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questions of procedure and may be altered by any particular High Court; but the entire jurisdiction of any court to interfere with its own decision once given is derived from section 114 of the Code itself where the single word " review " is used. Therefore, in my opinion, if no appeal had been preferred from the order on the application for restoration by the Subordinate Judge the date of his order would have been the starting point for limitation under clause (*3*) of Article 182, but as an appeal from this order was preferred, the start of limitation is the date of the order of the appellate court.

With great respect, therefore, for the careful judgment of the learned Judge of this Court I am of opinion that it was erroneous and the appeal under the Letters Patent should be allowed with costs throughout.

JAMES, J.—I agree.

Appeal allowed.

S. A. K.

APPELLATE CIVIL.

1937.

February, 18.

Before Agarwala and Madan, JJ.

GHASIRAM MARWARI

v.

RAJA SHIBA PRASAD SINGH.*

Execution—minor judgment-debtor described as major in execution petition—guardian ad litem appointed after expiry of limitation—execution, whether barred—Order-in-Council passed against a dead person, whether is a nullity—order for execution after issue of notice—execution proceeded against all the judgment-debtors—no separate order against

*Appeals from Original Orders nos. 359 of 1935 and 10 of 1936, from the orders of Babu Kishun Prasad, Subordinate Judge of Manbhum, dated the 13th November, 1935.

minor judgment-debtor—decree, whether revives against all—Limitation Act, 1908 (*Act IX of* 1908), *Schedule* 1, *Article* 183 *—homestead land not forming part of agricultural holding, whether exempt from sale—Chota Nagpur Tenancy Act*, 1908 (*Beng. Act VI of* 1908), *section* 47.

An Order-in-Council does not become a nullity merely because it is passed against a dead person.

Sri Chandra Chur Deo v. *Musammat Shyam Kumari*(1), followed.

An execution is not necessarily barred merely because one of the judgment-debtors is not described as a minor in the execution petition and the guardian ad litem is not appointed till after the period of limitation. The subsequent appointment of a guardian ad litem does not amount to the addition of a new party to the suit or proceeding which must be deemed to have been instituted against the minor on the date on which it was filed.

Khem Karan v. *Har Dayal*(2), *Rup Chand* v. *Dasodha*(3), *Talib Ali Shah* v. *Piarey Lal*(4) and *Peary Mohan Mukherjee* v. *Narendra Nath Mukherjee*(5), followed.

Where there was an order for execution after the issue of notice under Order XXI, rule 22, Code of Civil Procedure, 1908, and the execution did in fact proceed against all the judgment-debtors named in the execution petition and a portion of the decretal amount was realised, *held*, that there was a revivor of the decree against all the judgment-debtors named in the petition, within the meaning of Article 183 of the Limitation Act, 1908, although the court had not passed a separate order dealing with the case of the minor judgment-debtor.

James Russel McLaren v. *Veeriah Naidu*(6) and *V. Krishnaiyah* v. *C. Gajendra Naidu*(7), distinguished.

Parcels of land which do not form part of an agricultural holding but are either homestead land or form part of the

(1) (1931) I. L. R. 11 Pat. 445.
(2) (1881) I. L. R. 4 All. 37.
(3) (1907) I. L. R. 30 All. 55.
(4) (1930) I. L. R. 52 All. 924.
(5) (1915) I. L. R. 32 Cal. 582.
(6) (1915) I. L. R. 38 Mad. 1102.
(7) (1917) I. L. R. 40 Mad. 1127.

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compound of a house do not come within the purview of section 47 of the Chota Nagpur Tenancy Act, 1908.

Bama Charan Gorain v. *Gobindaram Marwari*(1), followed.

Appeals by the judgment-debtors.

The facts of the case material to this report are set out in the judgment of Madan, J.

