

**(1919) 07 BOM CK 0019**  
**In the Bombay High Court**  
**Case No : First Appeal No. 305 of 1916**

Ganpatrao Sultanbao Mahurkar

APPELLANT

Vs

Anandrao Jagdeorao Mahurkar

RESPONDENT

**Date of Decision :** 14-07-1919

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 47  
Limitation Act, 1908 — Section 14

**Citation :** (1920) 22 BOMLR 238 : 55 Ind. Cas. 967

**Hon'ble Judges :** Shah, J;Hayward, J

**Bench :** Division Bench

## Judgement

Shah, J.—This is an appeal from the order of the First Class Subordinate Judge of Ahmednagar on the application of the present appellant for a refund of Rs. 1,088-5-6 said to have been wrongfully recovered by the present respondent in execution proceedings in Darkhast No. 1224 of 1906. The decree under execution was passed by the Subordinate Judge of Jhanai and transferred for execution to the Court of the First Class Subordinate Judge at Ahmednagar. The sum is said to have been improperly recovered by "the respondent bout the 29th of November 1910. A suit was filed la the Court of the Second Class Subordinate Judge of Shevgaon on the, 14th of November 1918 to recover this amount, But that suit was dismissed on the 31st of March 1915 on the ground that no suit could lie and that the proper remedy was by way of an application u/s 47 of the Code of Civil Procedure. The present application was made to the Court at Ahmednagar on the 19th of May 1915. That Court has dismissed it on the ground that such an application in execution cannot lie and that it is time-barred.

2. The correctness of this view is questioned before us on behalf of the appellant; and on behalf of the respondent it has been further argued in support of the order made by the lower Court that that Court had no jurisdiction to entertain the application after the execution of the decree was over and that if at all the application should have been made to the Court at Jhansi, which passed the decree.

3. The first question is whether this application for a refund of the sum can be entertained by the executing Court. According to the terms of Section 47 of the Code of Civil Procedure, all questions arising between the parties to the suit and relating to the execution, discharge or satisfaction of the decree must be determined by the Court executing the decree and not by a separate suit. This application raises in my opinion a question relating to the execution of the decree and is clearly one, which could be and ought to be entertained by the Court executing the decree, and in respect of which no separate suit can lie. This view is supported by the decision in *Partab Singh v. Beni Ram* ILR (1878) All. 61, which was a decision u/s 244 of the Code of 1877 corresponding to Section 47 of the present Code. The application therefore was properly made to the executing Court. Further, it is difficult to understand how the present respondent can be heard to urge this plea, after having successfully contended in the suit filed in the Court at Shevgaon that the proper remedy was to file an application u/s 47 of the Code for the refund and not to file a suit.

4. The second point is one of limitation. It has been held by the lower Court that on the 19th of May 1915 the application was time-barred as it was not made within three years from the date on which this payment in excess is said to have been made, i. e., from the 29th of November 1910. It is urged, however, on behalf of the appellant that u/s 14 of the Indian Limitation Act the time taken up in the prosecution of the suit at Shevgaon should be deducted; and if that time were deducted, the application would be within time, as the . Court was closed for the Easter holidays from the 1st of April to the 6th of April 1915 and for the summer vacation from the 7th of April to the 18th of May. The question therefore is, whether the present appellant prosecuted the suit with due diligence and in good faith. I see no reason to doubt the .good faith of the present appellant in filing the suit in the Court at Shevgaon and in attempting to recover the sum in those proceedings. It is not suggested that he did not prosecute the suit with due diligence. I am, therefore, of opinion that the time taken up in prosecuting the suit at Shevgaon ought to be deducted u/s 14 of the Indian Limitation Act. The present application, therefore, is not time-barred.

5. It is urged on behalf of the respondent that the execution, being over long ago, the lower Court must have certified to the Court at Jhansi, which passed the decree, the fact of such execution u/s 41 of the Code of Civil Procedure, that thereafter it would have no jurisdiction to entertain such an application, and that the application could be properly made to the Court at Jhansi, In order to ascertain whether the Court of the First Class Subordinate Judge at Ahmednagar had certified to the Court at Jhansi the fact of execution as required by Section 41 of the CPC we called for the proceedings in the Darkhast; and the learned pleader for the respondent has practically given up that point as he has not been able to trace on the record any such certificate. It is not necessary, therefore, to consider the question whether in virtue of the provisions of Section 42 the Court of the First Class Subordinate Judge at Ahmednagar would have jurisdiction to entertain this application after it had certified to the Court at Jhansi the fact of

execution. At any rate before the fact of execution is certified to the Court which passed the decree, the Court to which the decree is transferred for execution, has jurisdiction to deal with an application like the present, for a refund of the excess.

6. The learned Subordinate Judge has not decided the application on the merits in favour of the respondent though it is claimed for him that it is a decision on the merits. In view of the observations made by the learned Judge in the last but one paragraph of his judgment it is clear that he has not decided the application on its merits.

7. As both the preliminary grounds upon lower Court disposed of this application fail, I think that the application must be remanded for disposal according to law.

8. I would, therefore, set aside the order of the lower Court and send back the application for disposal according to law.

9. Costs to be costs in the application.

Hayward, J.

10. I agree. The ascertainment of the facts is essential to a correct determination of the question whether an excess was or was not levied in execution and the matter must for that purpose be remanded for a further trial to the First Class Subordinate Judge at Ahmednagar.

11. The application was in time, because the excess, if any, was levied on the 29th of November 1910 and a suit was by bona fide mistake brought on the 14th of November 1913 and was pending until the 31st of March 1915 in the Subordinate Judge's Court at Shevgaon. It was not possible to take further steps until the 19th of May 1915 owing to the intervention of the Easter holidays and the summer vacation in the First Class Subordinate Judge's Court at Ahmednagar. It has been ascertained that no certificate has so far been sent to the decretal Court by the First Class Subordinate Judge at Ahmednagar u/s 41, and that, therefore, the jurisdiction to try the matter has still been retained by the First Class Subordinate Judge at Ahmednagar u/s 42 of the Civil Procedure Code. The question whether the excess has or has not been levied in execution would, in my opinion, undoubtedly be a question relating to the execution of the decree within the meaning of Section 47 of the Civil Procedure Code.