

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Beverley.

BUNKO BEHARY GANGOPADHYA AND ANOTHER (OPPOSITE PARTY),
 APPELLANTS, v. NIL MADHUB CHUTTOPADHYA
 (PETITIONER), RESPONDENT.*

1891
 June 30.

Execution of decree—Execution proceeding struck off—Civil Procedure Code (Act XIV of 1882), ss. 373, 647—“Suit.”

Section 647 of the Code of Civil Procedure does not operate to extend the rule laid down in respect of a suit in section 373 to an application for execution. *Radha Charan v. Man Singh* (1) not followed.

ONE Nil Madhub Chuttopadhaya having obtained a decree against one Basanta Kumari Debi, applied for execution. The judgment-debtor took the objection that the decree-holder had assigned his rights under the decree to a third person, and that therefore he had no longer any right to execution. Thereupon the pleader on behalf of the decree-holder stated that his client would not proceed with the execution proceedings, but would bring a regular suit to set aside the deed of assignment set up by the judgment-debtor. The Subordinate Judge thereupon dismissed the application “for want of prosecution.” The decree-holder subsequently renewed his application for execution, contending that his pleader in the former proceeding had no authority to state that execution would not be proceeded with.

The Subordinate Judge held that the order dismissing the application for want of prosecution was binding on the decree-holder, and prevented his present application from being granted.

The decree-holder appealed to the District Judge, who held that the pleader for the decree-holder in stating that he would not proceed with execution had exceeded his instructions, and that the order dismissing the former application for want of prosecution was not such an order as could prevent the renewal of his application. He therefore directed execution to issue.

The judgment-debtor appealed to the High Court.

* Appeal from Order No. 69 of 1891, against the order of C. B. Garrett, Esq., Judge of 24-Pergunnahs, dated the 16th of December 1890, reversing the order of Baboo Amitra Lall Chatterjee, Subordinate Judge of 24-Pergunnahs, dated the 1st of October 1890.

(1) I. L. R., 12 All., 392.

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Baboo *Nilmadhub Bose*, for the appellant, contended that the first order not having been set aside, the matter was *res judicata*; and further, that the decree-holder not having obtained leave to withdraw his former application with liberty to renew it, was, under section 373 read with section 647 of the Code, debarred from making the present application. On the latter point he cited *Kifayat Ali v. Ram Singh* (1), *Sarju Prasad v. Sita Ram* (2), *Fakir Ullah v. Thakur Prasad* (3), and *Ralhu Charan v. Man Singh* (4), as showing that section 373 when so read applied to execution proceedings.

Baboo *Akhoy Coomar Banerji*, for the respondent, referred to *Tarachand Megraj v. Kashinath Trimbak* (5) as dissenting from the view taken by the Allahabad Court; and also to *Laljee Sahoo v. Bysakhi Lall* (6), and *Wajihan v. Bishwanath Pershad* (7).

Judgment of the Court (PETHERAM, C.J., and BEVERLEY, J.) was delivered by

BEVERLEY, J.—This is a second appeal from an order of the District Judge of the 24-Pergunnahs, reversing an order of the First Subordinate Judge of that district, by which he had held that a certain application to execute a decree was barred.

It appears that there had been a previous application to execute the decree, and in that proceeding the judgment-debtor had appeared and objected that the decree-holder had assigned his rights under the decree to a third person. Upon that the pleader for the decree-holder intimated that he would not proceed with the application for execution, but would advise his client to bring a regular suit to set aside the alleged deed of assignment. The Subordinate Judge therefore dismissed that application for non-prosecution. The first Court was of opinion that the dismissal of that application operated as a bar to the present application; but this view was overruled by the District Judge.

On appeal before us it is contended—

(1) That the order on the previous application was an order to the effect that execution could not proceed at the instance of the

(1) I. L. R., 7 All., 359.

(4) I. L. R., 12 All., 392.

(2) I. L. R., 10 All., 71.

(5) I. L. R., 10 Bom., 62.

(3) I. L. R., 12 All., 179.

(6) Misc. App. 45 of 1891.

(7) I. L. R., 18 Calc., 462.

decree-holder, and until that order was set aside, it operated as a bar to any subsequent application by him.

(2) That if the notion of the decree-holder be construed as a withdrawal of the application, that withdrawal was made without leave of the Court, and therefore under section 373 of the Code of Civil Procedure (read with section 647) no subsequent application to execute the decree could be entertained.

As regards the first argument, it seems to us that there was no finding that execution could not proceed at the instance of the original decree-holder such as would bar a subsequent application by him. No enquiry on that point seems to have been made. All that appears is that the decree-holder having been met by a certain objection, declined to proceed with his application, which was accordingly dismissed or struck off for non-prosecution. Such an order could not operate as *res judicata*.

