APPEAL FROM ORIGINAL CIVIL.

Before Derbyshire C. J. and Lort-Williams J.

SHAIKH FAZAL ELAHI

v.

SREE KISSEN MAKKAR.*

1939

Nov. 17.

Execution—*Sheriff's poundage—Attachment pursuant to a precept—Attachment in execution—Rules and Orders of the Calcutta High Court (Original Side), Ch. XXXVI, r. 77, item 22—Code of Civil Procedure (Act V of 1908), s. 46.*

The Court of the Civil Judge of Benares passed a money decree and then issued a precept under s. 46 of the Code of Civil Procedure, 1908, to the Calcutta High Court to attach certain properties belonging to the judgment-debtor which were situate within the jurisdiction of the latter Court. In consequence, the Sheriff of Calcutta attached such properties. While the attachment so levied was continuing and after the decree had been transmitted to the Calcutta High Court for execution, but before any application was made to the Calcutta High Court for execution, a compromise was arrived at between the judgment-debtor and the judgment-creditor and recorded in the Benares Court. The Benares Court thereupon withdrew the precept. Upon a claim of the Sheriff of Calcutta under Ch. XXXVI, r. 77, item 22 of the Rules and Orders of the Calcutta High Court (Original Side) for his poundage on the amount of the compromise,

held : (i) that the issue of the precept was a step towards the execution of the decree and an attachment pursuant to such precept was an attachment in execution, and

(ii) that the Sheriff was, under Ch. XXXVI, r. 77, item 22, entitled to poundage on the amount of the compromise.

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

APPEAL FROM AN ORDER of Sen J. by Shaikh Fazal Elahi, Sheriff of Calcutta.

The facts relevant for this report appear from the judgment of Derbyshire C. J.

S. N. Banerjee (*Sr.*) and *A. Sen* for the appellant, the Sheriff of Calcutta. The compromise between the judgment-debtor and judgment-creditor was effected as a result of or at any rate under the pressure of the attachment levied by the Sheriff pursuant to

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the precept. The Sheriff is, therefore, entitled to poundage under Ch. XXXVI, r. 77, item 22 of the Rules of this Court on the amount of the compromise: *Pickford* v. *Janaki Nath Roy* (1).

The attachment pursuant to the precept was an attachment in execution. The precept itself is headed "Execution Case No. 79 of 1937". Section 46 of the Code of Civil Procedure, 1908, under which the precept was issued, appears in a portion of the Code entitled "Execution". From these it must be inferred that the issue of the precept was a step in the execution proceeding. Item 22, therefore, applies.

S. C. Bose and *S. N. Banerjee* (*Jr.*) for the judgment-debtor respondent. The Sheriff is only entitled to his poundage under item 22 if the attachment levied by him is in execution proceedings. An attachment pursuant to a precept under s. 46 of the Code of Civil Procedure is not an attachment in execution proceedings. Such an attachment is made not for the purpose of converting the property into money for realisation of the decretal amount, but for the purpose of keeping the property of the judgment-debtor *in medio* pending orders for the execution of the decree. After there is an attachment pursuant to a precept, further steps have to be taken before execution can issue. First, there has to be an application under s. 39 of the Code to the Court which passed the decree. Then there has to be an application in tabular form as provided in O. XXI, r. 11, of the Code to the Court to which the decree has been transmitted, before an order for execution can be made. The order issuing a precept is, therefore, not an order directing execution, and an attachment under a precept is not an attachment in execution proceedings.

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

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not make the attachment one in execution. The portion of the Code entitled "Execution" deals with matters leading up to execution as well as matters regarding execution itself. An attachment under s. 46 of the Code is merely a step to facilitate execution; it is not a step in proceedings in execution.

S. N. Banerjee (Sr.), in reply.

DERBYSHIRE C. J. This is an appeal against an order of Sen J. made on May 29, 1939, whereby he adjudged that the Sheriff was not in the circumstances entitled to any poundage.

The Sheriff claimed poundage under r. 77 of Ch. XXXVI of the Rules of the Original Side of this Court, which states:—

The fees to be allowed to the Sheriff and his officers shall be as follows:—

22. 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, compromise or settlement for the first 1,000 rupees at 5 per cent. and for the rest at $2\frac{1}{2}$ per cent.

The facts which led up to the claim were as follows: The decree-holder was the plaintiff in Suit No. 84 of 1931 in the Court of the Civil Judge of Benares, and on June 1, 1937, he obtained a decree against the judgment-debtor, who is the respondent in this appeal, for a sum of over two *lakhs* of rupees. On January 22, 1938, a precept was issued by the Court at Benares which was headed "Precept "(Section 46): In the Court of the Additional Civil "Judge, Benares. Execution Case No. 79 of 1937. "Original Case No. 84 of 1931. Shriman Rai "Krishnaji, Plaintiff, Decree-Holder *v.* Sree Kissen "Makkar, Defendant, Judgment-Debtor". It states in the operative part:—

On the motion of the decree-holder it is ordered that this precept be sent to the Registrar, High Court of Judicature at Fort William in Bengal, under s. 46 of the Code of Civil Procedure, 1908, with directions to attach the property specified in the annexed schedule and to hold the same pending any application which may be made by the decree-holder for execution of the decree. The attachment should be made subject to the limitations put in the order enclosed.

