

(1945) 05 CAL CK 0015
In the Calcutta High Court

Satyanarayan Banerji and Another

APPELLANT

Vs

Kalyani Prosad Singh Deo Bahadur and Others

RESPONDENT

Date of Decision : 28-05-1945

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47
Limitation Act, 1963 — Section 7

Citation : AIR 1945 Cal 387

Hon'ble Judges : Khundkar, J; Biswas, J

Bench : Full Bench

Judgement

Biswas, J.—This appeal arises out of certain proceedings in execution of a mortgage decree, and is directed against an order of the Subordinate Judge of Asansol, dated 12th June 1942, in Miscellaneous case NO. 106 of 1941, dismissing the appellants' objections to the sale held in execution of that decree. The mortgagors were two persons, S. H. Seddon and Rasaraj Biswas, who carried on business in co-partnership under the name and style of S. H. Seddon & Co., but they are not the appellants before us. The appellants are two joint Receivers of the said partnership business the assets of which included the mortgaged properties, having been appointed as such in a suit on the Original Side of this Court for dissolution of the partnership. The objections raised to the sale were partly under Order 21, Rule 90, and partly u/s 47, Civil P. C. In-so far as they fell under the first category, the learned Judge held that they were time-barred, and also that the appellants had failed to substantiate them, while as regards the other objections, he held inter alia that the appellants had no locus standi to maintain the same, as they were neither parties to the suit nor their representatives within the meaning of Section 47 of the Code. In the result, he dismissed the objections in their entirety.

2. The material facts of the case may be shortly stated: On 31st March 1921, the mortgagors abovenamed, S. H. Seddon and Rasaraj Biswas, executed a mortgage in favour of Mugniram Bangur and Kedar Nath Daga for a sum of Rs. 10 lakhs in respect of their 14 annas interest in certain coal lands in the districts

of Manbhum and Burdwan, stipulating to pay interest at the rate of 7 per cent, per annum with six-monthly rests. By an indenture of the same date they also assigned their remaining 2 annas interest in the properties to the mortgagees. On 4th September 1922, the mortgagees instituted a suit in the Court of the Subordinate Judge of Asansol to enforce the mortgage, and also for a declaration of their title to the 2 annas share which had been assigned to them. On 3rd July 1923, a preliminary decree was passed in the suit for a sum of Rs. 10,64,296-3-0, including interest and costs, on the basis of a compromise, one of the terms of which was that the name of defendant 2, Rasaraj Biswas, should be expunged from the record and the suit dismissed against him. As a result, the decree was made only against the other defendant, S. H. Seddon. The plaintiffs' title to the 2 annas share was also declared as claimed.

3. Meanwhile, it appears that on 24th March 1923, while the mortgage suit was pending, one Sasthi Kinkar Banerjee instituted a suit on the Original Side of the High Court (Suit No. 908 of 1923), claiming a 4 annas share in the partnership business of S. H. Seddon & Co., and praying for a dissolution of the partnership and for accounts. On 10th April 1923, a decree was made in the suit, also on compromise, by which the partnership was dissolved and accounts were ordered to be taken on the footing that Sasthi Kinkar Banerjee was entitled to the 4 annas share as claimed. By the decree certain persons were appointed joint Receivers of the partnership assets, which, as already stated, included the properties covered by the mortgage in favour of Mungniram Bangur and Kedar Nath Daga. The joint Receivers were these two mortgagees, besides one Satis Chandra Sen, a Solicitor of this Court, and two other persons, but it does not appear that the appointment of the mortgagees was made with their knowledge or consent. By a subsequent order made on 13th June 1923, the joint Receivers were in fact discharged, and in their place the said Satis Chandra Sen was appointed sole Receiver with the same powers and subject to the same conditions.

4. At the date of the preliminary decree in the mortgage suit, Satis Chandra Sen was accordingly in possession of the mortgaged properties as such sole Receiver, but he was not made a party to the decree. In the compromise petition which formed part of the decree there was a provision that within a period of six months from the date thereof a new Receiver should be appointed in the person of one F. M. Leslie upon discharge of the Receiver appointed in Suit No. 908 of 1923, and if this was done, the plaintiffs agreed not to put the decree into execution for three years, and the new Receiver was to liquidate the decretal amount within that period. On this basis the date of redemption was "fixed in the decree as 2nd July 1926. There was however a clause in the terms of compromise that in case Leslie was not appointed Receiver, the plaintiffs would be at liberty to take out execution without waiting for three years. No steps were taken by Seddon to get Leslie appointed, or otherwise comply with the conditions for liquidation of the mortgage debt. The decree-holders accordingly applied for a final decree for sale on 7th March 1925, and notwithstanding Seddon's objection

that the application was premature, the Court passed a final decree on 18th April 1925 (Ex. 9). Plaintiff 2, Kedar. Nath Daga having died, his two minor sons, Jewan Lal Daga and Satya Narayan Daga, had been substituted as decree holders in his place. It appears that before the final decree was passed, Sasthi Kinkar Banerjee, who had in the meantime been adjudicated an insolvent, applied for leave to intervene in the mortgage suit, and he also prayed that failing him, the Receiver of his estate should be added as a party. Both the prayers were rejected on 19th November 1934 (Exhibit B).

