

decree for pre-emption, and during the pendency of the appeal, in a totally separate litigation a decree had been passed which directed that the pre-emptor was not entitled to the pre-emptive tenement, namely, the tenement which gave him the right to sue, therefore such adjudication deprived such pre-emptor of his pre-emptive right and rendered the decree for pre-emption null and void. The case is not on all fours with the present case. If the case were applicable to this case I should have very great hesitation in holding that it was correct law. The rule of *lis pendens* is a broad doctrine, and the maxim *pendente lite nihil innovetur* is sufficiently broad to invest this question with some difficulty.

This case has not been tried upon the merits, and there are other questions in the case to which I have not referred, because I agree in the order of the learned Chief Justice that the case should go back under s. 562, of the Civil Procedure Code and be tried on the merits by the lower appellate Court, which Court should frame a decree such as the findings may require.

Costs to abide the result.

Cause remanded.

Before Mr. Justice Straight and Mr. Justice Mahmood.

ANGAN LAL (PLAINTIFF) v. GUDAR MAL AND ANOTHER (DEFENDANTS).*

Execution of decree—Deceased Judgment-debtor—Execution against a person not the legal representative.

The defendants, along with one N and C, had brought a suit against one A in the Civil Court at Pesháwar in the Panjáb and obtained a decree on the 23rd July, 1878, for Rs. 30,545-12-0. In 1881 application for transfer of the decree to the Court at Moradabad for execution was made, and it was granted, but no steps were taken thereupon. On the 12th June, 1883, A died. On the 30th April, 1884, the defendants again applied to the Court at Pesháwar treating their judgment-debtor as being then alive, for a fresh certificate to execute their decree in the Moradabad district, and obtained it. On the 20th of August, 1885, they made an application to the District Judge of Moradabad for execution of their decree, and in it, it was stated that the application was "for execution against Ajudhia Prasad and after his death against Angan Lal, the own brother, and Durga Kuar, widow, and Luchman Prasad and others, sons of Ajudhya Prasad, residents of Kundarkhi and the said Angan Lal at present residing at Umballa and employed in the Commissariat Transport Department, judgment-debtors." It was further stated that "the judgment-debtor was dead, and his heirs are living and in possession of his estate, and Angan Lal

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* First Appeal No. 198 of 1886, from a decree of Maulvi Zain-ul-abdin, Subordinate Judge of Moradabad, dated the 18th September, 1886.

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himself has realised Rs. 9,637-4-9 due to the deceased judgment-debtor from the Commissariat Department of Calcutta and appropriated the same, therefore to that extent the person of the said Angan Lal was liable." Notification of this application was issued to Angan Lal as also to the other persons named therein. Angan Lal objected to the application as against him, stating that, although he was the brother of A, deceased, yet he always lived separate and carried on business separately; that there was no connection or partnership between him and the deceased judgment-debtor, and that he had no property of the deceased in his possession. Further, that as A left issue, it was wrong to call him as heir to A, and take out execution process against him. In reply to these objections the judgment-creditors (defendants) did not contend that Angan Lal was the legal representative of the deceased judgment-debtor, but treated him as a person in possession of a sum of money belonging to the deceased, and therefore liable to the extent of the sum so received by him. The Subordinate Judge, holding that Angan Lal was the brother of the deceased, and had realised the amount from the Commissariat office, which he failed to prove that he paid to the deceased, ordered execution to proceed against him. Angan Lal then instituted this suit to set aside the order of the Subordinate Judge. It was contended first, that the suit was in effect a suit under s. 283 of the Code of Civil Procedure and therefore barred as not having been brought within a year from the order of the Subordinate Judge, and secondly, that the proceedings of the Subordinate Judge were held under s. 244 of the Code and therefore no separate suit would lie.

Held, that the first contention must fail, inasmuch as an essential condition precedent to a suit under s. 283 of the Code, is the making of an attachment of some property; of objection being taken to such attachment; of investigation being made into such objection, and lastly, of its being allowed or disallowed, and these do not exist in this case. The second contention also must fail, as the Subordinate Judge never treated the proceedings in execution against Angan Lal upon the footing that he was the legal representative of the deceased judgment-debtor.

Mirza Mahomed Aga Ali Khan Bahadur, v. *Balmukund* (1), *Sayid Nadir Hossain*, v. *Bipen Chund Bassarat* (2) were referred to.

The facts of this case are stated in the judgment.

Hon. T. Conlan and Hon. Pandit *Ajudhia Nath* for the appellant.

Mr. G. E. Ross and Pandit *Sundar Lal*, for the respondents.

