

For the foregoing reasons I am of opinion that the decision of the learned Judge in Chambers is correct and must be upheld. In this view of the case it is not necessary to consider the further question decided by the learned Judge whether the plaintiff had acquired an indefeasible right to the land by adverse possession.

I would accordingly dismiss the appeal, but having regard to all the circumstances would leave the parties to bear their own costs.

DIN MOHAMMAD J.—I agree.

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Appeal dismissed.

LETTERS PATENT APPEAL.

Before Tek Chand and Abdul Rashid JJ.

MOTI RAM-DIWAN CHAND (DECREE-HOLDER)

THROUGH BELI RAM (ASSIGNEE) Appellant

versus

DHANNA SINGH-HAVELI RAM

(JUDGMENT-DEBTOR) Respondent.

Letters Patent Appeal No. 41 of 1933.

Civil Procedure Code, Act V of 1908, Order XXI, rule 16: Transfer of Decree—after it has been sent for execution to another Court—Application for execution by assignee—to which Court to be made—Waiver—if application is made to wrong Court without objection.

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April 19.

A decree obtained from the Court of the Senior Subordinate Judge of Amritsar against a firm of Hafizabad, district Gujranwala, was transferred for execution to the Court of the Subordinate Judge at Hafizabad. After an infructuous application for execution the decree-holder assigned the decree to B. R. and the latter applied to the Court at Hafizabad for execution reciting the fact of the assignment to him. On 16th February, 1925, the Court issued notice to the judgment-debtor and the latter appeared before the Court and raised numerous

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objections, but none to the jurisdiction of the Court to entertain the application under Order XXI, rule 16, nor was this objection raised in subsequent execution proceedings until February, 1929.

Held, that where a decree is transferred by assignment in writing the transferee must under Order XXI, rule 16, apply for execution of the decree to the Court which passed it, even though that Court had transferred the decree for execution to another Court before the assignment, and notwithstanding the provisions of section 42.

Held however, that the failure to apply to the Court which had passed the decree was not fatal to the exercise of the jurisdiction of the transferee Court, as a defect in procedure may be waived and the party who has acquiesced in the transferee-Court exercising its jurisdiction in a wrong way cannot afterwards turn round and challenge the legality of the proceedings.

Jang Bahadur v. Bank of Upper India, Ltd. (in Liquidation) (1), and *Shailendranath Gosh v. Surendranath De (2)*, relied upon.

Sheo Narain Singh v. Hurbans Lall (3), and *Amar Chundra Banerjee v. Guru Prosunno Mukerjee (4)*, distinguished.

Letters Patent Appeal from the judgment passed by Tapp J. in C. A. No. 177 of 1931 on 18th May, 1931, affirming that of Lala Jaswant Rai Taneja, District Judge, Gujranwala, dated 3rd November, 1930 (who affirmed that of Sheikh Ijaz Ahmad, Subordinate Judge, Hafizabad, dated 3rd October, 1930), dismissing the assignee's application for execution.

MUKAND LAL PURI, for Appellant.

J. G. SETHI, for Respondent.

TEK CHAND J.

TEK CHAND J.—On the 26th of March, 1923, firm Moti Ram-Diwan Chand of Amritsar obtained a

(1) (1928) I. L. R. 3 Luck. 314 (P.C.). (3) (1870) 14 W. R. 65.

(2) (1933) I. L. R. 57 Cal. 1137, 1141. (4) (1900) I. L. R. 27 Cal. 488.

money-decree against firm Dhanna Singh-Haveli Ram of Hafizabad, district Gujranwala, from the Court of the Subordinate Judge at Amritsar. In December, 1923, on the decree-holder's application, the Court at Amritsar, transferred the decree for execution in the Gujranwala district. The certificate of transfer was duly presented before the District Judge, Gujranwala, who assigned the case to the Court of the Subordinate Judge at Hafizabad, where the judgment-debtor resided. On the 15th of May, 1924, the Subordinate Judge, Hafizabad, issued a warrant for attachment of certain moveable property belonging to the judgment-debtor. The attachment was duly effected, but before the property could be sold the proceedings were consigned to the record room on the 18th of December, 1924.

