

the present respondents. We are not bound, and we have no inclination to introduce into the limitation law any restrictions further than those which have been adopted by this Court on previous occasions. We think that the present case does not come within the further restrictions which we have mentioned, and that, upon the face of the proceedings and of the law, the execution in question is not barred.

That being so, we decree this appeal, setting aside the order of the lower Appellate Court and restoring that of the first Court, with costs.

T. A. P.

Application allowed.

Before Mr. Justice Tottenham and Mr. Justice Gordon.

MUNGESHUR KUAR AND OTHERS (JUDGMENT-DEBTORS) v. JAMOONA PRASHAD (DECREE-HOLDER).*

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May 14.

Civil Procedure Code (Act XIV of 1882), s. 244—Claim to attached property—Question to be decided in execution—Liability of property to be sold in execution.

The question whether property is liable to be sold in execution of a decree is one to be determined under s. 244 of the Code of Civil Procedure.

Chowdhry Wahed Ali v. Jumae (1) followed in principle.

ON the 20th April 1887 one Jamoona Prashad obtained a decree for Rs. 3,374 against one Panchu Kuar, the widow of Rajkumar Baboo Kali Pershad Singh. The debt in respect of which the decree was obtained was apparently incurred by the lady for payment of Government revenue and other public demands, but the decree itself was simply a personal decree, and created no charge on her husband's estate which had come into her possession. The decree-holder took out execution, and caused certain shares in the villages of Shampar and Shampur Dearah, which he described as the property of the judgment-debtor, to be attached and advertised for sale. But prior to the date (the 15th September 1887) fixed for the sale Panchu Kuar died, and further

*Appeal from Order No. 46 of 1889, against the order of A. C. Brett, Esq., Judge of Tirhoot, dated the 28th of January 1889, reversing the order of Baboo Anant Ram Ghose, Subordinate Judge of Tirhoot, dated the 11th of August 1888.

(1) 11 B. L. R., 149; 18 W. R., 185.

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proceedings were accordingly stayed, pending the determination of the question as to who were her representatives for the purpose of executing the decree. Several petitions relating to this question and the execution of the decree were then filed from time to time by some of the daughters of the deceased, as well as by the decree-holder, and ultimately, on the 21st May 1888, one of the daughters, Sundar Kuar, having filed a certificate granted by the Judge of Sarun to her and her sisters, Mungeshur Kuar and Tapessar Kuar, to collect debts due to their mother Panchu Kuar, the Subordinate Judge, before whom the execution proceedings were pending, ordered execution to proceed against the daughters as heiresses and representatives of the deceased judgment-debtor, and the usual notice to be served on them. This order was written in vernacular in the order sheet, but on the reverse an order was written in English, directing execution to proceed against Sundar Kuar alone. The effect of the order recorded in the order sheet was taken to be to bring on the record, for the purpose of executing the decree, all the three daughters of Panchu Kuar, as was prayed in the petition.

On the 16th June 1888 the execution case was struck off the file because the necessary process fees had not been deposited by the decree-holder. But on the 18th June the decree-holder filed a fresh application for execution against the three daughters, and the property referred to above was again advertised for sale on the 15th August 1888. But on the 28th July 1888 the daughters filed a petition objecting to the sale of the property in question on the ground that it belonged to their father, and not to their mother; and that on their mother's death it had devolved upon them as heiresses of their father, and could not therefore be followed in execution of a personal decree against their mother. The Subordinate Judge, assuming apparently that the property belonged to the estate of their father, and was not the *stridhan* of their mother, released it from attachment. The decree-holder then appealed to the District Judge, and the judgment-debtors raised a preliminary objection that their objection before the Subordinate Judge was a claim under s. 278 of the Civil Procedure Code, and that therefore no appeal lay. The learned Judge over-ruled this objection, and held that s. 244 applied;

and, on the merits, he was of opinion that there was no proof on the record that the attached property belonged to the father, and that, as the debt was one incurred for the payment of Government revenue, there was a legal necessity for it, which would bind the father's estate. He accordingly reversed the order of the Subordinate Judge, and directed execution to proceed.

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The daughters appealed to the High Court.

