

amounts, it would not be a judgment affirming the claim, and so the case would not come under the exception in clause (d) of section 135, and the first paragraph of the section would apply. But that is not the case here.

We think, therefore, that the two grounds upon which the Court of appeal below has dismissed the suit are both wrong in law; and the judgment appealed against must be reversed; and as the other questions raised in the case have not been disposed of by the lower Appellate Court, the case must be remanded to that Court for their determination. Costs will abide the result.

*Appeal allowed and case remanded.*

J. V. W.

*Before Mr. Justice Macpherson and Mr. Justice Ameer Ali.*

RADHA KISHEN LALL (JUDGMENT-DEBTOR) v. RADHA PERSHAD SING (DECREE-HOLDER).\*

*Limitation—Execution of decree—Civil Procedure Code (Act XIV of 1882), ss. 43, 373, 374, 464—Separate applications to execute reliefs of a different character.*

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The Code of Civil Procedure does not prevent a person from making separate and successive applications for execution of a decree, giving reliefs of different characters in respect to each such relief.

Sections 43, 373 and 374 do not apply to proceedings for execution of decree.

*Radha Charan v. Man Singh* (1) dissented from.

*Wajihan v. Biswanath Pershad* (2) followed.

In this case the decree-holder obtained a decree against the judgment-debtor, requiring the latter to remove his hut, which stood on the land decreed. The decree also contained an order for the delivery of the disputed land, and further awarded costs to the decree-holder. Out of the three reliefs thus granted, the decree-holder first applied for execution for costs only, and full satisfaction of this part of the decree was certified to the Court.

Subsequently the decree-holder applied for execution of the other reliefs granted by the decree. In the first Court this application

\* Appeal from order No. 17 of 1891, against the order of J. G. Charles, Esq., Judge of Shahabad, dated the 1st of September 1890; affirming the order of Baboo Promotho Nath Chatterjee, Munsiff of Buxar, dated the 23rd of May 1890.

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for execution was opposed by the judgment-debtor on the ground that it was a *res-judicata*, and that the reliefs were not included in the first application for execution. It was also contended that the application was barred by sections 43 and 373 of the Code of Civil Procedure. That Court overruled these objections and allowed execution to proceed. The judgment-debtor appealed to the District Judge of Shahabad.

The District Judge dismissed the appeal, and the material portion of his judgment was as follows :—

“No doubt the Privy Council has held that the principle of *res-judicata* applies to execution proceedings, but in my humble opinion it does not follow by any means that all legal restrictions, which the Legislature has seen fit to impose upon the institution of suits, should be considered equally applicable to the execution of decrees. Such legal barriers are in one sense matters of procedure, and find a place in the Civil Procedure Code, but in my opinion it is not desirable that they should all be extended to the execution of decrees. The execution of decrees has been separately dealt with by the Code, and if, in addition to the special restrictions of the Code, decree-holders are relegated in other matters to the position of ordinary plaintiffs, it seems to me that undesirable and unnecessary obstacles will be thrown in their way, and the execution of the decrees of the Civil Courts will be surrounded with ever-increasing difficulties. The learned Chief Justice of the Bombay High Court has held in *Tara Chand Megraj v. Kashinath Trimbak* (1), that section 374 of the Civil Procedure Code does not apply to applications for execution, and as the rulings applicable are conflicting, while the practice in Bengal is not, I believe, to apply sections 373 and 43 of the Civil Procedure Code to execution proceedings, I decline to follow the recent rulings of the Allahabad High Court (2) until they are approved by the Calcutta High Court; and I hold, therefore, that the barriers provided by sections 373 and 43 of the Civil Procedure Code are not applicable to proceedings in execution.”

From this order the judgment-debtor appealed to the High Court.

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

(2) I. L. R., 10 All., 71, and I. L. R., 12 All., 179.

Baboo *Taraknath Palit* for the appellant.

Baboo *Hem Chunder Banerjee*, Baboo *Umakali Mookerjee*, and  
Baboo *Jogender Chunder Ghose* for the respondent.

