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meaning of section 42; but I have no doubt that the steps contemplated by Order XXI, rule 53(4), are things to be done in executing the decree and, therefore, in this matter the powers of the Court to which a decree has been sent are co-extensive with the powers of the Court which passed the decree even without the addition in the rule of words specifically permitting the Court to which a decree has been sent to do a particular thing. There was, therefore, in my view, no irregularity in making the attachment. There was no illegality to condone and, as my learned brother has said, none of the decisions cited to us is directly in point.

K.D.

Appeal allowed.

APPELLATE CIVIL.

1940.

April, 2.

Before Agarwala and Rowland, JJ.

DEBENDRA NATH HALDAR

v.

G. A. ARATOON.*

Code of Civil Procedure, 1908 (Act V of 1908), sections 50 and 99—order under section 50 made by the Court to which decree has been transferred for execution—defect of procedure only—appellate Court, whether should interfere with the order, where merits of the case not affected by irregularity—section 99.

When the Court to which a decree has been transferred for execution makes an order for substitution under section 50, Code of Civil Procedure, 1908, it is a matter of procedure and not of jurisdiction.

Kunwar Jung Bahadur v. The Bank of Upper India, Ltd., Lucknow(1), relied on.

*Appeal from Appellate Order no. 329 of 1939, from an order of T. Luby, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 9th August, 1939, confirming an order of Babu Bahindra Nath Ghosh, Subordinate Judge of Ranchi, dated the 18th July, 1939.

(1) (1928) 32 Cal. W. N. 790, P. C.

Sri Chandra Chur Deo v. Musammam Shyam Kumari(1) and *Kalu Ram v. Firm Sheonand Rai Jokhi Ram*(2), followed.

Held, therefore, that an appellate Court ought not to interfere with an order under section 50 made by a Court to which a decree has been transferred for execution where the merits of the case are not affected by the irregularity.

Sham Lal Pal v. Modhu Sudan Sircar(3), followed.

Official Trustee of Bengal v. Basdeo Bhagat(4), distinguished.

S. Marahmat Husain v. Oudh Commercial Bank, Ltd.(5) and *Amar Chandra Banerjee v. Guru Prosunno Mukerjee*(6), referred to.

Appeal by the legal representatives of the judgment-debtor.

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

K. Sahay, for the appellants.

R. P. Jaruhar, for the respondent.

AGARWALA, J.—The facts material to this appeal are as follows: G. A. Aratoon & Co., obtained in the Calcutta High Court, a decree for Rs. 2,000 against Upendra & Debendra, a firm carrying on business at Bundu near Ranchi in this province. On the application of the decree-holder the decree was transferred for execution to Ranchi. In the Ranchi Court a compromise was entered into under which the judgment-debtors agreed to pay Rs. 100 a month to the decree-holder until the decretal debt should be satisfied. The compromise also provided that in default of any payment the decree-holder should be entitled to realise the entire balance

(1) (1931) I. L. R. 11 Pat. 445.

(2) (1932) I. L. R. 11 Pat. 580.

(3) (1895) I. L. R. 22 Cal. 558.

(4) (1937) A. I. R. (Pat.) 239.

(5) (1931) A. I. R. (All.) 320(2).

(6) (1900) I. L. R. 27 Cal. 488.

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instance could not be reversed on account of such irregularity. This case was referred to in a later decision of the Division Bench of the Calcutta High Court in *Amar Chandra Banerjee v. Guru Prosunno Mukerjee*(1). In that case it was held that an application by the transferee of a decree for execution after substitution of his name can be entertained only by the Court which passed the decree and the Court to which the decree has been transferred has no jurisdiction to entertain it. With reference to *Sham Lal Pal v. Modhu Sudan Sircar's case*(2) Banerji, J. said: "As to the case of *Sham Lal Pal v. Modhu Sudan Sircar*(2), that case is distinguishable from the present. The question there was as to the meaning and effect of section 234 of the Civil Procedure Code which provides that an application for executing the decree against the legal representative of a deceased judgment-debtor is to be made to the Court which passed it but does not, like section 232, leave any discretion in that court to allow execution or not". Order XXI, rule 22, has replaced section 232 of the old Code. Stevens, J. agreed with the judgment of Banerji, J. but said that he desired to express no opinion with regard to the construction of section 234. In the Privy Council case to which I have already referred both these decisions were referred to and Banerji, J.'s explanation of the decision in *Sham Lal Pal's case*(2) was accepted. The case before their Lordships of the Privy Council was a case in which the judgment-debtors had acquiesced in the defect of procedure and their Lordships, therefore, held that they must be taken to have waived the defect. They were not dealing with a case in which it was necessary to decide whether an appellate Court should interfere where a defect of procedure has occurred but where it is not shewn that the defect has affected the merits of the case. The case which at first sight supports the contention of the learned Advocate

