

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

1885

February 24.

RAM GHULAM AND OTHERS (DEFENDANTS) v. HAZARU KUAR AND ANOTHER
(PLAINTIFFS).*

*Civil Procedure Code, s. 244—Question for Court executing decree—Party to suit—
Representative.*

Where certain property was attached in execution of a decree passed upon a bond against the legal representatives of the obligor, and the judgment-debtors objected to the attachment on the ground that the property was not part of the obligor's estate and liable to be taken in execution of the decree, but was property which they could claim in their own right,—*held* that the matter in dispute was one between the parties to the suit in which the decree was passed, and relating to the execution, discharge or satisfaction of the decree within the meaning of s. 244 of the Civil Procedure Code, and was therefore to be determined in the execution department and not by regular suit, *Chowdry Wahed Ali v. Musammatt Jumace* (1), *Shankar Dial v. Amir Haidar* (2), and *Nath Mul Das v. Tajammul Husain* (3) referred to.

Per MAHMOOD, J.—That the turning-point upon which the application of the rule contained in s. 244 of the Civil Procedure Code barring adjudication in a regular suit depends, is whether the judgment-debtor, in raising objections to execution of decree against any property, pleads what may analogically be called a *jus tertii*, or a right which, although he represents it, belongs to a title totally separate from that which he personally holds in such property.

Kanai Lall Khan v. Sushī Bhuson Biswas (4) dissented from.

THE defendants in this suit, the obligees of a bond executed in their favour by one Imrit Kuar, after her death sued the plaintiffs in this suit, her daughters, on the bond, as representing their mother and being in possession of her estate. They obtained a decree, which directed that its amount should be realized by the sale of the property of Imrit Kuar, and exempting the persons and property of the plaintiffs from liability, and took out execution of it against certain property in the possession of the plaintiffs, alleging it to be the property of Imrit Kuar and liable under the decree. The plaintiffs objected to the attachment of the property, claiming it as their own, and their objections were disallowed. They thereupon instituted the present suit against the defendants to have it declared that the property did not form part of the estate of Imrit Kuar; that it formed part of the estate of their father;

* Second Appeal No. 334 of 1884, from a decree of Maulvi Farid-ud-din, Subordinate Judge of Cawnpore, dated the 13th December, 1883, reversing a decree of Rai Kishen Lal, Munsif of Cawnpore, dated the 23rd December, 1882.

(1) 11 B. L. R., 155

(3) *Supra*, p. 36.

(2) I. L. R., 2 All. 752.

(4) I. L. R., 6 Calc. 777.

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that Imrit Kuar's interest in it was only a life interest; that they had inherited it from their father; and that it was not liable to satisfy the decree against Imrit Kuar; and they sought to have the attachment removed.

The Court of first instance dismissed the suit, holding that the claim was one which should be determined under s. 244 of the Civil Procedure Code in the execution of the decree and not by a suit. On appeal by the plaintiffs the lower appellate Court held that the suit was maintainable, and gave the plaintiffs a decree. The defendants appealed to the High Court.

Pandit *Ajudhia Nath* and *Munshi Ram Prasad*, for the appellants.

Pandit *Bishambar Nath* and *Munshi Hanuman Prasad*, for the respondents.

OLDFIELD, J.—The first plea taken in second appeal is that no suit will lie, with reference to the provisions of s. 244 of the Civil Procedure Code. The plea is valid. The matter in dispute is one between the parties to the suit in which the decree was passed, and relates to the execution, discharge or satisfaction of the decree. The decree was a decree against the estate of Imrit Kuar, and the question is substantially whether the property is part of that estate and liable to be taken in execution of the decree, or is property which the defendants can claim in their own right and something apart from Imrit Kuar's estate.

The decision of the Privy Council in *Chowdry Wahed Ali v. Musammatt Jumace* (1) is an authority for holding that a question of this nature is one to be determined in the execution of the decree. Their Lordships remark:—"It is obvious that a party in a representative character is so distinctly a party to the suit that under certain conditions his own private property may be attached and sold. It is true that to fix him with this liability it must be shown that he has received property of the deceased, of which he has failed to prove a proper disposition. But these things are all cognizable and proper to be ascertained in the suit in which the decree is made during the progress of the execution proceedings founded upon such decree."

