

**(1965) 05 CAL CK 0002**

**Calcutta High Court**

**Case No:** Matter No. 980 of 1932

Mahammad Shams-uz-Zoha

APPELLANT

Vs

Maharaj Kumar Dharendra  
Krishna Deb and Others

RESPONDENT

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**Date of Decision:** May 14, 1965

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 21, Order 21 Rule 22, Order 21 Rule 54, Order 21 Rule 66, 47
- Limitation Act, 1963 - Section 3

**Citation:** 69 CWN 734

**Hon'ble Judges:** S.P. Mitra, J

**Bench:** Single Bench

**Advocate:** R.C. Deb and S.K. Mukherjee, for the Appellant; R.L. Sinha, for the Respondent

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### **Judgement**

S.P. Mitra, J.

This is an application for leave to execute a decree dated the 2nd January, 1940 against the heirs and legal representatives of the deceased judgment-debtor by attachment of 1,000 ordinary shares in East India Electric Supply & Traction Company Limited together with all dividends due thereon. The decree was obviously barred by limitation on the 3rd January, 1952 unless there was a revival within the meaning of article 183 of the previous Limitation Act. Reliance has been placed before me on certain proceedings in execution taken in 1955 and in 1960 and it is urged that in these proceedings there were express or implied decisions that the decree was capable of execution. It is unnecessary for me to go into the proceedings of 1955 which culminated on the 8th January, 1957. For purposes of this application I would refer to some of the events in 1960. On February 19, 1960, the Official Receiver of this Court as judgment creditor filed an application for execution of the decree in the Court of the 4th Subordinate Judge at Alipore. This application was marked as Money Execution Case No. 6 of 1960. After various

proceedings in this execution case had taken place, on December 5, 1961, the Court directed the issue of notice under Rule 54, of Order 21 for attachment of immovable properties belonging to the judgment-debtors. On the 6th March, 1962 a writ under Order 21, Rule 62 was executed without any objection. On the 20th March, 1962 the Court directed issue of notice under Order 21, Rule 66 of the Code. On the 20th August, 1962 three of the heirs and legal representatives of the original judgment-debtor made an application u/s 47 of the Code contending that the decree was barred by limitation. These three petitioners were directed to serve on the judgment-creditor a copy of their petition by the 31st August, 1962. On August 29, 1962 the Court directed issue of notice under Order 21, Rule 66. Then on November 7, 1962 the miscellaneous case filed by the heirs and legal representatives of the deceased judgment-debtor was dismissed for default. On the 9th February, 1963 the notice under Order 21, Rule 66 was served upon the judgment-debtors. On February 2, 1963 the Court issued a sale proclamation fixing the 17th of April, 1963 to be the date of the sale at 11.30 a.m. The sale has not yet taken place, and in Column 10 of the Tabular Statement herein there is a prayer for stay of the Execution Case No. 6 of 1960 pending the disposal of the present execution proceedings. The application which I am dealing with was made on the 2nd January, 1964.

2. Mr. R. Sinha, Learned Counsel for the judgment-debtors contends that both in the proceedings of 1954 and in those of 1960 objection petitions were filed on behalf of the judgment-debtors contending that the decree was barred by limitation. These objection petitions were dismissed for default. The plea of limitation is, therefore, still open to the judgment-debtors and can be taken in the present application as well Mr. Sinha has relied on several authorities.

3. In (1) Bholanath v. Prafulla, 28 Cal. 122, on an application for execution an order for attachment having been issued, the Judgment-debtor objected to the execution on the ground that it was barred by limitation. After several adjournments granted at the instance of the decree-holder, neither party having appeared at the date of the hearing, the court by its order refused the application for execution and disallowed the objection of the judgment-debtor. On a subsequent application by the decree-holder the judgment-debtor again objected to the execution on the ground that, inasmuch as the previous application was barred by limitation, the subsequent application was also barred. It was held, that the Judgment-debtor was not precluded from raising the objection that the previous application was barred by limitation. It should be pointed out that the previous application for execution was refused and in the subsequent application for execution the judgment-debtor was allowed to raise the plea of limitation. In the instant case Money Execution Case No. 6 of 1960 in the Court of the Fourth Sub-ordinate Judge of Alipore has not been dismissed. On the contrary, orders for execution were made and ultimately a date was fixed for sale of the properties attached in execution.

