

## APPELLATE CIVIL.

*Before Sir Louis Stuart, Knight, Chief Judge, and  
Mr. Justice Muhammad Raza.*

SHAH NAIM ATA (JUDGMENT-DEBTOR-APPELLANT) *v.* LALA GIRDHARI LAL AND OTHERS (DECREE-HOLDERS-RESPONDENTS).\* 1927  
January, 7.

*Civil Procedure Code, section 47, order XXI, rule 58—Attachment, objection to—Objection by judgment-debtor in a representative capacity, maintainability of, under section 47 of the Civil Procedure Code.* Stuart, C. J.,  
and  
Raza, J.

Where a decree-holder attached certain property and the judgment-debtor filed objections against the attachment under section 47 of the Code of Civil Procedure on the ground that it was endowed property and that he was in possession of it not in his own right but as manager of that endowment, held, that the judgment-debtor had every right to prefer his objection under section 47 of the Civil Procedure Code. [*Kartick Chandra Ghose v. Ashutosh Dhara* (1), dissented from. *Prosunno Kumar Sanyal v. Kali Das Sanyal* (2) and *Kuriyali v. Mayan* (3), followed. *Sakharam Govind Kale v. Damodar Akharam Gujar* (4), referred to.]

Messrs. *M. Wasim* and *Ali Mohammad*, for the appellant.

The respondents were absent.

STUART, C. J., and RAZA, J. :—Lala Girdhari Lal and others hold a simple money decree against Shah Mohammad Naim Ata. In execution of this decree they have sought to attach and bring to sale six villages: Baroulia, Palipur, Pipranagar-Mohiuddinpur, Ataganj-Ansari, Khwajapur and Madhopur-Sataiyan. The judgment-debtor preferred an objection the decision of which, according to his application, should be under the provisions of section 47 of the

\* Execution of Decree Appeal No. 44 of 1926, against the order, dated the 7th of August, 1926, of Damodar Rao Kelkar, Subordinate Judge of Rae Bareilly, dismissing the objections of the appellant.

(1) (1912) I.L.R., 39 Calc., 298 (2) (1892) L.R., 19 I.A., 166.

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(3) (1884) I.L.R., 7 Mad., 255. (4) (1885) I.L.R., 9 Bom., 468.

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Code of Civil Procedure, to the effect that he is in possession of these villages not in his own right, but as manager of an endowment to which these villages pertain. When this objection was made the decreeholder took exception to it on the ground that it did not lie under the provisions of section 47 but that it should have been made under the provisions of order XXI, rule 58. The learned Subordinate Judge decided that the objection did not lie under section 47 and that if it did lie under order XXI, rule 58, he could not take cognizance of it as it purported to be an objection under section 47. He dismissed the objection accordingly. The judgment-debtor appeals.

We agree with the learned Subordinate Judge that if the objection lay not under section 47 but under order XXI, rule 58, the proper course was to dismiss it, leaving the judgment-debtor the remedy of filing a separate objection under order XXI, rule 58. The arguments of the learned Counsel for the judgment-debtor will be only considered in so far as they are arguments to the effect that the objection lay properly under section 47. The learned Subordinate Judge in deciding this point against the judgment-debtor had in support of his view the authority of a Full Bench decision of the Calcutta High Court reported in *Kartick Chandra Ghose v. Ashutosh Dhara* (1). In that Full Bench decision it was laid down that, when a decree is passed against a judgment-debtor in his individual capacity and he takes an objection to the attachment of certain property in his possession upon the ground that although it is in his possession it is not in the possession of him in his personal capacity but in possession of him as a manager of endowed property, the question cannot be considered to be a question between the parties to the suit in which the decree was

(1) (1912) I.L.R., 39 Calc., 298 (F.B.).

