security has been lost so far as the Schedule C properties are concerned; and that it is subject to the *rehannama* of defendant no. 3 so far as the Schedule B properties are concerned. The decree of the Subordinate Judge requires modification. There will be the usual mortgage decree for the sum claimed with interest and costs as decreed by the Subordinate Judge: the period of grace being extended up to six months from the date of this decree. The mortgaged property, being mahal Gundi, tauzi no. 214/7, will be sold save and except the properties covered by the sale certificate of defendant no. 3, viz., 2 annas 3 pies share out of 4 annas 6 pies share in mauza Gundi Kalan, thana no. 57, khewat no. 1/10, and a similar share in mauza Gundi Khurd, thana no. 56, khewat no. 1/9, and as to the rest of the tauzi the sale will be subject to the *rehan* of defendant no. 3 except as to thana no. 55, khewat no. 1/8, which will be sold free of encumbrances. The order of the Subordinate Judge as to the costs of defendant no. 3 will stand. As the appellant has partly failed each party will bear its costs of the appeal.

JWALA PRASAD, J.—I agree.

Appeal allowed in part.

APPELLATE CIVIL.

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February, 20, 21. March, 18.

Before Macpherson and Fazl Ali, JJ.

SYED EKRAM HUSSAIN

v.

MUSAMMAT UMATUL RASUL.*

Execution—decree of first court affirmed on appeal—appellate court decree only capable of execution—decree-holders seeking to execute mandatory part of first court decree as affirmed by appellate court—execution, whether bad—court executing transferred decree, whether has power to

*Appeal from Original Order no. 256 of 1928, from an order of Babu Norendranath Banerji, Subordinate Judge of Palamau, dated the 11th October, 1928.

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question the jurisdiction of the court which passed the decree —Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXI, rule 7—first court decree transferred for execution—appeal—decree affirmed—transferee court, whether retains jurisdiction to execute—sections* 37, 38 *and* 42.

Where a court of appeal affirms, reverses or modifies the decree of the first court, the decree of the appellate court is the only decree capable of execution.

Shohrat Singh v. *Bridgman*(1), *Mohammad Suleman Khan* v. *Mohammad Yar Khan*(2), *Brijnarain* v. *Tejbal Bikram Bahadur*(3) and *Abdul Majid* v. *Jwahir Lal*(4), followed.

Kristo Kinkar Roy v. *Rajah Burroda Kaunto Roy*(5), referred to.

Where, however, the decree of the first court was affirmed by the High Court on appeal and the decree-holders sought to execute the mandatory part of the decree of the first court as affirmed by the court of appeal without expressly asking the court to execute the decree of the appellate court.

Held, that the objection of the judgment-debtor that the execution could not proceed inasmuch as the decree-holders had sought to execute the decree of the first court as distinct from the decree of the appellate court, was, in the circumstances, a mere technical objection which should not be allowed to prevail.

Gobardhan Das v. *Gopal Ram*(6), followed.

An executing court to which a decree has been transferred for execution, has no power under Order XXI, rule 7 of the Code of Civil Procedure, 1908, to question the jurisdiction of the court which passed the decree.

Harigobind Kalkundri v. *Narsing Rao Konhar Rao Deshpande*(7), followed.

Once a court which has the power to execute the decree, in any case whether it is its own decree, or the decree of the appellate court, has transferred the execution to another

(1) (1882) I. L. R. 4 All. 376, F. B.
(2) (1888) I. L. R. 11 All. 267, F. B.
(3) (1910) I. L. R. 32 All. 295, P. C.
(4) (1914) I. L. R. 36 All. 350.
(5) (1872) 14 Moo. I. A. 465.
(6) (1885) I. L. R. 7 All. 366.
(7) (1915) I. L. R. 38 Bom. 194.

court and the execution is still alive, the court to which the execution has been transferred will exercise all the powers of the court of the first instance and will retain the jurisdiction to proceed with the execution, even though there has been an appeal since and the decree has been affirmed in appeal.

Abda Begum v. *Muzaffar Hussain Khan*(1), *Maharaja of Bobbili* v. *Sree Raja Narasaraju Peda Baliar Simbulu Bahadur*(2) and *Manorath Das* v. *Ambika Kant Bose*(3), referred to.