4. The next case of Mr. Sinha is the case of (2) *Khosal v. Ukiladdi*, reported in 14 C.W.N. 114. In this case the head-note is that where the question whether execution of a decree is barred by limitation was not decided because the parties did not appear, there was no bar to the adjudication of the objection when actually raised at a later stage of the proceedings. From page 116 of the Report it appears that the first application for execution was not prosecuted and was subsequently dismissed. The second application for execution was dismissed on the ground that it was time-barred. There was no appeal against the order. Then there was a third application for execution which was dismissed for default. The fourth application for execution was the subject-matter of this appeal. this Court has made the above observations with reference to the order of dismissal for default in the third application for execution. And it has been held, inter alia, that the fourth application was barred by reason of the order in the the second application. In other words, there was an order holding that the application for execution was barred and that order stood unreversed. There was, therefore, no scope for making a fresh application for execution.

5. Learned Counsel for the judgment-debtors then referred to the case of (3) [Hira Lal Bose Vs. Dwija Charan Bose](#) . Here, an application for execution was made. The judgment-debtor preferred an objection on the ground that the decree was barred. On the day fixed for the hearing of the objection both the decree-holder and the judgment-debtor were absent. The objection was dismissed. The execution proceedings were also struck off as the decree-holder had not paid the process fees. It was held that the judgment-debtor was entitled to raise the question of limitation when the decree was again put in execution. In this case also after the judgment-debtor's objection was dismissed for default, there was no order for execution of the decree. In fact, the execution proceedings were struck off.

6. My attention was next drawn to a recent judgment of this Court in (4) [Bishwanath Kundu Vs. Sm. Subala Dassi](#) . In this case it has been stated that a dismissal for default of an objection u/s 47, which involves no decision on the merits, either expressly or impliedly that is, by necessary implication cannot be held to bar a subsequent objection, either similar or different. From paragraph 5 of the judgment at page 274 it appears that the first objection of the judgment-debtor was dismissed for default. The second objection u/s 47 of the Code was also dismissed and that gave rise to the appeal to this Court. this Court has decided that the first dismissal for default did not operate as a bar to the second objection. At no stage was there an order for execution or an adjudication that the decree was capable of execution.

7. I was then invited to consider the decision in (5) [Karali Prasad Roy Vs. Probodh Chandra Mitra and Others](#) . A Division Bench of this Court has held that whether or not a judgment-debtor has been served with notice under Order 21, Rule 22 he is not precluded from raising the point of limitation at the time of attachment or sale; u/s 3 of the Limitation Act the Court is bound to notice the point of limitation

disposing of the matter before it though the point may not be taken by the defendant or the respondent in a suit or an application; the principle incorporated in this section applies to execution proceedings as well, the plea of *res judicata*, is no bar to the judgment-debtor taking the point of limitation to an application for execution and where the application is not in time the Court is bound to dismiss it. In this case the question before the Court was whether the notice under Order 21, Rule 22 was served on the judgment-debtor. The Court came to the conclusion that the judgment-debtor had not been served. He did not appear to the notice under Order 21, Rule 22. He did not raise nor had the opportunity to raise the issue of limitation. The court issued notice under Order 21, Rule 66 and directed sale of the properties as it was incumbent on it to do so. In these circumstances the Court was of opinion that no question of *res judicata* arose. The other observations in the judgment appear to be *obiter dicta* and there are decisions of this Court I shall refer to later in this judgment which are contrary to these observations.

8. Then, in (6) *Chatterput Singh v. Daya Chand Marwari*, 23 C.L.J. 641 the decree was dated the 3rd September, 1896. On the 3rd April, 1897 an application was made for execution by the arrest of the judgment-debtor. Notice was ordered to be issued u/s 245B of the then Code but no evidence was given to show that any other action was taken. On the 2nd March, 1909, an application was made for the transfer of the decree to Bhagalpur and this was ordered by the Registrar. On the 6th April an application was made to the Bhagalpur Court to execute the decree. Notice was issued under Order 21, Rule 22 and on the 6th May the following order was passed:- "Service of notice proved, no objection raised. Let attachment be issued." On the attachment being effected the judgment-debtor came in and objected that, the execution was barred by limitation. this Court held that the mere fact that the High Court transmitted its decree for execution to another Court did not show that it was of opinion that the execution was not barred. Reference was also made to the decision of the Judicial Committee in (7) *Mungal Prashad v. Grija Kant*, 8 I.A. 123. this Court expressed the view that that case was no authority for holding that if a Judgment-debtor did not appear to contest a notice under Order 21, Rule 22, he could not avail himself of the Code which authorised him to put in objections when his property was attached. It is observed that the judgment-debtor in that case acquiesced in the order of attachment and the decision of their Lordships of the Judicial Committee was in great measure based on that acquiescence. There is no doubt that the order for transmission of the decree from this Court to the Bhagalpur Court did not show that this Court had determined that on the date of the order the decree was capable of execution. But *Mungal Pershad*'s case was carefully considered by another Division Bench of this Court in (8) *Lalit Mohan Roy v. Sarat Chandra Saha*, 37 C.W.N. 752. The latter Division Bench was of the view that the Judicial Committee had decided that where a decree-holder applied for execution and the judgment-debtor being entitled to and having had an opportunity to raise a plea of limitation, did not do so and an order for execution by attachment was made

