

APPELLATE CIVIL.

Before Mookerjee and Beachcroft JJ.

UPENDRA NATH KALAMURI

v.

KUSUM KUMARI DASL.*

1914
June 5.

Execution of Decree—Shebait—Claim preferred by successor in office of judgment-debtor (adverse to his own interests) as the legal representative—Order made, whether under scope of Civil Procedure Code (Act V of 1908), s. 47, or O. XXI, rr. 58, 60—Appeal therefrom, competency of—Civil Procedure Code (Act V of 1908), ss. 2, sub. s. (2), 96, 104; O. XLIII, r. 1.

Where X in execution of a decree for money against Y as shebait of a deity attached and proceeded to sell properties of which Y or his successor in office had alleged that he was in possession, not as shebait of the deity but in his own right :

Held, that the case did not fall within the scope of section 47 of the Civil Procedure Code of 1908 as Y in his character of shebait, the only character in which he was a party to the suit, could not rightly be deemed the same person in his character as a private individual.

Kartick Chandra Ghose v Ashutosh Dhara (1) followed.

That the order of the original Court must be taken to have been made under r. 60 of O. XXI, which recognised a broad distinction between the representative character and the personal character of the same individual : and that, in consequence, the appeal to the Subordinate Judge was incompetent.

Punchann v. Rabia Bibi (2) distinguished and explained.

Per MOOKERJEE J. When X in execution of a decree for money against Y seeks to proceed against Z as the legal representative of Y who is liable only to the extent of the assets of Y in his hands, and a question arises

* Appeal from Appellate Order, No. 184 of 1910, against the order of Prabha Chandra Sinha, Subordinate Judge of Midnapore, dated Feb. 11, 1910, confirming the order of Lal Behari Chatterjee, Munsif of Midnapore, dated Sept. 13, 1909.

(1) (1911) I. L. R. 39 Calc. 298. (2) (1890) I. L. R. 17 Calc. 711.

whether a particular property does, or does not, constitute such assets, it must be determined by the execution Court under section 47 of the Code.

Per BEACROFT J. If the claim of the objector is really in his own interests as representative of the judgment-debtor, the case will come under section 244 (of the Code of 1882); if the claim is adverse to his interest as representative, it will not.

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APPEAL by Upendra Nath Kalamuri and Sashi Bhushan Kalamuri, the objectors.

The facts are briefly as follows. On the 7th April 1904, Kusum Kumari Dasi, widow of one Harnarain Dutt, deceased, of Barabazar, Midnapore, obtained a decree for money against one Gobardhan Kalamuri described as the shebait of the goddesses, Lakshmi and Bhagabati, to whom certain properties were alleged to have been dedicated by a *niyampatra*, dated 16th Asarh 1284 *Amli* (corresponding to 29th June 1877). On the 28th July 1909, the decree-holder applied in the Court of the Munsif of Midnapore, for execution of the decree by sale of certain properties of the aforesaid goddesses, stating in her petition that the judgment-debtor was dead; and prayed that execution might proceed after service of notice on the deceased's three paternal uncles and five nephews under r. 22 of O. XXI of the Code of Civil Procedure, as she did not know who was the shebait. On the 19th August 1909, after issue of notices, a petition of objection under r. 58 of O. XXI, was filed by the two uncles alone, *viz.*, Upendra Nath Kalamuri and Sashi Bhushan Kalamuri, urging, *inter alia*, that the properties sought to be attached had not been dedicated to the goddesses, Lakshmi and Bhagabati, but were the private secular properties of the objectors, though under the *niyampatra* deed, dated 29th June 1877, a portion of the income of the properties had been directed by the then proprietor to be applied for religious purposes. On the 13th September 1909, the

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learned Munsif directed execution to proceed, deciding against the objectors. On appeal, the Subordinate Judge of Midnapore, on 11th February 1910, confirmed the order of the Court of first instance on the merits, being doubtful whether the appeal was really incompetent. The objectors then appealed to the High Court.

Mr. S. P. Sinha and Babu Mohini Mohan Chatterjee, for the appellants.

Dr. Rashbehari Ghose and Babu Khetra Mohan Sen, for respondents.

Cur. adv. vult.