B. C. De and *M. K. Mukharjee*, for the appellants.

S. N. Bose and *N. N. Roy*, for the respondent.

MADAN, J.—These two appeals by Bhagirath Marwari and his minor brother Ghasiram Marwari relate to the execution of a Privy Council decree for costs passed against Sheochand Marwari and others on the 24th February, 1919. The appellants who belong to a Hindu Mitakshara family are the sons of Sheochand who died on the 1st January, 1919. The decree-holder took out execution of the decree on the 7th February, 1931, within the statutory period of twelve years, and realised part of the decretal amount. The present execution was taken out for the balance of the decree in the year 1934, and objections filed by both the appellants were disallowed by the lower court and have again been urged before us. Mr. De for the appellants contended that the Privy Council decree was a nullity against Sheochand as he died during the pendency of the appeal and there was no substitution of his heirs. According to Bentwich's Privy Council Practice, second edition, page 234, a Privy Council appeal abates on the death of one of the parties and revives on his heir being substituted according to the law of the country from which the appeal comes. We were also referred to the case of *Jai Berhma* v. *Kedar Nath Marwari*(2) where their Lordships, having been informed before judgment that one of the respondents had died and his heirs had

(1) (1935) A. I. R. (Pat.) 105.
(2) (1922) I. L. R. 2 Pat. 10, P. C.

not been substituted, directed that the order passed should be without prejudice to the rights of that respondent or of his heirs. The case, however, is different where a Privy Council decree has actually been passed against a dead person. Such cases are governed by section 23 of Acts III and IV of *William IV* which runs as follows:—

"And be it enacted that in any case where any order shall have been made on any such appeal as last aforesaid, the same shall have full force and effect notwithstanding the death of any of the parties interested therein; but that in all cases where any such appeal may have been withdrawn or discontinued or any compromise made in respect of the matter in dispute, before the hearing thereof, then the determination of His Majesty in Council in respect of such appeal shall have no effect."

The decree against Sheochand was, therefore, not a nullity and under section 53 of the Civil Procedure Code it can be realised from the property of the deceased which came into the hands of his sons [*Sri Chandra Chur Deo v. Musammat Shyam Kumari*(1)]. This objection must, therefore, fail.

Mr. De next argued that the executions of both the years 1931 and 1934 were barred against the minor appellant. The execution of 1931 was taken out against both appellants, but Ghasiram was not described as a minor in the execution petition. On objection by Bhagirath filed on the 27th June, 1931, Ghasiram was described as a minor, and a guardian ad litem was appointed on the 22nd July, 1931, which was beyond twelve years from the date of the decree. It is therefore contended that the execution against the minor appellant had become barred. A similar point arose in *Khem Karan* v. *Har Dayal*(2) where a plaint was presented against two persons in ignorance of the fact that they were minors. It was held that a suit might be brought against a minor before a guardian was appointed, and that limitation counted from the date of the plaint and not from the appointment of the guardian. In *Rup Chand* v. *Dasodha*(3)

(1) (1931) I. L. R. 11 Pat. 445.
(2) (1881) I. L. R. 4 All 97.
(3) (1907) I. L. R. 30 All. 55.

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it was held that failure to make a guardian ad litem a party to an appeal within the period of limitation was immaterial. It was pointed out that the guardian ad litem was not really a party to the appeal, but that he was merely named on the record as the person responsible for looking after the affairs of the minor. *Talib Ali Shah* v. *Piarey Lal*(1) is a case where a suit was restored after it had been discovered in execution that an ex parte decree had been passed against a minor described as a major. It was held that the subsequent appointment of a guardian ad litem did not amount to the addition of a new party to the suit which must be deemed to have been instituted against the minor on the date on which it was filed. The same principle was approved by the Calcutta High Court in *Peary Mohan Mukherjee* v. *Narendra Nath Mukherjee*(2). Under the Civil Procedure Code procedure in execution is intended to be less rather than more formal than in a suit, and it is clear that the execution was not barred merely because Ghasiram was not described as a minor in the execution petition and the guardian ad litem was not appointed till after the expiry of the period of limitation. This objection must also fail.

