

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Abidunnissa Khatoon v. Amirunnissa Kha-
toon, from the High Court of Judicature at
Fort William, in Bengal; delivered 28th
November 1876.*

Present :

SIR J. W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR R. P. COLLIER.

THE facts necessary to the understanding of the question which arises in this appeal may be thus shortly stated :

Wahed Ali brought a suit against his father Abdool Ali to recover the possession of a considerable quantity of landed property, and it may be enough for the present purpose to describe the subject of contention between them thus : The father had executed certain hibbanamahs in favour of his son when that son was an infant : It was alleged on the part of the father that the son had subsequently executed certain ikrar-namahs, whereby he divested himself of the benefit which he derived under the previous hibbanamahs. The Court of First Instance dismissed the suit of the son, with the exception of that part which related to some property which he derived from his mother, and about which no question arose. Upon that, Wahed appealed to the High Court. Pending the appeal, Wahed died ; and thereupon the High Court, as it appears to their Lordships, under the powers given them by section 103 of Act VIII. of 1859,

substituted his widow Abidunnissa for Wahed for the purpose of prosecuting the appeal. The appeal was prosecuted; the High Court found the ikrarnamas to have been invalid, and reversed the decision of the Court below. The Court observe that since the death of Wahed “dis-
 “ putes have arisen, and litigation is now
 “ pending concerning his proper legal repre-
 “ sentative; and for the purpose of prosecuting
 “ this appeal we have admitted his widow
 “ Mussumat Abidunnissa Khatoon to be his
 “ legal representative.” At the conclusion of the judgment they thus express themselves:
 “ The decree of the Court below is reversed, with
 “ costs. Confining ourselves to the matters in
 “ issue in the present suit, our decree will
 “ proceed on the basis of the validity of the
 “ three deeds of gift, and the invalidity of the
 “ later documents. We shall declare that
 “ Moulvi Wahed Ali was, in his lifetime, and
 “ that those who are now by law his heirs and
 “ representatives are, entitled to a decree for
 “ setting aside the documents relied upon by the
 “ Respondents, and for the recovery of the
 “ property sued for.” It is to be observed that the decree drawn up in pursuance of this judgment does not conform to that portion of the judgment in which it is said that the representatives of Wahed are entitled to a decree for the recovery of the property sued for. The decree is in these terms:—“It is declared that the
 “ several ikrarnamas and miras pottahs, dated
 “ respectively the 29th Falgoon 1259, 16th
 “ Aughrau 1263, 6th Jeyt 1264, and the 15th
 “ Aughrau 1263, were of no effect and void
 “ against Moulvi Wahed Ali in his lifetime, and
 “ are void against his lawful representatives.
 “ And it is further ordered and decreed that the
 “ Defendants, Respondents, who appeared in this
 “ appeal, do pay to the Plaintiffs, Appellants,

“ the sum of Rs. 3,000.” So, in fact, all that could be executed under this decree is the order for costs, the rest of the decree being declaratory only.

It has been argued, however, that the decree ought to be taken to be in conformity with the judgment. Their Lordships are by no means satisfied that this decree *improvide emanavit*. If it were necessary, they would be disposed to take it as it stands, and to declare that the rights of the parties were determined by it. But in the view which they take of the case it is not necessary to decide this point; and it may be assumed for argument's sake that the decree is in conformity with the latter words of the judgment which have been read.

An appeal was preferred from this judgment to Her Majesty in Council, and in 1875 the judgment was reversed. In the meantime, however, pending the appeal, certain execution proceedings were taken. The widow Abidunnissa applied for execution on behalf of herself, and also, in a different character, as guardian of an infant son, Wajed Ali, whom she alleged to have been born to her husband after her husband's death. The legitimacy of this child was disputed by Abdool Ali. Certain other parties also applied for execution, Messrs. Wise and Dunne; but as nothing appears to turn on the proceedings taken by them, no further mention will be made of them.