MOOKERJEE J. This appeal is directed against an order by which the Subordinate Judge has confirmed an order of the Court of first instance for execution of a money decree. On the 7th April 1904, the respondent obtained a decree for money against one Gobardhan Kalamuri described as the shebait of goddesses Lakshmi and Bhagabati. Before the decree could be executed in full, the judgment-debtor died. On the 28th July 1909, the decree-holder applied for execution of the decree by the sale of a one-fourth share of 260 bighas of land within certain boundaries. She stated in her petition that the judgment-debtor was dead, that he had left five nephews (sons of different sisters) as also three paternal uncles, that one or more of these persons had succeeded as shebait of the endowment, but that as plaintiff had not been able to ascertain who was the shebait, she prayed that execution might proceed after service of notice on all these persons under rule 22 of Order XXI of the Civil Procedure Code, 1908. Notices were issued accordingly. The nephews of the original judgment-debtor took no notice of the proceedings, but on

the 19th August 1909, two of the uncles filed a petition of objection, in which they urged, amongst other things, that the properties sought to be attached had not been dedicated to the goddesses named but were private secular properties of the objectors, though under a deed, dated the 29th June 1877, a part of the income of these properties had been directed by the then proprietor to be applied for religious purposes. It transpired at the same time that the other uncle of the judgment-debtor, who had not entered appearance, had died on the 10th August; the decree-holder thereupon applied that the two objectors who had appeared might be treated as the representatives of the deceased; this was granted. The Court then proceeded to investigate the objection and, on the 13th September 1909, came to the conclusion that the properties sought to be attached had been dedicated to the goddesses named; in this view, the Court overruled the objection and directed execution to proceed. The objectors then appealed to the Subordinate Judge. When the appeal came on for hearing, a preliminary objection was taken by the decree-holder respondent that the appeal was incompetent, as the order could not be deemed to have been made under section 47 of the Code. The Subordinate Judge expressed himself in favour of this view, but as he felt doubtful whether the appeal was really incompetent, he considered the case on the merits and ultimately confirmed the order of the original Court. The objectors have appealed to this Court and have contended, *first*, that the appeal to the Subordinate Judge was competent, and, *secondly*, that he has misunderstood the legal effect of the deed of the 29th June 1877.

To determine whether the appeal to the Subordinate Judge was competent, it is necessary to ascertain

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whether the order of the primary Court falls within the scope of section 47. The answer to the question, whether an order in execution proceedings is within the scope of this section, depends upon its nature and contents. If it decides a question relating to the execution, satisfaction or discharge of the decree, and if the decision has been given between the parties to the suit or their representatives in interest, the order of the Court falls within the scope of this section, is a decree within the meaning of section 2, and as such is appealable under section 96; *Raghubar v. Jadu Nandin* (1), *Joytara v. Prankrishna* (2). It can not be disputed that the order of the original Court decided a question relating to the execution of the decree held by the respondent, namely, whether the decree could be executed by attachment and sale of the property specified in the application of the decree-holder. But the point remains, whether this question arose between the plaintiff decree-holder on the one hand, and the defendant judgment-debtor or his representatives on the other hand. It is plain that if and in so far as there was an endowment, the objectors were the legal representatives of the judgment-debtor, within the meaning of that expression as defined in section 2, clause (ii) of the Code; the original defendant had been sued in a representative character as the shebait of the two goddesses named; the objectors had succeeded to the office of shebait and the estate held by the deceased as shebait had devolved on his successors in office. This view is in accord with the elementary rule that when a decree has been passed in a suit against a shebait as representing an idol, it is binding on the succeeding shebait, provided it has been passed without any fraud

(1) (1911) 15 C. L. J. 89.