As regards the present execution the argument is that it is barred against the minor appellant as the former execution did not have the effect of reviving the decree against the minor within the meaning of Article 183. A revivor of a decree is effected by an order for execution after issue of notice under Order XXI, rule 22, and the ordersheet in this case shows that on the same day when the guardian was appointed the court ordered him to be served with a notice which must according to the normal procedure have been a notice under Order XXI, rule 22. There is nothing to show that any objection was filed by the guardian on receipt of the notice, nor has any reason been suggested why the decree should not have been revived

(1) (1930) I. L. R. 52 All. 924.
(2) (1915) I. L. R. 32 Cal. 582.

against the minor. The execution did in fact proceed against the judgment-debtors named in the execution petition and a sum of more than Rs. 5,000 was realised. In the circumstances it was not necessary for the court, as was contended by Mr. De before us, to pass a separate order dealing with the case of the minor judgment-debtor, and the decree must have been held to have revived against all the judgment-debtors against whom execution was taken out. Mr. De referred us to *James Russel McLaren* v. *Veeriah Naidu*(1) and *V. Krishnaiyah* v. *C. Gajendra Naidu*(2) where it was held that a decree does not revive against a judgment-debtor against whom the execution was not taken out. These cases are clearly different from the present case. This objection regarding the present execution was not raised before the lower court, and it also must fail.

The next argument was that the appeal to the Privy Council having been based on a wrong view of the law was in the nature of a gamble in litigation, and that the decree for costs was therefore not binding on the appellants even under their pious obligation to pay the debts of their father not contracted for illegal and immoral purposes. In *Ram Chandra Singh* v. *Jang Bahadur Singh*(3) it was held by this Court that it is not within the power of a karta to bind the joint family by entering into speculative transactions. In that case the suit was dismissed against all the defendants including the sons of the karta, but the question of the sons' separate obligation to pay off their father's debts was not dealt with in the judgment and does not appear to have been specifically raised. And apart from this, this whole argument of the appellants must fail if only because the appeal to the Privy Council did in part succeed, the case being remanded for hearing against some of the defendants.

(1) (1915) I. L. R. 38 Mad. 1102.
(2) (1917) I. L. R. 40 Mad. 1127.
(3) (1925) I. L. R. 5 Pat. 198.

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Lastly it was contended that the properties scheduled in the execution petition are exempted from sale under the provisions of section 47 of the Chota Nagpur Tenancy Act. The schedule comprises five pieces of land situated in the village in which the appellants reside. Four of these pieces of land are small areas containing pucka houses belonging to the appellants, and the fifth is a *bari* or homestead land surrounded by a wall and valued at Rs. 150. Section 47 provides that no order shall be passed by any court for the sale of the right of a raiyat in his holding, and a raiyat is defined in the Act as primarily a person who has acquired a right to hold land for the purpose of cultivating it. In this case it is admitted that the land was purchased by the appellants' ancestors who built the houses and had come to the village for doing business in cloth and grocery. There is no evidence worth considering to show that the appellants' family also acquired agricultural lands or that they depend for any appreciable portion of their livelihood on agriculture. In the survey khatian one of the plots containing a pucka house is described as raiyati, and as has already been stated one of the plots described in the schedule is a *bari*, but there is no evidence that these plots form part of an agricultural holding. In *Bama Charan Gorain* v. *Gobindaram Marwari*(1) one out of three plots was described as raiyati in the execution petition, but was held to be liable to be sold on the ground that land which is merely part of the compound of a house and shop does not come within the purview of the provisions of the Chota Nagpur Tenancy Act. This ruling is applicable to the present case, and it follows that this objection also cannot be sustained, and in fact it was given up in the lower court. These appeals must, therefore, fail and are dismissed with costs.

AGARWALA, J.—I agree.

Appeal dismissed.

S. A. K.

(1) (1935) A. I. R. (Pat.) 105.