On the second point the learned pleader for the appellant has relied on several decisions of the Allahabad High Court, namely, *Kifayat Ali v. Ram Singh* (1), *Sarju Prasad v. Situ Ram* (2), *Fakir Ullah v. Tnakur Prasad* (3), and *Radha Charan v. Man Singh* (4). The last case is the decision of a Full Bench of the Allahabad Court, and although not binding upon this Court, it is entitled to our utmost respect and most serious consideration. It appears to have been expressly dissented from recently by a Division Bench of this Court in *Wajihan v. Bishwanath Pershad* (5); and the decision of that Bench has been followed by two other Benches in *Radha Kishen Lall v. Radha Pershad Sing* (6) and in *Laljee Sahoo v. Bysakhi Lall* (7). It also appears that a Division Bench of the Bombay High Court in *Tarachand Megrag v. Kashinath Trimbak* (8) has expressed an opinion opposed to that of the Allahabad Court.

In the Full Bench case referred to, Edge, C.J., remarks as follows:—"It has been argued here to-day that section 373 does not apply to proceedings in execution. Unless we are to apply, so far as may be, the principles provided for the guidance

(1) I. L. R., 7 All., 359.

(2) I. L. R., 10 All., 71.

(3) I. L. R., 12 All., 179.

(4) I. L. R., 12 All., 392.

(5) I. L. R., 18 Calc., 462.

(6) I. L. R., 18 Calc., 515.

(7) Misc. App. 45 of 1891.

(8) I. L. R., 10 Bom., 62.

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of Courts in the other sections of the Code of Civil Procedure, there would, in a great number of cases, be no provision for what should be done in execution proceedings, as the sections which exclusively relate to execution proceedings are deficient and far from exhaustive, if we are to regard them as the only sections which supply the procedure in execution cases. In my opinion section 647 makes section 373 applicable. I think that 'suit' and 'appeal' in that section apply to those proceedings generally known as a suit and an appeal, that is, to suits and appeals in the strict acceptation of the terms, and that in section 647 the words 'suit' and 'appeal' were not intended to cover proceedings for the enforcement of rights decreed in a suit or appeal." The learned Chief Justice then goes on to refer with approval to the decisions in the cases of *Sarju Prasad v. Sita Ram* in I. L. R., 10 All., 71, and *Fakir Ullah v. Thakur Prasad*, I. L. R., 12 All., 179. The other Judges of the Full Bench (STRAIGHT, BRODHURST, TYRRELL, and MAHMOOD, JJ.) concurred with the Chief Justice.

Now the first paragraph of section 647 of the Code runs as follows:—

"The procedure herein prescribed shall be followed, as far as it can be made applicable, in all proceedings in any court of civil jurisdiction other than suits and appeals."

It appears to us that this provision of the Code was intended to apply to matters such as applications for probate, certificates of guardianship, or to collect debts, which, especially when contested, partake of the nature of suits, and to which the procedure laid down in the Code is clearly more or less applicable. We do not think that the term "proceedings other than suits and appeals" was intended to include or have reference to proceedings in execution of decree. Such proceedings have been frequently held to be proceedings in the suit, and are expressly described as such in the Code, as, for example, in section 3. Moreover, the Code lays down a procedure for the execution of decrees, viz., chapter XIX, comprising sections 223 to 343; and it would scarcely be necessary for the Legislature to declare again in section 647 that those sections shall be followed "as far as may be practicable" in the execution of decrees.

But, whether or not section 647 applies to execution proceedings, we entertain very little doubt that that section cannot operate to extend the rule laid down in respect of a suit in section 373 to an application for execution. In the first place the rule laid down in the second paragraph of that section is not a matter of procedure, but a substantive rule of law. It is a rule based on the general principle that no person shall be allowed to institute successive suits on the same cause of action. But that rule is not applicable to execution proceedings, in which the Code itself (section 230, for example) contemplates successive applications to execute the same decree. And even if the rule laid down in section 373 be held to be a rule of procedure, it is clear to our minds that it is not applicable to proceedings in execution, inasmuch as the principle of the rule is opposed to the principle of the Code in regard to those proceedings.

For these reasons we are unable to concur with the decision of the Allahabad Court, and as that decision has not been followed by any Bench of this Court, we think it unnecessary to refer the matter for the decision of a Full Bench.

This appeal will be dismissed with costs.

Appeal dismissed.

T. A. P.

Before Mr. Justice Tottenham and Mr. Justice Ghose.

JASODA DEYE (DECREE-HOLDER) v. KIRTIBASH DAS AND ANOTHER
(JUDGMENT-DEBTORS).*

1891
July 2.

*Execution of decree—Execution of decree by recorded decree-holder—
Civil Procedure Code (Act XIV of 1882), s. 232.*

The person appearing on the face of the decree as the decree-holder is entitled to execution, unless it be shown by some other person, under section 232 of the Civil Procedure Code, that he has taken the decree-holder's place.

Khetter Mohun Chattopadhyaya v. Issur Chunder Surma (1) relied on.

THIS was an application for execution of a mortgage decree by one Jasoda Deye. The judgment-debtor objected to the execution,

* Appeal from Order No. 118 of 1891, against the order of Bahoo Dwarka Nath Bhuttacharjee, Subordinate Judge of Midnapore, dated the 14th of March 1891.

(1) 11 W. R., 271.

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