Baboo Hem Chandra Banerjee and Baboo Sharoda Churn Mitter, for the appellants, contended that the case before the Subordinate Judge was in the nature of a claim under s. 278 of the Code and that no appeal lay to the District Judge, relying on the following cases:—*Shankar Dial v. Amir Haidar* (1), *Nath Mal Das v. Tajamul Husain* (2), *Bahori Lal v. Gauri Sakai* (3), *Roop Lal Dass v. Bekani Meah* (4), *Kameshwar Pershad v. Run Bahadur Singh* (5), *Kanai Lal Khan v. Sashi Bhuson Biswas* (6); and further contended that the properties were not liable to be sold, as they had devolved on the appellants as heiresses of their father. *Fanindro Deb Raikut v. Jugudishwari Dabi* (7).

Mr. M. P. Gasper and Baboo Rajendro Nath Bose for the respondent.

The judgment of the Court (TOTTENHAM and GORDON, JJ., after stating the facts, proceeded as follows):—

It is contended on behalf of the appellants, *firstly*, that the case before the Subordinate Judge was in the nature of a claim under s. 278, Civil Procedure Code, and that therefore no appeal lay to the District Judge; and, *secondly*, that the property is not liable to be sold, because it devolved on the appellants as heiresses of their father and not of their mother.

As regards the first point, we are of opinion that the case is governed by the provisions of ss. 234 and 244, Civil Procedure Code. It is clear from what we have already said that the appellants were brought on the record as representatives of the deceased judgment-debtor, without reference to their liability or non-liability as

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

(4) I. L. R., 15 Calo., 438.

(2) I. L. R., 7 All., 36.

(5) I. L. R., 12 Calo., 458.

(3) I. L. R., 8 All., 626.

(6) I. L. R., 6 Calo., 776.

(7) I. L. R., 14 Calo., 316.

1889 such representatives. This was in accordance with para. 1 of s. 234.
MUNGESHUR Then as to their liability, that question has to be ascertained
KUAR according to the provisions of para. 2 of s. 234 by the Court exe-
v. cuting the decree. In the present case the question was whether
JAMOONA certain property was liable to be sold in execution, and we think
PRASHAD. that such a question is a question relating to the execution of the
decree between the decree-holder and the appellants, and that
consequently it has to be determined under s. 244, Civil Proce-
dure Code. It is strongly urged that as the property came into
the hands of the appellants through their father, they are in res-
pect of such property his legal representatives, and not represen-
tatives of their mother. Assuming that the property did belong
to their father, and this is a disputed question before us, this
contention is no doubt true. But after all, it seems to us that
this is rather a matter of liability than of representation. The
liability of the property to be sold in execution depends upon the
determination of the question, whether it was the father's or the
mother's, and upon the determination of the same point depends
the question whether the appellants are in respect of this prop-
erty the legal representatives of their father or their mother.
But as we have already intimated we think that question falls
within the scope of s. 244. It is also contended that the form of
the proceedings before the Subordinate Judge shows that he
treated the case as one coming under s. 278, and not under s.
244. The petition of the appellants has been read to us, and we
find no reference in it to s. 278, and the mere use of the word
"claim" by the Subordinate Judge in his judgment is not in
our opinion inconsistent with the objection of the appellant's
coming under s. 244.

Further, in the view we take we think we are fully supported
by authority. In the case of *Chowdhury Wahed Ali v. Jumae* (1)
the Privy Council, dissenting from the opinion of a Full Bench
of this Court, held that, "when a decree has been properly passed
and proceedings taken under it to obtain execution against a
party in a representative character, there seems to be no good
reason for saying that he should not be considered 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 within the meaning of the 11th clause of the Act of 1861."

That was a case under the old Code, and there is this difference between it and the present case, that in that case the decree was against the representative, whereas in this case the representatives have been brought in after decree. But this we think makes no difference. The principle laid down applies to both cases, as the liability of a representative under ss. 234, and 252, Civil Procedure Code, is substantially the same.

The Privy Council decision was followed by this Court in the cases of *Oseemunnissa Khatoon v. Ameerunnissa Khatoon* (1) and *Ameerunnissa Khatoon v. Muhomed Mozuffer Hossein Chowdhry* (2) [this case is very similar to the present]; by the Allahabad High Court in *Ram Ghulam v. Hazaru Kuar* (3), and *Kashi Prasad v. Miller* (4); by the Madras High Court in the case of *Kuriyali v. Mayen* (5); and by the Bombay High Court in the case of *Nimba Harishet v. Sitaram Paraji* (6). The following rulings are relied upon on behalf of the appellants, but we think they are clearly distinguishable from the present case:—*Shankar Dial v. Amir Haidar* (7), *Nath Mal Das v. Tajamal Hossein* (8), *Bahari Lal v. Gauri Sahai* (9), *Fanindro Deb Raikut v. Jugudishwari Dabi* (10), *Roop Lall Das v. Bekani Meah* (11), *Kameshwar Pershad v. Run Bahadur Singh* (12), *Kanai Lall Khan v. Soshi Bhuson Biswas* (13).

