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the fulfilment of the trust; but the dedication once made cannot be recalled(1). Should the intermediate purposes of the dedication fail, the rule of Mahomedan law appears to be that the final trust for charity does not fail with them. It is but accelerated(2), being itself regarded as the principal object in virtue of which effect is given to the accompanying and intervening dispositions. Charitable grants being thus tenderly regarded, it would be inconsistent that a power of revocation should be recognized in the grantor. It is not recognized; and on the several questions submitted to the Court I must find against the plaintiff.

The costs of the defendant to be paid by the plaintiff by means of deductions from sums coming due to her under the indenture.

Defendant's costs as between attorney and client not thus satisfied to be defrayed out of the trust fund.

Attorneys for the plaintiff and second defendant.—Messrs. *Craigie, Lynch, and Owen.*

Attorneys for the Advocate General.—Messrs. *Hearn, Cleveland, and Little.*

(1) Baillie's M. L. 545, 558, 588.

(2) Baillie's M. L. 553, 558; *In re Williams*, L. R. 5 Ch. Div. 735; *In re Birkett*, L. R. 9 Ch. Div. 576.

APPELLATE CIVIL.

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Melvill.

September 26.

MANJUNA'TH BADRA'BHAT (ORIGINAL DEFENDANT), APPELLANT, *v.* VENKATESH GOVIND SHA'NBHOG (ORIGINAL PLAINTIFF), RESPONDENT.*

Decree—Execution—Limitation—Act XIV of 1859—*Act IX of* 1871—*Applications in suits instituted before the* 1*st April*, 1873—*Act VIII of* 1859, *Section* 2—*Act X of* 1877, *Section* 13—*Res judicata—Meaning of "suit".*

The decision, by a competent Court, that an application for the execution of a decree is barred by limitation, has the effect of *res judicata*; and although such decision may be erroneous, yet so long as it remains unreversed in appeal it is valid and binding, and the question cannot be re-opened. A decision, that an application for execution is not time-barred, has a similar effect.

* Second Appeal, No. 10 of 1880, from order.

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On the 15th April, 1868, the plaintiff applied for the execution of a decree held by him against the defendant, and certain houses were thereupon attached. In April, 1869, the attachment was raised on the intervention of a third person. The plaintiff then brought a suit to establish his right to attach the houses, and obtained a decree on the 28th February, 1871. An appeal was made, and the suit was finally decided in the plaintiff's favour in April, 1873. After the plaintiff had obtained his original decree, and while the appeal was pending, he applied for the sale of the houses in execution on the 30th November, 1871, and subsequently made three other applications within three years of each other, the last of which was dated the 30th October, 1876. The Court rejected this last application on the 28th November, 1876, on the ground that the execution of the decree was barred, as more than three years had elapsed between the first and second applications (*i. e.*, the applications of the 15th April, 1868, and 30th November, 1871). The plaintiff appealed against the order; but his appeal was rejected, because he had failed to produce with it a copy of the order appealed against. The plaintiff took no further steps in that proceeding, but made a fresh application for execution on the 10th August, 1878. The Subordinate Judge rejected it, on the ground that the execution was barred, the matter being *res judicata*. In appeal, the District Judge reversed that order, and allowed execution. On appeal to the High Court,

Held on the authority of *Mungul Pershad Dichit v. Grija Kant Lahiri Chowdry*(1) that the rule of *res judicata* applied, and that the application of the 30th November, 1871, was time-barred, and, *a fortiori*, every subsequent application was barred.

Semble.—A proceeding in execution is a proceeding which terminates in a decree as defined by section 244 of the Civil Procedure Code (Act X of 1877), and is, therefore, a suit within the meaning of the Code.

THIS was a second appeal from the order of J. W. Walker, Acting Judge of Kanara, in a miscellaneous appeal, reversing the decree of the Second Class Subordinate Judge of Kumta.

The facts of the case are briefly stated in the head-note above, and will be found fully set forth in the judgment of the High Court.

On the 10th August, 1878, the plaintiff, Venkatesh, applied to the Subordinate Court of Kumta for the execution of a decree held by him against the defendant, Manjunath. The Court rejected the application as barred by limitation. In appeal, the District Judge reversed that order, and allowed execution. The following are his reasons :—

" The points for decision are : (1) whether the execution of the decree is time-barred; and (2), if not, whether the present application

(1) L.R. 8 Ind. Ap. 123.

