

In our opinion the application contemplated by Art. 179, sched. ii, and described as "an application for the execution of a decree or order of any Civil Court, &c., &c." is an application within the terms of s. 235 of the Code of Civil Procedure, that is to say, an application setting the Court in motion to execute a decree in any manner set out in the last column of the form prescribed; but having so set the Court in motion, any further application during the continuance of the same proceeding is an application to take some step in aid of execution within the terms of cl. 4 in the last column of Art. 179, sched. ii of the Limitation Act. This we may add seems to have been the view taken by the Full Bench in the case of *Umbica Pershad Singh v. Spurdhari Lall* (1). It is unnecessary to consider the ground upon which the lower Court has held that execution is not barred, because we arrive at the same conclusion by holding that, under the existing law of limitation, execution is not barred.

The appeal is therefore dismissed with costs.

J. V. W.

Appeal dismissed.

Before Mr. Justice Tottenham and Mr. Justice Banerjee.
GOURMONI DABEE (DEFENDANT) v. JUGUT CHANDRA
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Res judicata—Party as representative—Execution of decree—Order disallowing objection—Civil Procedure Code (Act XIV of 1882), ss. 13 and 244.

G. brought a suit against I. for the establishment of her rights as purchaser of certain immoveable properties sold in execution of a decree obtained against I., and for possession of the same. After the settlement of issues, but before the suit was finally disposed of, I. died, and his brother J. was made defendant as his legal representative. J. consented to the suit being tried on the defence raised by I., and upon the issues already settled. The suit was decreed, it being held that G. was the purchaser. In execution of this decree, in which G. sought to obtain possession, J. objected that he was entitled to a half share of some and to the entire sixteen-annas of the other properties, and that his brother I. had no right whatever in the same. This objection was disallowed by the Court executing the decree, on the

* Appeal from Appellate Decree No. 1382 of 1888, against the decree of Baboo Karuna Das Bose, Subordinate Judge of Mymensingh, dated the 3rd of May 1888, reversing the decree of Baboo Ram Jadub Tolapatro, Munsiff of Sherepore, dated the 16th of May 1887.

(1) I. L. R., 10 Calc., 851.

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ground that it had not been raised in the original suit, and that, as the decree had been passed in the presence of the party then objecting, he was not entitled to urge it. Thereupon *J.* brought a suit against *G.* to establish his rights. The defence was that the order passed in the execution-proceedings, disallowing the plaintiff's objection, was a bar to the suit under ss. 13 and 244 of the Civil Procedure Code.

Held, that the order disallowing the plaintiff's objection did not operate as *res judicata* under s. 13 of the Civil Procedure Code.

The *Delhi and London Bank v. Orchard* (1) relied on.

Held, also, that this order was no bar to the suit under s. 244 of the Civil Procedure Code.

Kanoi Lal Khan v. Shashi Bhosun Biswas (2) followed.

SUIT for declaration of title.

Gourmoni Dabel, the defendant, obtained a decree against Iswar Chandra Audhikari, the brother of the plaintiff Jugut Chandra Audhikari; and, in execution of that decree, sold certain immoveable properties, alleging that they were the properties of the judgment-debtor Iswar Chandra. The purchase was made in the name of one Kandarpa Narain Singh. The defendant, Gourmoni, attempted to take possession of the properties, on the ground that she had paid the purchase-money, and that Kandarpa Narain was her *benamidar*. She was resisted by Iswar Chandra, who denied her title, alleging that Kandarpa Narain was his *benamidar*. Thereupon, Gourmoni instituted a suit against Iswar Chandra for a declaration that she was the real purchaser of the properties. Iswar Chandra filed a written statement, in which he alleged that he had purchased the properties with his own money in the name of Kandarpa Narain Singh. Issues were settled: but before the suit was finally disposed of, he died, and his brother, the plaintiff Jugut Chandra, was made a defendant as her legal representative. The plaintiff Jugut Chandra filed a petition, in which he prayed that the suit might proceed upon the defence raised by his brother and upon the issues already settled. The only material issue in that case was who paid the purchase-money: Gourmoni or Iswar Chandra? The Court held that Gourmoni, having paid the purchase-money, was the real purchaser, and accordingly decreed the suit.

(1) I. L. R. 3 Calc., 47; I. R., 4 I. A., 127.

(2) I. L. R., 6 Calc., 777; 8 C. L. R., 117.