STRAIGHT, J.—The suit to which this appeal relates is one of a peculiar character, and it is necessary for the purpose of making intelligible the view at which I have arrived to state as succinctly and clearly as I can the circumstances under which the plaintiff comes into Court. It appears that the defendants in the present suit, along with one Narain Das and Chela Ram, brought a suit against one Ajudhia Prasad in the Civil Court in the Panjab and

obtained a decree against him on the 23rd July, 1878, for a sum of Rs. 30,545-12-0. That was a simple money-decree. In the year 1881 an application was made to the Panjáb Court for a certificate to transfer the execution of that decree to Moradabad in these Provinces, and the application was granted. But nothing further was done in the matter. Upon the 12th June, 1883, Ajudhia Prasad, the judgment-debtor, died. On the 30th April, 1884, very nearly six years after the decree had been originally passed, the defendants, in the name of Damodar Das, who was the original decree-holder and was then also dead, came into the Panjáb Court and applied for a fresh certificate for the transfer of the execution of the case to Moradabad, and upon that date the certificate was granted. It is to be noticed, at least so I understand Mr. *Conlan*, that in that application to the Panjáb Court, Ajudhia Prasad was treated as still being alive. However, whatever informality there may have been in that application, on the 20th August, 1885, a formal application was presented in the Court of the Judge at Moradabad and it was for the execution of this decree which had been transferred. It said :—" Application for execution against Ajudhia Prasad, and after his death against Angan Lal, the own brother, and Musammat Durga Kuar the widow, Lachman Prasad, the major son, and Brijbasi Lal, Makut Behari Lal, and Kunj Behari Lal, minors, under the guardianship of Musammat Durga Kuar, their own mother in their own capacity, as the legal representatives of Ajudhia Prasad, the original judgment-debtor, deceased, residents of Kundarkhi, pargana Bilari, in the district of Moradabad, and the said Angan Lal at present residing at Umballa and employed in the Commissariat Transport Department, judgment-debtors."

In that petition the following statement was made :—" Although in the decree the names of Narain Das and Chela Ram are included, yet a separation of the demand due to Narain Das has been separately made, and we the decree-holders are separate; and this certificate in respect of money due to us, as decree-holders, has alone been given. Inasmuch as the judgment-debtor has died and his heirs are living and in possession of his property, and Angan Lal himself has realized Rs. 9,637-4-9 due to the deceased judgment-debtor from the Commissariat Department of Calcutta and

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has appropriated the same, therefore to that extent the person of the aforesaid Angan Lal is also responsible. The decree-holders pray that, after issuing the usual orders, the decretal money may be recovered by means of the attachment and sale, and that for the purpose of execution the case might be transferred to the Subordinate Judge."

That petition, as I have said, was filed in the Court of the Judge on the 20th August, 1885, and under his order was transmitted to the Subordinate Judge for execution. Notifications of the petition were conveyed to the present plaintiff Angal Lal, as well as to the other persons mentioned therein, and upon the 7th October, 1885, Angan Lal filed objections, which I need not travel through at length. It is sufficient to call attention to the 3rd and 4th paragraphs, in which he says as follows:—"Although the objector is own brother of Ajudhia Prasad, deceased original judgment-debtor, yet he always lived separate, even during the life-time of his parents, from the said judgment-debtor, and he followed his business separately. In the same way Ajudhia Prasad, the deceased judgment-debtor, used to live and work separate from the objector, who used to live upon what he earned from service, and the judgment-debtor himself was without any property—a thing which has been determined by this Court on several previous occasions. That there was no connection or partnership of the objector with Ajudhia Prasad deceased, neither any property belonging to Ajudhia Prasad is in possession of the objector. Inasmuch as Ajudhia Prasad has left issue, it is wrong on the part of decree-holders to call objector as heir to Ajudhia Prasad and to get execution process issued in his name in the presence of the deceased's male children."

Such was the way in which the plaintiff met the application of the decree-holders for execution against him, and it is quite clear upon the terms of these two paragraphs, that I have read, that the position taken up by him was that he was not the heir or legal representative of his deceased brother, and that it was erroneous on the part of the decree-holders-petitioners to ask the Subordinate Judge to bring him into the execution proceedings as the legal representative of the deceased judgment-debtor as provided for

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in s. 234 of the Civil Procedure Code. To these objections of the plaintiff Angan Lal, answers were filed by the decree-holders-petitioners, and it is plain from the terms of their answer that they practically threw overboard the notion that Angan Lal was in any sense a person standing in the position of the legal representative of their deceased judgment-debtor, but they treated him upon the footing of being a person, who was in possession of a sum of money belonging to the deceased judgment-debtor. Indeed, in the 4th paragraph of their answer they say in terms: "The plea of the objector that he was separate from Ajudhia Prasad does not strengthen his position. As the objector has realized and appropriated the money due to Ajudhia Prasad, he is certainly liable to the extent of the money realized by him."

