

APPELLATE CIVIL.

Before Mr. Justice Lindsay and Mr. Justice Mukerji.

SOMWAR GIR (DECREE-HOLDER) v. MAYANAND GIR
(JUDGEMENT-DEBTOR) AND MAHADEVA BHARTI
(DECREE-HOLDER.)* 1928
March, 19.

*Civil Procedure Code, order XXI, rules 58, 60 and 63—
Execution of decree—Attachment—Objection by judge-
ment-debtor that property is trust property and he is
in possession as mutwalli—Objection upheld—Remedy
of decree-holder.*

The objection of a judgement-debtor to the attachment of certain property in execution of a decree against him was that, though the property sought to be attached was vested in him, it was vested in him not in his private capacity but as *mutwalli* of a *math*, and, therefore, could not be taken in execution by the decree-holder.

Held that this objection was one under order XXI, rule 58, of the Code of Civil Procedure; that the order of the court upon it was consequently an order passed under order XXI, rule 60, and that therefore the person against whom the order was passed had no right of appeal, but his remedy was by way of suit in accordance with rule 63.

Bhagwan Das v. Mahmud Bano (1), *Kartik Chandra Ghose v. Ashutosh Dhar* (2), *Ramanathan Chettiar v. Leppai Marakayar* (3), *Murigeysa v. Hayat Saheb* (4), *Upendra Nath Kalamuri v. Kusum Kumari Dasi* (5), and *Seth Chand Mal v. Durga Dei* (6), referred to.

The facts of this case sufficiently appear from the judgement of the Court.

Pandit *Ambika Prasad Pande*, for the appellant.

The respondents were not represented.

*First Appeal No. 232 of 1927, from a decree of V. Mehta, Additional Subordinate Judge of Benares, dated the 7th of March, 1927.

(1) (1923) 75 Indian Cases, 1053. (2) (1911) I. L. R., 39 Calc., 298.
(3) (1899) I. L. R., 23 Mad., 195. (4) (1898) I. L. R., 23 Ben., 237.
(5) (1914) I. L. R., 42 Calc., 440. (6) (1889) I. L. R., 12 All., 313.

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LINDSAY and MUKERJI, JJ. :—This professes to be an execution first appeal on behalf of a decree-holder, Mahant Somwar Gir. Mr. Pande has appeared for the appellant; the opposite side is not represented.

The first question we have to consider is whether an appeal lies.

The facts of the case are as follows :—The decree-holder appellant obtained a simple money decree against the judgement-debtor on the 17th of February, 1926. Execution was applied for in May, 1926, and as the result of this there were attached certain properties—zamin-dari, house property etc., as also certain decrees which had been obtained by the judgement-debtor against third parties.

On the 16th of June, 1926, the judgement-debtor put in an objection to the attachment of certain house property mentioned in list B. His plea was that this property was not liable to attachment and sale in execution of the decree obtained against him by Mahant Somwar Gir, because it was not his personal property at all but was property belonging to a *math*. In substance the objection was to the effect that this house property was in the possession of the judgement-debtor as a trustee for the *math*.

This objection was dismissed for default on the 20th of November, 1926. On the same day the judgement-debtor's counsel asked for restoration of the case, but this application was refused on the ground that order IX, rule 9, did not apply to proceedings in execution of decree.

After this an application was made for review of judgement and it seems this was entertained by the court below and finally allowed. The court held that the house property belonged to the *math* and was not liable to be attached and sold in execution of Mahant Somwar

Gir's decree. The decree-holder now comes up in appeal.

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It appears to us, having regard to the circumstances of this case and to the nature of the objection which was put forward by the judgement-debtor in the court below, that this is not a case in which an appeal is allowable. It seems to us that the objection which the judgement-debtor preferred to the attachment and sale was one under order XXI, rule 58, and consequently the order of the court below which is now under appeal before us must be deemed to be an order under rule 60 of order XXI. If that is so, it follows that the person against whom this order has been passed has no remedy by way of appeal. His remedy is by way of a suit (see order XXI, rule 63).

Mr. *Pande*, however, has contended on behalf of the decree-holder that this application of objection ought not to be treated as having been made under order XXI, rule 58, at all. His case is that it was an objection raised under section 47 and that the order of the court below must therefore be treated as a decree and liable to be appealed from.

We are unable to accept this contention, although it finds support in a recent case of the Oudh Chief Court, *Shah Naim Ata v. Girdhari Lal* (1). In this case a number of previous authorities are discussed and in particular there is an examination of the Full Bench decision of the Calcutta High Court in *Kartik Chandra Ghose v. Ashutosh Dhar* (2). Their Lordships of the Chief Court found themselves unable to accept the view which was taken in this Full Bench decision. We find, however, that there is a great mass of authority against the view which is taken by the Chief Court. Leaving aside the Calcutta Full Bench decision to which reference

(1) (1927) I. L. R., 2 Luck., 145. (2) (1911) I. L. R., 39 Calc., 298.

