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JANKI KUAR v. LACHMI NARAIN.

does not appear to have been approved. It is true that in the present case the plaintiff was not allowed to adduce evidence in regard to what was alleged by him to be fraud, but this is immaterial, as in our opinion the allegations in the plaint as to the nature of the alleged fraud would not justify a court in setting aside a decree passed between the parties in a previous suit, even if the allegations were established. We agree with the conclusion of the court below and dismiss the appeal with costs.

Appeal dismissed.

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June, 1.

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

DAUD ALI AND OTHERS (PLAINTIFFS) *v.* RAM PRASAD AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1882)—*Execution of decree—Attachment, withdrawal of—Striking off of execution case—Alienation.*

In execution of a decree passed against H, his property was attached under Act XIV of 1882. The application for execution was struck off on default by the decree-holder in the payment of process fees. H then made a gift of the said property in favour of his mother who sold it to the defendants. *Held*, that the attachment must be presumed to have subsisted and the gift was void.

THE facts of this case were as follows :—

The plaintiffs came into court on the allegation that a decree for mesne profits was passed on the 28th of August, 1905, in favour of their predecessors-in-title by the Subordinate Judge of Meerut against one Hayat Ali Shah and others and that it was transferred for execution to Aligarh. In execution of that decree a certain share in the village Tatarpur, in the district of Bulandshahr, was attached. One of the judgement-debtors preferred objections which were allowed by the Subordinate Judge. An appeal was preferred to the High Court and the record was sent up there. In the meantime on the 18th of April 1907, the court struck off the execution case as the decree-holders had not paid the costs of sale. On the 22nd of April, 1908, the appeal was disposed of by the High Court. On the 16th of July, 1909, the decree-holders made a fresh application for execution but in the meanwhile, viz. on the 18th of August, 1908, the judgement-debtor Hayat Ali Shah had executed a deed of gift of

*First Appeal No. 220 of 1913, from a decree of Banke Behari Lal, Additional Subordinate Judge of Aligarh, dated the 18th of March, 1913.

Tatarpur in favour of his mother who had sold it to the defendants on the 16th of February, 1909. The defendants objected to the attachment. The plaintiffs contended that their attachment still subsisted and the subsequent gift and sale were invalid. The court allowed the objection and dismissed the application for execution. The plaintiffs brought this suit for a declaration that the property was saleable in execution of their decree. The defence, *inter alia*, was that at the date of gift there was no subsisting attachment and the property could therefore be sold. The court below dismissed the suit. The plaintiffs appealed.

Mr. *A. E. Ryves* (with him Maulvi *Iqbal Ahmad*), for the appellants:—

Before the passing of the present Code of Civil Procedure the trend of authorities was that an attachment remained subsisting unless there was a formal order withdrawing it. The present case arose under the old Code and there was no order withdrawing the attachment. The striking off of the execution case in default of payment of costs did not remove the attachment; *Qamaruddin Ahmad* v. *Jawahir Lal* (1), *Imtiaz Ali* v. *Bishambar Das* (2). The gift was made during the pendency of the attachment and was therefore void. The purchaser from the donee had no better right than the donee. The plaintiffs had a right to sell the property in execution of their decree.

The Hon'ble Dr. *Tej Bahadur Sapru*, for purchasers respondents:—

The question whether attachment subsisted or should be considered to have been withdrawn was a question of fact in each case. There is not a single case which laid down a general proposition. In the present case the defendants purchased the property in 1909, two years after the striking off of the execution case. Attachment therefore must be considered to have been withdrawn at the time the case was struck off the file specially when the purchasers were purchasers for valuable consideration.

Mr. *A. E. Ryves* was not called upon to reply.

(1) (1905) I. L. R., 27 All., 334. (2) (1911) 8 A. L. J., 619.

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DAUD ALI v. RAM PRASAD.

