

APPELLATE CIVIL.

Before Courtney Terrell, C.J., and Fazl Ali, J.

DOMI LAL SAHU

v.

BIJOY PRASAD SINGH.*

Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rule 53—money decree, whether can be sold in execution—attaching creditor should proceed to execute the attached decree.

A money decree cannot be sold in execution and once such a decree is attached the procedure indicated in Order XXI, rule 53, Code of Civil Procedure, 1908, should be followed, and the attaching creditor may proceed to execute the attached decree as if he was the representative of the holder of that decree.

Tiruvengada Chari v. Vythilinga Pillai(1), *Jotindro Nath Chowdhry v. Dwarka Nath Dey*(2), *Sultan Koer v. Gulzari Lall*(3), *Vithaldas Prabhu v. Subraya Manjappa*(4), *Maung Lun Bye v. Maung Po Nyun*(5) and *Lachman Ojha v. Chariter Ojha*(6), followed.

Appeal by the decree-holders.

The facts of the case material to this report are stated in the judgment of Fazl Ali, J.

Sarjoo Prasad, for the appellants.

B. P. Sinha, for the respondents.

FAZL ALI, J.—A preliminary point was raised on behalf of the respondents that one of these appeals (Appeal no. 12 of 1932) is barred by limitation. It

* Appeals from Appellate Order nos. 9 and 12 of 1932, from an order of Mr. Pramatha Nath Bhattacharji, District Judge of Monghyr, dated the 1st August, 1931, affirming an order of Babu Kishen Sahay, Subordinate Judge, 2nd Court of Monghyr, dated the 25th November, 1930.

(1) (1883) I. L. R. 6 Mad. 418.

(2) (1891) I. L. R. 20 Cal. 111.

(3) (1879) I. L. R. 2 All. 290.

(4) (1920) I. L. R. 45 Bom. 343.

(5) (1923) I. L. R. 1 Rang. 360.

(6) (1918) 4 Pat. L. J. 336.

appears that the appellate order against which these appeals are directed was passed by the court below on the 1st August, 1931. Two appeals were filed in this court against this order on the 2nd November, 1921, but only one copy of the order appealed against was filed and that copy was filed by the appellants in appeal no. 9 of 1932. On the report of the Stamp Reporter that another copy of the order should have been filed in appeal no. 12 an order was made directing the appellants concerned to file a copy and it was filed on the 12th January, 1932. It is contended by the respondents that as the copy of the order appealed against was filed on the 12th January, 1932, the appeal must be taken to have been duly presented on that date and not on the 2nd November, 1931, on which date the memorandum of appeal was filed. Technically that would be so, but, in my opinion, this is a fit case in which the period of limitation should be extended under section 5 of the Limitation Act.

Passing now to the merits of the case a few facts may be briefly stated. On the 29th October, 1918, the appellants obtained a mortgage decree as well as a decree for costs against one Domi Lal Sahu, a name-sake of one of the appellants. The mortgage decree was satisfied by the sale of the mortgaged properties and in 1926 the appellants applied for execution of the decree for costs. It appears that Domi Lal Sahu, the judgment-debtor, had taken out execution against the predecessors-in-interest of the respondents in respect of a money decree which he held against them. This decree was sold in execution of the appellants' decree and was purchased by the appellants with the result that the execution case in the course of which this decree was purchased was dismissed in 1927. Subsequently in 1929 the appellants started a fresh execution case and in the course of this execution they purchased certain properties belonging to the respondents. It may be mentioned here that on the 13th January, 1930, three days before the sale, certain objections were raised by the respondents to the execution proceedings but they were dismissed for default

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on the 16th January, 1930. On that day the properties in question belonging to the respondents were sold and purchased by the appellants. The respondents then preferred certain objections against the sale both under section 47 and under Order XXI, rule 90, of the Civil Procedure Code. One of these objections was that the money decree which Domi Lal Sahu, the judgment-debtor of the appellants, had obtained against the respondents could not be sold in execution of the appellants' decree and that the appellants should have followed the procedure laid down in Order XXI, rule 53, of the Civil Procedure Code to realise their decree. Another objection was that one Narendra Prasad Singh, one of the judgment-debtors against whom Domi Lal Sahu sought to execute his decree and who also represented the other minor judgment-debtors, had died before the passing of the decree and so the decree obtained by Domi Lal Sahu was a nullity and incapable of execution. The third objection was that the processes in the execution proceedings were not served at all and in fact could not have been served because they were directed against a dead person, amongst others.