In execution of this decree, Gourmoni was resisted by the plaintiff Jugut Chandra, who took the objection that he was the owner in his own right of an eight-annas share of some and of the entire sixteen-annas share of the rest of the properties; and that his brother Iswar Chandra had no right whatever in the same. This objection was disallowed by the Court executing the decree, on the ground that it had not been raised in the original suit, and that, as the decree had been passed in the presence of the party then objecting, he was not entitled to urge it. Thereupon the plaintiff brought this suit for a declaration that he was entitled to one half share of some and the entire sixteen-annas of the other properties, of which possession had been sought by the defendant Gourmoni. The defence was that the suit was barred as *res judicata*, and that the plaintiff was estopped from advancing his present claim under s. 115 of the Evidence Act. The Munsiff found that the plaintiff was entitled to a half share by right of inheritance: but held that his claim was barred under s. 13 of the Civil Procedure Code and also s. 115 of the Evidence Act, and accordingly dismissed the suit.

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On appeal, the Subordinate Judge upheld the decision of the Munsiff on the merits, but reversed it on the question whether the suit was barred under s. 13 of the Civil Procedure Code and s. 115 of the Evidence Act. He also decided in favour of the plaintiff the question, which was raised for the first time, whether the suit was barred under s. 244 of the Code of Civil Procedure. The Subordinate Judge accordingly gave the plaintiff a decree for a half share in the properties mentioned in the plaint.

The defendant Gourmoni appealed to the High Court.

The grounds of appeal were as follows:—

(1) For that the Court below ought to have held that the plaintiff's suit was barred under s. 13 of the Code of Civil Procedure.

(2) For that the Court below was wrong in holding that the plaintiff was not bound in the previous suit to raise the objections raised by him in this suit.

(3) For that the Court below ought to have held that the plaintiff was estopped under s. 115 of the Evidence Act from instituting this suit.

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(4) For that the Court below ought to have held that the plaintiff was bound by his application in the previous suit by which he agreed to have the trial of the case only on the issues already settled.

Baboo *Kaluda Kinkar Roy* for the appellant.

Baboo *Mukunda Nath Roy* for the respondent.

Baboo *Kaluda Kinkar Roy* contended that, although the decision in the original suit brought by Gourmoni against the plaintiff's brother might not operate as *res judicata*, by reason of the plaintiff having litigated under a different title from that which he was setting up in the present suit, yet the objections taken by him in execution of the decree, obtained by Gourmoni in that suit, were taken in the same character in which he had brought his present suit, and that consequently the decision in the execution-proceedings operated as *res judicata*. He also contended, (but this contention was not raised in the written grounds of appeal), that the order passed in the execution-proceedings, disallowing the plaintiff's objection, was a bar to the suit under s. 244 of the Code of Civil Procedure; and in support of this contention he cited *Chowdhry Wahed Ali v. Mussamut Jumae* (1), *Oseemunissa Khatoon v. Ameer-oonissa Khatoon* (2), *Raj' Rup Singh v. Ram Golam Roy* (3).

Baboo *Mukunda Nath Roy* contended that s. 13 of the Procedure Code did not apply in the present case. He also contended that the appellant should not be allowed to argue that the suit was barred under s. 244 of the Civil Procedure Code, as no such ground had been taken in his grounds of appeal; and further that, even if the Court allowed the appellant to take that ground, the suit was not barred under s. 244. In support of his argument he cited *Delhi and London Bank v. Orchard* (4) [see the observations of their Lordships of the Privy Council at p. 58]; *Rup Kuari v. Ram Kirpul Shukul* (5); *Beni*

(1) 11 B. L. R., 149; 18 W. R., 185.

(2) 20 W. R., 162.

(3) I. L. R., 16 Calc., 1.

(4) I. L. R., 3 Calc., 47; L. R., 4 I. A., 127.

(5) I. L. R., 3 All., 141.

Prasad v. Lachman Prasad (1); *Kanai Lall Khan v. Sashi Bhuson Biswas* (2); *Shankar Dial v. Amir Haidar* (3); *Abdul Rahman v. Mahmud Yar* (4); *Nath Mal Das v. Tajammul Husain* (5); *Bahori Lall v. Gauri Sahai* (6); *Koop Lull Dass v. Bekani Meah* (7). He also referred to *Raj Rup Singh v. Ramgolam Roy* (8); *Chowdhry Wahed Ali v. Jumae* (9); *Ram Ghulam v. Hazaru Kuar* (10); *Sita Ram v. Bhagawan Das* (11); *Mulmantri v. Ashfaq Akmad* (12).

