Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Thakur Parshad v. *Sheikh Fakir-ul-lah and another, from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered 24th November* 1894.

Present:

LORD HALSBURY.
LORD HOBHOUSE.
LORD SHAND.
LORD DAVEY.
SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

In this appeal the Appellant complains that the High Court of Allahabad has erred in refusing to entertain his application to execute a decree obtained by him against the Respondents on the 11th April 1883.

The mode in which the question arises is as follows:—

The Appellant first applied for execution on the 29th August 1885. He did not actively prosecute that application, and on the 5th January 1886 his pleader stated that the case might be struck off the list of pending cases "for the present." An order was accordingly made striking the case off the list "for default."

On the 24th August 1888 the Appellant made a second application. This was within three years from the date of his first application, and

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was in good time if the period of limitation was to be reckoned from that date; but out of time if the first application was to be treated as a nullity because it had been struck off the list. The Respondents put in a written objection opposing the Appellant's second application on two grounds; one was that his first application did become a nullity. The Subordinate Judge treated it as affording a fresh starting-point of time within the terms of the Limitation Act XV. of 1877, and made an order dated the 18th December 1888 disallowing the Respondents' objection. His opinion on this point appears to be in accordance with many decided cases, and the High Court have not expressed any adverse opinion. This appeal is argued *ex parte*, and their Lordships have to look carefully at the contentions of the Appellant; but they have no hesitation in agreeing with the Subordinate Judge that the application was not barred by lapse of time. The point on which the High Court dismissed it is quite a different one, which their Lordships go on to state.

By the Civil Procedure Code of 1882 it is enacted in Section 373 that if the Plaintiff withdraws from the suit or abandons part of the claim without the permission of the Court to bring a fresh suit, he shall be precluded from bringing a fresh suit for the same matter or in respect of the same part. By Section 647 of the same Code it is enacted that the procedure therein 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.

Some short time ago, in the case of *Sarju Parshad* v. *Sita Ram and another* (I. L. R. 10 All. 71), a decision was passed by the High Court of Allahabad, the effect of which is stated by Mr. Justice Straight in the present case thus:—"That where the circumstances and the

" facts in regard to an application for execution " show that it was withdrawn at the instance of " the pleader for the decree-holder, and that no " sanction was given to its withdrawal with " liberty to present a fresh application, any sub- " sequent application made by that decree-holder " was prohibited by the rule of Section 373 of " the Civil Procedure Code read with Section 647 " of the same Act." And again he says that the principle of Section 373 is properly applicable to execution proceedings, and that a decree-holder who is not desirous to proceed with an application for execution is in the same position as a Plaintiff who desires to withdraw from a suit. That principle has been since adhered to in Allahabad.

The Subordinate Judge was of course bound by the ruling of the High Court, but he construed his order of the 5th January 1886 in combination with the statement then made by the Appellant's pleader and showed therefrom that further proceedings were contemplated, and that the order ought to be read as giving permission for such proceedings. Incidentally, and by way of showing what hardship would be worked by construing the exact terms of his order as if they amounted to an absolute dismissal of the case, he mentions that the universal practice was to treat orders of that kind as not constituting any bar to future applications by decree-nolders.

On the Respondents' appeal the High Court refused to construe the order of the 5th January 1886 according to the interpretation of the Subordinate Judge. They considered themselves bound by the order as recorded. They do not deny the practice as stated by the Subordinate Judge; on the contrary, Mr. Justice Straight refers to it as very loose and as requiring the greater strictness enforced by the ruling in *Sarju Parshad's* case. On this point their Lordships have only to say that they think the

Subordinate Judge right in reciting the whole of the record of the 5th January 1886, which embodied the pleader's statement, in order to get at the true meaning of the order; and that he has given a very reasonable account of its meaning. But they do not further examine that question, because their decision must be rested on the more general ground that the ruling in *Sarju Parshad's* case is erroneous.

It is not suggested that Section 373 of the Civil Procedure Code would of its own force apply to execution proceedings. The suggestion is that it is applied by force of Section 647. But the whole of Chapter XIX. of the Code, consisting of 121 sections, is devoted to the procedure in executions, and it would be surprising if the framers of the Code had intended to apply another procedure, mostly unsuitable, by saying in general terms that the procedure for suits should be followed as far as applicable. Their Lordships think that the proceedings spoken of in Section 647 include original matters in the nature of suits such as proceedings in probates, guardianships, and so forth, and do not include executions. That is the view taken by the High Court of Calcutta, after consideration of the Allahabad decisions, in the case of *Bunko Behary Gango Padhya and another* v. *Nil Madhub Chutto Padhya* (I. L. R. 18 Cal. 635).

On this construction of Section 647 the reasoning of the High Court in *Sarju Parshad's* case falls to the ground. And it is clear, both from the Code itself and from the provisions of the Limitation Act of 1877, that the Legislature contemplated that there might be a succession of applications for execution. Under these enactments a course of practice has grown up all over India. Whether it is an injurious practice as intimated by the High Court in this

case, is not a question for their Lordships. It appears to be allowed by the law, and it has never been successfully impugned except in Allahabad. The High Court of Bombay after one contrary decision, and the High Courts of Calcutta and Madras, have repeatedly affirmed the legality of the procedure which is struck at by the ruling in *Sarju Parshad's* case.

Their Lordships' attention has been called to the recent Act VI. of 1892, which would appear to have been passed in order to avoid the disturbance of practice caused by the Allahabad rulings. That Act is framed so as to apply to the present appeal, and would have controlled their Lordships' opinion had it been the other way. But having regard to the controversies which have arisen, and the difference of opinion between the various High Courts, their Lordships have thought it right to state their opinion that the Act of 1892 does nothing more than express the true meaning of the Civil Procedure Code.

The result is that the High Court ought to have dismissed the Respondents' appeal with costs. Their Lordships will humbly advise Her Majesty to make that order, thereby restoring the Subordinate Judge's decree of the 18th December 1888. The Respondents must pay the costs of this appeal.