passed relating to the execution, discharge or satisfaction of the decree. While we give full weight to the view taken by the Hon'ble Judges composing this Full Bench, we are constrained to disagree with it. There can be no doubt as to the fact that the question relates to the execution and satisfaction of the decree and it should thus be determined by the court executing the decree, and not by a separate suit, under the provisions of section 47, if it is a question arising between the parties to the suit in which the decree was passed. The decree-holder is clearly a party to the suit in which the decree was passed. We thus have only to decide whether the judgment-debtor is to be considered not to be a party to the suit, in as much as he is objecting not in his individual capacity but on the allegation that he is the manager of endowed property and that the decree is sought to be executed against that endowed property. The learned Judges who decided *Kartick Chandra Ghose v. Ashutosh Dhara* (1), referred in their decision to a previous decision of a Bench of the Madras High Court in *Kuriyali v. Mayan* (2), which was approved by their Lordships of the Judicial Committee in *Prosunno Kumar Sanyal v. Kali Das Sanyal* (3), but while recognizing that this decision took the contrary view to the view which they were taking, they did not consider that it was an authoritative decision, because in their opinion their Lordships of the Judicial Committee approved of it upon an entirely different point. We proceed to examine this Madras case. It was as follows: A certain person had mortgaged four parcels of land. The mortgagee instituted a suit for satisfaction of the mortgage by sale of the parcels in question. During the course of the proceeding the mortgagor died. The

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mortgagee obtained a decree. In execution of that decree it was sought to sell the parcels in question. The mortgagor's representative-in-interest, who had become judgment-debtor under the decree, objected to the sale of three of the parcels on the ground that one was his own separate property and that the other two were the property of a joint family to which the mortgagor and he belonged, and that this being the case the mortgagor was not entitled to transfer. The Bench of the Madras Court held that this objection should be decided under the provisions of section 244 of the old Code of Civil Procedure, which corresponds now to section 47 of the new Code. In that case it will be seen that the objector set up a similar case to the case set up by the appellant here. He alleged that although certain property was in his possession, it was not in his possession personally as the representative of the mortgagor, but that a portion of it was in his possession personally on a title distinct from the title of the original mortgagor, and that a portion of it was in possession of the joint family of which both the mortgagor and he were members. It is true that in the decision of their Lordships of the Judicial Committee in *Prosunno Kumar Sanyal v. Kali Das Sanyal* (1) no such point was before them. The question before them was whether the following objection should be treated as an objection under section 244 of the old Code of Civil Procedure. Certain persons who were judgment-debtors under a decree alleged that they had satisfied their liability by a money payment to the decree-holders and that the decree-holders agreed that, in these circumstances, properties to which the judgment-debtors were entitled should be exempted from sale in execution, that the properties were exempted from sale in a prior execution, but that in a subsequent execution they were

(1) (1892) L.R., 19 I.A., 166.

attached and brought to sale. These persons then instituted a suit for a declaration that the properties were not liable to sale and it was held by their Lordships that such a suit did not lie, as it was contrary to the provision of section 244, and that their remedy was to take an objection under section 244. When it was pressed before their Lordships in argument that this was not a question between the parties to the suit in which the decree was passed because its determination affected the right of the auction-purchasers who had subsequently purchased the property (who were clearly not parties to the suit in which the decree was passed), their Lordships in determining the point as to whether this circumstance would, in any way, take the case out of the purview of section 244 "thought it desirable, before giving judgment, to examine the reported cases which had arisen under section 244 of the Code of Civil Procedure." They continued at pages 168-9:— "An examination of these cases, of which it is only necessary to mention *Sakharam Govind Kale v. Damodar Akharam Gujar* (1), and *Kuriyali v. Mayan* (2), has satisfied their Lordships that the decision appealed from is in accordance with the construction which the courts in India have uniformly placed on the section in question." And they proceeded further:—"It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the courts in India have not placed any narrow construction on the language of section 244." They then continued to apply the principles to the case before them. We are unable, with great respect, to agree with the learned Judges who decided the Full Bench decision, to which we have already referred, that the words of their Lordships can be construed in any other manner than this. We find that they