5. On 10th February 1930, the first application was made for execution of the final decree (in Mortgage Execution case No. 38 of 1930). The application was filed only by the two minor decree-holders under Order 21, Rule 15, Civil P. C, making the other decree-holder, Mugniram Bangur, a pro forma opposite party, and it was directed not only against the two original defendants, S. H. Seddon and Rasaraj Biswas, but also against the Receiver Satis Chandra Sen, who was added as a party with the leave of the High Court previously obtained on 14th January 1930, in Suit No. 908 of 1923 (Ex. 11). Both Seddon and Satis Chandra Sen filed objections, and their main contention was that the application was barred by limitation, not having been made within three years from the date of the final decree, 18th April 1925. By his order dated 3rd February 1931, the learned Subordinate Judge dismissed the objections, holding that as the adult decree-holder could not give a valid discharge without the concurrence of the two minor sons of Kedar Nath Daga, limitation was saved under the provisions of Section 7, Limitation Act. Two appeals were taken to the High Court (F. M. A. Nos. 251 and 252 of 1931), one by Seddon and the other by the Receiver, but they were both dismissed on the same ground on 3rd March 1933 (Ex. I). During the pendency of the appeals however, the decree-holders had suffered the execution case to be dismissed for non-prosecution, without satisfaction, on 7th September 1931 (Ex. 8).

6. No further steps appear to have been taken under the decree till the year 1988, but on 12th April that year the decree-holders executed a registered deed of transfer in favour of Raja Jyoti Prosad Singh Deo of Panchkote (Ex. K), by which they assigned to him all their right, title and interest in the properties which they had obtained under the decree as well as the decree itself, with express power to the transferee to execute the decree "at his option but without recourse to the transferors," the transferors on their part binding themselves to file any petition that might be required of them in order to entitle the transferee to carry out the execution. Of the two sons of Kedar Nath Daga, Jewan Lal Daga joined in the transfer merely as a confirming party, as he had no longer any interest in the properties assigned, having been previously taken in adoption in another family. Then followed on 2nd July 1938, the next application for execution (in Mortgage Execution case NO. 156 of 1938), out of which the present appeal has arisen. It was more than 12 years from 18th April 1925, the date on which the final decree had been passed, but within 12 years from 2nd July 1926, which was the date fixed for payment of the decretal amount under

the preliminary decree. The application was made only by one son of Kedar Nath Daga, Satya Narain Daga, and the other decree-holder, Mugniram Bangur, jointly with the said assignee of the decree, Raja Jyoti Prosad Singh Deo, Jewan Lal Daga being joined as a party pro forma. The principal opposite parties were S. H. Seddon and the heirs of the other judgment-debtor mentioned in the decree, Rasaraj Biswas, who appears to have died already.

7. As stated above, the Receiver, Satis Chandra Sen had been made a party to the previous (Execution Case No. 38 of 1930), but the decree-holders did not join him as party in the present proceeding. On 8th August 1939, the present appellants were appointed Receivers in the place of Satis Chandra Sen, but they also were not added as parties at any subsequent stage. The record shows that S. H. Seddon entered appearance through a pleader, and on 1st December 1938, made an application asking for one week's time to file objections to the execution. Time was allowed till 7th. December following, but ultimately no objections were filed on his behalf.

8. On 2nd July 1939, however, certain objections were filed by one Saradindu Nivanani, claiming to be a representative of the judgment-debtors on the allegation that on 20th September 1937, she had purchased the four annas share of Sasthi Kinkar Banerjee in the partnership business of S. H. Seddon & Co., at a public sale held by the Receiver in his insolvency. The objections were not only directed against the execution, but attacked the decree itself. The learned Subordinate Judge rejected her application, and the order was afterwards upheld in appeal by this Court on 8th July 1941, in F. M. A. T. No. 1236 of 1939 (EX. N), on the ground that it had not been shown that Sasthi Kinkar Banerjee had acquired any interest in the mortgaged properties or that Saradindu Nivanani had any locus standi u/s 47, Civil P. C. Thereafter, on 5th June 1939, the mortgage sale was held when 14 items of properties were purchased by Raja Kalyani Prosad Singh Deo, who, as eldest son of the assignee decree-holder, had in the meantime, upon his death, succeeded to the Panchkote Raj under the law of primogeniture which governed the family.

9. Two petitions were then filed for setting aside the sale, one on 30th June 1939, by Saradindu Nivanani, and the other on 28th July 1941, by the two Receivers in Suit No. 908 of 1923, the appellants in this appeal. The first was within 30 days from the date of sale, but the second was long after that date. Both applications were heard together and dismissed by the Subordinate Judge by the same judgment on 12th June 1942. We are "not concerned in this appeal with Saradindu Nivanani's case, but only with that of the joint Receivers. As already stated, the application of the Receivers was not limited to challenging the sale on the ground of fraud and material irregularity in publishing or conducting it under Order 21, Rule 90, Civil P. C, but covered grounds which fell within Section 47 of the Code. The grounds are set out in the petition and will be found printed at pp. 43 and 44 of the paper-book.

10. In so far as the objections were under Order 21, Rule 90 of the Code, they

need not detain us long. As the Court below pointed out, they were filed long out of time, and were clearly barred under Article 166 of Schedule 1, Limitation Act, the appellants not having made any case u/s 18 of having been kept out of knowledge of the sale by means of fraud. On the merits also, the learned Judge held that the appellants had failed to establish fraud or material irregularity, or any substantial injury by reason of fraud or material irregularity. Before us, Mr. Bankim Chandra Mookerjee on behalf of the appellants did not in fact think it fit to challenge the decision on this part of the case.