(2) (1910) 13 C. L. J. 257.

or collusion: *Prosumo Kumari v. Golab Chand* (1), *Tulsidas v. Bejoy* (2), *Manikka v. Balagopalkrishna* (3). But when a decree has been passed against a person in his capacity as shebait, execution can be taken out only against the properties of the endowment in his hands; for as Subramania Ayyar, J., observed in *Venkatasami v. Kuppeyee* (4), the private property of an individual cannot be taken in execution of a decree made against him in his capacity as manager or trustee of an endowment, just as the property of the endowment cannot be taken in execution when the decree against him is in respect of his personal debt. The two capacities are fundamentally distinct, and the individual constitutes two distinct juristic persons from the two different points of view. In the present case, the decree-holder seeks to proceed against the property on the assumption that the appellants hold it as part of the endowment of the two idols named. The objectors, on the other hand, assert in their personal capacity, that this is their private property and is not available to the decree-holder for satisfaction of her decree. That decree is essentially against the debutter estate, though, as pointed out by their Lordships of the Judicial Committee in *Jagadindra Nath Roy v. Hemanta Kumari Debi* (5), the suit was bound to be brought against the shebait as such, because it is only in an ideal sense that an idol, though regarded as a juristic person, can hold property. The true position, consequently, is that the question raised by the objectors calls for decision between the decree-holder who is a party to the suit and two persons who are not, for this purpose, representatives of the original

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(1) (1875) L. R. 2 I. A. 145 : (3) (1906) I. L. R. 29 Mad. 543.

14 B. L. R. 450 : 23 W. R. 253. (4) (1904) 14 Mad. L. J. 377.

(2) (1901) 6 C. W. N. 178. (5) (1904) 32 Calc. 129 :

L. R. 31 I. A. 203.

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defendant, as they raise the objection, not in their capacity as shebait, but in their private individual capacity. This view is supported by the decision of the Full Bench in *Kartick Chandra v. Ashutosh Dhara*(1). There it was ruled that when X, in execution of a decree for money against Y personally, attaches and proceeds to sell properties of which Y alleges that he is in possession, not in his own right but as shebait of a deity to whom the properties have been dedicated, the case does not fall within section 244 of the Code of 1882 or section 47 of the Code of 1908. The principle recognised by the Full Bench is that there is a fundamental distinction between a right acquired or liability incurred by Y in a personal capacity, and a claim advanced or defence interposed by the same individual in his capacity as shebait of a deity. If this distinction is borne in mind, the inference follows that when X, in execution of a decree for money against Y as shebait of a deity, attaches and proceeds to sell properties of which Y or his successor in office alleges that he is in possession, not as shebait of the deity, but in his own right, the case does not fall within the scope of section 47. Y, in his character as shebait, the only character in which he is a party to the suit, cannot rightly be deemed the same person in his character as a private individual. We may add that the decision of the Full Bench in *Punchanun v. Rabia Bibi* (2), on which reliance was placed by the appellants, is not directly in point and does not assist their contention. That case is an authority only for the proposition that when X, in execution of a decree for money against Y, seeks to proceed against Z as the legal representative of Y, who is liable only to the extent of the assets of Y in his hands, and a question arises, whether a particular property does or does not

(1) (1911) I. L. R. 39 Calc., 298.

(2) (1890) I. L. R. 17 Calc. 711.

constitute such assets, it must be determined by the execution Court under section 47 of the Code. Nor is the contention of the appellant supported by the cases of *Moharaj Kumar Bindeswari v. Thakur Lalpat Nath* (1), and *Umeshananda v. Mohendra Prosad* (2). The former case shows that where a party has obtained an order in his favour on the footing that the Court was competent to deal with the matter and make the order under section 47, he cannot, when the validity of the order is challenged by way of appeal, impugn the appeal as incompetent on the ground that the order could not have been made under section 47. The latter case is an authority for the proposition that where a decree has been obtained against a person (who had been really removed from the office of shebait) on the erroneous assumption that he is still the shebait, and upon application made to execute such decree against his successor in office, an objection is raised that there is no valid decree capable of execution against the properties of the endowment, the question falls within section 47, because a question was raised, who was the representative of the judgment-debtor, which could be determined only under clause (3) of that section. Reference was finally made to the decisions of their Lordships of the Judicial Committee in *Chowdry Wahed Ali v. Jumae* (3) and *Abidunnissa v. Amirunnissa* (4), neither of which lays down any principle contrary to the view I propose to take. The first case affirms, what must now be regarded as incontestable, namely, where a decree against a person in a representative capacity has been properly passed and proceedings have been taken thereunder to obtain execution against him in

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(1) (1910) 15 C. W. N. 725.

