APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Teunon.

CHHAYEMANNESSA BIBI

v.

BASIRAR RAHMAN.*

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Feb. 17.

Power-of-attorney—Omission of name of mukhtiar in the power, by mistake—Amendment of mistake by Court by allowing fresh power to be filed—Inherent jurisdiction of Court to allow amendment of mistake—Effect of amendment as to limitation—Civil Procedure Code (V of 1908) ss. 36, 37—Rules and Circular Orders, Ch. XI, Art. 34.

Where there is no doubt as to the fact that the *mukhtiar* who filed an application for execution had in fact authority from the decree-holder to do so, and that his name was omitted by mistake from the power-of-attorney, the Court may, in its discretion, allow the power to be amended, upon proper application by the decree-holder for the insertion of the name of the attorney.

If such amendment is allowed, it takes effect from the date when the power-of-attorney was originally filed.

SECOND APPEAL by the decree-holder.

This appeal arose out of an application for execution of a decree. The application was made on the 29th June 1908. It was presented by a *mukhtiar*, Gopi Nath. The *mukhtiarnama*, however, had not in its body, by mistake, the name of the *mukhtiar* who signed at the back. This formal defect was allowed to be rectified by the Subordinate Judge, and a properly executed *mukhtiarnama* was filed on the 10th September 1908. The judgment-debtor objected that the application for execution was barred by limitation, as the date of the application must be taken to be the date when the properly executed *mukhtiarnama* was filed. The Subordinate Judge overruled this objection. Meanwhile, the pleader, who appeared for the decree-holder in the original suit, also accepted the power filed

*Appeal from Appellate Order No. 306 of 1909, against the order of W. N. Delevingne, District Judge of Hooghly, dated April 19, 1909, reversing the order of Surendra Nath Mitra, Subordinate Judge of Hooghly, dated Jan. 2, 1909.

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by Gopi Nath. He also signed the application for execution, by order of Court, on the 2nd January 1909, the date on which the application was granted by the Subordinate Judge. The judgment-debtors appealed to the District Judge. He decreed the appeal. According to him, the application for execution being filed by a *mukhtiar* who had no authority to appear for the decree-holder, and the properly executed power presented being clearly out of time, the application was barred. He also held that the subsequent acceptance of the power and application by the pleader who appeared for the decree-holder in the original suit could not validate the proceedings.

The decree-holder thereupon preferred this second appeal.

Babu Jadunath Kanjilal, for the appellant. The original *mukhtiarnama* was allowed to be amended by the Court by fresh power. The Court has inherent jurisdiction to allow amendment of mistakes. The application of 10th September should be held to date back to 29th June, or the latter application regarded an application for amendment. The judgment-debtor, moreover, never objected in the Court of first instance on this ground: see Civil Procedure Code, sections 36, 37 and 39 on the rules of procedure for powers and *mukhtiars*. See also *Panchanan Singha Roy* v. *Dwarka Nath Roy* (1), *Hukum Chand Boid* v. *Kamalanand Singh* (2) on the inherent powers of Courts to amend mistakes, and also *Dhanpat Singh* v. *Lilanand Singh* (3), *Autoo Misree* v. *Bidhoomookhee Dabee* (4), and *Murari Lal* v. *Umrao Singh* (5). On the retrospective effect of amendments, see *Skinner* v. *Orde* (6), *Fuzloor Ruhman* v. *Altaf Hossen* (7) and *Macgregor* v. *Tarini Churn Sircar* (8).

Babu Nagendranath Mitra, for the respondent, contended that where rules of procedure have been laid down by the Court, they must be strictly adhered to.

Cur. adv. vult.

(1) (1905) 3 C. L. J. 29.
(2) (1905) I. L. R. 33 Calc. 927.
(3) (1869) 2 B. L. R. App. 18.
(4) (1878) I. L. R. 4 Calc. 605.
(5) (1901) I. L. R. 23 All. 499.
(6) (1879) I. L. R. 2 All. 241.
(7) (1884) I. L. R. 10 Calc. 541.
(8) (1886) I. L. R. 14 Calc. 124.

MOOKERJEE AND TEUNON JJ. We are invited in this appeal to reverse an order of the District Judge by which he has dismissed an application for execution of a decree as barred by limitation.

The appellant obtained the decree on the 5th July 1905. On the 29th June 1908 she applied for execution. This application was presented by a *mukhtiar*, Gopi Nath, who signed on the back of the *mukhtiarnama* which was attached to the application. As a matter of fact, the body of the *mukhtiarnama* did not contain the name of this *mukhtiar*, and the case of the appellant throughout has been that the name was omitted by the mistake of the writer who drew up the power-of-attorney. The Officer of the Court who examined the application overlooked this defect, though he found out that the application was not in order, as the properties sought to be attached had been imperfectly described. On the 2nd July 1908, the application was returned to the "filing pleader" for amendment within seven days. The application was amended, and refiled on the 6th July following. It was thereupon registered, and notices were directed to be issued on the judgment-debtor under section 248 of the Civil Procedure Code. On the 5th August the judgment-debtor filed his objections. One of these was that the application was barred by limitation; another was that the person who had verified the application was not the duly authorised agent of the decree-holder; but no objection appears to have been expressly taken that the *mukhtiar* had not been duly empowered to file the application. It is not clear how the mistake was first discovered; but on the 10th September the decree-holder filed an application, in which it was stated that by an oversight the name of the *mukhtiar* had been omitted from the power-of-attorney, and along with it a properly executed *mukhtiarnama* in favour of Gopi Nath was filed. The Court directed this *mukhtiarnama* to be placed on the record.