RICHARDS, C. J., and BANERJI, J.—The plaintiffs' predecessor-in-title obtained a decree for mesne profits against Hayat Ali Shah and others on the 28th of August, 1905. On the 11th of June, 1906, he applied for execution of the decree and on the 23rd of July, 1906, certain property of the judgement-debtors was attached. The execution case was struck off on the 18th of April, 1907, by reason of the decree-holder's default in paying certain requisite fees. Meanwhile an appeal from the decree was pending in the High Court. After the disposal of the appeal the decree-holders applied for the revival of the execution proceedings on the 16th of July, 1909, and they prayed for the sale of the property which had already been attached. On the 18th of August, 1908, Hayat Ali Shah made a gift of the attached property in favour of his mother who, on the 16th of February, 1909, sold the said property to the principal respondents. Upon the objection of those respondents the court released the attachment and thereupon the suit, out of which this appeal has arisen, was brought by the plaintiffs for a declaration that they were entitled to proceed against the attached property on the ground that the gift and the sale were void as against them as the property had been attached on the 23rd of July, 1906, and the transfers were made pending the attachment. The question to be considered is whether the property should be deemed to have been under attachment on the date on which the gift by Hayat Ali Shah in favour of his mother was made. On behalf of the defendants it is contended that the striking off of the execution proceedings should raise a presumption that the attachment had been withdrawn. Under the present Code of Civil Procedure if an application for execution is dismissed for default, it must be deemed that the attachment was withdrawn, but there was no such provision in Act No. XIV of 1882, which was the Code of Civil Procedure applicable at the time when the execution case was struck off on the 18th of July, 1907. It has been held by this Court in a number of cases that unless there is a clear order withdrawing the attachment the presumption will be that the attachment continues. No doubt in some cases the opinion has been expressed that the question is one of the intention of the court and the parties. If we were to consider the case

from that point of view it is clear that the intention of the court was to maintain the attachment, for we find that when an application was made to revive the execution proceedings the court held, on the 2nd of August, 1909, that no further attachment was necessary and that the property was already under attachment. The delay which had taken place in following up the attachment is explained by the fact that an appeal was pending from the original decree in the High Court. We think the court below was wrong in holding that the property was not under attachment when the gift in favour of the judgement-debtor's mother was made. That gift having been made during the pendency of an attachment was void against the attaching creditor and the sale made by the donee falls with it. It was urged on behalf of Hayat Ali Shah that he was not a party to the original suit and that it was through an error that his name appears in the array of judgement-debtors. It is admitted that the decree for mesne profits was passed against him. We allowed him an opportunity of getting the decree amended if his statement was true, but we are informed that the application made by him has been rejected. We must hold that Hayat Ali Shah was a person against whom the decree sought to be executed was passed. We allow the appeal, set aside the decree of the court below and decree the plaintiffs' claim with costs in both courts.

Appeal allowed.

PRIVY COUNCIL.

GANGA SAHAI (DEFENDANT) *v.* KESRI AND OTHERS (PLAINTIFFS), 83 OF 1912, AND MUNSHI LAL AND OTHERS (PLAINTIFFS) *v.* GANGA SAHAI AND OTHERS (DEFENDANTS) AND MUNSHI LAL AND OTHERS (PLAINTIFFS) *v.* CHUNNI LAL (DEFENDANT) AND TWO OTHER APPEALS, FIVE APPEALS CONSOLIDATED, 84 OF 1912.

*P. C.** 1915 *June* 8, 9. *July*, 13.

[On appeal from the High Court of Judicature at Allahabad.]

Hindu law—Succession—Mitakshara law—Succession of sapindas of same and of different degrees—Uncle of half blood opposed as heir to son of uncle of whole blood—Civil Procedure Code, 1882, *sections* 317 *and* 231—*Execution of mortgage decree by one of several decree-holders—Suit by heirs of the other decree-holders against decree-holder who, after a sale subject to rights of heirs of the others, claimed and obtained sole possession.*

Held (affirming the decision of the High Court) that under the Mitakshara law the preference of heirs of the whole blood to those of the half blood is

Present:—Lord SHAW, Sir GEORGE FARWELL, Sir JOHN EDGE, and Mr. AMEER ALI.