On the 14th of February, 1925, the decree-holder assigned his rights in the decree to one Beli Ram of Hafizabad. Two days later, on the 16th of February, 1925, Beli Ram (assignee) presented an application for execution of the decree in the Court at Hafizabad, reciting the fact of the assignment of the decree to him and praying that it be executed against the property of the judgment-debtor. The Subordinate Judge, Hafizabad, issued notices under Order XXI, rule 16, to the decree-holder and the judgment-debtor. On receipt of this notice, the judgment-debtor appeared before the Court on the 5th of March, 1925, and raised numerous objections to the execution of the decree. It is not necessary to set out these objections in detail here as they are not material for the purposes of this appeal. It is important to note, however, that no objection was raised at that time on the ground that the Hafizabad Court had no jurisdiction to entertain

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the application of the assignee for execution of the decree, as the assignee had not obtained beforehand an order under Order XXI, rule 16, Civil Procedure Code, from the Court at Amritsar, which had passed the decree. The Hafizabad Court started an enquiry into the objections which had been raised by the judgment-debtor and after some proceedings the case was consigned to the record room on the 2nd of May, 1925.

Two years later, on the 18th of May, 1927, Beli Ram again applied at Hafizabad for execution, and notice of this application was duly served on the judgment-debtor, but he failed to appear. These proceedings, however, proved infructuous.

On the 23rd July, 1928, the assignee presented another application, this time praying for the arrest of the judgment-debtor as well as for attachment of his property. The judgment-debtor was arrested in due course and produced before the Court, when he expressed a desire to apply for adjudication as insolvent, and the usual order under Order XXI, rule 40, releasing him on furnishing security, was passed. Nothing further appears to have been done and the proceedings were again "filed as incomplete," on the 18th of September, 1928.

Finally, on the 10th of November, 1928, the assignee applied for the fourth time, and repeated his prayer for arrest of the judgment-debtor and attachment of his property. The judgment-debtor was again arrested and the Court ordered his detention in the Civil Jail for a period of six months. In the meantime some property of small value, belonging to the judgment-debtor, had been attached and sold, and the sale-proceeds were ordered to be applied towards the satisfaction of the decree. In the course of these

proceedings, on the 22nd of January, 1929, written objections were filed on behalf of the judgment-debtor against his arrest. These objections also are not material for the purposes of this appeal and it is not necessary to mention them here. While an enquiry into these objections was proceeding, the judgment-debtor filed another application on the 22nd of February, 1929, in which it was urged for the first time that the entire proceedings in the Hafizabad Court during the preceding four years (February, 1925, to February, 1929) were *ultra vires* and void, as the assignee had not obtained beforehand an order under Order XXI, rule 16, from the Court at Amritsar, which had passed the decree, recognizing the assignment and permitting him to execute it against the judgment-debtor. The Subordinate Judge, Hafizabad, proceeded to try together both sets of objections, raised in the applications of the 22nd of January and the 22nd of February, 1929, and after a lengthy enquiry passed an order overruling all objections raised in the first application, but upholding the one as to want of jurisdiction by reason of non-compliance with the "imperative provisions of Order XXI, rule 16." He accordingly dismissed the assignee's application for execution. On appeal the District Judge affirmed the decision of the executing Court. The assignee filed a second appeal in this Court but it was dismissed, the learned Judge in Chambers agreeing with the Courts below, that in the absence of an order by the Amritsar Court under Order XXI, rule 16, the Court at Hafizabad had no power to execute the decree at the instance of the assignee and, therefore, the entire proceedings in that Court from February, 1925, onwards were *ultra vires* and illegal. He, however, granted a certifi-

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cate to the assignee that it was a fit case for a further appeal under clause 10 of the Letters Patent. The assignee appeals.