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is barred by the former decision that the execution is time-barred. My finding on these points is in the negative.

"As to the first question, if the application of November, 1871, was time-barred, then the present application would be barred through the break in the chain of applications (see *Gopal* v. *Ganeshdas*, 8 Bom. H. C. Rep., A. C. J. 97 ; and *Ameerun Bibee* v. *Shib Pershad Thakor*, 8 Calc. W. R. Civ. Rul., 199). The point, therefore, for determination is, whether the application of November, 1871, was within time or not. At that time the Limitation Act (IX of 1871) was in force, and there is a Full Bench Ruling of the Allahabad High Court (I. L. R., 1 All., 355) that, under circumstances above stated, the application was not barred under Schedule II, art. 167. According to that decision the application of November, 1871, should be taken as a continuation of the application of April, 1868, after the interruption caused by the claim of a third person, had ceased by a decree in plaintiffs favour, and the three-years' rule, accordingly, does not apply.

" On the next point, the decision of the Privy Council in *The Delhi and London Bank* v. *Orchard*, reported in I. L. R. 3 Calc. 47, seems to apply. It was there held that an order rejecting an application to execute a decree on the ground of its being time-barred, was not an adjudication within the rule of *res judicata*. That decision refers to the old Limitation Act (XIV of 1859), sec. 20 ; but the ruling appears to me to be equally applicable to the Acts of 1871 and 1877 and the new Civil Procedure Code. It is urged that in the Privy Council case there was an *ex-parte* decision on the point of limitation ; while, here, the respondent appeared and was heard. I do not see, however, that this can affect the question at all. In the above case the Privy Council found that if a Court rejected an application for the execution of a decree on the ground of its being time-barred, and a subsequent application were made within three years, the Court could, on the latter application, order execution if, in point of fact, the execution was not time-barred, notwithstanding the previous order rejecting the former application. The present case is precisely similar.

" It may seem that such a decision is anomalous, and opens up

a prospect of increasing work for the Courts. But, in practice, probably little inconvenience will be felt.

"With respect to the *res-judicata* objection, it is clear that the case does not fall under the law as now contained in section 13 of the Civil Procedure Code. The rule there refers only to a *former suit*, and not to a second application in the same suit. Next, under section 230 of the Code, there is no restriction imposed as to applications for execution,—the restriction contained in the Code, as first passed, about due diligence being now removed. It seems clear, therefore, that there is nothing to prevent the application to the Court from which the appeal is brought, or the present appeal. It may be pointed out that as, under the amended Code, a miscellaneous appeal is no longer allowed in such a case as the present, practically the anomaly, noticed above, will cease. * * * *

"I reverse the decision of the lower Court, and order that execution issue on the application".—(12th June 1880.)

The defendant appealed to the High Court.

Shamrav Vithal for the appellant.

Ghanasham Nilkanth for the respondent.

The following is the judgment of the Court, delivered by

MELVILL, J.—In this case we have to consider the effect of the recent judgment of the Privy Council in *Mungul Pershad Dichit* v. *Grija Kant Lahiri Chowdhry* (1)

This judgment lays down two propositions, which will revolutionise the practice of the Indian Courts in two important particulars.

The first proposition is that, as regards suits instituted before the 1st April, 1873, all applications in them are excluded from the operation of Act IX of 1871, and are governed by Act XIV of 1859.

This decision must, of course, be accepted with the respect due to the tribunal from which it emanates, and must be acted upon in future, though directly opposed to the practice of the past.

(1) L. R. 8 Ind. Ap. 123.

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The second proposition is that, although a decree may be barred at the date of some order made for its execution, yet such order, though erroneously made, is nevertheless valid, unless reversed upon appeal.

This proposition must materially affect the practice of our Courts in dealing with a second application for execution made within three years from a previous time-barred application which has been erroneously admitted and acted upon. The practice in such cases has been to reject the second application on the ground that the previous application, from which the three years are dated, was itself time-barred.