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clearly decided that the Bench of the Madras High Court, which decided *Kuriyali v. Mayan* (1), had arrived at a correct interpretation of the law. We are unable to attach any other meaning to their words. The point before them was whether a liberal construction should be given to the provisions of section 244 or whether a narrow construction should be given to those words. They laid down, as we construe, as one of the conditions governing the decision the importance of disposing of objections to execution sales as cheaply and as speedily as possible. In this connection they considered *Kuriyali v. Mayan* (1), in which a Bench of the Madras High Court had refused to take a narrow view of this section and held that the objection of the representative of the original defendant put forward to the attachment and sale of certain property in execution of the decree to the effect that that property was not the defendant's own property but the property partly of his representative in his private capacity and partly of a joint family to which both he and the defendant's representative belonged was an objection which was properly decided under section 244. The Bench in that case thereby decided clearly and distinctly that the person who was the judgment-debtor in execution of a decree was a representative of a party to the suit in which the decree was passed, and that when in raising an objection to the execution of the decree he went completely outside the character of a representative of the original defendant and took an objection based upon a title which not only was not the title of the original defendant but absolutely opposed to that title, he was still at liberty to object under the provisions of section 244 and was not at liberty to bring a separate suit upon the point. We cannot read the words of their Lordships of the Judicial Committee in approving of this decision in

(1) (1884) I.L.R., 7 Mad., 255.

any other manner than conveying the conclusion that the Bench of the Madras High Court was correct in their decision, and that their construction of the words of the section was approved, largely because it was a sensible construction, which had the effect of disposing of an objection to an execution sale as cheaply and as quickly as possible. With all respect to the learned Judges who decided *Kartick Chandra Ghose v. Ashutosh Dhara* (1), we are of opinion that the fine distinction drawn there between the judgment-debtor in his personal capacity and the judgment-debtor in his representative capacity is a distinction which their Lordships of the Judicial Committee considered should not be made. The Bench of the Madras High Court which refused to make that distinction was considered by their Lordships to have taken the right course. In these circumstances we need not consider the large mass of authorities which have been cited at the Bar. Some of these are in favour of the view which we have taken—some are against it. We consider that the matter is concluded by the decision of their Lordships of the Judicial Committee in *Prosunno Kumar Sanyal v. Kali Das Sanyal* (2). The judgment-debtor-appellant, we consider, had every right to prefer this objection under section 47. Unfortunately the other side has not been represented. They have received notice, but they preferred not to be represented. We have, however, endeavoured to give every weight to every point in favour of the decision appealed against. In our opinion, however, the matter is concluded by the decision of their Lordships which we have quoted. We accordingly allow this appeal to this extent. We set aside the order of dismissal and hold that the application rightly lay under section 47. We send the case back under the provisions of order XLI, rule 23, to the

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learned trial Judge or his successor to be re-admitted under its original number and decided according to law. Costs will abide the result.

*Case remanded.*

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 February, 1.

*Before Mr. Justice Wazir Hasan and Mr. Justice King.*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL;  
 (DEPENDANT-APPELLANT) v. MURLIDHAR (PLAINTIFF-RESPONDENT).\*

*Railway—Risk Form B, goods despatched under—Under-charge, claim for, when permissible.*

The plaintiff offered some bags of castor-cakes at a station on the O. and R. Railway for being carried to a station on the B. & N.-W. Railway. The goods were accepted as manure and booked at owner's risk under Risk Form B and charged as such. At the place of destination the railway refused to deliver the goods unless an additional payment on account of freight at a higher rate was made. The plaintiff refused to pay the additional charge and filed the present suit for damages. The defence was that the booking clerk made a mistake in calculation and should have charged them at the higher rate for oil-cakes on the O. & R. Railway or at the higher rate for manure on the B. & N.-W. Railway and that the railway could ask for the payment of a proper freight on the basis of condition sixth printed on the reverse of the receipt—Risk Form B.

*Held*, that condition sixth in Risk Form B cannot be so interpreted as to permit any basic alteration in the terms of the contract. Under that clause alterations are permissible only in the case of mistakes in re-measurement, re-weighment, re-calculation and re-classification of rates, and the present case is not of such a nature.

The precise matter which has the effect of altering the contract is that the claim for under-charge necessarily carries with it the alteration of that part of the agreement between the parties which related to the carrying of the goods at the

\* Second Civil Appeal No. 222 of 1926, against the judgment and decree of Sheo Narain Tiwari, Second Additional Subordinate Judge of Lucknow, dated the 16th of April, 1926, decreeing the plaintiff's claim and reversing the decree, dated the 11th of January, 1926, of Chaudhry Mohammad Abdul Azim Siddiqi, Munsif South, Lucknow, dismissing the plaintiff's claim.