

**Krishna Mohan Samanta and anr. Vs. Khandu Moyee Dasi**

**LegalCrystal Citation :** [legalcrystal.com/863884](http://legalcrystal.com/863884)

**Court :** Kolkata

**Decided On :** Jan-08-1954

**Reported in :** AIR1954Cal295

**Judge :** P.N. Mookerjee, J.

**Acts :** [Code of Civil Procedure \(CPC\), 1908](#) - Section 11 - Order 21, Rule 22

**Appeal No. :** A.F.A.O. No. 79 of 1953

**Appellant :** Krishna Mohan Samanta and anr.

**Respondent :** Khandu Moyee Dasi

**Advocate for Def. :** Ranjit Kumar Banerjee and ;Bimal Kumar Banerjee, Advs.

**Advocate for Pet/Ap. :** Sukumar Ghose, Adv.

**Disposition :** Appeal dismissed

**Judgement :**

P.N. Mookerjee, J.

1. This is the judgment-debtors' appeal arising out of proceedings in execution of a final mortgage decree. The preliminary decree in the mortgage suit was passed on 30-8-1939 and it was made final on 9-12-1939. It was first put into execution in 1941 in Title Execution Case No. 100 of that year. The said execution case was dismissed on part satisfaction on 22-6-1943. On 19-7-1946, the mortgagee decree-holder again applied for execution alleging that limitation had been saved by a payment made towards the decree on 10-4-1944. In that execution case (Title Execution Case No. 70 of 1946) notices were served upon the judgment-debtors under Order 21, Rule 22, Civil P. C., but none of them appeared in pursuance of the notices on the date fixed, viz., 6-1-1947. On this last mentioned date the court recorded an order to the following effect;

'Notice under Order 21, Rule 22, Civil P. C. served. The judgment-debtors do not appear, process fee filed but written process not filed. To 10-1-47 for filing complete requisites.'

The next order was recorded on 10-1-1947 in these terms:

'Decree-holder takes no steps. He do show cause for not taking step by 18-1-47.' And on this last mentioned date the execution case was dismissed for default by the

following order: 'Decree-holder did not take step though sufficient time had already been allowed to him. Ordered that the execution case be dismissed for default.'

2. Thereafter on 12-1-1950, the present execution case was filed and on receipt of notice under Order 21, Rule 22, Civil P. C., the judgment-debtors appeared and filed objections under Section 47 of the Code. The main objection taken to the execution of the decree was on the ground of limitation. It was pleaded by the judgment-debtors that there was no payment as alleged by the decree-holder on 10-4-1944 and- that therefore, the second execution case (Title Execution Case No. 70 of 1946) was time-barred. Accordingly, the judgment-debtors contended that the present execution must be dismissed on the ground of limitation. In connection with this question of limitation, it was also contended by the judgment-debtors that in the second execution case there was no service upon them of the notices under Order 21, Rule 22 of the Code. Both the courts below have overruled the judgment-debtors' objections and have directed the execution to proceed. Against this concurrent decision, the present appeal has been filed by the judgment-debtors.

3. On the question of the payment, alleged to have been made on 10-4-1944, the courts below have found it as a fact that such payment was made by one of the judgment-debtors Krishna Samanta. The courts below have further found that Krishna Mohan was the 'Karta' of the joint family of which the other judgment-debtors were members. But it appears that the judgment-debtors also included a deity of which the other judgment-debtors were shebait. It is at least open to doubt whether the payment made by Krishna Mohan Samanta without describing himself as the Karta or as the shebait of the Deity or as purporting to act on behalf of all the members of the joint family or on behalf of all the shebait of the Deity can be taken as a sufficient payment for the purpose of saving limitation. There is also very little evidence that Krishna Mohan made the payments as 'Karta' or as Shebait of the deity. I am, therefore, not prepared to proceed in this case on the finding of the two courts below that the alleged payment of 10-4-1944 would be sufficient to save the second execution from being time-barred.

That, however, is of no material assistance to the judgment-debtors in the present case as, in my opinion, the plea of limitation, so far as the second execution case is concerned, and necessarily, therefore, so far as the present execution case goes, is barred by constructive res judicata. I am in entire agreement with the findings of the two courts below that under Order 21, Rule 22 notices were duly served upon the judgment-debtors in the second execution case. The peon's returns, Ex. G and Ex. G(1), read with the order-sheet Ex. B, and the evidence of the serving peon, clearly show that the said notices were duly served upon all the judgment-debtors. It is also clear from the orders which I have quoted above that the judgment-debtors did not appear to object to the execution case although they duly received the notices, under Order 21, Rule 22 of the Code.