At the hearing, it was objected that there was no application in accordance with law till the 10th September 1908, and that it was consequently barred by limitation; but the Subordinate

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Judge overruled this objection. It may be mentioned that the decree-holder anticipating the objection had, on the 19th September, got Dasarathi Ghosh, who had appeared in the original suit and appeal, to accept the power filed at first by Gopi Nath; and on the 2nd January 1909 Dasarathi also signed the application for execution. The Subordinate Judge thought that this was sufficient to validate the proceedings and allowed execution to proceed. On appeal, the District Judge held that the proceedings were illegal; the application for execution which had been originally signed by Gopi Nath was inoperative, because it was not till the 10th September that Gopi Nath had written authority to appear on behalf of the decree-holder, and the application treated as made on that day was obviously barred by limitation; on the other hand, the application could not be validated by the subsequent signature of the pleader who had appeared in the original suit. In other words, according to the District Judge the application was inoperative, because it had been signed and presented by a *mukhtiar* who had no written authority at the time, and had not been signed by the pleader who might, at that time, have filed it. In this view the District Judge allowed the appeal and dismissed the application for execution.

The decree-holder has now appealed to this Court, and on her behalf it has been contended that in the events which had happened, the application ought to have been treated as within time; that although the original *mukhtiarnama* did not contain the name of the *mukhtiar* who accepted it, it was open to the Court to allow the *mukhtiarnama* to be subsequently amended; and that the application of the 10th September 1908 might, in substance, be treated as an application for such amendment. It has further been argued that as objection was not taken on this ground by the judgment-debtor, he must be taken to have waived it, and that in any event the Court had inherent power so to amend the proceedings as to do justice between the parties. These positions have been controverted on behalf of the respondent, and it has been broadly argued that the parties ought to be made strictly to adhere to the rules of procedure on the

subject. The question raised for our decision is one of some novelty, and is not altogether free from difficulty. But after careful consideration of the arguments addressed to us on both sides, we are of opinion that the contention of the appellant should prevail.

Section 36 of the Civil Procedure Code of 1882 provides that any application or act required or authorised by law to be made or done by a party to a suit, may be made or done by his recognised agent or by a pleader duly appointed to act on his behalf. Section 39 provides that the appointment of a pleader shall be in writing, and such appointment shall be filed in Court. Section 37, which deals with recognised agents, specifies the classes of persons by whom appearances, applications, and acts may be made or done on behalf of the parties. The second clause of the section deals with certificated *mukhtiars*, who, when holding special powers-of-attorney authorising them to do on behalf of their principals such acts as may legally be done by *mukhtiars*, may appear or act. Under the rules of this Court, a certificated *mukhtiar* is authorised to file an application for execution (Rules and Circular Orders, Chapter XI, Article 34). Section 37 of the Code, however, does not define a power-of-attorney, nor is any definition given elsewhere in the Civil Procedure Code, or in the General Clauses Act.

A question might, perhaps, therefore arise as to whether a power-of-attorney, for purposes of section 37, must always be in writing; in other words, whether authority to act, when conferred upon a certificated *mukhtiar*, must be by a written instrument.

In England, it appears to have been ruled that written authority is not absolutely necessary, and that parol authority is sufficient: *Lord* v. *Kellet* (1). The case of *Wright* v. *Castle* (2) shows that an attorney who acts without a written authority may find himself in trouble if his client denies that he had authority to institute the proceedings; and Lord Eldon observed that a solicitor must furnish himself with an authority in writing (Street on Equity Procedure, Volume I, sections 570 and 641;

(1) (1835) 2 Myl. & K. 1. (2) (1817) 3 Mer. 12; 36 E. R. 12.

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Gibson on Suits in Chancery, section 1174; Annual Practice, 1910, Volume II, page 436). In this country, it is undoubtedly the practice for *mukhtiars* to file *mukhtairnamas*, and as it has not been argued that a power-of attorney under section 37 may be by parol, we shall assume that it must be in writing; that is, that a power-of-attorney is an instrument by which the authority of an attorney in fact is set forth. This view receives some support from the case of *Walker* v. *Remmett* (1). If, therefore, written authority is essential, the question arises whether an application made by an attorney, whose name has by mistake been omitted from the power, can be validated by a subsequent amendment. In our opinion there is no reasonable doubt that the Court has inherent power to allow such amendment to be made, and that the amended power takes effect from the date when it was originally filed.