The Judge of Dacca, before whom the case originally came, appears to have held that he had no jurisdiction in a mere execution proceeding to determine such a question as the legitimacy or the illegitimacy of Wajed Ali, the son whom the widow had put forward as being legitimately born to Wahed. Unfortunately, we have not the original judgment of the Judge of Dacca before us. But we come

to the conclusion that the judge so decided, from the first order of the High Court on remand and what proceeded from the judge upon the remand. The High Court, in remanding the case, made these observations: "The Lower Court has assigned no good reason whatever for not entertaining and disposing of the application for execution made in this case. Under sections 102 and 103 and section 208 of Act VIII of 1859, the case may, so far as anything has been shown to us to the contrary, be perfectly well disposed of without a separate regular suit." And thereupon they remanded the case to be disposed of by the Judge of Dacca, and directed him to determine the question of the legitimacy of Wajed Ali. After a second remand, this question was heard and decided by the Judge of Dacca and decided against the widow, the judge holding that Wajed Ali was supposititious. Subsequently, on appeal, the same matter came before the Court; and two judges of the High Court reversed the judgment of the Judge of Dacca, and held that Wajed Ali was the legitimate son of Wahed. They refer to the proceedings in this manner: They state: "The question that is now before us is, whether the person who goes by the name of Wajed Ali is or is not a posthumous son of the said Wahed Ali; and whether, therefore, one Abidunnissa who is admittedly the guardian of Wajed Ali, if there is such a person in reality, is entitled to execute the said decree partly in her own right and partly as mother and guardian of the said Wajed Ali,"—and they decree,—“that Abidunnissa be declared entitled to execute the whole of her decree against the judgment debtor before us,”—that is, in her two capacities, partly for herself and partly in her new capacity of guardian of Wajed Ali. It appears to their Lordships, that she, in her

character of guardian of Wajed Ali, became a new party in these proceedings, just to the same extent that Wajed Ali would have become himself if, after he had come of age, he had appeared by his attorney.

Upon this, Abdool Ali having died, his widow Amirunnissa instituted the present suit for the purpose of setting aside the last judgment which has been referred to mainly upon two grounds; in the first place, that in an execution proceeding it was not competent to the Court to entertain such a question as the legitimacy of Wajed; and secondly, upon the merits. On the other hand, Abidunnissa contends that the suit is not maintainable, because the very question has been decided between the same parties in a previous suit by a court of competent jurisdiction. In other words, she pleads *res judicata*, and she also joins issue upon the merits.

As far as the merits are concerned, both Courts have found that Wajed was not the son of Wahed; and the sole question before their Lordships is this, whether this question is *res judicata* or not. There is no doubt that in the execution proceeding, which has been referred to, the very same issue was tried between the same parties. The sole question is, whether the Court had jurisdiction in such a proceeding to try it.

Some attempt was made to establish that Abdool had originally consented to the exercise of this jurisdiction, but their Lordships cannot assume this. The inference appears to them the other way. They have not the record of the first proceeding before the Judge of Dacca; but the Judge of Dacca decided that he had not jurisdiction to determine the question in that suit. It appears to their Lordships that it ought not to be assumed that he would have come to that conclusion unless the objection had been raised; the assumption would be the other way. They

cannot, therefore, assume consent even if consent would have given jurisdiction in such a case.

The question, whether the jurisdiction existed or not, depends entirely upon the construction of certain sections in two Acts which have been referred to; the first being Act VIII. of 1859, and the second Act XXIII. of 1861. The sections of the first Act, relied upon by the Court in their first remand, are sections 102, 103, and 208. The first sections, 102 and 103, relate to the substitution, in the case of the death of a sole Plaintiff or surviving Plaintiff, of a legal representative of such Plaintiff. The 102nd section refers to cases where there is no dispute. Section 103 is the section which, as before observed, was acted upon in this case, when Abidunissa was allowed to prosecute the suit, and is to this effect: "If any dispute
" arise as to who is the legal representative of a
" deceased Plaintiff, it shall be competent to
" the Court either to stay the suit until the
" fact has been determined in another suit, or
" to decide at or before the hearing of the suit
" who shall be admitted to be such legal repre-
" sentative for the purpose of prosecuting the
" suit." Under the terms of this section, it not being decided by the Court that Abidunissa was the legal representative of her husband, she was admitted "for the purpose of prosecuting the suit"; those being the very words used by the Court in their judgment. This section manifestly cannot apply to the case of Wajed, because this section, which comes under the heading of "Proceeding before Judgment," has reference only to a state of things existing before the hearing of the suit or at the hearing of the suit; and before and at the hearing of the suit there was no suggestion whatever that Wajed had any interest whatever in it. Then we come to section 208, which undoubtedly is a section

relating to proceedings for execution and after judgment and decree. It is to this effect:—

