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IN THE
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SUNDARI
DASI

In *Moosa Haji v. Haji Abdul* (1) SIR LAWRENCE JENKINS, C.J., pointed out that there was nothing in the Probate and Administration Act which imposed upon a testator an obligation himself to name his executor and that there was nothing which precluded a testator from appointing as his executor such person as some one selected by him may name for that purpose. The learned CHIEF JUSTICE cited some English cases as showing that such an appointment has been held to be good consistently in England.

It therefore seems to us that inasmuch as Mst. Sukhi Sundari Dasi in her will had authorised Biswanath Koosary to nominate an executor and he has done so, it must be taken that the present applicant has been appointed under the will by necessary implication.

We accordingly direct that probate be granted to the applicant of the will of Sukhi Sundari Dasi.

APPELLATE CIVIL

*Before Sir Shah Muhammad Sulaiman, Chief Justice, and
Mr. Justice King*

DAL CHAND (DEFENDANT) *v.* MUL CHAND (PLAINTIFF)*

Civil Procedure Code, section 64, Explanation; order XXI, rule 55 (as amended)—Attachment of same property in execution of two decrees—Application for rateable distribution by a third decree-holder—Notified to sale officer—Private alienation by judgment-debtor—Execution sale satisfying one decree, and the other decree paid off privately—Rights of applicant for rateable distribution.

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The same property was attached in execution of D. P.'s decree of the Subordinate Judge's court and of M. R.'s decree of the Munsif's court, and both execution cases were transferred to the Collector for sale of the property. A third decree-holder, D. C., applied, in the execution case in the Munsif's court, for a rateable distribution, and his application was notified to the sale officer. After this, but before the auction sale, the judgment-debtor made a private sale of the attached

*Appeal No. 52 of 1932, under section 10 of the Letters Patent.

(1) (1908) 5 Bom., L.R., 639 (641).

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property to *M. C.* The property was sold in execution of *D. P.*'s decree, which was fully satisfied thereby, and the surplus was sent over to the civil court. *M. R.* then made a statement that his decree had been satisfied out of court and he would not proceed with his execution. The question then was whether *M. C.* or *D. C.* was entitled to the surplus. *Held*, that under the provisions of the explanation to section 64 of the Civil Procedure Code, and of order XXI, rule 55 as amended by the High Court, the applicant for rateable distribution was entitled to the surplus as against the private transferee. The property was under attachment under both the decrees, and so the surplus was subject to *M. R.*'s decree, whose rights could not be affected by the private transfer; the same benefit would be available to those who had already applied for rateable distribution, and the satisfaction or withdrawal of the attaching decree-holder's claim would not affect their rights.

Mr. *Harnandan Prasad*, for the appellant.

Mr. *S. N. Seth*, for the respondent.

SULAIMAN, C.J., and KING, J.:—This appeal arises out of certain execution proceedings. There were three decrees against the same judgment-debtors, Jagannath Prasad and others. One had been obtained by Durga Prasad from the court of the Subordinate Judge and the other two by Mewa Ram and Dal Chand separately from the court of the Munsif. Durga Prasad executed his decree and attached certain properties and the execution of his decree was transferred to the Collector by the Subordinate Judge. Mewa Ram acted independently. He executed his decree, got the same property attached and got execution of his own decree transferred to the Collector. Both the decrees were therefore in execution before the Collector. Dal Chand did not attach any property separately, nor did he apply to the court of the Subordinate Judge for a rateable distribution. He applied only to the court of the Munsif in Mewa Ram's case for a rateable distribution. An intimation of his application was sent to the sale officer. Thus the sale officer had the claims of all the three decree-holders in his consideration.

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Before any auction sale could be held the judgment-debtors privately transferred to the present plaintiff, Mul Chand, part of the property on the 3rd January, 1928, at a time when the attachments of Durga Prasad and Mewa Ram were subsisting and Dal Chand's application for rateable distribution also was pending. The Collector sold the property, in execution of Durga Prasad's decree and even after satisfying the amount due to him there was a surplus left which was sent to the civil court. Mewa Ram made a statement that he had been paid out of court and would not proceed with his execution. Upon this a dispute arose between Mul Chand, the private transferee, and Dal Chand, the third decree-holder, as to who was entitled to the surplus amount which had been left over after the satisfaction of Durga Prasad's decree.

The present plaintiff, Mul Chand, brought the suit for a declaration that he was entitled to this amount inasmuch as Mewa Ram's attachment no longer subsisted. The defendant Dal Chand defended the claim on the ground that the benefit of the attachment of Mewa Ram enured to him and the private sale to the plaintiff was subject to his rights.

The first court decreed the suit but the lower appellate court dismissed it. On appeal a learned Judge of this Court has restored the decree of the first court on the strength of the view expressed in three cases, *Mina Kumari Bibi v. Bijoy Singh Dudhuria* (1), *Annamalai Chettiar v. Palamalai Pillai* (2), and *Bhupal v. Kundan Lal* (3). It seems to us that the present case is clearly distinguishable from all these three cases. The point which we have to consider in the present case is whether Dal Chand who had applied for rateable distribution in the execution case of Mewa Ram who had, independently of Durga Prasad, attached the same property is not entitled to the benefit of the attachment. If Mewa

(1) (1916) I.L.R., 44 Cal., 662. (2) (1917) I.L.R., 41 Mad., 265.