The executing Court before which these objections were preferred held that the sale of the money decree was illegal and that the decree-holders not having proceeded under Order XXI, rule 53, the sale of the properties of the respondents could not be upheld. It also came to the conclusion on certain oral and documentary evidence adduced on behalf of the respondents that Narendra Prasad Singh had died before the passing of the decree in favour of Domi Lal Sahu, the appellants' original judgment-debtor.

The sale having been set aside the appellants appealed to the District Judge of Monghyr who also upheld the contention of the respondents that the sale of the money decree was not provided for under the Code and that the procedure followed by the appellants was not in accordance with law. The learned District Judge, however, did not record a finding on the

question as to whether Narendra Prasad Singh had died before the passing of the decree or not.

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The main question argued before us is whether the view taken by the courts below that the money decree could not be sold is correct. Mr. Sarjoo Prasad who appears for the appellants contends that Order XXI, rule 53, being only one among the many sections of the Civil Procedure Code which provide for the various modes in which various kinds of properties are to be attached in execution of a decree, cannot override Order XXI, rule 64, which provides that the court executing a decree may order that any property attached by it and liable to sale may be sold by the executing court and the proceeds of such sale paid to the party entitled to receive the same. It is urged that the words of rule 64 are wide enough to include a money decree and that there is no express provision either in Order XXI, rule 53, or anywhere else in the Code prohibiting the sale of a money decree by the executing court. The argument is not without substance and receives some support from the language used in Order XXI, rule 16, where it deals with a case in which a decree is transferred by operation of law. But, on the other hand, almost all the High Courts in this country seem to have taken the view that a money decree cannot be sold in execution and once such a decree is attached the procedure indicated in Order XXI, rule 53, should be followed; see *Tiruvengada Chari v. Vythilinga Pillai*⁽¹⁾; *Jotindro Nath Chowdhry v. Dwarka Nath Dey*⁽²⁾; *Sultan Koer v. Gulzari Lall*⁽³⁾; *Vithaldas Prabhu v. Subraya Manjappa*⁽⁴⁾; *Maung Lun Bye v. Maung Po Nyun*⁽⁵⁾ and *Lachman Ojha v. Chariter Ojha*⁽⁶⁾. It appears to me on a careful consideration of these decisions that the view which has been expressed in them must be adhered to and it is now too late to question its correctness.

(1) (1883) I. L. R. 6 Mad. 418.

(2) (1891) I. L. R. 20 Cal. 111.

(3) (1879) I. L. R. 2 All. 290.

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Upon an examination of the various provisions with regard to the attachment of properties it would appear that in no other rule is there any provision corresponding to sub-clause (2) of Order XXI, rule 53. That clause runs as follows:—

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“(2) Where a Court makes an order under clause (a) of sub-rule (1), or receives an application under sub-head (ii) of clause (b) of the said sub-rule, it shall, on the application of the creditor who has attached the decree or his judgment-debtor, proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed.”