on the application, the judgment-debtor was precluded from raising that plea at a subsequent stage in the execution proceedings. In Mungal Pershad's case an order for attachment was made by the Subordinate Judge, after notice was served on the judgment-debtor, to show cause why the decree should not be executed against him. The Judicial Committee says: "The Order was made by a Court having competent jurisdiction to try and determine whether the decree was barred by limitation. No appeal was preferred against it; it was acted upon, and the property sought to be sold under it was attached, and remained under attachment until the application for the sale now under consideration was made.....the Subordinate Judge had jurisdiction....., to determine whether the decree was barred....., and he made an order that an attachment should issue. He, whether right or wrong, must be considered to have determined that it was not barred. A Judge in a suit upon a cause of action is bound to dismiss the suit, or to decree for the Defendant, if it appears that the cause of action is barred by limitation. But if instead of dismissing the suit he decrees for the plaintiff, his decree is valid, unless reversed upon appeal; and the defendant cannot, upon an application to execute the decree, set-up as an answer that the cause of action was barred by limitation."

9. To my mind the effect of the Privy Council's decision in Mungal Pershad's case, if I may say so with great respect, was correctly appreciated in Lalit Mohan Roy's case. In that case a notice under Order 21, Rule 22 was served. The Judgment-debtor did not appear and an order of attachment under Order 21, Rule 54 was issued. Subsequently when a notice for settlement of sale proclamation under Rule 66 was issued, the judgment-debtor appeared and pleaded that the application for execution was barred by limitation. It was held relying, inter alia, on Mungal Pershad's case that the judgment-debtor was estopped from raising the plea. The Division Bench also referred to the case of (9) Raja of Ramnad v. Valusami Tevar, 48 I.A. 45. In this case upon an application by the appellant to a Subordinate Judge to be brought on the record as assignee of a partially executed decree the respondents who were the judgment-debtors derived the assignment, alleged that the right to execute the decree was barred by limitation, and alleged that the right to execute the decree was barred by limitation, and questioned the liability of certain properties to attachment. The Subordinate Judge by his order of December 13, 1915, re-recognised the assignment, allowed the appellant to execute the decree and gave him permission to file a fresh application for attachment. There was no appeal from that order. The appellant attached certain properties and various claims were disposed of. Upon the matter coming before the Subordinate Judge to be finally dealt with he held that execution of the decree was barred by limitation and this decision was affirmed by the High Court. The Judicial Committee was of opinion that the order of December 13, 1915 was a positive order allowing the appellant to execute the decree and that it was not open to the Court subsequently to hold that execution was barred.

10. Learned Counsel for the respondents has referred me to a decision of the Full Bench of the Allahabad High Court in (10) [Genda Lal Vs. Hazari Lal](#), . In this case it has been decided that there is nothing in law to prevent the Court from entertaining the judgment-debtor's plea of limitation at any time during the pendency of the application for execution just as in a pending suit in which ex-parte proceedings are taken against the defendant. The judgment-debtor is not barred by the principle of res judicata, unless: (1) there was an express adjudication on the question of limitation against him in an earlier proceeding or at an earlier stage of the same proceeding; or (2) there was an adjudication implied in an order which with surrounding circumstances, should be taken to imply a conscious determination of the question of limitation adversely to the judgment-debtor, or (3) where the judgment-debtor might or ought to have taken the plea of limitation, but failed to do so, and the final result of the application was to grant the relief of partial satisfaction of the decree to the decree-holder.