11. The learned advocate confined himself in the appeal to the objections u/s 47 of the Code, and these he summarised as follows: (i) That the Receiver was a necessary party to the execution proceeding, and in so far as he had not been made a party, the proceeding was wholly void. (ii) That the application for execution having been made more than 12 years from the date of the final decree, it was barred u/s 48 of the Code, (iii) That the application was also barred under Article 182 of Schedule 1, Limitation Act. (iv) That no notice had been served on the judgment-debtor under Order 21, Rule 16 of the Code, and the proceeding was accordingly null and void. (v) That there was no express order of the Court allowing the assignee of the decree to proceed with the execution, and this also rendered the proceeding bad in law. It was further contended that the Court was wrong in holding that the appellants had no locus standi to maintain the objections u/s 47. It may be mentioned that before filing their petition of objections, the "joint Receivers had duly obtained the leave of this Court in its original jurisdiction in Suit No. 908 of 1923 (Ex. 13). The objections were all overruled, except that on the question of limitation u/s 48, Civil P. C, the Court agreed that the period of 12 years under the section should be reckoned from the date on which the final decree had been passed, namely, 18th April 1925, and not from 2nd July 1926, which had been fixed as the date for payment under the preliminary decree, though the learned Judge held that limitation was saved by reason of the order for execution which had been passed after due notice to the judgment-debtor under Order 21, Rule 22 and Rule 66 of the Code.

12. Mr. Mookerjee recognised that the preliminary difficulty in his clients' way was the bar of Section 47, and this was in fact the primary question which the learned Judge was called upon to consider. It was not disputed that the section applies only between "parties to the suit in which the decree was passed, or their representatives," and the question was whether the appellants could bring themselves within either of these categories. Admittedly, neither Satis Chandra Sen, who was the Receiver in office at the date the present execution was started, nor his successors, the present appellants, who came into office on 8th August 1939, had been impleaded as a party or parties to the mortgage suit. They were also in fact not parties to the present execution proceeding, though Satis Chandra Sen had been added as a party in the previous execution case (Mortgage Execution case No. 38 of 1930), which was dismissed for non-prosecution on 7th September 1931. It was nevertheless Mr. Mookerjee's

contention relying on the last mentioned fact, that Satis Chandra Sen, and necessarily, therefore, the succeeding Receivers should be regarded as "parties to the suit" within the meaning of Section 47. The argument involved a double fiction. The first was that as Satis Chandra Sen was a party to the execution case of 1930, he must be deemed to have been equally a party to the next, and the second was that if he was a party to the execution proceeding, he thereby became a party also to the suit, as a suit continued till the termination of the execution proceeding.

13. In our opinion, none of these propositions can be supported. As regards the first, it is sufficient to state that there is neither principle nor authority for holding that if a person is made a party to an execution proceeding, and particularly, if that proceeding is finally disposed of, as was the case here, by an order of dismissal he must be taken to be a party to every subsequent execution that may be levied, whether he is in fact joined as a party or not. Each execution case is a distinct proceeding, and there is no presumption of continued representation of parties in successive execution's. In this case, under the leave obtained from the original side of this Court in Suit No. 908 of 1923, the decree-holders were given liberty to add the Receiver as a party to the execution proceedings, but this only meant that they would not be required to apply for and obtain leave to join the Receiver as a party every time they took out execution against the properties in his hands. It did not mean that if the Receiver was added as a party once, it would not be necessary to make him a party in any subsequent proceeding. If, then, in point of fact, rightly or wrongly, the receiver was not a party to the later execution which was started on 2nd July 1938, it is not possible to say that he was still a party to it, merely because he had been added as a party to the previous proceeding of 1930, which, as already stated, was afterwards dismissed for default. It is needless to add that the present appellants as succeeding Receivers could not in this respect claim to be in a better position than Satis Chandra Sen.

14. The first branch of the appellants' contention thus failing, the second does not arise, but even supposing that Satis Chandra Sen as Receiver had been made a party to the execution case of 1938, it did not follow that he could, therefore, claim to be regarded as a "party to the suit" for the purpose of raising objections u/s 47 of the Code. Whether the "Receiver could be said to be a "representative" of a party to the suit, is another question which will be considered separately. Mr. Mookerjee, on behalf of the appellants, was unable to cite any authority in support of his contention which was certainly not assisted merely by saying that execution proceedings were a continuation of the suit. Our attention was neither invited, on the other hand, to any direct authority to the contrary.

15. Mr. Atul Chandra Gupta for the respondents, however, relied on an Allahabad case *Angan Lal v. Gudar Lal* ("88) 10 All. 479, which appears to lend indirect support to the contrary view. In that case, a person held a money decree, and upon the death of the original judgment-debtor, took out execution against a

number of persons as the latter's heirs and legal representatives, including a brother of the deceased. The brother objected that he was not an heir or legal representative, and execution could not consequently proceed against him. The learned Judge who tried the execution case, however, held that the brother had received some money which was due to the estate of the deceased judgment-debtor, and misappropriated the amount himself, and on that basis, made an order for execution against him. The brother then brought a suit to set aside this order, and the question arose whether the suit was barred u/s 244, Civil P. C., then in force, which corresponded to Section 47 of the present Code. It was held that the suit was maintainable. It was rightly pointed out by Mr. Gupta that the decision could be justified only on the basis that the plaintiff was neither a party to the suit nor a representative of a party to the suit within the meaning of Section 244. The fact that he was a party to the execution was obviously not deemed sufficient to bring him within any of these categories.