Appeal by the judgment-debtor.

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

Syed Noorul Hossain and *Syed Izhar Hussain*, for the appellant.

Syed Ali Khan, for the respondents.

FAZL ALI, J.—This is an appeal from a decision of the Subordinate Judge of Palamau disallowing certain objections preferred by the appellant against the execution of a decree. The decree in question was passed on the 27th February, 1922, in favour of three persons, namely, Bintul Fatma, Umatul Rasul and Salma by the Subordinate Judge of Gaya in a suit brought against the appellant Ekram Hussain. Ekram Hussain appealed to the High Court and during the pendency of the appeal Bintul Fatma died whereupon the appellant substituted her husband and the other two decree-holders (Umatul Rasul and Salma) as her heirs. On the 20th April, 1925, the decree of the trial Court was affirmed by consent of the parties. In the meantime while the appeal was still pending before the High Court the decree-holders executed the decree and got it transferred to the Court of the Subordinate Judge of Palamau. This execution, however, was dismissed on the 5th December, 1925. On the 29th March, 1928, the respondents to this appeal made another application for execution in the Court of the Subordinate Judge of Palamau.

(1) (1897) I. L. R. 20 All. 129.
(2) (1912) I. L. R. 37 Mad. 231.
(3) (1909) 13 Cal. W. N. 533.

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The appellant thereupon appeared and objected to the execution of the decree. His objection was disallowed and so he prefers this appeal.

The first contention raised by the learned Advocate for the appellant is that what the present respondents are trying to execute now is the decree of the trial court but that decree cannot be executed because it has merged in the decree of the High Court which is the final decree. Now, before answering the question of fact which is here raised by the learned Advocate for the appellant, that is to say, whether the respondents are really trying to execute the decree of the first court, I wish briefly to consider the question of law raised by him, namely, that if the decree of the first court is affirmed in appeal the decree of the first court will be no longer capable of execution and it is only the decree of the appellate court which can be executed. The earliest case on that point is to be found in *Shohrat Singh* v. *Bridgman*(1) in which it was held by a Full Bench of the Allahabad High Court that the decree of the court of the last instance is the only decree susceptible of execution. This case was followed by another Full Bench of the Allahabad High Court in *Mohammad Suleman Khan* v. *Mohammad Yar Khan*(2). In that case a question arose whether the court of first instance had the jurisdiction to amend a decree which had been affirmed by the appellate court and it was held by the majority of the Judges that the only court which had the jurisdiction to amend the decree was the court of appeal and the reasoning adopted was that the decree of the lower court had merged in the decree of the appellate court. Mahmood, J. dissented from this view and in support of his view referred to the following passage in the decision of the Privy Council in *Kristo Kinkar Roy* v. *Raja Barroda Kaunto Roy*(3) :—

"The function of an appellate Court is to determine what decree the Court below ought to have

(1) (1882) I. L. R. 4 All. 376, F. B.
(2) (1888) I. L. R. 11 All. 267, F. B.
(3) (1872) 14 Moo. I. A. 465.

made. It may affirm, reverse or vary the decree under appeal. In the first case, it leaves the original decree standing, superadding, it may be, an order for the payment of the costs of the appeal, or for the interest on the amount originally decreed. In the other two cases it substitutes other relief for the relief originally given. In all these cases the decree of the appellate Court may be regarded either as a direction to the lower Court to make and execute a decree of its own accordingly, or as an independent decree whether it is to be executed by the appellate Court or by the lower Court. In the latter case a further question arises, namely, whether the original decree, if wholly affirmed (or so much of it as has been affirmed, if it has been partially affirmed), is to be treated as merged or incorporated in the decree of the appellate Court as the sole decree capable of execution, or whether both decrees should be treated as standing execution being had on each in respect of what is enjoined by the one, and not expressly enjoined by the other.