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The judgment of the Court (TOTTENHAM and BANERJEE, JJ.) was as follows:—

The main question raised in this case is whether the plaintiff's suit is barred under s. 13 of the Code of Civil Procedure.

The facts of the case are shortly these: The defendant, the appellant before us, obtained a decree against the plaintiff's brother, and, in execution of that decree, sold certain immoveable properties, alleging that they were the properties of the judgment-debtor. The purchase was made in the name of one Kandarpa Narain Singh, and the question was raised as to whether Kandarpa Narain Singh was the *benamidar* for the defendant or for the plaintiff's brother.

This dispute led to a suit by the defendant against the plaintiff's brother, Iswar Chandra Audhikari, to have it declared that the defendant was the real purchaser of the property. Iswar Chandra Audhikari filed an answer to the effect that he was the real purchaser: but before the suit was finally disposed of, he died, and his brother, the present plaintiff, was made a defendant as his legal representative, and he consented to the suit being tried upon the defence made by his brother and upon the issues laid down. The suit was decreed, it being held that the defendant was the real purchaser.

(1) I. L. R., 4 All., 131.

(6) I. L. R., 8 All., 626.

(2) I. L. R., 6 Calc., 777; 8 C. L. R., 117.

(7) I. L. R., 15 Calc., 437.

(3) I. L. R., 2 All., 752.

(8) I. L. R., 16 Calc., 1.

(4) I. L. R., 4 All., 190.

(9) 11 B. L. R., 149; 18 W. B., 185.

(5) I. L. R., 7 All., 36.

(10) I. L. R., 7 All., 547.

(11) I. L. R., 7 All., 733.

(12) I. L. R., 9 All., 605.

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In execution of the decree obtained by the defendant, the plaintiff took an objection that one-half share of some and the entire sixteen-annas of the other properties, of which possession was sought in execution, belonged to him in his own right, and that his deceased brother had no right in the same. This objection was disallowed by the Court executing the decree, upon the ground that in the original suit no such objection had been raised, and the decree having been obtained in the presence of the party then objecting, he was not entitled to urge it. The plaintiff, thereupon, brought the present suit for recovery of one half share of some and the entire sixteen-annas of the other properties, of which possession had been sought by the defendant.

The first Court found that the plaintiff was entitled to an eight-annas share of the properties mentioned in the plaint, but it dismissed the suit on the ground that it was barred as *res judicata*, and also because the plaintiff was estopped from advancing the present claim under s. 115 of the Evidence Act.

On appeal, the lower Appellate Court has affirmed the decision of the first Court on the merits, but reversed it on the question as to whether the suit was barred under s. 13 of the Code of Civil Procedure and s. 115 of the Evidence Act. It also considered the question, which was for the first time raised before it, as to whether the present suit was barred under s. 244 of the Code of Civil Procedure, and it decided that question also in favour of the plaintiff. The lower Appellate Court, accordingly, gave a decree to the plaintiff to the extent of eight annas of the properties mentioned in the plaint.

Against that decree of the lower Appellate Court the defendant has preferred this second appeal; and the grounds taken in the memorandum of appeal are that the suit is barred under s. 13 of the Code of Civil Procedure, and that the plaintiff is estopped under s. 115 of the Evidence Act.

This last ground was not seriously pressed by the learned Vakil for the appellant, and we do not see any reason for holding that s. 115 of the Evidence Act can at all apply to this case.

As to the plea of *res judicata*, it was contended that, though in the original suit brought by the defendant for the determination of the question as to whether Kandarpa Narain Singh purchased

the properties really for her or for Iswar Chandra Audhikari, the present plaintiff might have been litigating under a title different from that which he is now setting up; and although for that reason the decision in that suit may not operate as *res judicata*, yet the objection taken by the plaintiff in execution of the decree passed in that suit to the effect that certain shares in the properties, of which possession was sought to be recovered, belonged to him in his own right, was certainly taken in the same character in which he has brought his present suit, and that consequently the decision passed by the Court in the execution-proceedings should operate as *res judicata* upon the present question. It was also contended, though this contention is not raised in the written grounds of appeal, that s. 244 of the Code of Civil Procedure would bar the present suit, as the question now sought to be raised ought to have been, if it has not actually been, disposed of in execution of the decree obtained in the former suit.

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We shall consider these two grounds separately.

