ORIGINAL CIVIL.

1939

May, 22, 23, 24, 29.

Before Sen J.

RAI KISSENJI

v.

SRI KISSEN MACKAR.*

Sheriff's Poundage—*Precept of attachment, if a step in execution—Compromise after attachment under precept—High Court (Original Side) Rules, Ch. XXXVI, r. 77 (22)—Code of Civil Procedure (Act V of 1908), s. 46.*

The Sheriff is not entitled to his poundage under Chap. XXXVI, r. 77, of the High Court (Original Side) Rules, unless he has taken steps to levy sums in execution of a decree.

Pickford v. *Janaki Nath Roy* (1) followed.

Attachment, in pursuance of a precept under s. 46 of the Code of Civil Procedure, is not a step in the execution proceedings, but it is merely a step taken to facilitate execution.

Kasiwar De v. *Aswini Kumar Pal* (2) relied on.

Where a property is attached by the Sheriff in pursuance of a precept of another Court, he is not entitled to his poundage, if the decree is satisfied before any application is made for executing it.

APPLICATION by the judgment-debtor for release of the attached property without payment of the Sheriff's poundage.

Sambhu Nath Banerjee for the applicant. The Sheriff is not entitled to his poundage unless he has taken steps in execution of a decree. The two parts of r. 77 in Chap. XXXVI are not independent of each other. Once he has taken steps to levy a sum in execution, he is entitled to his poundage even though the claim is satisfied or compromised. *Pickford* v. *Janaki Nath Roy* (1).

Here, no application for execution was made. The property was attached under a precept pending orders for execution merely to preserve it *in medio*.

*Application in Execution Case No. 74 of 1938.

(1) (1921) 26 C. W. N. 673. (2) [1926] A. I. R. (Cal.) 249.

An application to the High Court for executing the decree must be in Form No. 1 as given in Chap. XVII, r. 10 of the Rules of the High Court (Original Side). Attachment under a precept is not an attachment in execution,. *Kasiwar De* v. *Aswini Kumar Pal* (1).

H. D. Bose for the Sheriff of Calcutta. The Sheriff has earned his poundage and must be paid. Poundage is Sheriff's remuneration for seizure and for getting money in execution of decree. He is the Court's officer and is protected for rendering his services by payment of poundage. He is entitled to it even if there is a compromise on account of his seizure. Halsbury, Vol. 14, ss. 71, 72. The test is whether there has been a seizure in fact which procured the money. *Mortimore* v. *Cragg* (2); *Bissicks* v. *Bath Colliery Co.* (3); *Alchin* v. *Wells* (4). He is entitled to his poundage where there has been a seizure but no sale, or where there has been payment after a demand along with the writ or even if there has been composition before sale.

Attachment under a precept is a step in execution. Section 46 is in Part II of the Code of Civil Procedure which refers to execution of decree.

Cur. adv. vult.

SEN J. The only point for determination in this application is whether the Sheriff of Calcutta, who attached certain property pursuant to a precept issued to this Court by a Court at Benares, is entitled to poundage, the claim under the decree having been satisfied on a compromise entered into after such attachment.

One Rai Kissenji brought a suit against the petitioner in the Court of the Civil Judge at Benares and got a decree for over two lakhs of rupees.

(1) [1926] A. I. R. (Cal.) 249.
(2) (1878) 3 C. P. D. 216.
(3) (1878) 3 Ex. D. 174.
(4) (1793) 5 T. R. 470; 101 E.R. 265.

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Thereafter, the decree-holder applied under s. 46 of the Code of Civil Procedure to the Court at Benares for the issue of a precept to this Court for the attachment of certain property belonging to the petitioner at Calcutta. The precept was issued and, under the orders of this Court, the Sheriff attached the properties sometime in January, 1938. As an attachment under a precept lapses after the termination of two months, the period of attachment was extended from time to time.