In this practice the High Court of Bombay considered (see *Gopal* v. *Ganeshdas* [1]) that it was following the decision in the Calcutta Full Bench case, *Bisseshur Mullick* v. *Maharajah Mahatab Chunder Bahadoor* [2]. The Calcutta High Court has always taken the same view of the intention and scope of that decision. In the Privy Council case, which we are now considering, the High Court had based their judgment upon the Full Bench case, the effect of which they stated to be that "a decree having been once dead, no proceeding by means of an application out of time could revive it". But, in delivering the judgment of the Judicial Committee, Sir Barnes Peacock limits the scope of the Full Bench decision, to which, it is to be remarked, he was himself a party. He points out that in the Full Bench case there had been no proceedings after the decree was barred, beyond an application and the service of a notice on the judgment-debtor; and that no order had been made. The proceedings under that execution were in fact, for some reason or other, struck off. But Sir Barnes Peacock then goes on to say that when, upon a time-barred application, a Court makes an order for execution, that order amounts to an adjudication by a competent Court that the application is not time-barred: and, although such adjudication may be erroneous, it is nevertheless *res judicata*, and, unless the judgment-debtor appeals and obtains a reversal of the order, the order remains valid and binding, and it is not competent to any Court to re-open the question in a subsequent proceeding.

(1) 8 Bom H. C. Rep. 97.

(2) 10 Calc. W. Rep. F. B. 8.

This judgment goes no further than to ascribe the effect of *res judicata* to a decision, whether express or implied, that an application is *not* time-barred. But it seems to be a necessary conclusion that the same effect must be given to a decision that an application *is* time-barred. If a decision be valid and binding, although it may be erroneous, when it is given in favour of one party, it cannot be less so when it is in favour of the other party. In the present case the learned Judge (who had not, of course, had the advantage of seeing the Privy Council case with which we have been dealing) has, indeed, held otherwise, and has supported his opinion by a reference to the decision of the Judicial Committee in The *Delhi and London Bank* v. *Orchard*[1]. That decision was also delivered by Sir Barnes Peacock, and was cited in the argument in *Mungul Pershad Dichit* v. *Grija Kant Lahiri Chowdhry*. It would, therefore, be very surprising if we were to find any irreconcileable inconsistency in the two judgments. A careful consideration of the judgment in *The Delhi and London Bank* v. *Orchard* will show that there is not, in fact, any such inconsistency. It is quite true that at the close of that judgment their Lordships make the following observation :—

"It was contended that the rule *res judicata* applied, and that the application made on the 4th of May, 1871, was barred by the order of the Deputy Commissioner of the 10th day of December, 1869, from which no appeal was preferred. But their Lordships are of opinion that the order of the 10th day of December, 1869, was not an adjudication within the rule of *res judicata*, or within section 2 of Act VIII of 1859."

No reasons are given for the above observation ; but it is clear that it applies only to a particular order, and cannot be construed into a general rule, unless the particular order referred to is found to be one of a general class. Now the order referred to is set out in the judgment of the Privy Council, and is as follows :—

"The decree is of a prior date to the introduction of Act XIV of 1859. It should be executed according to the civil law of the Punjab ; and as, according to the said law, the period of one year was fixed for its execution, and, in case that period expires, the rule is that the decree should be executed by obtaining the

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

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sanction of the Commissioner; and as, on the report sent for obtaining sanction, the Commissioner did not pass any order either giving sanction or any other order; and as it is not within the power of this Court to execute such a decree, it is ordered that the petition be sent to the record-room."

It appears to us that the above order was not in the nature of an adjudication at all, and that the description of it in the head-note to the report in the Indian Appeals, and still more the description in the head-note to the Calcutta Report, is incorrect, and gives an erroneous idea of the meaning of the Judicial Committee's observation. The Deputy Commissioner did not, in fact, decide that the application was time-barred, nor did he decide anything. He simply said that, as he could not execute the decree without the Commissioner's sanction, and as the Commissioner had not given the sanction which had been applied for, nor made any other order, it was not within his power to execute the decree, and, therefore, the application must go to the record-room. The Judicial Committee might well say that this was not an adjudication within the rule of *res judicata*, or within section 2 of Act VIII of 1859. We do not think that the question, whether a decision that an application is time-barred is *res judicata*, is in any way concluded by the observation of the Privy Council in *The Delhi and London Bank* v. *Orchard*, but we think that it *is* concluded by necessary inference from the judgment of the same tribunal in *Mungul Pershad Dichit* v. *Grija Kant Lahiri Chowdhry*.

