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RIKHAB
KUMAR
v.
TRIVEDI
AND Co.

The consequence is that this appeal must be dismissed and the suit must be stayed in accordance with the order of Mr. Raja Ram.

Before Mr. Justice Sulaiman and Mr. Justice Banerji.

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April, 6.

IMTIAZ BIBI (PLAINTIFF) v. KABIA BIBI (DEFENDANT).*

Civil Procedure Code, section 47—Legal representative of deceased judgement-debtor—Claim by legal representative that property is his own and not an asset of the deceased judgement-debtor—Separate suit not maintainable.

Where the legal representative of a deceased judgement-debtor asserts that the property attached and sought to be sold is his own property, acquired by him under a transfer previous to the attachment, and is not part of the assets of the deceased judgement-debtor, the question is one which comes within section 47 of the Civil Procedure Code. Hence, where no such claim was raised in the execution court and the property was sold and was purchased by the decree-holder, a suit to recover the property, based on such a claim, does not lie. *Seth Chand Mal v. Durga Dei* (1) and *Dulla v. Shih Lal* (2), followed. *Gulzari Lal v. Madho Ram* (3), *Bhagwati v. Banwari Lal* (4) and *Bulaqi Das v. Kesri* (5), distinguished.

Mr. Hem Chandra Mukerji, for the appellant.

Mr. Panna Lal, for the respondent.

SULAIMAN and BANERJI, JJ. :—This case has been referred to a larger Bench on account of an apparent conflict between the case of *Dulla v. Shih Lal* (2) and the case of *Bulaqi Das v. Kesri* (5).

One Abdul Rahman died in 1917 leaving a widow Musammat Kabia Bibi and a daughter as well as three

* Second Appeal No. 792 of 1926, from a decree of J. N. Mushran, Subordinate Judge of Meerut, dated the 21st of January, 1926, confirming a decree of Mohammad Aqib Nomani, Munsif of Meerut, dated the 17th of August, 1925.

(1) (1889) I. L. R., 12 All., 313. (2) (1916) I. L. R., 39 All., 47.

(3) (1901) I. L. R., 26 All., 447. (4) (1903) I. L. R., 31 All., 82.

(5) (1928) I. L. R., 50 All., 686.

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brothers as his heirs. One of his brothers, Abdul Karim, promptly made a gift of his share which he had inherited in favour of his wife Musammat Imtiaz Bibi. A suit was brought by Musammat Kabia Bibi for recovery of her dower-debt against the heirs of the deceased by realization of the amount out of the assets left by him. There can be no doubt that the heirs were liable to pay the dower-debt when they took the assets. A compromise decree was passed in favour of Musammat Kabia Bibi against the heirs, including Abdul Karim. Abdul Karim died afterwards and his heirs, including Musammat Imtiaz Bibi his widow, were brought on the record as the legal representatives of the deceased judgement-debtor. Musammat Kabia Bibi decree-holder proceeded to execute the decree and attached the property of her deceased husband in the hands of his heirs, including the share in the possession of Musammat Imtiaz Bibi. No objection appears to have been raised by the latter on the occasion and the property was sold and purchased by the decree-holder Musammat Kabia Bibi herself. Musammat Imtiaz Bibi has now brought the suit for recovery of possession on the ground that it was no part of the assets of the deceased Abdul Karim and could not have been validly sold in execution of a money decree against Abdul Karim. Both the courts below have dismissed the suit on the ground that it was barred by section 47 of the Code of Civil Procedure.

It appears to us that this case is concluded by the ruling in the Full Bench case of *Seth Chand Mal v. Durga Dei* (1) which has been followed in subsequent cases. There, too, a simple money decree was passed against a judgement-debtor who died and his legal representatives were brought on the record in execution proceedings to represent him. They raised the question as to a certain property which they said was no part of the

(1) (1889) I. L. R., 12 All., 313.

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deceased's assets in their hands but was their own property. Four out of the five learned Judges held that the case was covered by section 244 of the old Civil Procedure Code. STRAIGHT, J., on page 322 remarked: "I do not think, when the representative of the deceased judgement-debtor says in regard to the property which he contends is not the property of the deceased judgement-debtor but is his property, that it can rightly be said that he thereby sets up a *jus tertii*". He admitted that the case would be different if he were trustee or representing some character wholly separate from his personal and individual character. EDGE, C. J., on pages 323 and 324 also pointed out the same distinction and held that where the representative merely asserts that the property sought to be sold is his own property to which he is beneficially entitled by purchase or from its having come to him otherwise than as a representative of the deceased judgement-debtor, it is not a case in which he has set up a *jus tertii*. The learned Judge also agreed that the case would be different if the representative of the judgement-debtor opposed the execution on the ground that the property vested in him as trustee or as executor of someone else. BRODHURST, J., concurred in that opinion. MAHMOOD, J., also agreed with that view and on page 327 pointed out that a distinction was to be drawn between the capacity of the judgement-debtor as representing his own interest and his capacity as representing an interest which did not vest in him and which one would call a *jus tertii*. The learned Judge held that as soon as a person is impleaded and objects against the execution of the decree he is bound, so long as he claims in respect of the property against which execution is sought a right no other than that which vests in him in his own person, to raise those objections in the execution of the decree and cannot be allowed to reagitate the matter in a regular suit. TYRRELL, J., however, dis-

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sented. Although in that case the point arose in appeal and before the property presumably was actually sold, the case is a clear authority for the view that the legal representative of a deceased judgement-debtor, when she is asserting that a certain property is her own property and no part of the assets of the deceased in her hand, is raising an objection relating to the execution, discharge or satisfaction of the decree within the meaning of section 47 of the Civil Procedure Code and that the question is between the representatives of the parties. In the present case, also, Musammat Imtiaz ought to have objected to the attachment of the property in her hands on the ground that it was no part of the assets of her deceased husband but had been acquired by her under a gift previous to the attachment. She was bound to raise this objection if it were good, as she was asserting her own personal rights to the property and was not putting forward the claim of any stranger to the execution proceedings. The case, in our opinion, is therefore fully covered by the ruling in the Full Bench case quoted above, which has never been doubted in this Court. It was expressly followed, as it was bound to be, in the case of *Dulla v. Shib Lal* (1). The only difference between the latter case and the present case is that there the legal representatives were brought on the record before the decree was passed. The principle underlying both is, however, the same.

The rulings in the Full Bench cases of *Gulzari Lal v. Madho Ram* (2) and *Bhagwati v. Banwari Lal* (3) are not directly in point. We would also hold that the case of *Bulaqi Das v. Kesri* (4) does not deal with the point which arises in this particular case and it is not therefore necessary for us to express any opinion on the question decided there.

We accordingly dismiss this appeal with costs.

(1) (1916) I. L. R., 39 All., 47.

(2) (1904) I. L. R., 26 All., 447.

(3) (1908) I. L. R., 31 All., 82

(4) (1928) I. L. R., 50 All., 686.