16. The broad proposition for which Mr. Mookerjee contended on this branch of his argument must consequently be overruled, and that brings us to the next question: Could the joint Receivers be regarded as "representatives" of the original parties to the suit? The Receivers had been appointed in Suit No. 908 of 1923, to which none of the decree-holders were parties. There could, therefore, be no question of their being representatives of the decree holders. Were they, then, representatives of the judgment-debtors? *Ajodhya Roy v. Hardwar Roy* ("09) 1 I. C. 213 Mookerjee J. laid down two tests in order to determine whether a particular person is a representative of a party to the suit. They are:

first, whether any portion of the interest of the decree-holder or of the judgment-debtor, which was originally vested in one of the parties to the suit, has, by act of parties or by operation of law, vested in the person who is sought to be treated as a representative, and secondly, if there has been a devolution of interest, whether, so far as such interest is concerned, that person is bound by the decree.

17. Clearly, the Receivers here did not satisfy any of these tests. They were Receivers appointed under Order 40, Rule 1, Civil P. C, and it is hardly necessary to cite any authority to show that the appointment of such a Receiver, though it might operate to change possession, could not affect the title to the property, which remained in those in whom it was vested when the appointment was made. This is indeed sufficiently clear from some of the decisions on which Mr. Mookerjee himself relied, and to which reference has been made by my learned brother Khundkar J. in his judgment: *Harihar Mukerji v. Harendra Nath Mukerji* ("10) 37 Cal. 754 at pp. 757-758; and *Dwijendra Narain Roy Vs. Joges Chandra De and Others*, . Put shortly, the object of the appointment is not to divest a rightful owner of the title, but only to protect the property by taking possession (Beach, Sections 209 and 221). It could not be said, therefore, that the interest of the judgment-debtors any more than that of the decree holders in any of the properties was vested in the joint Receivers here upon their appointment, or that there was any devolution of interest in their favour.

18. A Receiver in insolvency, appointed under the Provincial or Presidency Insolvency Acts, stands on a different footing from a Receiver under the Code of Civil Procedure, as under the statute the insolvent's estate vests in the former for the benefit of creditors. But even in respect of such a Receiver, Rankin C. J. pointed out in *Mohitosh Dutta Vs. Rai Satish Chandra Chaudhuri and Another*, that any general statement to the effect that he was or was not a representative for the purposes of Section 47 was necessarily misleading, as it all depended on the purpose and nature of the application made by the Receiver. The soundness of this view is not at all weakened by the decision of Guha and Bartley JJ. in *Dinesh Chandra Roy Choudhury Vs. Jahan Ali Biswas and Others*, . The contention that the appellants are representatives of any of the parties to the suit must therefore also fail, and the objections u/s 47, Civil P. C, should consequently be rejected as not maintainable.

19. This should be sufficient to dispose of the appeal, but we may add that the objections themselves as they stand are without any substance. But before dealing with them, we may dispose of an alternative argument which Mr. Mookerjee put forward on the question of locus standi. It was to the effect that we might treat the petition which his clients had presented to the Court below not as a petition of objection u/s 47 of the Code, but merely as an application to be added as parties to the execution case on the ground that they were necessary parties to the proceeding, and that in their absence no valid execution could be had. On this basis we were invited to interfere with the order of the learned Subordinate Judge u/s 115, Civil P. C., converting the memorandum of appeal into an application in revision. We may say at once that we see no reason for acceding to the prayer, but even if we did, it would be of no assistance to the appellants. It would merely have the effect of bringing the joint Receivers upon the record of the execution case, without giving them the locus standi, which they would still have to establish, to raise any objections u/s 47.

20. We may also mention here that with a view to save the appeal, Mr. Mookerjee, on the last date of hearing, presented before us a petition of objections purporting to be on behalf of the judgment-debtor, Seddon under a power executed in favour of the learned advocate by a person claiming to hold a power of attorney from Seddon dated 12th May 1939. We have no hesitation in rejecting the petition. In the first place, it was filed more than three years from the date of the sale, and was consequently barred under the residuary Article 181 of Schedule 1, Limitation Act. Secondly, as we have seen, Seddon had notice of the last applications for execution, and actually entered appearance, and applied for time to file objections, which, however, he never did. We see no reason in these circumstances to entertain the present application, which, in our opinion, is not at all bona fide. Turning now to the objections u/s 47 of the Code, as already set out under five heads, objection (i) was the one which was most strenuously pressed by Mr. Mookerjee. It was urged that a Receiver was a necessary party to any execution levied against properties of which he was in possession, and that omission to make him a party rendered the proceeding null

and void. Quite a large number of cases were cited by Mr. Mookerjee in support of his contention, but it is sufficient to state that none of the decisions go the length of holding that if the Receiver is not added as a party, the whole of the execution would be ab initio void. The cases have been fully discussed by my learned brother Khundkar J., and I need only say that I respectfully adopt his conclusions on the point. The first objection must accordingly be overruled.

21. As regards objection (ii) to the effect that the execution was barred u/s 48, Civil P. C, the learned Subordinate Judge, as already stated, accepted the appellants' contention, but held that as an order for execution had been made after due notice to the judgment-debtor under Order 21, Rules 22 and 66, of the Code, no objection was open any further on the ground of limitation. In answer, Mr. Mookerjee cited a Pull Bench decision of the Allahabad High Court in *Genda Lal Vs. Hazari Lal*, , to show that such an objection could be taken even after an order had been made for execution with notice to the judgment-debtor. In this case the Full Bench laid down a series of propositions to illustrate the application of the principle of constructive res judicata or estoppel by judgment to execution proceedings, and it was ruled inter alia that where the judgment-debtor appeared, but took no objection to" the execution, he would not be debarred from raising the question of limitation at a later stage, only if the application for execution did not become fructuous at all: he would, however, be so debarred, if the application became fructuous in whole or in part, and such fructification necessarily involved the assumption that the application had been made within limitation.