In the meantime, the decree was transmitted to this Court for execution, but no application for execution was made in this Court. In December, 1938, while the attachment was still subsisting, the decree-holder and the judgment-debtor entered into a compromise, whereby *inter alia* the judgment-debtor agreed to pay the decree-holder the sum of Rs. 1,05,000 in full settlement of the decretal dues by March 1, 1939. The judgment-debtor also agreed to pay to the decree-holder all costs incurred by the decree-holder from and after December 19, 1938. The sum agreed upon as liquidating the decretal dues was paid within the stipulated time and a sum of Rs. 3,000 has been deposited in payment towards costs with the solicitor of the decree-holder. On March 20, 1939, the attachment ceased to exist, as no further application was made to extend the period of the attachment. The Sheriff, however, refuses to release the property, on the ground that his poundage has not been paid. The petitioner has, therefore, applied for an order for the release of the attachment upon payment of only the actual costs incurred by the Sheriff without poundage.

The contention of the Sheriff is that, as the compromise has been effected and the amount under the compromise has been realised as a result of or, at any rate, under pressure of the attachment levied by him, he is entitled to poundage under the rules of

this Court. On behalf of the petitioner the contention broadly put is that as the attachment has not been effected in execution proceedings it cannot be said that the amount has been realised as a result of any action by the Sheriff in execution and that, therefore, the Sheriff is not entitled to poundage. Learned counsel on behalf of the petitioner states that his client is perfectly willing to pay the Sheriff his poundage if it is held that the Sheriff is entitled to the same and that he is not going to contend that the Sheriff should realise his poundage from anybody else or by any other proceeding or that the amount of poundage claimed is incorrect. The only question for decision, therefore, is whether in the circumstances related above the Sheriff is at law entitled to poundage.

The nature of the right of the Sheriff to poundage has been elaborately discussed in the case of *Pickford* v. *Janaki Nath Roy* (1). The Sheriff has no common law right to reward for executing a writ. The Sheriff is not engaged by the litigant to realise the decree. There is no privity between the Sheriff and the litigant. The latter applies to the Court for the enforcement of its own decree and it is the Court that employs the Sheriff as one of its officer to enforce its orders. If the Sheriff is to be remunerated for such services it is a matter between the Court and the Sheriff with which the litigant has no direct concern. If the Court or the legislature consider that the Sheriff should receive remuneration, it is for those authorities to make provision by rule or statute for such remuneration, and in doing so they may undoubtedly levy fees on the litigant. Such rule or statute being a taxing rule or statute must be strictly construed so as to guard against any enlargement of its scope to the detriment of the subject who but for such rule or statute would be under no liability to pay. So far as this Court is concerned, poundage

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is a charge authorised by the 22nd and 23rd item of r. 77 of Chap. XXXVI of the Rules of this Court. We are concerned in this case with the 22nd item, which is as follows :—

> The fees allowed to the Sheriff and his officers shall be as follows :—
>
> Poundage on sums levied by the Sheriff in execution or, in the event of the claim being satisfied, compromised or settled, upon the amount of such satisfaction, composition or settlement for the first Rs. 1,000 at 5 per cent. and for the next at 2½ per cent.

It will be noticed that there are two parts to the Rule, one part deals with the case where a sum is levied by the Sheriff in execution of a decree and the other with the case where the parties settle the claim. The Sheriff is said to levy a sum when he realises it by converting the property seized by him into money or when he receives the sum from the judgment-debtor who wishes to avoid or lift the attachment. We are not concerned with the first part of the Rule, as no sum has been levied by the Sheriff. We are concerned with the alternative portion of the Rule, *viz.*, when the claim has been *settled*.