Such was the petition, such the objection of Angan Lal, and such the reply to the objection of Angan Lal on the part of the decree-holders, and upon those materials the Subordinate Judge proceeded to pass an order dated the 27th March, 1886. Now it is plain to my mind from the terms of that order, that the Subordinate Judge dealt with the proceedings before him, not upon the footing of determining a question under s. 234 of the Civil Procedure Code, as to the responsibility of a legal representative in respect of a deceased judgment-debtor, but he disposed of it upon the single and simple ground, that so far as the materials before him enabled him to form an opinion, it was established that money had been received by Angan Lal, which he had not paid over to his deceased brother and therefore he was responsible. Thus the Subordinate Judge was, by the summary method of an execution proceeding, trying a question as to whether money was or was not due to the estate of a deceased person by a third party, who was outside the decree and who was not brought in, in the character of a legal representative. In dealing with the matter in that way the Subordinate Judge acted without jurisdiction, and he had no right whatever to decide anything as to a person, who stood in the position of a stranger, or to hold that such stranger was liable to have the decree executed against him, as if he was the representative of the deceased judgment-debtor.

That order of the Subordinate Judge is the foundation of the present claim by the plaintiff, and as I understand the relief

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sought in his plaint and the scope of his suit, the only object he had in view was to get rid of that order. It is not denied by Mr. Conlan, on the contrary it is conceded, that if the plaintiff Angan Lal was separated from his brother as there seems to be no doubt, and if he had received a sum of money for his brother which he had not paid over, there was provision in the Civil Procedure Code under which the judgment-debtor might have realized that money from him. But he could not do so by a proceeding in which the plaintiff could not be a party, and the order made in regard to him was bad as being passed without jurisdiction.

The only way in which it is met by the respondent is, first, that this suit must be tried and disposed of on the ground that it is in effect nothing more or less than a suit under s. 233 of the Civil Procedure Code, brought by the plaintiff to get rid of the order of the 27th March, 1886, and as such, barred by one year's limitation. I dissent from that view. An essential condition precedent to the institution of a suit under that section is the making of an attachment of some immoveable property, of objection being taken to such attachment, of investigation being made into such objection in the manner provided in Chapter XIX of the Civil Procedure Code, and lastly, of its being allowed or disallowed, with the consequential right of the party damnified to bring a suit within a certain period of time. In the present case there has been no attachment, there has been no investigation of any objections in the sense of the chapter to which I have referred, and there has been no disallowance of those objections. This seems to me to answer the first objection of the defendants-respondents.

The second objection taken by the respondents is this:—These proceedings of the Subordinate Judge must be regarded as held under s. 244 of the Civil Procedure Code, and so no separate suit lies. But as I have already remarked, the Subordinate Judge never tried the action upon the footing of the present plaintiff being the legal representative of the deceased judgment-debtor within the meaning of s. 244. On the contrary, he dealt with him throughout in a totally different character. Mr. Conlan has called our attention to a ruling of their Lordships of the Privy Council in the case of *Mirza Mahomed Aga Ali Khan Bahadoor v. The widow of*

Balmakund, (1) and he has also referred us to a ruling in the case of *Syed Nadir Hossein v. Bissen Chand Bassawat* (2). Both these cases are very apposite to the matter before us. The ruling of the Privy Council seems to me directly in point, and if I understand it aright, it lays down the principle, which, if adopted, would have warranted the present respondent in attaching the alleged sum of money in the hands of the plaintiff as being due to the estate of the deceased Ajudhia Prasad in the ordinary manner provided by the law. That procedure might have resulted in objection being taken by the present plaintiff, and the ordinary machinery would then have been followed. But the respondents did not think proper to adopt that course. They sought through the machinery of the execution department, by a wholly erroneous proceeding, to enforce payment by the appellant of a sum due to the judgment-debtor, and as their proceeding was not only irregular but illegal, the order of the Subordinate Judge cannot possibly be sustained. Under these circumstances this appeal should be decreed, and the plaintiff should obtain a decree declaring that the Subordinate Judge's order of the 27th March, 1886, is of no effect so far as it professes to give execution of the decree of the 23rd July, 1878, against the plaintiff-appellant Angan Lal. The plaintiff will be entitled to his costs in all the Courts.

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MAHMOOD, J.—I am of the same opinion.

Appeal decreed.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

GHANDHARAP SINGH AND OTHERS (PLAINTIFFS) v. LACHMAN SINGH
 AND OTHERS (DEPENDANTS).*

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 May 4.

*Hindu widow—Adverse possession against widow—Reversioners—Act XV
 of 1877 (Limitation Act), s. ii, Nos. 141, 144.*

The plaintiffs sued for possession of certain zamindari property as reversioners to the estate of one C, their right to sue having accrued as alleged on the death of the widow of C, which took place on 14th October, 1884. The defendant, alleging himself to be the adopted son of C, and being in possession of the property in dispute since the death of C, which happened in 1869, contended that the claim was barred. The Court of first instance dismissed the claim as barred by art. 118 of the Limitation Act, and in appeal the District Judge held the claim was barred by defendants' adverse posses-

* Second Appeal No. 2200 of 1886, from a decree of W. Blennerhassett, Esq., District Judge of Cawnpore, dated the 6th September 1886, confirming a decree of Munshi Kulwant Prasad, Subordinate Judge of Cawnpore, dated the 26th March, 1886.

(1) L. R., 3, I. A., 24. (2) B., C. L. R., 437.