22. We are not really called upon to consider the application of this ruling to a case like the present, where the question is raised by or against a person who is neither the judgment-debtor nor a person claiming through him, but a stranger to the decree. Apart from that, upon the facts of the case, we do not think it possible to say that the application for execution had not become fructuous. It is quite true that so far as Seddon was concerned, he took time, but did not file any objections, but as we have seen, objections were raised by Saradindu Nivanani, and these were dismissed after adjudication, and, it was thereafter that the sale was held. Mr. Mookerjee relied on another Allahabad case, *Collector of Benares and Another Vs. Jai Narain Rai* , which went to show that even if an execution sale had taken place, but the sale had not been confirmed, the execution would be deemed to remain infructuous within the meaning of the Pull Bench ruling. Whether this is a correct view or not, the facts here, as already explained, are wholly distinguishable. We must consequently also overrule the second objection.

23. The next objection was that the application for execution was barred under Article 182, Schedule I, Limitation Act, inasmuch as it had been filed on 2nd July 1938, which was more than three years from the date of the final order passed on the previous application (7th September 1931). We agree with the learned Subordinate Judge that the objection is fully met by the provisions of Section 7, Limitation. Act. One of the decree-holders, Satya Narayan Daga, was still a

minor, and the other decree-holders were not competent to give a valid discharge without his concurrence. Time would not, there-fore, run against any of them till the minor attained majority. This was in fact the ground on which a similar objection by Satis Chandra Sen as well as by Seddon had been rejected by this Court in the previous execution case, Ex. I. Objection.

24. Objection (iv) related to non-service of notice on the judgment-debtor under Order 21, Rule 16 of the Code, but this, in our opinion, was not a case coming under that rule. The rule applied only where application for execution was made by the transferee of a decree, and not where the transferor and transferee both joined. As the order-sheet in the present execution case will show, the application here was by Satya Narayan Daga, one of the sons of Kedar Nath Daga, and Mugniram Bangur, the other son of Kedar Nath Daga being added as a pro forma party, and Raja Jyoti Prosad Singh Deo merely joined as assignee from the original decree-holders, without praying to be substituted in their place : (vide order NO. 1, dated 16th September 1938). As to whether after the assignment, the original decree-holders were entitled to maintain the application, was a different question which the present appellants do not appear to have raised in the Court below, but it would be sufficiently met by the terms of the deed of assignment (Ex. K) referred to in an earlier portion of the judgment. It is to be noted that on the application being presented, the Court ordered it to be registered as one by the decree-holders alone, and the question whether joint execution with the assignee would be allowed or not was left over to be considered after the judgment-debtor and the pro forma decree-holder appeared., In these circumstances, there was no occasion for the issue of any notice under Order 21, Rule 16, and this particular objection must, therefore, also fail.

25. The last point taken was that there was no express order made by the Court directing execution by the assignee decree-holder. As already stated, the question as to his right to proceed with the execution singly or jointly was left over to be considered later after Seddon and Jewan Lal Daga appeared. None of them, however, appeared or filed any objections on the due date. Mean time, it appears the original assignee, Raja Jyoti Prasad Singh Deo, had died, and his eldest son, Raja Kalyani Prosad Singh Deo, applied for being substituted in his place. No notice of the application for substitution was directed to be served on the judgment-debtor, but the Court made the order for substitution at once, and ordered intimation of the fact to be given to the judgment-debtor by registered post. Notices were thereafter ordered to be issued in the usual course under Order 21, Rule 66 to which also there was no response from the judgment-debtor. We think that in the circumstances the order for substitution might be taken to involve a determination of the assignee's right to execute the decree jointly with the original decree-holders. The last objection must consequently be also overruled. The result is that on the merits as well as on the preliminary point the objections raised by the appellants to the present execution fail, and the appeal must accordingly be dismissed with costs. We assess the hearing fee

at 10 gold mohurs.

Khundkar, J.

26. I agree, but desire to say something about the cases which have been cited for and against the main argument. This is an appeal by Receivers whose objections u/s 47, Civil P. C, to the execution of a decree and whose prayer under Order 21, Rule 90 of the Code for setting aside the execution sale were disallowed. One of the objections u/s 47 was that the execution of the decree was barred u/s 48 of the Code and under Article 182, Limitation Act. The prayer to set aside the sale was on the ground of irregularity and fraud in publishing and conducting the same. The Receivers were not parties to the suit, but after the final mortgage decree was pronounced leave was obtained by the decree-holders from the Court which appointed the original Receivers to add the then Receiver as a party to proceedings for the execution of that decree. It should be further noted that the then Receiver was not made a party to the later execution case out of which the present appeal has in fact arisen, nor were the appellants who are the succeeding Receivers made parties at any later stage. So far as the prayer under Order 21, Rule 90 to set aside the mortgage sale is concerned, the present Receivers appellants may have locus standi to maintain it, because although neither they nor their predecessor were parties to the suit or to the execution proceedings which led up to the sale, they are nevertheless parties whose interest was affected by the sale. But that application itself, as found, is time-barred. It is however urged that notwithstanding this, the sale should be set aside, because the execution proceedings in which it was held were void ab initio. This contention which amounts to an objection u/s 47, is founded on the argument that the Receivers were necessary parties to the execution proceedings and without them those proceedings are a nullity.

