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MARWARI.

always been loth to take up in revision cases of this description which have not been brought before it on appeal by the Local Government. In the present case it is really a public prosecution by a public official which has taken place. It is a matter in which Government is concerned and it is open to the District Magistrate to lay the matter before the Local Government with a view to an appeal being filed if necessary; the matter being one of more or less public importance. In the second place I have read the learned Sessions Judge's opinion as expressed in his order of reference and I have considerable doubts as to the correctness thereof. A necessary ingredient of an offence under section 266 is fraudulent intent. One knows full well that the measures of weight and measures of length which are in use in this country in villages and towns differ considerably from the standard measures laid down by Government under Act II of 1889. Where both purchaser and seller are well aware of the actual measure being used, there can be no question of fraudulent intent. It is only when the seller purports to sell according to a certain standard and sells below that standard, that he can be said to be guilty of fraud. The case in my opinion is one which this Court ought not to take up in revision but one in which if it is necessary the Local Government may appeal if it deems fit. Let the record be returned.

Record returned.

APPELLATE CIVIL.

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November, 10.

*Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir P. Amada
Chasan Banerji.*

DAMBAR SINGH (DECREE-HOLDER) v. MUNAWAR ALI KHAN
AND ANOTHER (JUDGEMENT-DEBTORS) *

Act No. III of 1907 (Provincial Insolvency Act), section 18—Decree obtained by insolvent before adjudication—Attachment of decree—Effect of subsequent adjudication on right of attaching creditor to execute.

Where a decree has been attached by a creditor of the decree-holder and subsequently the decree-holder is adjudged an insolvent, the right to execute such decree vests in the receiver in insolvency, and is not retained by the attaching creditor. *Raghunath Das v. Sunda Das Khatri* (1) referred to.

* First Appeal No. 153 of 1916, in a decree of Abdul Hasan, Subordinate Judge of Meerut, dated the 8th of May, 1916.

(1) (1914) I. L. R., 42 Calc., 72.

ONE Sri Kishan Das obtained a decree against Munawar Ali and another on the 1st of December, 1904. Dambar Singh held a decree against Sri Kishan Das and in execution thereof attached the decree held by Sri Kishan Das. As attaching creditor he applied to execute the decree of Sri Kishan Das on the 12th of July, 1907, again on the 30th of March, 1908, and again presented the present application on the 3rd of June, 1913. Sri Kishan Das was adjudicated an insolvent on the 26th of September, 1913, by the Bombay High Court and the official assignee was appointed receiver. The judgment-debtors objected that after Sri Kishan Das's insolvency, Dambar Singh had no right to execute the decree. The court allowed the objection and dismissed the application. Dambar Singh appealed.

Babu *Piari Lal Banerji*, for the appellant.

The attachment of the decree was made under section 273 of the Code of Civil Procedure, 1882. Under the provisions of that section the effect of the attachment was to take away the right to execute the decree for Sri Kishan Das and to vest it solely in Dambar Singh. The provisions of the present Code, order XXI, rule 53, made no material difference; *T. Unni Koya v. A. P. Umma*, (1). The subsequent insolvency of Sri Kishan Das could not give to the receiver the right to execute the decree which by the attachment had been taken away from Sri Kishan Das and had become vested in Dambar Singh. The right to proceed further with the execution of the decree which he had attached remained with Dambar Singh notwithstanding the insolvency of Sri Kishan Das.

Dr. *S. M. Sulaiman* (for Mr. *Abdul Raoof*), for the respondent.

Under section 53 of the Presidency Insolvency Act corresponding to section 34 of the Provincial Insolvency Act, it is only in respect of assets realized before the insolvency, that the appellant could have any right as against the receiver. The attachment gave to the appellant no lien or charge over the insolvent's property and the receiver in insolvency took all the property as if no attachment had taken place. The Privy Council has recently considered the effect of an attachment by a

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creditor as against the rights of the receiver. He cited *Raghunath Das v. Sundar Das Khetri*, (1).

Babu *Piari Lal Banerji*, in reply.

The Privy Council considered the case of an attachment of ordinary property. Under such attachment, the decree-holder secured no right over the property, but the judgement-debtor was merely prevented from alienating the property. When a decree is attached, the attaching creditor not only secures a right to prevent his debtor from executing the decree, but secures a substantive right to execute the decree himself, that is, he gets the sole right to deal with the debtor's property. In the one case the judgement-debtor is merely subjected to a disqualification and the receiver in insolvency takes the entire property without the disqualification, but in the other case the attaching creditor has secured the sole right to execute the decree, and though the receiver in insolvency may not be subject to the debtor's disqualification, he cannot take what by statute has already vested in the attaching creditor. No question under section 53 of the Presidency or section 34 of the Provincial Insolvency Act, arises at the present stage. Such question would only arise when after the realization of money the receiver claimed it as against the appellant. At the present stage the only question is "who has the right to execute the decree." In any case, the entire application could not be dismissed, as it included items of costs allowed to the appellant on account of the previous executions.

RICHARDS, C. J., and BANERJI, J. :—One Sri Kishan had obtained a certain decree. The appellant here obtained another decree against Sri Kishan and attached the decree belonging to Sri Kishan. Sri Kishan was declared an insolvent and his property vested in the official assignee. Notwithstanding the adjudication of Sri Kishan the appellant sought to put into execution the decree belonging to Sri Kishan which he had attached in execution of his decree. The judgement-debtors objected that Dambar Singh was not competent to execute the decree. The court below held that the objection had force and dismissed the application. We think the decision appealed from is correct. The effect of the attachment obtained by the appellant was not to

vest in him any property. It gave him, no doubt, the right to execute the attached decree, and had it not been for the insolvency he would still have that right. The insolvency, however, vested all the property of the insolvent in the official assignee and in effect cancelled the attachment obtained by Dambar Singh. Once Sri Kishan was declared an insolvent, the official assignee was the only person who could execute the decree which Sri Kishan had obtained, unless the official assignee had, in realizing the estate, sold the decree to some third party. See the decision of their Lordships of the Privy Council in *Raghunath Das v. Sundar Das Khetri* (1).

In the third ground in the memorandum of appeal the appellant contends that the court below has also dismissed his application to recover certain costs which were no part of the decree belonging to Sri Kishan, but which were in fact awarded to him as costs of previous execution proceedings. We think that this objection may have force. If any costs were awarded to Dambar Singh personally against the judgement-debtors, those costs form no portion of the assets of Sri Kishan and accordingly never vested in the official assignee. Save as just mentioned we dismiss the appeal, but in doing so expressly state that the dismissal of the appeal is not to prejudice the right of the appellant (if he has any) to recover costs which were personally awarded to him. We make no order as to costs of the appeal. The order of the court below as to costs in that court will stand.

Decree varied.

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

MATHURA PRASAD AND ANOTHER (JUDGEMENT-DEBTORS) v.
SHEOBALAK RAM (DECREE-HOLDER).*

Act No. II of 1912 (Co-operative Societies Act), sections 42 (5) and (6)—Order of liquidator declaring each member to be jointly and severally liable—Application for enforcement of order by Civil Court—Appeal—Jurisdiction.

A society formed under the Co-operative Societies Act, 1912, went into liquidation. The liquidator, having taken mortgages from the various persons

* Second Appeal No. 1086 of 1916, from a decree of E. M. Nanavutty, District Judge of Benares, dated the 12th of January, 1916, modifying a decree of Udit Narain Sinha, Subordinate Judge of Benares, dated the 9th of October, 1915.

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