In the first place, it is clear upon the authorities that a Court has inherent power, in any particular case, to adopt such procedure as may be necessary to enable it to do that justice for the administration of which alone it exists: *Panchanan Singha Roy* v. *Dwarka Nath Roy* (2), *Hukum Chand Boid* v. *Kamalanand Singh* (3). As Mr. Justice Mahmood observed in *Narsingh Das* v. *Mangal Dubey* (4), 'the Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law.' This is of course subject to the qualification that, in the exercise of its inherent power, the Court must be careful to see that its decision is based on sound general principles, and is not in conflict with them or the intentions of the Legislature. A similar view was emphasised by Lord Penzance in *Kendall* v. *Hamilton*(5), where he observed that procedure is the machinery of the law after all, the channel and means whereby law is administered and justice reached; it strangely departs from its

(1) (1846) 2 C. B. 850; 69 R. R. 625.
(2) (1905) 3 C. L. J. 29.
(3) (1905) I. L. R. 33 Calc. 927.
(4) (1882) I. L. R. 5 All. 163.
(5) (1879) 4 App. Cas. 504, 525

proper office, when, in place of facilitating, it is permitted to obstruct and even extinguish legal rights, and is thus made to govern where it ought to subserve. Now there can be no room for controversy that the Code of Civil Procedure allows amendments to be made in judicial proceedings under various circumstances. No comprehensive formula can be framed to define precisely the power of a Court to allow such amendments to be made, but this much may be laid down as the cardinal rule, that the allowance of amendments must, in every stage of the case, rest with the discretion of the Court, and that discretion must depend largely on the special circumstances of each case. If a limit to amendments may be laid down, it is this: that they must not be allowed to prejudice the substantial rights of the party in favour of whose opponent the amendment is allowed, but observing due caution in that regard, the time and extent of each amendment are in the judicial discretion of the Court: *Hardin* v. *Boyd* (1), *Codington* v. *Maff* (2).

In a case like the present, where there is no doubt as to the fact that the *mukhtiar* who filed the application for execution had in fact authority from the decree-holder, and that his name was omitted by mistake from the power-of-attorney, it is, in our opinion, reasonable to hold that the Court may in its discretion allow the power to be amended upon proper application by the decree-holder for the insertion of the name of the attorney.

The view we take is supported by the case of *Pinde* v. *Norton* (3), where a mistake of a name in a warrant-of-attorney to suffer a common recovery was allowed to be amended: see also Comyn's Digest, 5th Edition, Volume I, page 746, tit. Attorney, and Bacon's Abridgment, 7th Edition, Volume I, page 404, tit. Attorney. The same view is borne out, to some extent, by the decisions in *Dhanpat Singh* v. *Lilanand Singh* (4), *Autoo Misree* v. *Bidhoomookhee Dabee* (5) and *Lakhmi Das* v. *Gobind Ram* (6), where want of authority in the person who presented

(1) (1884) 113 U. S. 750.
(2) (1862) 14 N. J. Eq. 430; 82 Am. Dec. 258.
(3) (1554) Dyer, 105*a*.
(4) (1869) 2 B. L. R. App. 18.
(5) (1878) I. L. R. 4 Calc. 605.
(6) (1882) Punj. Record 105.

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an application for execution was treated as a mere irregularity which could be waived, a view not inconsistent with that taken in *Murari Lal* v. *Umrao Singh* (1).

In the second place, it is reasonably clear that if such amendment is allowed, it takes effect from the date when the power-of-attorney was originally filed. It is not practicable to lay down any rule of universal application on the subject of the retro-active effect of amendments. There are cases, however, in which amendments have been allowed with retro-active effect ; for instance, when a plaint has been filed upon insufficient court fees, upon payment of deficit court fees, the suit must be taken to have been instituted on the day when the plaint was originally filed : *Skinner* v. *Orde* (2). In other cases of amendments also, for instance, amendments of applications for execution of decrees, the amended application has been treated, for purposes of limitation, as if it had been presented in its amended form on the original date : *Fuzloor Ruhman* v. *Altaf Hossen* (3), *Macgregor* v. *Tarini Churn Sircar* (4), *Jiwat Dube* v. *Kali Charan Ram* (5), *Shama Prosad Ghose* v. *Taki Mullik* (6), which were not referred to in *Raghunatha Thaha Chariar* v. *Venkatesa Tawker* (7), where a different view was taken. In fact, when an amendment has been properly made, and the cause of action is not altered, the amended pleading may properly be regarded as a continuation of the original pleading and takes effect as of the date when the latter was filed. On these principles, we must hold that it was competent to the Court of first instance to allow the omission in the original power-of-attorney to be supplied, and that as soon as the defect was removed, the proceeding was validated from its inception.

The result, therefore, is that this appeal must be allowed, the order of the District Judge set aside, and that of the Court of first instance restored with costs throughout.

Appeal allowed.

S. M.

(1) (1901) I. L. R. 23 All. 499.
(2) (1879) I. L. R. 2 All. 241 ; L. R. 6 I. A. 126.
(3) (1884) I. L. R. 10 Calc 541.
(4) (1886) I. L. R. 14 Calc. 124.
(5) (1896) I. L. R. 20 All. 478.
(6) (1901) 5 C. W. N. 816.
(7) (1902) I. L. R. 26 Mad. 101.