(1) (1900) I. L. R. 27 Cal. 488.

(2) (1895) I. L. R. 22 Cal. 558.

for the appellants is a Division Bench decision of this Court in the *Official Trustee of Bengal v. Basdeo Bhagat*(1). That was a case in which there had been no waiver of the irregularity in the procedure of the court executing the decree in making an order under section 50 of the Code of Civil Procedure; but the learned Judges who dealt with that case, after referring to the Privy Council decision, decided that the execution should not be allowed to proceed. The facts were that the executing Court had refused to order the substitution of the representatives of the deceased judgment-debtor, and it was against that order of refusal that the appeal had been preferred. Mohamad Noor, J., delivering the judgment of the Court, said: "We are at a stage where no execution has been issued. When it is brought to the notice of the Court that a certain procedure is irregular, and when the proceedings can be regularised by applications to the proper Court, there is no reason why the Court should allow the irregular proceeding to continue". It will be observed, therefore, that Mohamad Noor, J. was not dealing with a case like the present where the Court has passed an order in favour of continuing the execution proceeding and the appellate Court has to consider whether the order should be interfered with. The last case to which I propose to refer is the decision of a Division Bench of the Allahabad High Court in *S. Marahmat Husain v. Oudh Commercial Bank, Ltd.*(2). There it was held that section 50(1) does not confer exclusive jurisdiction on the Court which passed a decree for the purpose of substituting the names of the legal representatives of a deceased judgment-debtor, but that an application for substitution is also entertainable by a Court to which a decree has been transferred for execution. In delivering the judgment of the Court Bennet, J. observed: "For the

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(1) (1937) A. I. R. (Pat.) 289.

(2) (1981) A. I. R. (All.) 820(2).

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judgment-debtor-appellant it was argued that although section 42 gave jurisdiction to the Court to which a decree was transferred for purposes of execution that jurisdiction does not include the particular jurisdiction given by section 50(1) exclusively to the Court which passed the decree. Now if that were so a very remarkable result would follow, because section 47(3) states that a Court executing a decree shall determine all questions which arise as to whether any person is or is not representative of a party."

In my view the defect in procedure which has occurred has not affected the merits of the decision and should not be interfered with. The appellants admittedly reside in Ranchi and, prima facie, therefore, it was more convenient for them to have the matter decided at Ranchi than at Calcutta. It has not been made a matter of grievance that they have been inconvenienced in placing their case before the Ranchi Court or that they were not representatives of the deceased judgment-debtor.

I would, therefore, dismiss this appeal with costs.

ROWLAND, J.—I agree.

S.A.K.

Appeal dismissed.

APPELLATE CIVIL.

Before Harries, C. J. and Agarwala, J.

GAYA PRASAD SINGH.

v.

JAGDISH CHANDRA DEO DHABAL DEB.*

Chota Nagpur Tenancy Act, 1908 (Beng. Act VI of 1908), sections 230 and 233—Limitation Act, 1908 (Act IX of 1908), section 23, whether governs the provisions of the

*Appeal from Appellate Decree no. 220 of 1936, from a decision of Rai Bahadur Saudagar Singh, Judicial Commissioner of Singhbhum, dated the 2nd September, 1935, reversing a decision of A. H. Kemp, Esq., I.C.S., Subdivisional Officer of Dhalbhum, dated the 27th July, 1934.

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