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The question in this form did not arise in the case of *Ram Nath* v. *Chiranji Lal* (1), nor was it decided. In that case the creditor was willing to allow a rateable distribution, and it was the debtor who was saying that the whole of the amount should be appropriated towards that part of the debt which was for legal necessity. As the debtor's option must be exercised at the time of the payment, the debtor had in that case already lost his option and could not compel the creditor to appropriate the amount in a particular way. In the absence of any express specification by the creditor, the court upheld the rateable distribution of the amount. The word "appropriation" as used in that judgment did not mean the exclusive appropriation to one part of the debt, but its rateable distribution between the two portions of the debt.

Our answer to the other part of the question is that when the two portions of the debt have not been definitely ascertained, and the mortgagee regards the whole debt as one debt, it is not open to the creditor to appropriate the payment towards an unknown and unspecified portion of the debt; but he may make the appropriation if the two portions are definitely ascertained, in such a way as to make them constitute two distinct debts, although parts of the same loan.

This is our answer to the question referred to us.

REVISIONAL CIVIL

Before Mr. Justice Collister and Mr. Justice Bajpai

SARJULAL BEHARILAL (DECREE-HOLDER) *v.* SUKHDEO PRASAD AND OTHERS (OBJECTORS)*

1935 *December*, 17

Civil Procedure Code, order XXI, rule 58—*Claimant's objection to attachment of property—Proceeding in execution—Reference to arbitration* ultra vires—*Jurisdiction—Civil Procedure Code, section* 141 ; *schedule II, paragraph* 1.

*Civil Revision No. 477 of 1934.

(1) (1934) I.L.R. 57 All. 605.

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An objection under order XXI, rule 58 of the Civil Procedure Code, creating as it does a dispute between the decree-holder and a person claiming property which the decree-holder seeks to put to sale as being the property of his judgment-debtor, is a matter relating to the execution, discharge or satisfaction of a decree and is a proceeding in execution. Such a proceeding can not be made the subject of a reference to arbitration. Schedule II, paragraph 1 of the Civil Procedure Code is not in terms applicable to such a proceeding, nor can it be made applicable by virtue of section 141 of the Code, for that section applies to "original matters" and not to proceedings in execution. Accordingly the court has no jurisdiction to refer to arbitration a dispute under order XXI, rule 58, and such a reference is *ultra vires*.

Messrs. *H. P. Agarwal* and *D. P. Malaviya*, for the applicant.

Mr. *Ambika Prasad*, for the opposite parties.

COLLISTER and BAJPAI, JJ.:—The applicants in this case are a firm and they sued a certain person on a promissory note and obtained a decree for Rs.1,900 odd. Thereafter they took out execution and applied for the sale of certain property which had been attached before judgment. An objection under order XXI, rule 58 of the Civil Procedure Code was made by the sons of the judgment-debtor and certain other relatives of his. On the application of the parties the matter was referred to arbitration and in due course an award was submitted to the court. An objection to the award was made on behalf of the decree-holders, but it was dismissed by the court and the award was confirmed.

Two points have been taken before us by learned counsel for the applicants. One is that the court had no jurisdiction to refer the matter to arbitration and acted *ultra vires*, and the other is that the award is invalid for the reason that the judgment-debtor himself, who had been impleaded in the proceedings under order XXI, rule 58, was not a party to the agreement to refer the matter to arbitration.

As regards the first point, learned counsel contends that schedule II of the Civil Procedure Code does not apply to proceedings in execution and therefore the court had no jurisdiction to refer the dispute to arbitration; the award is consequently invalid and the order of confirmation is bad. On behalf of the opposite party it is pleaded that a proceeding under order XXI, rule 58 is not a proceeding in execution at all; but if it be held to be such, then learned counsel contends that, although schedule II does not apply in terms, yet it is rendered applicable by the provisions of section 141 of the Civil Procedure Code.

As regards the question whether the trial of an objection under order XXI, rule 58 is a proceeding in execution learned counsel for the opposite party contends that it is not a matter which relates to the execution, discharge or satisfaction of a decree. He relies upon *Sheonandan Chowdhury* v. *Debi Lal Chowdhury* (1), and *Diljan Mihha Bibi* v. *Hemanta Kumar Roy* (2). In the Patna case the court held that an application under order XXI, rule 100 was not an application in execution of a decree, but was an original matter in the nature of a suit; and after discussing the Privy Council case of *Thakur Prasad* v. *Fakir Ullah* (3), to which we shall have occasion to refer later on, the court held that order IX, rule 4 of the Civil Procedure Code would apply by force of section 141 to a proceeding under order XXI, rule 100. The learned Judges held that the Privy Council case above referred to was an authority for the proposition that order IX, rule 4 would apply by force of section 141 to original matters in the nature of suits. Similarly in *Diljan Mihha Bibi* v. *Hemanta Kumar Roy* (2), a Bench of the Calcutta High Court held that an application for setting aside a sale under order XXI, rule 90 of the Civil Procedure Code was not an application for execution; it was a miscel-

(1) (1923) I.L.R., 2 Pat., 372. (2) (1915) 29 Indian Cases, 395.
(3) (1894) I.L.R., 17 All., 106.