The former of these two contentions we consider untenable for two reasons: In the first place, it is only certain descriptions of orders passed in the course of the execution of a decree that have operation by way of *res judicata*, and not every order passed in execution. In the present case, the objection that was raised was raised by the plaintiff, not in his character as judgment-debtor under the decree, but in a different and quite an independent character, and if it could have been adjudicated at all, it should have been under s. 331 of the Code of Civil Procedure, and if it had been so adjudicated, it must have been numbered and registered as a suit as that section requires. In that case the decision arrived at might have had the effect of a decree. But no such thing appears to have been done in this case.

In the second place, though the objection was disallowed, it does not appear to have been disallowed after any adjudication of the question raised. It was disallowed, as has been said at the outset of this judgment, merely upon the ground that the point had not been raised in the original suit.

We are not, therefore, prepared to hold that this was a matter heard and determined within the meaning of s. 13 of the Code of Civil Procedure, and we think we are supported in this view

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by the observations of the Judicial Committee in the case of the *Delhi and London Bank v. Orchard* (1) with reference to a somewhat similar order.

With reference to the plea of *res judicata*, there is one other observation that we wish to make, which is this, that the learned Vakil for the appellant, while arguing the case, gave to his first ground in the memorandum of appeal this somewhat strained-meaning, namely, that it was urged with reference to the order in the execution case; yet reading his memorandum of appeal, especially the first, second, and fourth grounds together, it does seem that the objection was originally evidently meant to be taken with reference to the decision in the previous suit, and not with reference to the order passed in the execution-proceedings. But be that as it may, as we have shown above, that order cannot, in our opinion, have the effect of *res judicata*.

We come now to the second contention noticed above, namely, that the present suit is barred under the provisions of s. 244 of the Code of Civil Procedure.

As this ground is not taken in the memorandum of appeal, we do not feel disposed to allow it to be successfully taken. To allow it to be taken would be far from furthering the ends of justice. It has been found concurrently by both the Courts below in this case that the plaintiff has a good case on the merits; and though the plaintiff was unsuccessful in the execution-proceedings, his objection was thrown out without any adjudication upon it.

Then as to the validity of this contention, it is, we think, more than doubtful. It is true it has been held in several cases, and must now be taken to be settled law, that a person who is made a party to a suit in his representative capacity is a party to the suit within the meaning of s. 244 for several purposes, but it has never yet been held, as far as we are aware, that he is in every capacity a party to the suit for all purposes. The cases referred to are all without exception cases where the judgment-debtor in his representative capacity sought to question his liability to satisfy a decree for money or for costs out of property which he claimed as his own as distinguished from

(1) I. L. R., 3 Cal., 47; L. R., 4 I. A., 127.

that of the person whose representative he was. The questions thus raised are questions which are to be decided with reference to the provisions of ss. 234 and 252 of the Code of Civil Procedure, and these provisions of law throw upon the Court executing the decree the duty of coming to a decision as to whether the liability questioned does or does not really attach. The question now raised is of a very different kind, that question being whether the share that the plaintiff now claims was sold in execution of the decree in the previous suit, irrespective of any question as to whether the purchase was for the plaintiff or for the defendant. If Iswar Chandra Audhikari had not died during the pendency of that suit, and if the decree in that suit had been passed in the presence of Iswar Chandra Audhikari there can be no question that it would have been open to the present plaintiff to raise the point that he now raises in this regular suit; and we see no reason for thinking that the mere fact of the present plaintiff having been made a party defendant in that suit as the legal representative of his brother Iswar Chandra Audhikari, had the effect of enlarging the scope of that suit so as to make the present question come under the description of questions arising between the parties to that suit and relating to the execution of the decree. Indeed s. 368 of the Code of Civil Procedure would not have admitted of the scope of that suit being so enlarged; for that section provides that the person so made defendant may make any defence appropriate to his character as legal representative, and it would certainly never have been appropriate to the character of the present plaintiff as the legal representative of his deceased brother, Iswar Chandra Audhikari, to raise the question in that suit that he now seeks to raise.

We think that this case comes well within the scope of the observations made by this Court in the case of *Kanai Lal Khan v. Shashi Bhosun Biswas* (1), and, following that case, we think the present suit is not barred under s. 244 of the Code of Civil Procedure, even if the objection raised by the learned Vakil for the appellant had been allowed to be taken.

In the result we dismiss this appeal with costs.

C. D. P.

Appeal dismissed.

(1) I. L. R., 6 C. 777; 8 C. L. R., 117.

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