27. As regards the objection u/s 47, it is difficult to understand how the Receivers appellants had locus standi to take any such objection, seeing that they were not parties to the suit which resulted in the decree, the execution of which is objected to. Here again, the contention is that they were parties whose presence in the suit was so necessary that they cannot now be debarred from taking objections u/s 47, even though they do not technically answer the description of "parties to the suit" which that section contains. Consistently with this it is also urged that, if they are not actually parties to the suit, they fall at any rate, within the meaning of the words "or their representatives" in Section 47. It is further contended that they are in fact parties to the execution proceedings, because leave was granted to the decree-holders on 14th January 1940 by the Court which appointed the original Receivers to proceed against the then Receiver in execution, and he was made a party to Execution case No. 38 of 1930 which was commenced on 10th February 1930. This last contention must be rejected at once. Execution Case No. 38 of 1930 was dismissed for default on 7th September 1931 and in the present Execution case No. 156 of 1938, which was started on 2nd July 1938, the Receivers who are the appellants here were

not made parties. It is idle to say that if a Receiver is made a party to an execution proceeding which is then disposed of by dismissal, he or his successors in the office of Receiver become by operation of law parties to every subsequent execution, even though the decree-holder does not seek to levy the same against him or them.

28. It is thus seen that the maintainability of the objections u/s 47, which really include the argument that the execution proceedings were void ab initio owing to defect of parties, rests upon the contention that the Receivers were either representatives of a party to the suit, or themselves in the position of parties, though they were not impleaded. A number of cases have been cited on behalf of the appellant from which, it is said, one must extract the conclusion that a Receiver appointed by a Court is so indispensable to the proper constitution of any proceedings respecting property of which he has been placed in charge, that to leave him out goes to the root of those proceedings. A careful examination of the decisions cited and of certain passages therein which have been relied upon is required in order to exhibit the true principles stated, and to appreciate the limits to which they extend: *Jagat Tarini Dasi v. Naba Gopal Chaki* ('07) 34 Cal. 305. In this case the question raised was whether a suit for arrears of rent of a taluq could be brought by a receiver of the same suing in his own name. In answering this question in the affirmative it was observed as follows:

Now Section 503, (Order 40 Rule 1 of the present Code) authorises the Court to grant to the receiver all such powers as to bringing and defending suits as the owner himself has. When an appointment has been made under that section and full powers granted to the receiver, we are disposed to agree with *Peter O'Kinealy J.* in the view taken by him in *William Robert Fink v. Moharaj Bahadur Singh* ('98) 25 Cal. 642 that power is conferred upon the receiver to bring and maintain suits in his own name, always supposing that the ownership of the property is completely represented in the suit in which the receiver is appointed.

29. This case has little or no application, because the question with which we are concerned in the present case is not whether a receiver can sue or be sued in his own name, and the proposition that he can does not advance the argument that a receiver is not only a necessary but an indispensable party to any suit in respect of property in his possession as receiver: 14 C. W. N. 560. In this case the holders of a money decree applied for execution by sale of a foreclosure decree obtained by their judgment-debtors and had that decree sold. Prior to the application for execution a receiver had been appointed of properties which included the property embraced by the foreclosure decree. The receiver had been appointed in another proceeding but to the knowledge of the applicants. The sale of the foreclosure decree in execution of the money decree was set aside upon the principle

that property in the hands of a receiver, though subject to a paramount judgment, cannot be sold under execution without leave of Court. A purchaser of such property at an execution sale buys at his peril and the sale may be

cancelled upon an appropriate application to the execution Court,

30. The question whether the receiver, not being a party to the suit in which the money decree was obtained, had locus standi to maintain an objection to the execution of that decree was not raised. Apparently, the application to reverse the sale was under a provision of the Code which corresponded to Order 21, Rule 90 of the present Code, and, in any event, one of the judgment-debtors was a party to that application. This case lays down the proposition that the sale could be avoided at the instance of the receiver, and not that the execution proceedings were void ab initio because the receiver was not made a party thereto. *Mrs. Livinia Ashton v. Madhabmoni Dasi* ("10) 5 I.C. 390, was followed in *Sarat Chandra v. Apurba Krishna* ("11) 11 I.C. 187 in which the material facts were as follows: In execution of a decree against a judgment-debtor and a receiver appointed by the Court, certain properties were sold. Another decree-holder having applied for rateable distribution u/s 73 of the Code, the objection of the receiver to the application on the ground that leave had not been obtained from the Court which appointed him, was upheld, and it was stated that Courts are generally reluctant to allow execution to proceed against the properties in the hands of a receiver until leave has been expressly granted for this purpose. No question arose in this case as to whether a receiver, who was not a party to the suit, was competent to raise an objection to the execution of the decree. In *Ajodhya Roy v. Hardwar Roy* ("09) 1 I. C. 213, a mortgagee having applied for execution of a decree obtained by him against the mortgagors who were members of a mitakshara joint family, sought to proceed also against a son of one of the mortgagors who was born after the decree, and the question was whether the son was a proper party to the execution proceedings. It was held that upon the son's birth the aggregate of rights then vested in his father, his grand-father and his uncles, who were the mortgagors, became vested in him conjointly with them, and that by this devolution of interest the son became the representative of a party to the suit within the meaning of Section 244 of the Code of 1882. It was ruled the

the term "representative" means not merely legal representative in the sense of heir, executor or administrator, but includes any representative in interest, that is, any transferee of the interest of the decree-holder or judgment-debtor, who so far as such interest is concerned, is bound by the decree: *Ishan Chandra v. Beni Madhub* ("97) 24 Cal. 62 (F.B.); *Gulzarilal v. Madho Ram* ("04) 26 All. 447. To determine, therefore, whether a particular person is a representative of a party to the suit, the two tests to be applied are first, whether any portion of the interest of the decree-holder or of the judgment-debtor which was originally vested in one of the parties to the suit, has by act of parties or by operation of law, vested in the person who is sought to be treated as representative, and secondly, if there has been a devolution of interest, whether, so far as such interest is concerned, that person is bound by the decree.

