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the defendants, he not being a co-sharer in the same mahal. We agree that, whatever the custom was prior to the partition, it still continued. We have to see what that custom was. The only evidence being the entry in the wajib-ul-arz, we must look to this document in order to find out what the custom (if any) was. It is not contended in the present case that either parties are related to the vendor. Therefore that part of the wajib-ul-arz which refers to relationship may be left out of consideration. It is quite clear that the remaining part refers entirely to a custom existing between co-sharers because at that time all the proprietors in the village were *co-sharers with each other.* In the events which have happened *the plaintiff is no longer a co-sharer with the vendor.* He has ceased to have any community of interest with him. In this view it seems perfectly clear that there was no evidence of the existence of a custom *between persons who are not co-sharers.* After partition has taken place the owner in one mahal is no longer able to bring himself within the custom where the property sold is situate in the other mahal. We allow the appeal, set aside the decrees of both the courts below and dismiss the plaintiffs' suit with costs in all courts.

Appeal decreed.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

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BISHESHAR DAS AND OTHERS (PLAINTIFFS) *v.* AMBIKA PRASAD (DEFENDANT).*

Civil Procedure Code (1908), *section 73, order XXXVIII, rules* 5, 8, 10; *order XXI, rules* 52 *and* 63—*Effect of attachment before judgement—Property deposited in court—Decree—Priority—Suit for a declaration that attachment before judgement did not confer any title on the attaching creditor.*

A got certain property belonging to B attached before judgement. The property being of a perishable nature it was sold and the proceeds were deposited in court. Subsequently one C obtained a decree against B and applied for the satisfaction of his decree out of the sum of money that was lying in court A filed an objection and it was allowed by the court. After A had obtained his decree, the sum deposited in court was distributed rateably between A and C. C brought the present suit for a declaration that he was entitled to get his

* Second Appeal No. 581 of 1914, from a decree of Gokul Prasad, Subordinate Judge of Allahabad, dated the 21st of February, 1914, reversing a decree of Sidheshwar Maitra, Munsif of Allahabad, dated the 29th of March, 1913.

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decree satisfied out of the sum which had been deposited in court. *Held*, that the effect of attachment before judgement was to prevent alienation. It did not confer any priority of title on the attaching creditor, and, therefore, the plaintiff was entitled to get his decree satisfied and the suit was maintainable. *Tikum Singh* v. *Sheo Ram Singh* (1), referred to.

THE facts of this case were as follows :—

The defendant brought a suit in the court of the Subordinate Judge for recovery of money in 1911 (No. 9 of 1911) against one Mahbub Husain and applied for attachment of his property before judgement. The property was attached, but, being of a perishable nature, was sold, and Rs. 669-9-6 were deposited in court. The plaintiffs brought a suit in the court of the Munsif against Mahbub Husain and obtained a decree before any decree was passed in favour of the defendant. On the 10th of January, 1912, the plaintiffs executed their decree and attached Rs. 627-9-6 out of Rs. 669-9-6 deposited in the court of the Subordinate Judge. On the 12th of February, 1912, on the application of the plaintiffs for execution the Subordinate Judge ordered the amount attached to be paid to the plaintiffs who made an application for withdrawal of the money they had attached. On the 26th of February, 1912, the defendant filed an objection to the effect that he had a lien on the money, and that it should not be paid to the plaintiffs. He further stated that the decree of the plaintiffs was collusive, and they were not entitled to get the money. The Subordinate Judge ordered that the money be not paid. After this, on the 10th of April, 1912, the defendant obtained a decree against Mahbub Husain, and three days later the Subordinate Judge ordered that the money in deposit in his court may be rateably distributed between the plaintiffs and the defendant. The plaintiffs brought the suit out of which the present appeal arose for a declaration that they were entitled to recover the entire amount of their decree. The court of first instance decreed the claim holding that the order of the 12th of February, 1912, gave them a prior right. The Subordinate Judge on appeal reversed the decree on the ground that the plaintiffs had no right prior to that of the defendant.

The plaintiffs appealed.

Pandit *Ladli Prasad Zutshi*, for the appellants.

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The defendant did not trouble himself to make good any of the pleas that he took in his written statement. He only rested his case on the fact that he had obtained attachment before judgement and claimed precedence thereby. An attachment before judgement only secured the property from alienation. It conferred no title in favour of the person attaching. The effect of attachment was that after decree no fresh attachment would be necessary, *Krishnasawmy* v. *Official Assignee of Madras* (1). Both the parties were decree-holders and an order for payment of money in favour of the plaintiffs having been made before the defendant obtained his decree they were entitled to the entire amount. In fact the order amounted to a satisfaction of the decree. If, however, the defendant could show that he was entitled to rateable distribution under section 73 of the Code of Civil Procedure he would be entitled to it. But section 73 did not apply to the case. Assets were not held by the court after the order vesting the money in the plaintiffs was made. The words "before the receipt of assets" in section 73 were important. They meant assets held in execution of the decree. He also referred to order XXXVIII, rules 5 and 10, of the Code of Civil Procedure, and submitted that in order to give him a right to the money it was not necessary for the plaintiff to withdraw it.