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laneous proceeding in the nature of an original proceeding in which the auction purchaser was the principal interested party. The learned Judges accordingly held that where an application for setting aside an execution sale under order XXI, rule 90 had been dismissed for default and an application for restoration was made, order IX, rule 9 of the Civil Procedure Code was applicable. In the case of *Hari Charan Ghose* v. *Manmatha Nath Sen* (1), which was decided a year previously to the above mentioned case, a Bench of the same High Court held that order IX, rule 13 of the Civil Procedure Code was not applicable to a proceeding under rules 100 and 101 of order XXI. This case was referred to in *Diljan Mihha Bibi* v. *Hemanta Kumar Roy* (2), but the learned Judges seem to have distinguished it partly on the ground that it merely laid down the proposition that *all* the provisions of order IX were not applicable to proceedings in execution and partly on the ground that in that case there was no necessity in the interests of justice that order IX, rule 13 should be applied because the order was not conclusive but was subject to the right of a person aggrieved to institute a suit.

In our opinion an objection under order XXI, rule 58, creating as it does a dispute between the decree-holder and a person claiming property which the decree-holder seeks to put to sale as being the property of his judgment-debtor, is a matter relating to the execution, discharge or satisfaction of a decree and is a proceeding in execution.

The next point to determine is whether schedule II of the Civil Procedure Code is applicable by virtue of section 141 to such a proceeding. In *Thakur Prasad* v. *Fakir Ullah* (3) an application for execution of a decree had been struck off on the decree-holder's own petition and thereafter a second application was made within the

(1) (1913) I.L.R., 41 Cal., 1. (2) (1915) 29 Indian Cases, 395.
(3) (1894) I.L.R., 17 All., 106.

period of limitation. Their Lordships of the Privy Council held that, although the petition for execution had been withdrawn without leave to apply again having been expressly granted by the court, the petitioner's right to renew his petition within due time remained; the provisions of section 373 (which corresponds to order XXIII, rule 1 of the present Code) which could only have applied through the effect of section 647 (i.e., section 141 of the present Code) had not been rendered applicable thereby to petitions for execution. At page 111 their Lordships observe as follows:

. ."It is not suggested that section 373 of the Civil Procedure Code would of its own force apply to execution proceedings. The suggestion is that it is applied by force of section 647. But the whole of chapter XIX of the Code, consisting of 121 sections, is devoted to the procedure in executions, and it would be surprising if the framers of the Code had intended to apply another procedure, mostly unsuitable, by saying in general terms that the procedure for suits should be followed as far as applicable. Their Lordships think that the proceedings spoken of in section 647 include original matters in the nature of suits such as proceedings in probates, guardianships and so forth and do not include executions."

In *Bharat Indu* v. *Asghar Ali Khan* (1) a Bench of this Court, following *Thakur Prasad* v. *Fakir Ullah* (2), and *Hari Charan Ghose* v. *Manmatha Nath Sen* (3), held that order IX of the Civil Procedure Code does not apply to a case where an application for execution is dismissed for default. In *Bachan Lal* v. *Amar Singh* (4) the representatives of a decree-holder took out execution. The judgment-debtors objected and ultimately the matter was referred to arbitration. Meanwhile a third person sued the representatives of the decree-holder on a promissory note and attached the decree before judgment. Subsequently he made an objection impugning the arbitration proceedings and the award. A learned single Judge of this Court held

(1) (1922) I.L.R., 45 All., 148.
(2) (1894) I.L.R., 17 All., 106.
(3) (1913) I.L.R., 41 Cal., 1.
(4) A.I.R., 1935 All., 125.

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that an execution proceeding is not a suit and therefore schedule II does not entitle the parties to an execution proceeding to file an application for a reference to arbitration; the arbitration proceedings were therefore invalid and the court was not entitled to enforce the award. In *Hari Charan Ghose* v. *Manmatha Nath Sen* (1), to which reference has already been made, the Court in discussing section 141 observed at page 4 as follows:

"This section" (i.e. section 141) "reproduces with modifications section 647 of the previous Code, but in section 647 there was an explanation in these terms; 'This section does not apply to applications for the execution of decrees, which are proceedings in suits.' That explanation has been omitted and it has been argued before us that this omission is an indication that the legislature in passing the present Code intended that section 141 should have a wider operation than section 647. There is a certain amount of force in this argument, but it overlooks the history of this section and the case law. At one time there was a considerable divergence of opinion as to whether section 647 applied to execution proceedings; and it was in consequence of this that by Act VI of 1892 this explanation was introduced into the section of the Code of 1882. But after this alteration in the law the Privy Council by a case, *Thakur Prasad* v. *Fakir Ullah* (2), decided on section 647, as it stood before the explanation was added, that the section did not apply to execution proceedings. The purpose of the legislature in omitting that explanation was to do away with that which was shown to be unnecessary by the Privy Council decision and to rely upon the terms of the section as interpreted by the Privy Council. So it was that the explanation came to be omitted. This may have been an unfortunate way of proceeding, because it involves some knowledge of the history of section 647 and of the decision on that section to appreciate the effect of this change; but this is how the matter was dealt with by the legislature. The result is that section 141 does not make applicable to proceedings in execution all the procedure provided by the Code."

In T. *Wang* v. *Sona Wangdi* (3), a Bench of the Calcutta High Court held that a court was not com-

(1) (1913) I.L.R., 41 Cal., 1. (2) (1894) I.L.R., 17 All., 106.
(3) (1924) I.L.R., 52 Cal., 559.

petent to refer to arbitration a dispute between a judgment-debtor and his decree-holder and the award was therefore invalid and unenforceable. The learned Judges observe at page 563 as follows:

"Nothing has been shown to us to persuade us to hold that there is any speciality in the second schedule which makes it applicable to questions arising in the execution of decrees. . . . As has been explained in *Hari Charan Ghose* v. *Manmatha Nath Sen* (1), the law is the same as it was under section 647 of the Code of 1882 which expressly excluded execution proceedings from those to which provisions relating to suits were extended. The view that the special procedures in suits do not apply to execution of decrees is based on the supposition that order XXI relating to executions is self-contained and exhaustive as to the special subject with which it deals."

The case of *Sattar-un-Nissa* v. *Shaikh Muhammad Ruhulla* (2) supports the contention of learned counsel for the opposite party. After discussing the Privy Council case of *Thakur Prasad* v. *Fakir Ullah* (3) the learned Judges observed that "There does not appear to be anything unsuitable to apply chapter XXXVII" (which is equivalent to schedule II of the present Code) "to proceedings in execution of decrees and we are not prepared to accept this view."

On a careful consideration of the view expressed by their Lordships of the Privy Council in *Thakur Prasad* v. *Fakir Ullah* (3) we are of opinion that an objection under order XXI, rule 58 of the Civil Procedure Code cannot be held to be an "original matter" as contemplated by their Lordships; we think that it is a proceeding in execution and we hold on the authority of the above mentioned case that the provisions of schedule II are not applicable. It is obvious that schedule II does not apply of its own force and in our opinion it is not rendered applicable under the provisions of section 141.

The above being our view, it is not necessary for us to deal with the other plea which has been argued by

(1) (1913) I.L.R., 41 Cal., 1. (2) (1905) 8 Oudh Cases, 263.
(3) (1894) I.L.R., 17 All., 106.

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learned counsel for the applicants. We accordingly allow this application with costs and set aside the order of the court below confirming the award and we direct that the objection under order XXI, rule 58 be tried according to law.

FULL BENCH

Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr. Justice Bennet and Mr. Justice Bajpai

1935 *December*, 19

BHARATPUR STATE (PLAINTIFF) *v.* SRI KISHAN DAS AND OTHERS (DEFENDANTS)*

Hindu law—Alienation by father—Suretyship for payment of money—Mortgage of joint ancestral property by father as security for due payment of rent under a lease taken by him of certain property—Lease not executed for legal necessity—Antecedent debt.

Where the father in a joint Hindu family took a lease of a village for nine years at an annual rent of Rs.2,700, and three months afterwards executed a mortgage of joint ancestral property for Rs.8,000 by way of security for the due payment of the rent; and it was found that the transaction was not supported by legal necessity or benefit to the estate:

Held that in these circumstances, and if there was no antecedency of the original debt or liability in point of time and in fact, the hypothecation of joint ancestral property by way of security was invalid.

Held, also, on the question of antecedent debt,—

(1) If the execution of the lease and the subsequent execution of the security bond were part and parcel of the same transaction, then obviously there could be no antecedent debt in point of time or fact.

(2) [*Per* SULAIMAN, C.J.; BENNET, J., concurring; BAJPAI, J., *contra*] If, however, the two transactions were separate and independent, the first would be antecedent in point of time. If the pecuniary liability incurred under the lease was certain, definite and unconditional, it would amount to a debt, even though the payment was to be by future instalments. But if under the terms of the lease the pecuniary liability were not only contingent but also conditional, and might accrue in certain

*First Appeal No. 233 of 1931, from a decree of Nawab Hasan, Subordinate Judge of Aligarh, dated the 11th of March, 1931.