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In the schedule annexed was a list of properties. The list included premises No. 15, Banstalla Street, Calcutta, known as "Makkar House" and all the moveables therein including cash, ornaments, jewellery, furniture, household effects, motor cars and also a share in the Calcutta Stock Exchange. The precept was signed by the Additional Civil Judge of the Court at Benares.

Consequent upon that precept the Sheriff attached the premises No. 15, Banstalla Street and two iron safes found on the said premises. He sealed up the said two iron safes belonging to the judgment-debtor situated in the house. No further application for execution was made, but the precept was extended by orders of the Benares Court at the end of two months, and every subsequent two months, until March 20, 1939.

The respondent, who was the petitioner before Sen J., stated in his petition:—

"In the meantime the decree has been sent to this Court" (*i.e.*, the Calcutta High Court) "for execution. But no application has been made in this "Court for execution as yet."

That petition was filed on May 2, 1939. In the meantime, in December of 1938, the respondent in this appeal, namely, the judgment-debtor, came to terms with the decree-holder. The terms of that compromise were filed in the Court at Benares. By those terms the judgment-debtor agreed to pay to the decree-holder a sum of Rs. 1,05,000 in full settlement of the decree-holder's claim, by March 1, 1939.

On March 15, the Additional Civil Judge at Benares wrote to the Registrar of the Original Side of this Court as follows:—

I have the honour to inform you hereby that the Execution Case noted above (*i. e.*, Ex. Case No. 79 of 1937) has been struck off after full satisfaction of the decree, the attachments effected by this Court on the properties both moveable and immoveable of the judgment-debtor Sree Kissen Makkar as detailed in the original precept of this Court are hereby withdrawn. This may kindly be noted and the needful may be done.

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The Sheriff refused to withdraw the attachment until his charges under Ch. XXXVI, r. 77, item No. 22 (set out above) of the Rules and Orders of this Court (Original Side), which amounted to Rs. 2,640 had been paid. In consequence of this refusal the present respondent judgment-debtor took proceedings before Sen J., who, relying on the case of *Pickford* v. *Janaki Nath Roy* (1), held that the Sheriff was not entitled to any sum by way of poundage or otherwise under Ch. XXXVI, r. 77, item No. 22, and ordered the Sheriff to withdraw the attachment. The Sheriff withdrew the attachment, but appealed to this Bench.

It has been contended before us that Ch. XXXVI, r. 77, item No. 22, has no application to the circumstances of this case, because no execution proceedings were pending when the Sheriff attached the property concerned.

In my view, there clearly were execution-proceedings in this case and a precept for the attachment of the property was one of the steps taken in those execution proceedings.

Mr. Bose has argued that the precept was something quite independent of any execution proceedings. I cannot agree. The precept itself is headed "Execution Case No. 79 of 1937. Original Case "No. 84 of 1931". I cannot do otherwise than infer from that, that the precept was a step in the execution proceedings which had been started, entitled Execution Case No. 79 of 1937.

Also, there is the letter of the Additional Civil Judge of Benares stating that the above case No. 79 of 1937 has been struck off after full satisfaction of the decree. To execute a decree means to carry it into effect by legal process. It seems quite clear that the sending of the precept to this Court by the

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Benares Court was something done towards carrying into effect the decree of the Benares Court for two *lakhs* odd rupees given in the original case No. 84 of 1931. Consequently, when the claim was compromised for Rs. 1,05,000 it was compromised in the course of execution proceedings, and the second part of item No. 22, namely, "in the event of the claim "being satisfied, compromised or settled, poundage "shall be paid upon the amount of such satisfaction, "compromise or settlement for the first 1,000 rupees "at 5 per cent. and for the rest at 2½ per cent." applied, and, therefore, the Sheriff is entitled to the sum which he has claimed.

It seems to me that the learned Judge misread the case of *Pickford* v. *Janaki Nath Roy* (*supra*). That was a case where A filed a suit against B for about 8½ *lakhs* of rupees and subsequently applied for attachment before judgment of certain moneys belonging to B and got an order for interim attachment which the Sheriff effected. Thereafter, a settlement was arrived at and the order *nisi* was discharged and the interim attachment was withdrawn by consent.

It was held that the Sheriff who claimed Rs. 21,900 as poundage under the item now in question, namely, item No. 22 of Ch. XXXVI, r. 77, was not entitled to such poundage. Rankin J., as he then was, giving judgment said :—

"The rule does not give the Sheriff a commission upon the settlement of "every man's claim or even upon the settlement of every claim made in a suit. "So much is admitted. The definite article" (*i. e.*, the word 'the' in Art. 22) "can only be intended with reference to the preceding words of the pro- "vision. The whole provision is directed to proceedings in which the Sheriff "is employed about the levying of a sum of money in execution. The alter- "native part applies to such a proceeding in an event, *viz.*, where the process "is interrupted before completion but in a manner which produces the same "or a similar result. In such a case the debtor merely anticipates by means "less distressing to himself the result of a coercive process already in mid "career. He can safely be deemed to have paid, not only in the course of the "execution, but under stress of the execution. It can safely be said of the "Sheriff: 'he seized and thereby got the money.' No one can be heard to "the contrary."