Dr. *Surendra Nath Sen* (with him Munshi *Haribans Sahai*), for the respondent.

The money was under an attachment when the plaintiffs made their application for attachment. Order XXXVIII, rule 10, did not bar any person from applying for sale of the attached property, but made no provision for payment of the money. The court, therefore, could make no order for its payment to the plaintiffs. Moreover the order had been cancelled. The rule did not apply when the property sought to be attached was money. If it did, the formality of selling the property attached should have been gone through so as to invest the purchaser, if any, with the right to the property sold. The defendant had not obtained his decree and the attachment gave him no lien, but he had an equitable right to have the property kept *in custodia legis*. Before the plaintiffs obtained a decree the defendant had attached

(1) (1903) I. L. R., 26 Mad., 673 (678).

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the property. The plaintiffs could not nullify the effect of the attachment before judgement by their attachment; *Sewdut Roy* v. *Sree Canto Maity* (1). The court could order rateable distribution under the rule of justice, equity and good conscience. Order XXI, rule 52, expressly laid down that the court could not touch the question of attachment; *Chedi Lal* v. *Kuarji Dichit* (2). Lastly it was submitted that, section 73 not being applicable, the suit was not maintainable. A suit of a particular description was contemplated by that section, and if all the requirements were not complied with the suit would not lie; *Debee Pershad* v. *Gujadhur Ram* (3). The remedy of the plaintiffs was to apply in the execution court for recovery of the money, and, in case the court refused to pay, to apply in revision to the High Court. Order XXI, rule 63, did not give a right of suit to one of two successful decree-holders against the same judgement-debtor. It only applied when a third party claimed under an independent title.

Pandit *Ladli Prasad Zutshi* was not heard in reply.

RICHARDS, C. J.—This appeal arises out of a suit in which the plaintiffs sought a declaration that they were entitled to Rs. 627-9-6 out of a sum which had been deposited in court. The facts are as follows:—Ambika Prasad brought a suit against Mahbub and others. Before judgement he attached property which belonged to Mahbub, under the provisions of order XXXVIII of the Code of Civil Procedure. The property being of a perishable nature it was sold and the proceeds were lodged in court on the 29th of March, 1911. It is out of this sum that the plaintiffs seek to be paid the amount of a decree. The plaintiffs obtained their decree on the 12th of September, 1911. They made an application for execution by "attachment" of the money in court on the 10th of January, 1912. The court made an order on the 21st of February, 1912, in which it is stated that the property having been attached the money should be paid to the decree-holders upon application. An application for payment was made on the 23rd of February, 1912. On the 26th of February, 1912, Ambika made an objection to the money being paid

(1) (1906) I. L. R., 33 Calc., 639. (2) (1894) I. L. R., 17 All., 82.

(3) (1873) 20 W. R., 73.

to the decree-holders on the ground that he had attached it before judgement. The court on this objection refused to allow the money to be paid out to the decree-holders, who are the plaintiffs in the present case. Ambika got his decree on the 10th of April, 1912. It seems to me that we have to consider what were the rights of the decree-holders on the 23rd of February, 1912, that is to say, were they entitled by law to have their decree satisfied out of the money deposited in court? If they were, they are entitled to a decree in the present suit, provided that their remedy lay by suit. Order XXXVIII, rule 5, provides for attachment before judgement. Property can only be attached before judgement upon the court being satisfied that the defendant, with intent to obstruct or delay the execution of any decree that may be given against him, is about to dispose of the whole or any part of his property, or that he is about to remove the whole or part of his property from the local limits of the jurisdiction of the court. It seems to me absolutely clear that as it is only to prevent one or other or both of these things that attachment before judgement is allowed. Such attachment confers no right in the property on the plaintiff who obtains the order. Everything remains as before the attachment, save that it has been taken out of the power of the defendant to dispose of the property attached or remove it out of the jurisdiction. If there was the least doubt about the matter, it is set at rest by the provisions of order XXXVIII, rule 10, which is as follows :—"Attachment before judgement shall not affect the rights existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree." Supposing, therefore, that the property had not been of a perishable nature, but had been simply attached before judgement, the plaintiffs would have been entitled to have attached the property, have it sold and obtain payment under their decree. Ambika would have had no right of any sort to object to the decree of the plaintiffs being discharged. Some attempt has been made to contend that the fact that the property had been turned into money altered the circumstances. I think that this is a most unreasonable contention. In my opinion the money, which represented the

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property which had been attached before judgement is to be treated in exactly the same way as the property would have been, with this difference only that of course there is no sale. Under these circumstances it seems to me that the plaintiffs were clearly entitled on the 23rd of February, 1912, to have had their decree satisfied out of the money deposited in court.