* * * * *

If the question were res integra, their Lordships would incline to the view taken by the Judges of the High Court in the present case, namely, that the execution ought to proceed on a decree of which the mandatory part expressly declares the right sought to be enforced. Considering, however, that for the reasons already given, the question is not of much practical importance, their Lordships will not express dissent from the rulings of the Madras Court and of the Full Bench of the Bengal Court further than by saying, that there may be cases in which the appellate Court, particularly on special appeal, might see good reasons to limit its decision to a simple dismissal of the appeal, and to abstain from confirming a decree erroneous or questionable, yet not open to examination by reason of the special and limited nature of the appeal. Their Lordships may further suggest that in all cases it may be expedient expressly to embody in a decree of affirmance so much of the decree below as it is intended to affirm, and thus avoid the necessity of a reference to the superseded decree."

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There are many recent decisions, however, including those of the Privy Council [see *Brijnarain* v. *Tejbal Bikram Bahadur*(1) and *Abdul Majid* v. *Jwahir Lal*(2)] where the view taken in *Suleman Khan* v. *Yar Khan*(3) has been affirmed. It is true that in most of these cases the question which directly arose was as to whether the first Court or the appellate Court had the power to amend the decree when the decree of the first Court had been affirmed by the appellate Court. But the principle which has been laid down in all these cases is that in such a case the decree of the first Court must be considered to have merged in the decree of the appellate Court and in the present state of law it is difficult to hold that the same principle will not apply in a case like the present. The case of *Shohrat Singh* v. *Bridgman*(4) was, however, explained in a later case—*Gobardhan Das* v. *Gopal Ram*(5)—where the facts were these :— The first Court of appeal affirmed the decree of the Court of first instance and the High Court affirmed the decree of the lower appellate Court and dismissed the appeal. The decree-holder made an application in which he did not expressly ask the Court to execute the decree of the last instance but it could be gathered from the application of the decree-holder that his object was to have execution taken under the decree of the appellate Court by carrying out the mandatory part of the decree of the Court of first instance. It was held in these circumstances that the objection that the decree-holder did not in his application expressly ask the Court to execute the decree of the last instance was under the circumstances a mere technical objection and there was no reason why the execution asked for should not be allowed. In my opinion this decision will govern the present case where also, although the decree-holders have not

(1) (1910) I. L. R. 32 All. 295, F. B.
(2) (1914) I. L. R. 36 All. 350.
(3) (1888) I. L. R. 11 All. 267, F. B.
(4) (1882) I. L. R. 4 All. 376, F. B.
(5) (1885) I. L. R. 7 All. 366.

expressly asked the Court to execute the decree of the appellate Court, yet they do mention that an appeal was preferred on behalf of the judgment-debtors in the High Court of Patna and was decided in favour of the decree-holders on the 20th April, 1925. It is thus clear that what the respondents were trying to execute was the mandatory part of the decree of the first Court as affirmed by the Court of appeal and it will be the merest technicality to say under these circumstances that the decree-holders were asking for the execution of the decree of the first Court as something distinct from the decree of the appellate Court.

The learned Advocate for the appellant, however, contends that the decree is incapable of execution even if it be held that the decree sought to be executed was the decree of the appellate Court and he rests his contention on two grounds: (*1*) that the decree of the appellate Court must be treated as a nullity because the appellate Court passed the decree without requiring the heirs of Bintul Fatma to produce a succession certificate as required by section 214 of the Indian Succession Act of 1925 and (*2*) that the decree of the appellate Court not having been transferred by the Subordinate Judge of Gaya could not be executed by the Subordinate Judge of Palamau.

Now, so far as the first point is concerned it appears to me to be wholly untenable. It is to be remembered in the first place that it was the appellant himself who had substituted the heirs of Bintul Fatma and he cannot now turn round and say that they should not have been treated as heirs by the appellate Court. Besides, as the lower Court has pointed out, no such objection was taken by the appellant in his petition of objection filed in the Court below. It is true that in paragraph (*4*) of his petition the appellant did refer to the absence of a succession certificate but the ground raised there was entirely different from the ground which is being raised now. What is, however, most fatal to the case of the appellant is that under

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Order XXI, rule 7 of the amended Code, it is no longer possible for a judgment-debtor to say that the decree sought to be executed by a Court to which it has been transferred for execution was passed without jurisdiction and is a nullity. This result will follow from a comparison of the rule as it stands now with the corresponding provision of the old Code on the same point. In the old Code section 225 was worded in such a way that some of the Courts took the view that the executing Court had the right to enquire into the jurisdiction of the Court which passed the decree. Under the new Code, however, the words " or the jurisdiction of the Court which passed it " have been omitted and, as was pointed out in *Harigobind Kalkundri* v. *Narsing Rao Konhar Rao Deshpande*(1), the inference from this omission is clear that the executing Court has no power under the present Code to question the jurisdiction of the Court which passed the decree under execution.