Before us Mr. Mukand Lal Puri for the appellant has assailed the judgments of the Courts below on three grounds. He has urged, *firstly*, that the lower Courts have erroneously assumed that under the law an application by the assignee of a decree for execution can be made only to the Court which had passed the decree, even though that Court had transferred the decree for execution to another Court before the assignment. *Secondly*, it is urged that, even if it be held that this was a necessary preliminary to an assignee taking out execution of the decree and the transferee Court could not entertain his application direct, the judgment-debtor in this case must be taken to have "waived" the objection, having regard to the fact that execution proceedings had been going on against him at Hafizabad for more than four years before the plea was raised. *Thirdly*, counsel argues, that the judgment-debtor not having raised this objection in the course of the proceedings on the earlier applications for execution, he is barred from raising it now by the rule of "constructive *res judicata*" enunciated in Explanation IV of section 11, Civil Procedure Code, the principles of which have been held applicable to execution proceedings.

After hearing Mr. Puri at length, I have no doubt that the first contention has no force. The statutory provision governing the matter is to be found in Order XXI, rule 16, Civil Procedure Code, which lays down that where a decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree *to the Court which*

passed it and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder. If this be read with the definition of the expression "the Court which passed the decree" as given in section 37, there seems to be no doubt that the proper Court to which the application should have been made was the Court of the Subordinate Judge at Amritsar. Mr. Puri refers to section 42, which lays down that the Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. I do not think, however, that this section overrides the plain words of Order XXI, rule 16. On the other hand, it seems to me that section 42 is subject to Order XXI, rule 16. On this point there is a volume of authority both under the old Code of 1882 as well as the present Code. The first contention fails and must be rejected.

On the second point, the leading cases under the earlier Codes were *Sheo Narain Singh v. Hurbans Lall* (1) and *Amar Chundra Banerjee v. Guru Prosunno Mukerjee* (2). In those cases it was held that an application by the transferee of a decree for execution, after substitution of his name, could be entertained only by the Court which passed the decree and the Court to which the decree had been transferred had no jurisdiction to entertain it, and that this was not an irregularity which could be cured by section 578 of the Code of 1882. In those cases two grounds were given in support of this conclusion. Firstly, it was pointed out that under section 285 of the Code of 1859, as well as under section 232 of the Code of 1882, which were the statutory provisions dealing with the matter then

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in force, a discretion had been given to the Court "which had passed the decree" to grant or refuse the application for execution made by a transferee of the decree. Those sections provided that "the transferee may apply for the execution of the decree to the Court which passed it and if that Court thinks fit, the decree may be executed." It was accordingly held that the discretion, having been conferred specifically on a particular Court, no other Court could possibly have jurisdiction to entertain the application of the transferee of the decree for substitution and permission to execute it. This argument, however, no longer holds good, for in rule 16 of Order XXI of the Code of 1908, which has replaced the old section 232, the words "if that Court thinks fit" are not to be found. Under the law as it stands now, the Court has no discretion in the matter, and the assignee of the decree is entitled to execution as of right, provided the other conditions mentioned in the rule have been satisfied. This part of the reasoning of the decisions above referred to has, therefore, become obsolete.

The other ground on which the decision proceeded was brought out prominently by Markby J. in *Sheo Narain Singh v. Hurbuns Lall* (1), as follows:—

"It would lead to the greatest of difficulties if in one Court one party was recognised as being the holder of, and having the control over, a decree and at the same time in another Court another party was recognised as being in that position."