It cannot, we think, be said that the rule of law which we have deduced from the recent Privy Council judgment is inequitable, or opposed to public policy. On the contrary, it appears to us that it would, (as the learned District Judge in the present case admits), be anomalous, and, we may add, inconvenient and unjust, if a judgment-creditor, whose decree had been declared by a subordinate, but competent, Court to be time-barred, and who had acquiesced in such decision, or had failed to get it reversed in appeal, were to be allowed to go again to the subordinate Court with another application for execution, and ask that Court to determine that the previous decision, though perhaps confirmed by the High Court or the Privy Council, was erroneous and of

no effect. A judgment-debtor, who has once obtained a decision from a competent Court, declaring the judgment against him to be dead, is surely entitled to expect that, so long as that decision remains unreversed, he will not be further harassed by applications for execution.

We have been referred to a decision of the Full Bench of the Allahabad Court in *Rup Kuari* v. *Ram Kirpal Shukul* (1), in which that Court held that the law of *res judicata* does not apply in proceedings in execution of a decree; two of the learned Judges basing their decision on the ground that a proceeding in execution is not a "suit" within the meaning of section 13 of Act X of 1877, and a third learned Judge considering the question concluded by the judgment of the Privy Council in *The Delhi and London Bank* v. *Orchard*. That decision of the Allahabad Court is, no doubt, opposed to the view which we have expressed. But the case was decided before the judgment of the Privy Council in *Mungul Pershad Dichit* v. *Grija Kant Lahiri Chowdhry* was given, and it may be that it will have to be reconsidered by the light of that judgment. It is true that the Privy Council had not to consider the effect of section 13 of Act X of 1877; but they were bound to consider section 2 of Act VIII of 1859, the provisions of which are as closely limited to *suits* as are those of the later Code of Civil Procedure. The Privy Council must, therefore, have held either that the word "suit" has a more extensive application than is given to it by the Allahabad Court, or else, (and the observation already quoted from *The Delhi and London Bank* v. *Orchard* renders this the more probable hypothesis), that the rule of *res judicata* extends much further than the limited terms of the Civil Procedure Code. But, independently of this, and even if we felt ourselves to be bound down within the four corners of Act X of 1877, we are not sure that we should feel constrained to put upon the word "suit" in section 13 the narrow construction adopted by the Allahabad High Court. Section 2 of the Act, as amended by Act XII of 1879, declares that an order under section 244 is a decree; and the term "decree" is defined to mean "the formal adjudication upon *any right claimed* or defence set up in a Civil Court, when

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

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such adjudication, so far as regards the Court expressing it, decides *the suit* or appeal". From this it might very fairly be argued that every proceeding which terminates in a decree (and a proceeding in execution is such a proceeding) is a suit within the meaning and intention of the Code. In the case of *Bhikambhat* v. *Joseph Fernandez* (1) we have pointed out that there may be a distinction betwen the term " suit" as used in the Procedure Code and the term " regular suit" as used in the Limitation and other Acts ; and we referred to the decision of the Calcutta High Court in *Syud Emam Momtazuddeen Mahomed* v. *Raj Coomar Doss* (2), in which it will be observed that the Full Bench of that Court in dealing with the question of *res judicata* refused to adopt the narrow construction which one learned Judge wished to attach to the word " suit" in section 2 of Act VIII of 1859.

It only remains for us to apply the law, as we have gathered it from the judgment of the highest tribunal, to the circumstances of the present case. Those circumstances are stated by the learned District Judge to be admittedly as follows :—The plaintiff made his first application in execution of his decree on the 15th April, 1868. Some houses were attached thereon ; but a third person intervened, and the attachment was raised in April, 1869. The plaintiff then brought a suit to establish his right to attach the houses, and obtained a decree on the 28th February, 1871. An appeal was made, and the suit was finally decided in plaintiff's favour in April, 1873. After plaintiff had obtained his original decree, and while the appeal was pending, he applied for the sale of the property in execution on the 30th November, 1871. He also made three other applications after that date within three years of each other, the last being on the 30th October, 1876. This last application was rejected by the Subordinate Judge on the 28th November, 1876, on the ground that the execution of the decree was barred, as more than three years had elapsed between the first and second applications,—that is between the applications of April, 1868, and November, 1871. The plaintiff thereupon made a miscellaneous appeal to the District Court, which was rejected, because plaintiff had failed to produce with his memorandum of appeal a copy of the order appealed against. The plaintiff took