31. No question touching the position of a receiver was considered in this case. It

is, therefore, not an authority for the proposition that a receiver is a representative of a party to the suit within the meaning of Section 47 of the Code, on the ground that the interest of that party is vested in him. *Tohra Bibi v. Zabeda Khatoon* ('09) 7 I. C. 75 (Cal.). This was a suit to wind up a partnership business brought by a partner against the heirs of a deceased partner. It was held that a Receiver subsequently appointed by a Court in a partition suit between the heirs of the deceased was a necessary party to the suit for winding up. Mookerjee J. stated that the test to be applied was whether the property in the hands of a Receiver was intended to be affected by the result of the litigation, because if the property was intended to be so affected, the Receiver was a proper and necessary party by way of addition to, and not in substitution for the parties primarily responsible. But his Lordship went on to say:

It may be conceded that the appointment of a Receiver does not by itself debar a creditor of the person over whose estate the Receiver is appointed from pursuing his legal remedy by action against such debtor, or from bringing a suit for relief touching the same property; this general rule, however, is subject to the qualification that the suit so brought does not in any way interfere with the possession or jurisdiction of the Court by which the Receiver was appointed. If the contrary view was maintained and the decree made in such a suit were allowed to operate to the disturbance of the custody of the Receiver when he had not been made a party to the suit, the very object of the appointment of a Receiver might be defeated, that object is to protect the estate from unnecessary and expensive litigation: to preserve it for the equal benefit of those equally interested in its distribution and to keep the: property at all times within the control of the Court by which the Receiver had been appointed.

32. This case goes no further than to say that Receivers in possession of partnership property are necessary parties to a suit for dissolution of that partnership: 39 C. W. N. 424. After a judgment-debtor had been adjudicated insolvent, the decree-holder who was unaware of the insolvency, proceeded to execution and purchased the attached property. The Receiver in insolvency having applied to have the sale declared void, it was held that his application must be treated as one u/s 47, Civil P. C, he being the representative of the judgment-debtor for the purpose of saving the property from execution. *Guha and Bartley JJ.* expressed their decision on this point in these words:

The Receiver in whom the property of the insolvent vested after the passing of the order of adjudication u/s 28, Sub-section (2), Provincial Insolvency Act, does represent both the insolvent and the creditors of the insolvent; and if any application is made to the Court which on the face of it was an application made in the interest of the insolvent judgment-debtor, the application, in our judgment, could, under the law, be treated as an application u/s 47, Civil P. C, made by the Receiver in insolvency, as representative of the insolvent judgment-debtor.

33. Their Lordships were careful to confine their decision to the case of a

Receiver in insolvency, that is to say of a Receiver in whom the property of the judgment-debtors stood vested, and in the course of their judgment they quoted the following observation of Rankin C. J. in *Collector of Benares and Another Vs. Jai Narain Rai* :

Any general statement to the effect that a Receiver is or is not representative for the purposes of Section 47 of the Code is merely misleading. It all depends on the purpose and nature of the application made by the receiver, whether he is a representative of the judgment-debtor or not. For some purposes, he would be entitled as representing the judgment-debtor to litigate matters u/s 47 of the Code.

34. It is worthy of note that in *Mohitosh Dutta Vs. Rai Satish Chandra Chaudhuri and Another*, the learned Chief Justice went on to draw a clear distinction:

but where he comes to the executing Court for the purpose of saying that as the judgment-debtor's property now belongs to the receiver, the Court cannot sell for the judgment-debtor's debt that which is the property of another person because it has vested in the receiver for the benefit of the creditors, then for that purpose, the receiver is not, in my judgment a representative of the judgment-debtor... The receiver in such a case, if he is not acting u/s 52 of the Act but acting under the usual provisions of the Civil Procedure Code, is really a third party making a claim.

35. The actual facts in *Mohitosh Dutta Vs. Rai Satish Chandra Chaudhuri and Another*, were that a decree-holder had applied for execution of a money-decree, and the judgment-debtor's property had been sold before the judgment-debtor was adjudicated insolvent. Then an interim receiver was appointed in whom nothing vested but who had the power of a receiver under the Civil Procedure Code. This receiver applied under Order 21, Rule 90 to set aside the sale. It was held that the application was not one competently made by the receiver u/s 47, Civil P. C. The precise circumstances under which a receiver in insolvency may maintain, as representative of the judgment-debtor an objection to execution u/s 47 of the Code, do not require to be discussed here. We are concerned with a receiver appointed under the Code who occupies a capacity by no means identical with that of a receiver in insolvency, the powers and functions of the latter being very different in extent. The fundamental distinction is that the legal estate in the property of an insolvent is vested in the receiver in insolvency, whereas no property is vested in a receiver appointed under the Code who is merely the manager appointed by the Court of the properties in question. The cases in *Dinesh Chandra Roy Choudhury Vs. Jahan Ali Biswas and Others*, and *Mohitosh Dutta Vs. Rai Satish Chandra Chaudhuri and Another*, seem to indicate that a receiver would have no locus standi as representative of a party to a suit to maintain an objection u/s 47 of the Code, unless the property of the party was vested in him: *Sm. Annapurna Dasi and Others Vs. Sarat Chandra Bhattacharjee and Others*, . This was a suit for a declaration that a mortgage by a receiver and a decree in enforcement thereof were not binding on the owners of the property

mortgaged. The receiver was appointed under o. 40, Rule 1, Civil P. C, and he executed the mortgage with the sanction of the Court which appointed him. One of the questions raised was whether the plaintiffs who were the owners of the property should have been made parties to the mortgage suit. Akram and Pal JJ., said:

There is no express order of the Court appointing the receiver allowing the receiver to represent the true owners in the mortgage suit. Admittedly the property never vested in the receiver, his appointment being only under Order 40, Rule 1, Civil P. C. The property was only in the custody of the Court and the receiver was simply managing the estate as an officer of that Court. No doubt while he mortgaged the property with the sanction of the Court he must be taken to have represented the owners of the property. But that was the effect of the express sanction given by the Court.