I shall now deal with the second contention raised by the appellant that the appellate decree cannot be executed by the Subordinate Judge of Palamau because all that was transferred was the decree of the first Court. Here it will be necessary to consider how long the Court to which a decree is sent for execution retains its jurisdiction to execute the decree. This matter was considered in *Abda Begam* v. *Muzaffar Hussain Khan*(2) and the decision was given in these terms—

" In our opinion the Court to which a decree is sent for execution retains its jurisdiction to execute the decree until the execution has been withdrawn from it, or until it has fully executed the decree and has certified that fact to the Court which sent the decree, or has executed it so far as that Court has been able to execute it within its jurisdiction and has certified that fact to the Court which sent the decree,

(1) (1913) I. L. R. 38 Bom. 194.
(2) (1897) I. L. R. 20 All. 129.

or until it has failed to execute the decree and has certified that fact to the Court which sent the decree."

This case was followed by the Madras High Court in *Maharaja of Bobbili v. Sree Raja Narasaraju Peda Balliar Simbulu Bahadur*(1) and by the Calcutta High Court in the case of *Manorath Das* v. *Ambika Kant Bose*(2). Now, here it is nobody's case that any of the events which are mentioned in the passage which I have quoted as being necessary to terminate the jurisdiction of the Court to which a decree has been sent for execution, has taken place. It is, however, urged that the mere fact that the decree of the first Court was affirmed in appeal is sufficient to deprive the Court of Palamau of its jurisdiction to execute the decree, and, unless there is a fresh transfer of the decree of the appellate Court to that Court, it will have no jurisdiction to execute the decree. This view, however, does not appear to me to be sound nor does it seem to be supported by any express provision of the Code. Section 38 of the Code says that a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. Section 42 says that the Court executing a decree sent to it shall have the same powers in executing such a decree as if it had been passed by itself. The effect of section 37 is that where the decree to be executed is a decree passed by a Court of first appeal or by the High Court in second appeal, then the proper Court to execute it is the Court of first instance. Thus, in any case, the Court of first instance would be the Court empowered to execute the decree even when it has been affirmed by the appellate Court and it has been expressly provided that the Court to which the decree is sent for execution will have the same powers as the Court which passed the decree. In my opinion, reading all these provisions together, it follows that

(1) (1912) I. L. R. 37 Mad. 231.

(2) (1909) 13 Cal. W. N. 533.

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once a Court, which has the power to execute the decree, in any case whether it is its own decree or the decree of the appellate Court, has transferred the execution to another Court and the execution is still alive, the Court to which the execution has been transferred will exercise all the powers of the Court of first instance and will retain its jurisdiction to execute the decree even though there has been an appeal since and it has been affirmed in appeal. In this case there is no doubt that the Subordinate Judge of Gaya was primarily the Court which alone could have executed the decree even after the decree had been affirmed in appeal. The Subordinate Judge of Gaya, however, had transferred the decree to the Subordinate Judge of Palamau and according to the Code the Subordinate Judge of Palamau would have all the powers exercisable by the Subordinate Judge of Gaya. Now, one of the powers of the Subordinate Judge of Gaya obviously was to execute the decree even after it was affirmed by the appellate Court and the question is whether there is anything in the Code to say that such a power will not be exercisable by the Court which is not only in seisin of the execution but has also all the powers exercisable by the Subordinate Judge of Gaya according to section 42. As I read the various provisions of the Code I do not think that the execution can be defeated merely by the fact that no fresh order of transfer was made by the Subordinate Judge of Gaya after the decree had been affirmed by the High Court. The execution is still alive and the Subordinate Judge of Palamau must be held to have the same powers as the Subordinate Judge of Gaya including the power of executing the decree of the appellate Court. In my opinion, therefore, the objections urged in this appeal are without merits and the appeal must be dismissed with costs.

MACPHERSON, J.—I agree.

Appeal dismissed.