(3) (1921) I.L.R., 43 All., 399.

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Ram had not separately attached the property the case would have been similar to those referred to above.

In *Mina Kumari Bibi's* case (1) the defendant respondent was a transferee of two decrees but he had attached the property in execution of one of the decrees only and by a subsequent order the sale of the attached property was indefinitely postponed until the execution application was dismissed. Before he could attach again the judgment-debtor conveyed the property privately. Their Lordships of the Privy Council laid down that in the first place there were no assets held by the court at all which the applicant for rateable distribution could claim. In the second place, the attachment was only one attachment, namely, that in the first execution case and all that could be done was to employ that attachment for the purpose of impugning the private alienation. But that would not help the applicant in placing himself in a better position than the decree-holder who had attached the property earlier. If that attachment failed his rights also disappeared. The same view was expressed in the other two cases, in none of which there was any second and independent attachment.

In the present case Mewa Ram was entitled to attach the same property over again in execution of his own decree and the execution of the Munsif's court's decree was rightly transferred to the Collector. It therefore follows that the property was under attachment under both the decrees and not only under the decree of Durga Prasad. The sale officer could not sell the property to satisfy Durga Prasad's decree alone and release the judgment-debtor from all liability to pay Mewa Ram's decree.

The learned advocate for the respondents relies on the provisions of section 63 of the Civil Procedure Code, under which if property is under attachment in execution of decrees of more courts than one, the court of the higher gradé is to receive the property and determine all claims. This, however, does not mean that the

(1) (1916) I.L.R., 44 Cal., 662.

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attachment by the court of the lower grade is a nullity. If any surplus was left after the satisfaction of Durga Prasad's decree, it must be held that that surplus was subject to the attachment of Mewa Ram's decree. No private transfer of the property or the surplus, which was its equivalent, could in any way affect the rights of Mewa Ram. It is therefore perfectly clear that if Mewa Ram had persisted in his execution and laid claim to the surplus amount left over, his application could not have been successfully resisted.

Now under section 64 of the Civil Procedure Code a person who applies for rateable distribution is placed on the same footing, so far as the attachment goes, as the attaching decree-holder. If, however, the attachment were to cease the position of the person who had applied merely for rateable distribution might become precarious and he might be unable to proceed further to realise the amount.

But this Court has amended rule 55 of order XXI in order to make it perfectly clear that even if the attaching decree-holder is satisfied or withdraws his claim, that would not affect the rights of those who had already applied for rateable distribution. Under that rule the amount decreed is deemed to include the amount of any decree passed against the same judgment-debtor, notice of which had been sent to the sale officer. It is an admitted fact that in this case notice of the claim of Dal Chand who had applied for rateable distribution had in fact been sent to the sale officer. It is therefore quite clear that Dal Chand's rights could not be prejudiced by the mere fact that subsequently Mewa Ram chose not to press his application and, whether rightly or in collusion with the judgment-debtor, stated that he had been paid out of court.

In this view of the matter the plaintiff Mul Chand, who was a private transferee at a time when the attachment of the property by Mewa Ram was subsisting, cannot claim a paramount right so as to override the

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claims of the defendant who had, previous to his private transfer, applied for rateable distribution and thereby placed himself on the same footing as the attaching decree-holder Mewa Ram.

We accordingly allow this appeal and setting aside the decree of the learned Judge of this Court restore that of the lower appellate court with costs in all courts.

PRIVY COUNCIL

J. C.*
1935
February, 7

MAQBUL AHMAD AND OTHERS v. PRATAP NARAIN SINGH
AND OTHERS

[On appeal from the High Court at Allahabad]

Limitation Act (IX of 1908), sections 4, 14(2)—Prescribed period expiring when court closed—Proceeding in wrong court—Discretion of court.

There is a marked difference between the language and effect of section 4 and section 14 of the Indian Limitation Act, 1908. Section 4 provides merely that if the prescribed time for a civil proceeding expires when the court is closed, it can be commenced on the day when the court (which means the proper court) re-opens; the section does not alter the period prescribed for the proceeding. Under section 14, and similar sections, certain periods are to be excluded in computing the prescribed period; the effect is that any days so excluded have to be added to what is primarily the prescribed period.

On June 7, 1920, the appellants obtained a preliminary mortgage decree; under article 181 of schedule I of the Act the period for applying for a final decree was three years from that date, which expired when the court was closed for the vacation. The application was made on June 20, 1923, the day when the court re-opened, but to a court which no longer had jurisdiction in the matter. It was there prosecuted for 48 days and by section 14, sub-section (2), of the Act those days were to be excluded. The appellants applied in the right court on August 6, 1923:

Held, that the application was barred as a period of three years and forty-eight days had expired about July 25, 1923; the appellants were not entitled under section 4 to exclude the period of the vacation.

*Present: Lord TOMLIN, Lord THANKERTON, Lord RUSSELL of KILLOWEN, Sir LANCELOT SANDERSON, and Sir SHADI LAL.