It seems to me that if the learned Judge had had regard to that passage he would not have fallen into the error which, in my view, he has fallen into. The plain fact of the matter is that the decree-holder in this case took proceedings to enforce his decree in the Benares Court. The judgment-debtor's chief property was in Calcutta where the Benares Court had no jurisdiction. The Benares Court, however, could by virtue of s. 46 of the Code of Civil Procedure issue a precept to the Sheriff of the High Court at Calcutta to attach the property at Calcutta. This the Benares Court did.

The result of the Sheriff's attachment of the property undoubtedly was that the judgment-debtor took steps to compromise the decree-holder's decree and satisfy it. The Sheriff had done what he was compelled to do according to law and it had had the effect which everyone anticipated. He was the instrument effectual in the decree-holder recovering the amount of Rs. 1,05,000 and he is entitled to be paid his proper charges which are those set out in Ch. XXXVI, r. 77, item No. 22.

For these reasons I am of the opinion that this appeal must be allowed and that it must be ordered that the respondent herein do pay to the Sheriff the sum claimed by him as poundage, namely, Rs. 2,640.

The appeal is accordingly allowed with costs here and below.

LORT-WILLIAMS J. I agree. I desire only to add the following observations:—

Our task, as I understand it, is to construe item No. 22 of r. 77 of Ch. XXXVI of the Rules of this Court on its Original Side. That item reads 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, compromise or settlement for the first 1,000 rupees at 5 per cent. and for the rest at 2½ per cent.

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We have to ascertain the meaning and intention of this Court when framing that rule, as disclosed in the words used by the Court, and to bear in mind that the object of the rule is to provide for the remuneration of the Sheriff, and that the Court intended that he should be entitled to poundage on sums levied by him in execution, and in cases where a levy was either frustrated or made unnecessary owing to a compromise or settlement of the claim which was "in "execution".

I respectfully agree with the observations of Rankin J., as he then was, in the case of *Pickford* v. *Janaki Nath Roy* (1) to the effect that the second part of item No. 22 does not apply to any claim but only to a claim "in execution". That learned Judge in his judgment points out that there is a great difference between attachment before judgment which is provided for under O. XXXVIII of Sch. I to the Code of Civil Procedure and an attachment, such as occurred in the present case, which is provided for in s. 46 of the Code.

The latter form of attachment comes under Part II of the Code of Civil Procedure which is headed "Execution". The first sections under that heading are termed "General" and s. 46 is the last section under the heading "Courts by which decrees may be "executed".

The application under that section made to the Court at Benares was treated by that Court as an application not *for* execution, but *in* execution. The case was entitled Execution Case No. 79 of 1937, and thus was entitled distinctly from the original title of the case which was Original Case No. 84 of 1931.

When the application for a precept had been granted and the precept was received in this High Court it was entitled "Mofussil Execution Case"

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and the writ directed to the Sheriff recited as follows:—

Whereas the Court of the Additional Civil Judge of Benares by its precept dated January 22, 1938, issued by it in execution of the decree of the said Court in the above case has requested this Court to attach the immoveable property belonging to the defendant abovenamed specified in the schedule hereunder written,

and it commanded the Sheriff *inter alia*:—

to receive all moneys tendered to you under this Warrant and upon receipt by you of any such moneys you do forthwith certify to this Court the amount and date of such receipt and do pay the amount less your fees, poundage and charges to the Finance Secretary to the Government of Bengal and the Secretary and Treasurer for the time being of the Imperial Bank of India with the privity of the Accountant-General of this Court to be by them placed to the credit of this suit subject to the further order of this Court.

Both parties to this appeal have treated the case as an execution case because all the applications and the documents which are set out in the paper book are headed either "Mofussil Execution Case" or "Execution Case No. 79 of 1937", and the attorneys for both parties have referred to it throughout, both in their correspondence and in applications to the Court, as the Execution Case in the Court of the Additional Civil Judge at Benares".

In my opinion, therefore, the proceedings which have taken place in the Benares Court and in this High Court are proceedings coming well within the expression "in execution" used in item No. 22 of r. 77 of Ch. XXXVI of our Rules.

I desire only to say in conclusion that it appears to me that the Sheriff had no right to maintain the attachment, because the precept had been cancelled, but both sides agree that the only point in this appeal for us to decide is whether the Sheriff in these circumstances is entitled to poundage. In my opinion he is, and this appeal must be allowed.

Appeal allowed.

Attorneys for appellant: *R. M. Chatterjee & Co.*

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

P.K.D.