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has just been made, we find that a similar view was taken in *Ramanathan Chettiar v. Levai Marakayar* (1), *Murigeya v. Hayat Saheb* (2), *Budrudeen v. Abdul Rahim* (3), *Upendra Nath Kalamuri v. Kusum Kumari Dasi* (4) and *Sheikh Nazir Hussain v. Muhammad Ejaz Hussain* (5).

We would also refer to the Full Bench case of this Court—*Seth Chand Mal v. Durga Dei* (6). In that case it was held that where the legal representative asserts that the property is his own and has not come to him from the deceased judgement-debtor, he cannot set up a *jus tertii* so as to come in under section 278 and the following sections of the Code. He can only do so where he opposes execution against any particular property on the ground that, although it is vested in him, it is vested in him not beneficially by reason of his being the representative of the judgement-debtor but as trustee or executor of some one else; in that case either party may have the question of *jus tertii* determined in a separate suit.

If that is true of a case in which the capacity of the legal representative of a judgement-debtor to raise a *jus tertii* was under consideration, we see no reason why such a plea is not open to the judgement-debtor himself.

The authorities were examined in a recent judgement of a single Judge of this Court in *Bhagwan Das v. Mahmud Bano* (7). There Mr. Justice KANHAIYA LAL held that in objecting to attachment of certain properties in the execution of a decree under order XXI, rule 58, of the Code of Civil Procedure, if the objector claims the property as the *mutwalli* of a trust he does not do so as a representative of the judgement-debtor, even though

(1) (1899) I. L. R., 23 Mad., 195. (2) (1898) I. L. R., 23 Bom., 237.
(3) (1908) I. L. R., 31 Mad., 125. (4) (1914) I. L. R., 42 Calc., 440.
(5) (1922) I. L. R., 1 Pat., 637. (6) (1889) I. L. R., 12 All., 313.

(7) (1928) 75 Indian Cases, 1058.

the author of the trust may himself have been the judgment-debtor, except where such trust is created after the suit or the decree passed therein. We think the view taken by Mr. Justice KANHAIYA LAL is right and is supported by authority. It seems to us that in cases of this kind a judgement-debtor may fill two totally distinct legal characters. He may have property of which he is the beneficial owner. On the other hand, he may also be in possession of property which he holds in trust on behalf of a third party. If this latter property is attached in the execution of a decree obtained personally against him he is surely entitled to apply to the court and say that the property which is being attached is not really his property at all but belongs to a third party for whom he is holding as a trustee, and an examination of the language of order XXI, rule 60, supports this conclusion, for there it is said that if the court on investigation finds "that property which is in the possession of the judgement-debtor at such time is so in his possession not on his own account or as his own property, but on account of or in trust for some other person, the court shall make an order releasing the property wholly or to such extent as it thinks fit from the attachment." It seems plain to us that a question of this kind may be raised by the judgement-debtor himself and that in such cases he is not raising it as judgement-debtor but in a totally different legal character, namely, that of a trustee for a third person. In this view, therefore, we are of opinion that no appeal can be entertained against the order of the court below in the present case.

We have been asked to treat this present appeal as an application for revision of the order of the lower court, the ground taken being that the lower court had no jurisdiction to entertain and allow the application for review of judgement. We have no doubt that the ground upon which the court below allowed the review was not a

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good ground in law, but it cannot be said that there is any ground for revision. We cannot revise the order of the lower court merely because it came to an erroneous conclusion on a question of law raised before it. We think, therefore, this appeal fails and it is dismissed. No order as to costs, as the opposite party is not represented.

Appeal dismissed.

REVISIONAL CRIMINAL

*Before Sir Greenwood Mears, Knight, Chief Justice,
and Mr. Justice King.*

HAR SWARUP v. MUHAMMAD SIRAJ.*

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Act No. XXV of 1867 (Press and Registration of Books Act), section 7—Newspaper—“Declared printer”—Responsibility of printer for defamatory matter printed in a paper—Act No. XLV of 1860 (Indian Penal Code), section 500.

Primâ facie the person who is the “declared printer” of a newspaper is responsible for every thing that is printed in it. He can, however, escape liability by showing that he was absent *bonâ fide*, that is, not with the purpose of evading responsibility, when a particular article complained of was printed. But if he does so, he is bound to give evidence as to who the actual printer of the paper in his absence was. *Emperor v. Phanendra Nath Mitter* (1), followed.

THE facts of this case sufficiently appear from the judgement of the Court.

Pandit Madanmohan Nath Raina, for the applicant.

The opposite party appeared in person.

*Criminal Revision No. 279 of 1928, from an order of H. G. Smith, Sessions Judge of Meerut, dated the 10th of December, 1927.

(1) (1908) I. L. R., 35 Calc., 945.