The same argument was used by some of the High Courts in interpreting in a similar way section 234 of the Code of 1882, which laid down the procedure for execution of a decree against the legal representative

(1) (1870) 14 W. R. 65.

of a judgment-debtor, who had died before the satisfaction of the decree. In that section also, it was provided that the application to execute the decree against the legal representative of the deceased judgment-debtor should be made "to the Court which passed it." That section has been replaced by section 50 of the present Code, the phraseology of which is, so far as this matter is concerned, identical with that of the repealed section. In several cases decided in India it had been held that an application under these sections can be made only to the Court which had passed the decree and that the Court to which the decree had been sent for execution was not competent to entertain it and make an order of execution against the legal representative. It was further held that if such an order had been made by the latter Court it would be without jurisdiction and that the irregularity could not be waived. This matter, however, has been set at rest by the recent pronouncement of their Lordships of the Privy Council in *Jang Bahadur v. Bank of Upper India (in Liquidation)* (1), where it has been ruled that, an application under section 50 must be made to the Court which had passed the decree, but if this was not done and the application had been presented to the Court to which the decree had been transferred and no objection had been taken, the defect was one of procedure and not of jurisdiction and might be waived. Their Lordships specifically ruled that the jurisdiction of the transferee Court over the subject matter continued as before, and the mere fact that a certain procedure had "not been complied with was not fatal to the exercise of that jurisdiction but that it was merely a defect in procedure which might be waived and the

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party who had acquiesced in the Court exercising this jurisdiction in a wrong way could not afterwards turn round and challenge the legality of the proceedings."

It seems to me that these observations apply fully to cases under Order XXI, rule 16, the wording of which on this point is, as already stated, analogous to that of section 50.

It follows from the foregoing discussion that neither of the grounds on which the decision in *Sheo Narain Singh v. Hurbuns Lall* (1), or *Amar Chandra Banerjee v. Guru Prosunno Mukerjee* (2), was founded hold good any longer.

Recently the Calcutta High Court in *Shailendra-nath Gosh v. Surendranath De* (3), following the decision of the Privy Council in *Jang Bahadur v. Bank of Upper India* (4), cited above, has held that where substitution under Order XXI, rule 16, is made by the transferee Court it was merely an irregularity which may be waived by acquiescence, and that when this has been done, the party acquiescing cannot turn round and question the jurisdiction of the executing Court.

On the facts there can be no doubt that in the case before us the respondent judgment-debtor had clearly waived the objection. The second contention of the appellant must, therefore, prevail.

In this view of the case it is not necessary to decide the third point as to whether the objection is barred by the rule of constructive *res judicata*.

I would accordingly accept this appeal, set aside the judgment of the learned Judge in Chambers and of the District Judge and remit the case to the District

(1) (1870) 14 W. R. 65.

(3) (1930) I. L. R. 57 Cal. 1137, 1141.

(2) (1900) I. L. R. 27 Cal. 488.

(4) (1928) I. L. R. 3 Luck. 314 (P.C.).

Judge for decision in accordance with law. It will be open to the judgment-debtor, if so advised, to support the ultimate decision of the executing Court on any of the points which had been raised by him before that Court but had been decided against him. Having regard to all the circumstances of the case and the fact that the question was not free from difficulty I would leave the parties to bear their own costs in all Courts.

ABDUL RASHID J.—I agree.

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Appeal accepted.

APPELLATE CRIMINAL.

Before Hilton J.

MUHAMMAD QASIM KHAN—Appellant

versus

THE CROWN—Respondent.

1934

April 19.

Criminal Appeal No. 1438 of 1933.

Criminal Procedure Code, Act V of 1898, Sections 188, 537: Trial for offences committed at Kabul, beyond the limits of British India—Sanction of Local Government signed, and placed on record before the trial ended—Accused not raising any objection till the very close of the proceedings—Defect—whether fatal.

Where an accused in a criminal case relating to offences committed at Kabul, beyond the limits of British India, does not raise any objection as to the jurisdiction of the trial Court till the very end of the proceedings, and the sanction of the Local Government required by Section 188, Criminal Procedure Code, is signed while the trial was proceeding, and is placed on the record of the case before the trial ends—

Held, that the absence of the required certificate during the earlier stages of the trial was not a fatal defect, but a mere irregularity curable under section 537 of the Code.