11. This judgment of the Allahabad High Court cannot be followed any longer in view of the Supreme Court's decision in (11) [Mohanlal Goenka Vs. Benoy Krishna Mukherjee and Others](#), . The Supreme Court has said that the principle of constructive res judicata is applicable to execution proceedings. This observation of the Supreme Court was followed in (12) [Komarenalli Balaraj Vs. Akarappu Gurucherenam](#), . A Division Bench of the Andhra Pradesh High Court has held that there can be no controversy that the rule of constructive res judicata applies to execution proceedings, that is to say, that the objections which might or ought to have been taken must be deemed to have been decided against the party. It is also a settled proposition says the Andhra Pradesh High Court, that even an erroneous decision on a question of law operates as res judicata between the parties to it, and that the correctness or otherwise of a judicial decision has no bearing on the question whether or not it operates as res judicata that is the rule operates even if there has been an erroneous order at a prior stage of the execution proceeding. It is observed that a Judgment-debtor is barred by the Rule of constructive res judicata from raising the plea that the execution petition is barred by limitation u/s 48 of the Code at the later stage of the execution proceeding if he has failed to appear and raise the objection when notice was issued to him under Order 21, Rule 22 and when the Court ordered the sale.

12. Upon considering the relevant facts of the instant case which I have discussed above in the context of the authorities placed before me I am of opinion that the fact that the judgment-debtors made an application in Money Execution Case No. 6 of 1960 in the Court of the 4th Subordinate Judge at Alipore u/s 47 of the CPC and have allowed the application to be dismissed for default does not give them a right higher than the right they would have enjoyed if they had not made the application at all. In Money Execution Case No. 6 of 1960 there had been adjudications by Orders for execution passed in those proceedings from time to time that the decree was capable of execution. There were no appeals against those orders which were

binding upon the judgment-debtors. The questions as to whether there has been revival of the decree or the decree is barred are covered by those decisions of the Alipore Court. That Court had not merely passed an order of attachment but had issued a sale proclamation as well. In the premises it is not open to the judgment-debtors in this application to contend that the decree is barred by limitation. I may in this connection refer to only one judgment of this Court in (13) Aswini Kumar Das Gupta v. Karmat Ali Kha, reported in 82 C.L.J. 278. The appellant in this case obtained a final decree in a mortgage suit on the 6th September, 1938. He started execution proceedings on the 7th September, 1942. Notice under Order 21, Rule 22 was directed to be issued and it was served on the judgment-debtor prior to the 7th January, 1943 when the Court by its order directed the decree-holder to file the costs and necessary processes by the 14th January, 1943. The judgment-debtor did not appear on that date namely January 7, 1943 in pursuance of the notice under Order 21, Rule 22. It was held that the Court in passing its order on the 7th January, 1943 was of opinion that the decree was executable and further process in execution might be taken; the order necessarily implied an adjudication that the decree at the time was capable of execution; the order dated January 7, 1943 stood unchallenged; and was not set aside by the judgment-debtor. this Court was also of the view that the fact that the execution case was dismissed for default at a later stage did not matter and the judgment-debtor was precluded by the order of the 7th January, 1943 from raising the bar of limitation in a subsequent execution case on the ground that the previous execution case was filed beyond time. this Court decided further that an order passed in a subsequent execution proceeding directing sale proclamation in issue proceeded on an implied adjudication that the decree was executable and precluded the judgment-debtor from raiding the bar of limitation in the subsequent execution proceeding.

13. This judgment in Aswini Kumar's case provides in my view a complete answer to the contentions raised before me on behalf of the respondents.

14. In the result, therefore, there will be an order in terms of clauses (1) and (2) in Column 10 of the Tabular Statement after deleting the words "and mentioned in column 9 hereof". I also direct that the proceedings in execution in Money Execution Case No. 6 of 1960 in the 4th Court of the Subordinate Judge at Alipore be stayed until further orders of this Court. The orders aforesaid would operate against the following judgment-debtors:-

1. Kumar Digendra Krishna Deb
2. Kumar Swarindra Krishna Deb
3. Kumar Sisirendra Krishna Deb
4. Kumar Charan Krishna Deb
5. Kumar Gopi Krishna Deb

6. Kumar Japendra Krishna Deb
7. Sm. Nirala Sundari Deb also known as Sm. Nirala Deb Bowrani
8. Kumar Radha Krishna Deb
9. Kumar Barindra Krishna Deb and N
10. Kumar Charan Krishna Deb
11. Kumar Tapendra Krishna Deb
12. Sm. Krishna Lakshmi Dutt
13. Sm. Krishna Manjali Bose-the last four as heirs and legal representatives of Kumar Jalendar Krishna Deb, deceased.

The petitioner's cost of this application will be added to the petitioner's claim.  
Certified for Counsel.