This portion of the Rule has been explained, if I may say so with respect, very clearly by Rankin J. in the case mentioned above. In explaining the words "the claim" he says that they do not mean any and every claim which one party may have against the other but the particular claim which was the subject matter of execution. In other words, the claim must be one in respect of which the Sheriff took steps in execution under the first part of the Rule. In this view he held that where subsequent to an attachment before judgment the parties compromised the claim the Sheriff was not entitled to poundage, inasmuch as the attachment before judgment was not an attachment for the purpose of levying a sum in execution, but an attachment made merely for the purpose of preserving the property *in medio* pending the decision of the suit and inasmuch as the claim settled was not one in respect of which execution had been levied.

Thus there are two sets of circumstances under which the Sheriff can get poundage: (*a*) where the Sheriff levies a sum in execution and (*b*) where the claim in respect of which the Sheriff has taken steps to levy a sum in execution is satisfied, compromised or settled. It is clear that the alternative portion of the Rule is not independent of the first portion; the Sheriff is not entitled to poundage under the second portion of the Rule unless he has taken steps under the first portion of the Rule with a view to levying a sum in execution.

Now, in this case, what has been done by the Sheriff? Has he taken any steps to levy a sum in execution? In my opinion, he has not. The attachment is one under s. 46 of the Civil Procedure Code. Under that section, upon application by the decree-holder, in proper circumstances, the Court which passed the decree will issue a precept to another Court to attach certain property belonging to the judgment-debtor pending orders for execution of the decree. The attachment is made not for the purpose of converting the property attached into money for the realisation of the decree but for the purpose of keeping the property of the judgment-debtor *in medio* until the decree can be executed. It is similar to an attachment before judgment in this sense. It is not an attachment in execution but an attachment before execution.

After there is an attachment pursuant to a precept under s. 46 of the Code of Civil Procedure, further steps have to be taken before the decree can be executed. First, there must be an application under s. 39 of the Code to the Court, which passed the decree, for transmission of the decree to the Court which is to execute the decree. Then there must be an application for execution of the decree to the Court to which the decree has been transferred and the application must be in tabular

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form as provided in O. XXI, r. 11 of the Code of Civil Procedure when the executing Court is not the High Court. If the Court, to which the decree has been transferred, is the High Court, then the application for execution must be in Form I of the Rules of this Court and must contain, in addition to the particulars mentioned in O. XXI, r. 11, certain other particulars (*vide* Chap. XVII, r. 10, of the Original Side rules). It is thus clear that after an attachment under a precept there must be an application for execution in the proper form and it is only upon such aplication that execution can issue. The order issuing a precept is, therefore, not an order directing execution and the attachment under a precept is not an attachment in execution proceedings. In the case of *Kasiwar De* v. *Aswini Kumar Pal* (1) it was held that an application for an attachment under s. 46 of the Code of Civil Procedure cannot be regarded as an application for execution. This was a case regarding rateable distribution, but the principle underlying this view applies.

In the present case, although the decree has been transferred to this Court, there has as yet been no application for execution. Learned counsel for the Sheriff draws my attention to the fact that s. 46 of the Code of Civil Procedure is to be found in a portion of the Code entitled "execution" and he argues that the attachment is really an attachment in execution. In my opinion, the fact that the attachment has been made in accordance with the provisions of a section appearing in a portion of the Code entitled "Execution" does not make the attachment an attachment in execution. This portion of the Code deals with matters leading up to execution as well as with matters regarding execution itself. The attachment under s. 46 of the Code of Civil Procedure is merely a step taken to facilitate execution, it is not a step taken in the proceedings in execution.

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As stated before, the Sheriff's right to poundage is a right granted by the provisions of r. 77 of Chap. XXXVI of the Rules of the Original Side of this Court; in my view, that Rule comes into operation only when the Sheriff has taken steps to levy sums in execution of a decree. I have held that no such steps have been taken in the present case. The Sheriff is, therefore, not entitled to any poundage. The result is that the application must be allowed with costs.

Application allowed.

Attorneys for applicant: *P. L. Mullick & Co.*

Attorney for Sheriff: *R. M. Chatterjee.*

G. K. D.