(1) I. L. R. 5 Bom. 673. (2) 23 Calc. W. Rep., 187.

no further steps in that proceeding, but he made a fresh application for execution on the 10th August, 1878. The Subordinate Judge rejected this application, on the ground that the execution was barred, the matter being *res judicata*. In appeal the District Judge laid down, as the point for determination, whether the application of 30th November, 1871, was time-barred or not, and he reversed the order of the Subordinate Judge, holding that the matter was not *res judicata*; that the order of the Subordinate Judge, dated the 28th November, 1876, by which he held the application of the 30th November, 1871, to be time-barred, was erroneous; and that, there having been a continuous chain of applications since the 30th November, 1871, the last application of the 10th August, 1878 was in time. The matter now comes before us in second appeal.

If it were possible for us to consider the issue laid down by the learned District Judge, we should probably come to the same conclusion at which he has arrived. Indeed, it was admitted by the pleader for the appellant that, if we apply, (as we are now bound to do,) the provisions of Act XIV of 1859, and not those of Act IX of 1871, we should be obliged to hold that the Subordinate Judge's order of the 28th November, 1876, was erroneous. It may be, too, that, as the learned District Judge says, the order was equally erroneous under the provisions of Act IX of 1871. But, although that order may have been erroneous, yet, not having been reversed in appeal, it is nevertheless valid and binding, and the question cannot be re-opened. We are bound, by the rule of *res judicata*, to hold that the application of the 30th November, 1871, was time-barred; and *a fortiori*, every subsequent application was barred.

It was argued that an order for execution was issued in December, 1871, upon the application of the 30th November, 1871; that, according to the view taken by the Privy Council, this order was equivalent to a decision that the application was within time; and that the question being thus already *res judicata*, the decision of the Subordinate Judge on the 28th November, 1876, was without jurisdiction, and is, therefore, of no effect. But this argument is really nothing more than a repetition of the statement that the Subordinate Judge's order of the 28th November, 1876,

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was erroneous. The Subordinate Judge had jurisdiction to decide whether the matter before him was *res judicata* or not; and if he decided this question wrongly, or, if the question not having been raised, he did not decide it at all, his decision is not the less binding, and cannot now be set aside.

We have come to this conclusion reluctantly, for the plaintiff seems to have been diligent in his endeavours to obtain the fruit of his decree. He appealed against the fatal order of the 28th November, 1876, and the ground on which his appeal was rejected was a very technical one. He might, (unless there was some strong reason to the contrary), have been allowed time to produce the copy of the order appealed against.

The order of the District Judge is reversed, and that of the Subordinate Judge restored. The respondent must bear the costs in the two lower Courts. The parties will bear their own costs of this second appeal.

Decree reversed.

APPELLATE CIVIL.

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Pinhey.

September 6. APA'JIBHIVRA'V RAYRIKUR (ORIGINAL PLAINTIFF No. 3), APPELLANT, *v.* KA'VJI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Mortgage of property already sold in execution—Subsequent mortgagee with notice of previous sale—Assignment—Rejection of application under section 269 of Act VIII of 1859—Suit within one year.

On the 17th October, 1866, K (defendant No. 1), one of the three sons of Bahirji, mortgaged certain immoveable property to one Narhar with possession. On the 19th December, 1866, Atmaram (plaintiff No. 1) obtained a money decree against K and the estate of his deceased father. In execution of that decree the property was sold by the Court and purchased by Atmaram himself, who obtained a certificate of sale dated the 30th January, 1868. He subsequently sold and conveyed the property to Damodar and Apaji (plaintiffs Nos. 2 and 3). On applying to the Court for possession, the plaintiffs were resisted by Narhar. The Court rejected the plaintiffs' application on the 11th July, 1868. On the 31st May, 1871, K and his two brothers mortgaged the property to M (defendant No. 2), who took the mortgage with full notice of the Court sale to the plaintiff Atmaram. K and his

*Second Appeal, No. 26 of 1881.