It is next argued that the dispute between the plaintiffs and Ambika had to be decided by the court in which the money was deposited, and that no suit lay. Order XXI, rule 52, provides that "where property which has been attached is in the custody of the court any question of title or priority arising between the decree-holder and any other person not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such court." Order XXXVIII, rule 8, provides that "where any claim is preferred to property attached before judgement, such claim shall be investigated in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for the payment of money." Order XXI, rule 63, provides that "where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive." It seems to me that the effect of order XXXVIII, rule 8, is to incorporate the provisions of order XXI, and amongst them the provisions of rule 63. The court accordingly having investigated the claim of the decree-holders, the plaintiffs in the present suit, and made an order against them, the effect of which was that they were not allowed to receive payment of their decree, they are entitled to institute a suit. I hold, therefore, that the present suit is maintainable. I would allow the appeal and decree the plaintiffs' claim.

BANERJI, J.—I have arrived at the same conclusion. The first question to be determined is whether the court below was justified in ordering a rateable distribution. It is clear from the provisions of the Code of Civil Procedure that priority of attachment gives no priority of title. Order XXXVIII, rule 10,

clearly provides that where property has been attached before judgement that circumstance does not preclude any other judgement-creditor of the judgement-debtor from attaching the same property and proceeding to the sale of it. It is obvious from the provisions of that rule that, notwithstanding an attachment before judgement, any other creditor who has obtained a decree may proceed to execution and cause the property attached to be sold. The effect of the attachment before judgement is only to prevent the debtor from dealing with the property, but the property still continues to be his. Therefore, the plaintiffs in the present case were entitled to attach the money which was in court, being the proceeds of the sale of the property attached before judgement. As the court made an order on the 23rd of February, 1912, directing the money attached to be paid over to the plaintiffs, the plaintiffs were entitled to receive that money, and the court or the defendant Ambika Prasad could not deprive them of their right to get the money. Had Ambika Prasad already obtained a decree on the date on which the money was ordered to be paid to the plaintiffs and had he applied for execution, different equities might arise. It may be that when several decree-holders have caused the same property to be attached, but to their case section 73 of the Code of Civil Procedure does not strictly apply, they would be entitled to a rateable distribution on general principles of justice, equity and good conscience. But that is not the case here. It is not necessary, therefore, to express any opinion on the point. In the present case, as I have said above, Ambika Prasad had not obtained his decree when the court ordered the money in deposit, attached by the plaintiffs, to be paid over to them. Had the property not been of a perishable nature, and had it not been already sold, the plaintiffs would have been entitled to get it sold, and after the sale to have their decree satisfied out of the proceeds of the sale, and there is nothing in the Code to prevent their doing so merely because Ambika Prasad had caused the same property to be attached before judgement. He had not obtained a decree and had not applied for execution. Section 73 of the Code of Civil Procedure would not apply to a case of this kind, because this was not a case in which several

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decree-holders had before the realization of assets applied for execution of their decrees.

There remains the other question as to whether such a suit is maintainable. As has been pointed out by the learned Chief Justice, rule 52 and the subsequent rules in order XXI are by reason of the provisions of order XXXVIII, rule 8, applicable to cases of attachment before judgement. Under rule 25 of order XXI the court which holds the property is the court which must decide all claims made in respect of it, whether arising from assignment or attachment or otherwise. The mode of investigation is provided for by rule 58 and the subsequent rules, but in all cases when an order is made, the defeated party is entitled to bring a suit to establish his right under rule 63. The language of that rule differs from that of section 283 of the old Code of Civil Procedure. Under that section a party was allowed to bring a suit when an order had been passed against him under sections 280, 281 and 282. There is no such limitation in rule 63, and this alteration appears to have been deliberately made by the Legislature to include all cases of orders of this kind passed under order XXI, including orders under rule 52. I find that under the old Code of Civil Procedure, it was held that where an order was made under section 272, which corresponds to the present rule 52, a suit would lie to set aside the order, *Tikum Singh* v. *Sheo Ram Singh* (1). The present suit was in my opinion clearly maintainable. I also would allow the appeal.

BY THE COURT.—The order of the Court is that the appeal be allowed, the decree of the court below set aside and the decree of the court of first instance restored with costs in all courts.

Appeal decreed.

(1) (1891) I. L. R., 19 Calc., 286.