The sub-rule thus provides that the attaching creditor may at once proceed to execute the attached decree as if he is the representative of the holder of that decree. It is clear that if this mode is adopted no sale of the attached decree would be necessary and it appears to me to be permissible to argue that if the framers of the Code contemplated the sale of the attached decree it was unnecessary for them to make this provision. It further appears to me that this provision has been inserted in the Code not only to avoid multiplicity of execution proceedings but also to safeguard the interests of the holder of the attached decree. If the procedure indicated by sub-rule (2) of Order XXI, rule 53, is followed the surplus, if any, which might be left after satisfying the decree of the attaching creditor will become available for the benefit of the holder of the attached decree but if the decree was liable to be sold in execution this result may not always follow. In the other provisions which relate to the mode of executing and attaching varying kinds of property no express provision is made as to the mode in which the decree is to be realised and it may, therefore, be inferred that in those cases the attachment must be followed by the sale of the property attached. The reference in Order XXI, rule 16, to those cases where the decree is transferred by operation of law is capable of explanation inasmuch as sub-rule (2) of Order XXI, rule 53, applies only to a decree for money and for sale in enforcement of a mortgage or charge and some provision had to be made in respect of other kinds of decree. I am, therefore, of opinion that the

courts below were correct in holding that the sale of Domi Lal Sahu's money decree was not warranted by law and the question now is whether the appellants could proceed to sell the properties of the respondents in their capacity as purchasers of that decree. It was contended by Mr. Sarjoo Prasad that the sale of the money decree should in the circumstances of the case be regarded as a merely redundant step and, therefore, liable to be ignored and it should be held that the appellants have substantially complied with the requirements of Order XXI, rule 53, in this case. The difficulty, however, in the way of the appellants seems to be this. When they proceeded to get the money decree sold and purchased it their decree against Domi Lal Sahu was satisfied and their execution case was dismissed. Under Order XXI, rule 57, upon the dismissal of an application for execution the attachment must be deemed to cease. It follows that the attachment ceased on the 9th May, 1927, upon which date the execution case was dismissed. The present execution case was started by the appellants two years later in the year 1929 and the steps which they took in this proceeding could be deemed to have been taken under Order XXI, rule 53, only if it was shewn that the property was still under attachment under that provision, but, as I have already stated, the attachment had ceased to exist and in the present execution proceeding the appellants have proceeded in a new capacity, that is to say, in the capacity of persons who have purchased the money decree obtained by Domi Lal Sahu against the respondents. The procedure which was, therefore, adopted was not really the procedure which is contemplated in Order XXI, rule 53, and it appears to me that the courts below rightly held that the sale of the properties of the judgment-debtor in those circumstances could not be upheld. The respondents have further urged that Narendra Prasad being dead before the decree was passed the decree of Domi Lal Sahu was a nullity. This is no doubt a substantial point and it appears that the respondents have adduced both oral and documentary evidence in support of their allegation but unfortunately the lower

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appellate court has not gone into the question as it should have done and in view of the fact that the appeals fail on the first point it is not necessary to deal with the matter any further. These appeals must be dismissed with costs.

COURTNEY TERRELL, C.J.—I agree.

Appeals dismissed.

FAZL ALI, J.

APPELLATE CIVIL.

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Before Courtney Terrell, C.J., and Fazl Ali, J.

August 29.

RAMESHWAR PRASAD BHAGAT

v.

RAM RATAN RAM.*

Execution—decree in favour of two coparceners of joint Hindu family—death of one coparcener—execution by the surviving coparcener decree-holder—Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rule 16, whether applies—rule 15, applicability of—omission to mention fact of death of the deceased decree-holder, whether fatal to execution.

Upon the death of a coparcener of a joint Hindu family his share and interest in the family property becomes extinct and the surviving coparceners become the full owners of the whole estate. It is really not a case of the transfer of the interest held by the deceased coparcener but the total extinction or absorption of that interest.

Order XXI, rule 16, Code of Civil Procedure, 1908, is intended primarily for those cases where the name of the applicant for the execution of the decree does not appear as a decree-holder in the decree and he bases his right to execute the decree on the ground that the interest of one or more of the decree-holders has been assigned to him in writing or transferred to him by operation of law.

Where, therefore, the application for execution is on behalf of one of the decree-holders as the sole surviving coparcener and he bases his title not as a transferee but as the surviving decree-holder, the provision of Order XXI, rule 16, does not apply.

* Appeal from Original Order no. 68 of 1931, from an order of Babu Rabindra Nath Ghosh, Subordinate Judge of Santal Parganas, dated the 3rd January, 1931.