(3) (1872) 11 B. L. R. 149.

(2) (1911) 14 C. L. J. 337.

(4) (1876) I. L. R. 2 Calc. 327;

L. R. 4 I. A. 66.

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his representative character, he is a party to the suit with respect to any question which may arise between him and the other parties relating to the execution of the decree. The second case shows that section 11 of Act XXIII of 1861 (which with important modifications now stands as section 47 of the Code of 1908) was not 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 follows that the order of the original Court was not made under section 47 and was not a decree liable to be challenged by way of appeal. It must be taken to have been made under rule 60 of Order XXI, although it may be difficult to make the language of that rule fit in precisely with a case in which the defendant has been sued in a representative capacity and prefers a claim in his personal capacity. The rule, however, recognises a broad distinction between the representative character and the personal character of the same individual. In this view, the appeal to the Subordinate Judge was incompetent, and no opinion need be expressed on the question, whether the objection is well founded on the merits. The appeal is consequently dismissed with costs.

BEACHCROFT J. In this case a very real difficulty is raised by the decisions in the cases of *Punchanun v. Rabia Bibi* (1) and *Kartick Chandra Ghose v. Ashutosh Dhara* (2). Both are decisions of a Full Bench. In the first of these two cases, it was decided that an objection by the representative of the judgment-debtor in execution to the effect that the property attached was his own and not held by him as such representative was cognisable only under section 244 of Act XIV of 1882, (section 47 of the

(1) (1890) I. L. R. 17 Calc. 711.

(2) (1911) I. L. R. 39 Calc. 298.

present Code). *Prima facie* that decision would seem to cover the present case. The appellant has been brought on the record as the representative of the original judgment-debtor and his claim is that the property is his own, and that he does not hold it as shebait. In the second of the above cases, it was decided that when the objector alleges that he is in possession, not in his own right but as shebait of a deity to whom the property has been dedicated, the order passed is one under section 278 of the old Code (now O. XXI, r. 58). The ground on which the decision proceeded was that while the objector was a party to the suit in one capacity, the claim was advanced by him in another, and consequently the question did not arise between the parties to the suit in which the decree was passed and therefore was not one to be determined under section 244.

Now, if this be taken to be the underlying principle to be applied in cases of this nature, it might also have been applied in the case of *Punchun v. Rabia Bibi* (1), for while the objector claimed the property as her own in her personal right, she was a party to the suit, only because she was the widow of the original judgment-debtor and therefore liable to the extent of the assets which had come into her hands.

So far then, as the principle was recognised in one case and ignored in the other, the two cases would seem to be in conflict. But the learned judges who decided the latter case distinguished it from the earlier one on the ground that it dealt with the converse question. If that be a real ground of distinction, it might be said that the present case being also the converse to the case of *Kartick Chandra Ghose v. Ashutosh Dhara* (2), is not concluded by that decision, but should follow that in *Punchun v. Rabia Bibi* (1).

(1) (1890) I. L. R. 17 Calc. 711.

(2) (1911) I. L. R. 39 Calc. 298.

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The distinction, however, fails when it is attempted to apply it to the facts of the case before us, for here we again have one person in a dual capacity, a state of things which was the foundation of the decision in *Kartick Chandra v. Ashutosh* (1).

Can then the two cases be reconciled? One possible view occurs to me; it is this. If the claim of the objector is really in his own interests as representative of the judgment-debtor, the case will come under section 244, if the claim is adverse to his interest as representative, it will not. If this be a correct test, it will satisfy the conditions in the case of *Punchanun v. Rabia Bibi* (2), for the widow's claim in her personal right was in her interests as representative of the judgment-debtor. It will satisfy the conditions in *Kartick Chandra v. Ashutosh* (1), for the objector's claim as shebait was adverse to his interests as representative of the judgment-debtor. Applied to the present case, it provides a feature distinguishing it from the case of *Punchanun v. Rabia Bibi* (2), and a solution in accord with the principle underlying the case of *Kartick Chndra v. Ashutosh* (1). I, therefore, agree in dismissing the appeal.

G. S.

Appeal dismissed.

(1) (1911) I. L. R. 39 Calc. 298.

(2) (1893) I. L. R. 17 Calc. 711.