1912
May, 15.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

MUKHTAR AHMAD (JUDGEMENT-DEBTOR) *v.* MUQARRAB HUSAIN (DECREE-HOLDER).*

Civil Procedure Code (1908), *section* 47—*Execution of decree—Interlocutory order—Appeal.*

The court executing a decree struck off the proceedings upon the ground of wilful default on the part of the decree-holder in prosecuting his claim. Subsequently, however, finding that the decree-holder had not really been in default, the court cancelled its former order, held that an attachment which was in existence at that time still subsisted, and that execution should proceed. *Held* that this was not an order to which section 47 of the Code of Civil Procedure, 1908, applied.

Observations of BANERJEE, J., in *Jogodishury Debea* v. *Kailash Chundra Lahiry* (1) followed.

In this case property was attached on the 17th of July, 26th of July, 27th of July, 28th of July, and 12th of August, 1909. The decree-holder along with his application filed an affidavit, dated the 15th of May, 1909, giving full particulars as required by order XXI, rule 66. After all these proceedings the judgement-debtor objected to the execution of the decree. His objection was disallowed and his appeal to the High Court was also dismissed. When the record went back to the court below in September 1910, notice was issued to the judgement-debtor under order XXI, rule 66, and the decree-holder was directed to file an affidavit under the same rule. But as no affidavit was filed by him, the court, on the 11th of November, 1910, struck off the case for default. The order runs as follows :—"The decree-holder notwithstanding two adjournments has failed to prosecute the proceedings. The case, therefore, cannot be adjourned any more. The proceedings are struck off." The court, however, subsequently discovered that that order was a wrong order, and that in fact there was no default of prosecution on the part of the decree-holder. It, therefore, held that the former attachment subsisted and that no fresh attachment was necessary, and it decided to go on with the execution proceedings. The judgement-debtor objected that a fresh attachment was necessary, but his objection was disallowed.

From this order the judgement-debtor appealed to the High Court.

* First Appeal No. 61 of 1912 from a decree of Keshab Deb, Subordinate Judge of Moradabad, dated the 4th November, 1911.

(1) (1897) I. L. R., 24 Calc., 725.

Maulvi *Muhammad Ishaq*, for the appellant.

Mr. *B. E. O'Conor* and Mr. *Abdul Raoof*, for the respondent.

KARAMAT HUSAIN and TUDBALL, JJ.—In this case property was attached on the 17th of July, 26th of July, 27th of July, 28th of July, and 12th of August, 1909. The decree-holder along with his application filed an affidavit, dated the 15th of May, 1909, giving full particulars as required by order XXI, rule 66. After all these proceedings the judgement-debtor objected to the execution of the decree. His objection was disallowed and his appeal to the High Court was also dismissed. When the record went back to the court below in September, 1910, notice was issued to the judgement-debtor under order XXI, rule 66, and the decree-holder was directed to file an affidavit under the same rule. But as no affidavit was filed by him, the court, on the 11th of November, 1910, struck off the case for default. The order runs as follows:—"The decree-holder notwithstanding two adjournments has failed to prosecute the proceedings. The case, therefore, cannot be adjourned any more. The proceedings are struck off." The court, however, subsequently discovered that that order was a wrong order, and that in fact there was no default of prosecution on the part of the decree-holder. It, therefore, held that the former attachment subsisted and that no fresh attachment was necessary, and it decided to go on with the execution proceedings. The judgement-debtor objected that a fresh attachment was necessary, but his objection was disallowed.

From that order disallowing the objection this appeal is preferred. A preliminary objection to the hearing of the appeal is taken by the learned counsel for the other side. The substance of his contention is that this order is a mere interlocutory order and does not come within the purview of section 47 of the Code of Civil Procedure. The words of section 47 are, no doubt, very wide, and if taken in their literal sense will cover every order of an interlocutory nature that may be passed in execution proceedings. But that does not seem to have been the intention of the Legislature. In our opinion the view taken by BANERJEE, J., in *Jogodishury Debea* v. *Kailash Chundra Lahiry* (1) is a sound one. On page 739 he remarked as follows:—"It is not every order made in execution of a decree that comes within section 244,

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1912

MUKHTAR AHMAD v. MUQARRAB HUSAIN.

If that were so, every interlocutory order in an execution proceeding, such as an order granting or refusing process for the examination of witnesses, would be appealable; and far greater latitude would be given of appealing against orders in such proceedings than is allowed as against orders made in suits before decree—a thing which could hardly have been intended. See *Sreenath Roy* v. *Radhanath Mookerjee* (1) and *Behary Lal Pundit* v. *Kedar Nath Mullick* (2). An order in execution proceedings can come under section 244 only when it determines some question relating to the rights and liabilities of parties with reference to the relief granted by the decree; *not when, as in this case, it determines merely an incidental question as to whether the proceedings are to be conducted in a certain way.* I may add that the language of section 244, which enacts that certain 'questions shall be determined by an order of the court executing the decree, and not by separate suit,' clearly indicates that the questions contemplated by the section must be of a nature such that it is possible to suppose that but for the section they could have formed the subject of determination by a separate suit. But a question of an incidental character can never come under that description, and an order determining such a question cannot, therefore, be a decree as defined in section 2." We agree with this view, which applies very aptly to the circumstances of this case now before us. The result is that we hold that no appeal lies from the order of the court below, and we dismiss the appeal with costs.

Appeal dismissed.

(1) (1883) I. L. R., 9 Calc., 773. (2) (1891) I. L. R., 18 Calc., 469.