36. The observation just quoted in no way supports the contention that a receiver appointed under the Code is in exactly the same position as the owner of the equity of redemption of a mortgaged property, or that he is the latter's representative in all litigation relating thereto. To illustrate the true position of a receiver in proceedings affecting property of which he is in charge, reference may briefly be made to the following cases cited on behalf of the respondent. Harihar Mukerji v. Harendra Nath Mukerji ("10) 37 Cal. 754. The question in this case was whether a receiver appointed by a Court of the assets of a deceased person could be described as a person claiming to be entitled to the effects of the deceased person within the meaning of Section 4, Succession Act of 1889. Mookerjee and Cam-duff JJ. said:

It is well settled that a Receiver by his appointment does not become the representative of the parties, but is an officer and representative of the Court which appoints him. The effect of the appointment of a Receiver is to bring the subject-matter of the litigation in custodia legis, and the Court can effectively manage the property only through its officer, who is the Receiver. In other words, the Receiver ordinarily is not the representative or agent of either party in the administration of the trust, but his appointment is for the benefit of all parties, and he holds the property for the benefit of those ultimately found to be the rightful owners....

37. The true position of a receiver in possession of property which is the subject of litigation was again expounded by Mookerjee J. in Dwijendra Narain Roy Vs. Joges Chandra De and Others, of the report there is a passage in the judgment which is in the following words:

When the Court has. appointed a receiver and the receiver is in possession, his possession is the possession of the Court, and the possession of the Court by its receiver is the possession of all parties to the action according to their titles: Re Butlar (1863) 13 Ir. Ch. 456; Bertrand v. Davies (1862) 31 Beav. 429; Moir v. Blacker (1890) 26 L. R. Ir. 375; Re Ind. Coope & Co (1911) 2 Ch. 223: 80 L. J.

Ch. 661. The property passes into legal custody as the receiver is in the position of stake-holder, and such custody is for the benefit of the true owner : *Brajendra Kishore v. Abdul Razac* ("16) 3 AIR 1916 Cal. 751, *Ramaswamy Aiyar v. Muthusamy Aiyar* ("07) 30 Mad. 12, *Khagendra v. Matangini* ("90) 17 Cal. 814 : 17 I.A. 62; *Rao Karan v. Rajah Baker Ali* ("83) 5 All. 1; *Jagat Tarini Dasi v. Naba Gopal Chaki* ("07) 34 Cal. 305.

38. In *Raj Raghubar Singh v. Jai Indra Bahadur Singh* ("19) 6 A. I. R. 1919 P. C. 55: 42 All. 158 their Lordships of the Privy Council made it clear (p. 236 of the report) that Sections 47 and 144 of the Code apply only to the parties or the representatives of the original parties and not to sureties.

39. *Fraser v. Krishnaswamy Aiyer* ("23) 10 A. I. R. 1923 Mad. 144. In this case it was held that a mortgagee decree-holder is bound to apply to the Court which has, in another suit, appointed a receiver of the mortgaged properties, for leave to execute his decree, and can not, without such leave, proceed to sell such properties. *Devadoss J.*, observed as follows:

The Court having taken possession of the properties it appoints an officer to look after the properties on behalf of all the parties and a Receiver is not a legal representative of any party; nor is he a new party to the proceedings. But he represents all the parties for some purpose and his duty is that which is assigned to him by the Court.

40. These remarks make it clear that though a receiver is in many cases a necessary party to a suit, he is not the representative of any particular party thereto. In our judgment, it cannot be said that the words "parties to the suit" or the words "their representatives" in Section 47 of the Code can be extended to include a mere receiver appointed under Order 40, Rule 1 of the Code to take charge of property which is subsequently sold in execution of a decree suffered by the owner thereof. Nor can it be said that the omission to make such a receiver a party to the execution proceedings which have led up to the sale renders those proceedings void. It, therefore, follows that the receivers in the present case were not competent to challenge the execution of the decree on the ground of limitation or any other ground within the scope of Section 47 of the Code. It follows also that the execution proceedings were not void ab initio, and that as the receiver's application under Order 21, Rule 90, Civil P. C., was itself barred by limitation, that application must fail. Two other questions were argued which would have had to be considered if the main argument dealt with above succeeded. It was contended, firstly, that the application for execution of the mortgage decree which was preferred on 2nd of July 1938, was barred both under Article 182, Limitation Act, and Section 48, Civil P. C, and that it was open to the appellants to take this objection even after the sale had taken place. Secondly, it was urged that the application for execution of the mortgage decree was not maintainable at the instance of the Raja of Pachit who was the assignee of that decree. Finally, we were invited to allow Mr. Seddon, one of the mortgagors judgment-debtors, to be joined with the receivers as an applicant in

the applications out of which this appeal has arisen. It is unnecessary for me to add anything to what has been said by my learned brother regarding these matters, as, for the reasons indicated by him, I agree in the decision which he has pronounced. This appeal accordingly fails and must be dismissed with costs.