“ If a decree shall be transferred by assignment
 “ or by operation of law from the original decree-
 “ holder to any other person, application for the
 “ execution of the decree may be made by the
 “ person to whom it shall have been so trans-
 “ ferred, or his pleader; and if the Court shall
 “ think proper to grant such application, the
 “ decree may be executed in the same manner as
 “ if the application were made by the original
 “ decree-holder.” It appears to their Lord-
 ships, in the first place, that, assuming Wajed
 to have the interest asserted, the decree was not,
 in the terms of this section, transferred to him,
 either by assignment, which is not pretended,
 or by operation of law, from the original decree-
 holder. No incident had occurred, on which the
 law could operate, to transfer any estate from
 his mother to him. There had been no death;
 there had been no devolution; there had been no
 succession. His mother retained what right she
 had; that right was not transferred to him; if he
 had a right, it was derived from his father; it
 appears to their Lordships, therefore, that he is
 not a transferee of a decree within the terms of
 this section.

Their Lordships have farther to observe, that
 they agree with the Chief Justice in the view
 which he expressed,—that this was not a section
 intended to apply to cases where a serious contest
 arose with respect to the rights of persons to an
 equitable interest in a decree. It was not
 intended to enable them to try an important
 question, such as the legitimacy or illegitimacy
 of an heir. They are further fortified in this
 view by the consideration that, under section 321
 of this Act, no appeal would lie from any
 judgment or decision given in a proceeding
 under section 208; it appears difficult to suppose

that such an important question as this should be tryable without appeal. Therefore, in their Lordships' view, agreeing with that of the Chief Justice, section 208 does not apply. Even if it did apply, it would appear to their Lordships that, inasmuch as proceedings under it are not subject to appeal, probably a suit would lie for the purpose of reversing an order made in pursuance of it.

Act VIII then being disposed of, we next come to the second Act, Act XXIII of 1861. The sole section relied upon has been the 11th, which is in these terms: "All questions regarding the amount of any mesne profits which, by the terms of the decree, may have been reserved for adjustment in the execution of the decree, or of any mesne profits or interest which may be payable in respect of the subject-matter of a suit, between the date of the institution of the suit and execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree, or the like, and any other questions arising between the parties to the suit, in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by separate suits, and the order passed by the Court shall be open to appeal." Their Lordships quite accede to the view of the learned counsel for the Appellant, that this section was intended to enable questions to be tried in execution cases which could not have been so tried before, and to provide, as might have been expected, an appeal from decisions in such trials; but the question narrows itself to this, whether the present case comes under these words: "Any other questions arising between the parties to the suit in which the decree was

“ passed, and relating to the execution of the “ decree.” There must be two conditions to give the Court jurisdiction. The question must be between parties to the suit, and must relate to the execution of the decree.

Their Lordships are of opinion that it would be straining the words of this section beyond any legitimate construction which could be put upon them, to apply them to the present case. In their judgment, Wajed Ali appearing by his mother (and, as before observed, it would have been the same thing if he had been of age and had appeared in the usual way by his attorney or mooktear,) in no proper sense of the word was a party to this suit. No rights of Wajed Ali were determined or considered in the suit. He was not on the record when judgment was given, nor when the decree was made. He subsequently applied for execution of the decree; but it appears to their Lordships impossible to say that a person by merely applying for execution of the decree thereby constitutes himself a party to the suit. Their Lordships are therefore of opinion that this section does not apply.

Under these circumstances, their Lordships have come to the conclusion that the issue which has been referred to in the case was not *res judicata* by a competent Court in a competent proceeding; and for this reason they will humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this Appeal, with costs.