It further appears from the order recorded on 6-1-1947 that the court ordered execution to proceed and directed the decree-holder to take necessary steps in the matter. The order of that date can be construed only as a finding that the decree was capable of execution and such 'execution could be obtained provided only the decree-holder took necessary steps by filing appropriate processes and other requisites: It appears also that there was no appeal from that order and it has consequently become final. That being so, the question of limitation must be held to have been impliedly decided once for all against the judgment-debtors and must be held to be

barred by constructive res judicata in favour of the decree-holder by reason of the said order dated 6-1-1947. The fact that the decree-holder did not take further steps in the matter and that in consequence the execution case was dismissed for default on 18-1-1947, is, in my opinion, immaterial so far as this aspect of the matter is concerned.

I must, accordingly, hold that no question of limitation can now be raised as regards the second execution case and, necessarily, therefore, no such question can also be raised, in the circumstance of the present case, in regard to the present execution.

4. The view I am taking above is well supported by the decisions of the Judicial Committee in the cases of -- 'Mungul Pershad Dichit v. Grija Kant Lahiri' 8 Ind App 123 (PC) (A) and -- 'Raja of Ramnad v. Velusami Tewar' AIR 1921 P.C. 23(B); and the decisions of this Court in the cases of -- 'Murlidhar Supal v. Narsingh Das', 17 CalW. N. 113(C); -- 'Aswini Kumar v. Keramat Ali' : AIR 1948 Cal 165 and -- 'Sm. Akshoy Kumari Debi v. Nalini Ranjan Mukherjee', : AIR 1950 Cal 493 (E), to cite only a few of the relevant authorities. The contrary observations in the case of -- 'Karali Prasad y. Probodh Chandra', : AIR 1950 Cal 513 (P) appearing at pp. 514-515 of this latter volume were mere obiter dicta and, in any event, they were against the trend of decisions in this Court and the decisions of the Judicial Committee, to which reference has been made above. I cannot, therefore, agree with the said observations or act upon the same. \_

5. For similar reasons the case in -- 'Chatterput Singh v. Daya Chand' AIR 1915 Cal 350 (G), on which Banerjee, J. relied at pp. 514-515 of ' : AIR 1950 Cal 513 (F)', cannot be considered to be good law on this point, although its actual decision may somehow be supported, on the authority of the decision of this Court, -- not itself altogether free from doubt, -- reported in -- 'Jatindra Nath v. Uday Kumar' ; upon the view that possibly in that case -- AIR 1915 Cal 350(G), the relevant order, dated 6-5-1909, was still open to appeal and had not, therefore, become final when the plea of limitation was subsequently raised by the judgment-debtor.

6. The notice under Order 21, Rule 22, Civil P. C. requires the judgment-debtor 'to show cause' 'why the decree should not be executed against him'. If, therefore, the decree is time-barred and if on that ground its execution ought to be refused such objection ought, in the fitness of things, to be taken by the judgment-debtor upon receipt of the above notice and in pursuance of it and there can be no question also as to the propriety of such objection at that stage and, if available, it may quite properly and legitimately be taken then. Indeed, it appears clear that it is 'not only competent' for the judgment-debtor to take such objection at that stage but it is also 'incumbent' upon him 'to do so' if he 'proposed to rely on it' vide -- 'AIR 1921 P.C. 23 at P. 24(B)'.

It is thus quite obvious that if the judgment-debtor fails to raise the objection in spite of service upon him of the notice under Order 21, Rule 22 of the Code and the Court orders the execution to proceed, -- and a direction upon the decree-holder to take further steps in the matter or to do something in aid of execution is nothing else, -- and that order attains finality in law, the objection on the ground of limitation becomes barred by constructive res judicata just as if such objection is taken and overruled and that decision is not challenged by appropriate proceedings the rule of actual res judicata precludes the judgment-debtor from raising the question of limitation over again.

The real test is whether, after service of the notice under Order 21, Rule 22 of the Code and expiry of the date or time for showing cause against the execution of the decree, the Court has passed an order directing in effect the execution to proceed. If such an order has been passed and it has attained finality in law the plea of limitation no longer survives. If, however, there is no such order, or possibly also, -- and that at least is necessary, -- if the order has not become finalvide -- 'AIR 1931 P.C. 104 (H)', already cited, the matter remains at large. The Full Bench case of this Court in -- 'Bisseeur Mullick v. Maharaja Dhiraj Mahtab Chund' 10 W.R. 8 (F. B.)(I), falls, within the first branch of this latter category. It was so held by their Lordships of the Judicial-Committee in -- '8 Ind App 123 at P. 131 (P.C.)(A) of the Report where they distinguished the Full Bench Case by their observations to the following effect :

'That case however is very different from the present. There was merely the service of a notice upon the judgment-debtor after the decree was barred; but no order was made. Similar, apparently, was the position in -- 'Umed. Ali v. Abdul Karim', 8 Cal L. J. 193 (J), where also the bar of estoppel or res judicata was refused to be applied against the judgment-debtor.

7. In the above view of the matter, I hold that the courts below were right in rejecting the judgment-debtor's objections under Section 47, Civil P. C., and their decision must be affirmed.

8. I, accordingly, dismiss this appeal with costs.

**LegalCrystal - Indian Law Search Engine - [www.legalcrystal.com](http://www.legalcrystal.com)**