The cases of *Shankar Dial v. Amir Haidar* (7) and *Nath Mal Das v. Tajamal Hossein* (8) were both referred to in the case of *Ram Ghulam v. Hazaru Kuar* (3), which we have already mentioned, and were distinguished from that case. In both these cases the judgment-debtor objected to the attachment

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(1) 20 W. R., 162.

(2) 12 B. L. R., 65; 20 W. R., 280.

(3) I. L. R., 7 All., 547.

(4) I. L. R., 7 All., 733.

(5) I. L. R., 7 Mad., 255.

(6) I. L. R., 9 Bom., 458.

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

(8) I. L. R., 7 All., 36.

(9) I. L. R., 8 All., 626.

(10) I. L. R., 14 Calc., 316.

(11) I. L. R., 15 Calc., 438.

(12) I. L. R., 12 Calc., 453.

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

1889 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 that the order passed upon it was not appealable.

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But in the present case the appellants claim the property in their own right. The case of *Bahari Lal v. Gauri Sahai* (1) is also different. There the judgment-debtor filed two distinct characters, one as representative of the original judgment-debtor, and the other as representative of a third party who had died after preferring a claim; and it was the order passed on this objection which was held to have been passed under s. 281, Civil Procedure Code.

The cases of *Fanindro Deb Raikut v. Jugudishwari Dabi* (2) and *Roop Lall Das v. Bekani Meah* (3) are clearly not on all fours with the present case. And in the case of *Kanai Lall Khan v. Soshi Bhuson Biswas* (4), the High Court held that there were special circumstances which took it out of the general rule established in the cases of *Chowdhry Wahed Ali v. Jumae* (5) and of *Ameerunnissa Khatoon v. Mahomed Mozuffer Hossein Chowdhry* (6).

Lastly, there is the case of *Kameshwar Pershad v. Run Bahadur Singh* (7), to which our attention has been particularly drawn. But in that case there was no decision that the order passed by the Subordinate Judge did not fall under s. 244. On the contrary, the case appears to have been treated by the Subordinate Judge and the High Court as one coming under s. 244. The real point decided was that Run Bahadur could not be held liable as regards property which had devolved on him as reversionary heir of the husband of the deceased judgment-debtor, or as regards property which he been made over to him by the debtor prior to decree, and that in respect of such property he was not, properly speaking, the representative of the judgment-debtor.

(1) I. L. R., 8 All., 626.

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

(2) I. L. R., 14 Calc., 316.

(5) 11 B. L. R., 149; 18 W. R., 185.

(3) I. L. R., 15 Calc., 329.

(6) 12 B. L. R., 65; 20 W. R., 280.

(7) I. L. R., 12 Calc., 468.

We think therefore on a careful examination of all the reported cases bearing on the matter in dispute, that the weight of authority is in favour of the view we take, *viz.*, that the present case comes under s. 244.

Then as regards the second point argued before us, we think there has been no proper judicial enquiry as to whether the property in dispute belonged to the father or the mother of the appellants.

From an affidavit filed before us it would appear that it was understood before the Subordinate Judge that there was no question as to the property having originally belonged to the husband of the judgment-debtor, and it was for this reason that certain documentary evidence on this point tendered by the appellants was not received. The District Judge merely observes that there is no proof on the record that the properties attached belonged to the father's estate, while before us the matter is disputed. Under these circumstances we think the appellants are entitled to ask for a judicial enquiry, and that the proper course will be to set aside the District Judge's order, and to remand the case to him with directions to receive and consider any evidence that may be adduced by the parties in reference to the matter in dispute, that is, the ownership of the property, and then to re-try the appeal. We may add that we think the question of legal necessity does not arise in the execution of the decree. The decree-holder cannot go behind the decree. Costs will abide the event.

T. A. P.

Case remanded.

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