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The case of *Shankar Dial v. Amir Haidar* (1) is distinguishable. In that case the judgment-debtor objected to the attachment of certain property on the ground that such property was in his possession as trustee for an endowment, and not in his own right, and it was held that the objection, although made by the judgment-debtor, was one properly falling under ss. 278-283, Civil Procedure Code, and the order upon it was one not appealable, but that the remedy was by suit under s. 283. The case of *Nath Mal Das v. Tajammul Husain* (2) is also similarly distinguishable. The dispute in the case before us is not one of the nature to be dealt with under those sections of the Civil Procedure Code; but purely a question between parties to the suit and relating to its execution. The appeal is decreed, the lower appellate Court's decree set aside, and the suit is dismissed with costs.

MAHMOOD, J.—I concur entirely, not only in the conclusion at which my learned brother Oldfield has arrived, but also in the reasoning which leads up to that conclusion. I, however, wish to add that the only case of importance cited against the view taken by us is *Kanai Lal Khan v. Sashi Bhuson Biswas* (3). That case is not on all fours with the present, but there are a great many *dicta* in the earlier part of the judgment which have a bearing upon this case, and go to contradict the principle laid down by my brother Oldfield to-day. I have studied the judgment, and reading the Privy Council case cited therein, I confess, with due deference, I cannot place the same interpretation as that adopted by the Calcutta Court. It seems to me that the turning point upon which the application of the rule contained in s. 244 of the Civil Procedure Code barring adjudication in a regular suit depends, is whether the judgment-debtor in raising objections of execution of decree against any property pleads what may analogically be called a *jus tertii*, or a right which, although he represents it, belongs to a title totally separate from that which he personally holds in such property. If in the future regular suit he can plead no title other than that which he himself personally held *in his own right* at the time when execution was sought against the property, the bar provided by s. 244 of the Civil Procedure Code would operate, because

(1) I. L. R., 2 All. 752. (2) *Supra* p. 36.

(3) I. L. R., 6 Calc. 777.

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such questions could be adjudicated upon in proceedings relating to the execution of the decree within the meaning of cl. (c) of the section read in the light of the Privy Council ruling to which reference has already been made. On the other hand, if the judgment-debtor pleads a title which he does not hold in his own right, but merely as a trustee of an interest totally different from his own, the mere identity of the person of the judgment-debtor would not bar the adjudication upon a right which could not be adjudicated upon in the execution proceedings, and for this reason, that the judgment-debtor *as such* had no interest in saving the property from the consequences of the execution. This I understand to be the *ratio decidendi* adopted by my brother Oldfield in *Shankar Dial v. Amir Haidar* (1), which I followed in *Nath Mal Das v. Tajammul Husain* (2). I still adhere to that view, and therefore concur in the order proposed by my learned brother.

Appeal allowed.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

AMOLAK RAM AND ANOTHER (DECREE-HOLDERS) v. SAHIB SINGH
(JUDGMENT-DEBTOR)*.

Temporary injunction—Stay of sale in execution of decree—Practice—Notice to opposite party—Civil Procedure Code, ss. 492, 494.

Where a Court made an order granting a temporary injunction under s. 492 of the Civil Procedure Code, without directing notice of the application for injunction to be issued to the other side, and its order directing stay of sale of property in execution was passed *ex-parte*, without the other side being given an opportunity to show cause, *held* that the order was irregular.

Where ancestral property was attached in execution of a decree, and a son of the judgment-debtor instituted a suit to establish his right to the property and made an application for a temporary injunction directing stay of sale pending the decision of the suit, *held* that, inasmuch as what was advertised to be sold was the rights and interests of the plaintiff's father in the property, and it could not be said that the property was being "wrongfully sold in execution of a decree" and the application on the face of it disclosed no sufficient ground to warrant an order under s. 492 of the Civil Procedure Code being made as prayed, the temporary injunction ought not to have been granted.

The facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

* First Appeal No. 163 of 1884, from an order of Lala Cheda Lal, Offg. Subordinate Judge of Aligarh, dated the 15th November, 1884.

(1) I. L. R., 2 All. 752, (2) *Supra*. p. 36.