The following cases were referred to in the course of the arguments:—

*Bandey Karim v. Romesh Chunder Bundopadhya* (1), *Protab Chunder Doss v. Peary Chowdhraïn* (2), *Suraj Prosad v. Sita Ram* (3), *Fakir-ullah v. Thakur Prosad* (4), *Pirjade v. Pirjade* (5), *Tara Chand Megraj v. Kashinath Trimbak* (6), *Ramanandan Chetti v. Periatambi Shervai* (7), and *Radha Charan v. Man Singh* (8).

The judgment of the Court (MACPHERSON and AMEER ALI, JJ.) was as follows:—

The decree-holder, the respondent in this appeal, had obtained a decree for possession of a plot of land, for the removal of a hut which stood thereon, and for costs. He first took out execution for costs, and on the amount being realized, the case was struck off on the 5th of June 1889 as disposed of. On the 17th March 1890, he applied to execute the decree for possession and for the removal of the hut, and was met by the objection that the decree could not be executed in parts; that the order of the 5th of June had disposed of the whole case, and that under the provisions of section 43 of the Civil Procedure Code, read with section 647, a further application for execution could not be entertained. The Munsiff and the District Judge on appeal overruled the objections, and it is now contended that they were wrong in doing so, having regard to the provisions of sections 43 and 373 of the Code.

In our opinion section 43 does not apply to proceedings in execution of a decree, and when a decree gives reliefs of a different character, such as a decree for possession and a decree for costs, we see nothing in the Code of Procedure which prevents separate and successive applications for execution as regards each of them. In some cases separate applications to different Courts would be necessary. If the judgment-debtor resided out of the jurisdiction and had no assets within it, the decree for costs would necessarily be executed in the district in which the assets were, although the

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| (1) I. L. R., 9 Calc., 65.  | (5) I. L. R., 6 Bom., 681.  |
| (2) I. L. R., 8 Calc., 174. | (6) I. L. R., 10 Bom., 62.  |
| (3) I. L. R., 10 All., 71.  | (7) I. L. R., 6 Mad., 250.  |
| (4) I. L. R., 12 All., 179. | (8) I. L. R., 12 All., 392. |

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decree for possession would be executed by the Court which passed the decree. In the absence of any provision in the Code directing that the application must be, when possible, to execute the entire decree, however various the reliefs granted may be, we must hold that the second application in the present case is not barred on the ground that the decree-holder did not in his first application apply to execute the whole decree. The order of the Court, striking the case off as disposed of, obviously had reference only to the particular application before it.

As regards the provisions of section 373 of the Code in connection with which it was argued that, as the first application was struck off without any permission to make a fresh one for the unexecuted portion of the decree, a fresh application could not be entertained, our attention has been called to a decision of a Division Bench of this Court in *Wajihan v. Biswanath Pershad* (1), in which it was held, differing from the Allahabad High Court (2), that sections 373 and 374 did not apply to execution proceedings. We agree with the learned Judges who decided that case, and we think that the grounds for holding that sections 373 and 374 do not apply, are applicable to section 43 also. The appeal is dismissed with costs.

*Appeal dismissed.*

A. F. M. A. R.

## CRIMINAL MOTION.

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

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CHATTER LAL AND OTHERS (PETITIONERS) v. THACCOOR  
PERSHAD (OPPOSITE PARTY).\*

*Penal Code (Act XLV of 1860), s. 186—Public Servant—Ameen appointed under Bengal Tenancy Act (VIII of 1885), s. 69—Bengal Tenancy Act, s. 89.*

A person nominated by the Collector under section 69 of the Bengal Tenancy Act, for the purpose of making a division of crops between the

\* Criminal Motion No. 232 of 1891 against the order of G. Geidt, Esq., Sessions Judge of Bhagulpore, dated the 15th of May 1891, affirming the order passed by H. Basu, Esq., Deputy Magistrate of Jamui, dated the 6th of May 1891.

(1) *Ante*, p. 462

(2) *Radha Charan v. Man Singh*, I. L. R., 12 All., 392.