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what authority Rekhraj had to depose in this affidavit. It is stated by the learned Advocate on behalf of the respondents that the statement was made before the Judge that he was an agent for Bhagwan but of that fact we cannot at this stage take notice. In my opinion the proof contemplated by section 49 is not present in this case and I think the insolvent in this appeal is entitled to have this debt expunged from the schedule.

In the circumstances of the case the appeal succeeds in part. The appeal is dismissed with costs as against Gouri Shankar and allowed with costs as against Bhagwan Singh.

VARMA, J.—I agree.

J. K.

Appeal allowed in part.

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January, 14.

APPELLATE CIVIL.

Before Fazl Ali and Agarwala, JJ.

NANDKISHORE LALL

v.

CHANDRIKA PRASAD SINGH.*

Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rule 16—preliminary decree for ascertainment of mesne profits, whether is a decree for money—rule 16 of Order XXI, whether applies where the assignee of a preliminary decree for mesne profits applies for execution after the passing of the final decree.

Held that Order XXI, rule 16, does not apply to the case of an applicant for execution who after taking an assignment of a decree for ascertainment of mesne profits is substituted in the place of the decree-holder and obtains a final decree in his name.

*Appeal from Original Order no. 49 of 1937, from an order of Babu Manindra Nath Mitra, Subordinate Judge of Monghyr, dated the 3rd March, 1937.

In order to substantiate an objection under the second proviso to Order XXI, rule 16, it is necessary to show firstly that the decree which was transferred was a money decree and secondly that the transfer took place after the decree sought to be executed had been passed.

It may be questioned whether a decree for ascertainment of mesne profits under the present Code of Civil Procedure is strictly speaking a money decree.

Appeal by the judgment-debtor.

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

S. M. Mullick and *M. Rahman*, for the appellants.

D. C. Varma, for the respondent.

FAZL ALI, J.—This is an appeal by one of the judgment-debtors whose objection to the execution of a decree has been dismissed by the Subordinate Judge of Monghyr.

It appears that in 1927 Ram Sekhar Prasad Singh and certain other persons brought a suit for recovery of possession of certain lands and mesne profits. The suit was decreed and the plaintiffs applied for the ascertainment of the mesne profits. While the enquiry relating to the mesne profits was proceeding, the plaintiffs assigned the decree for mesne profits to the respondent Chandrika Prasad with the result that ultimately when the amount of mesne profits was ascertained, a decree was passed in favour of Chandrika Prasad. He has now applied for the execution of the decree but his application is resisted by the appellant on the ground that he is a benamidar for some of the judgment-debtors and therefore the decree cannot be executed against him under the second proviso to Order XXI, rule 16, which lays down that where a decree for the payment of money against two or more persons has been transferred to one of them it shall not be executed against the others. The question whether

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Chandrika Prasad is or is not a benamidar for some of the judgment-debtors was enquired into by the Subordinate Judge (court below) and he has upon a consideration of the evidence adduced before him come to the conclusion that the appellant judgment-debtor has failed to establish that Chandrika Prasad is a benamidar. The learned Advocate for the appellant contends in this Court that the learned Subordinate Judge has come to a wrong decision and that the only conclusion which can be drawn from the evidence which has been adduced by the parties is that Chandrika Prasad was a benamidar on behalf of some of the judgment-debtors. In my opinion, however, that question does not legitimately arise in these proceedings. The objection which has been preferred by the appellant in the court below purports to be an objection under the second proviso to Order XXI, rule 16, and for the purpose of establishing it, it is necessary for the appellant to show firstly that the decree which was transferred to the respondent was a money decree and secondly, that the transfer took place after the decree now sought to be executed had been passed. It may be pointed out that what was transferred in this case was not a decree for an ascertained sum of money but the preliminary decree for mesne profits. The learned Advocate for the appellant contends upon the authority of *Viraragava Ayyangar v. Varada Ayyangar*⁽¹⁾ that a decree for mesne profits, even though the mesne profits may not have been ascertained is a decree for money. That case, however, was decided under the old Civil Procedure Code under which after a decree for mesne profits was passed the decree-holder had to go to the execution department and apply for the ascertainment of the mesne profits. Under the new Code the proceeding taken for ascertainment of mesne profits is a continuation of the suit and under Order XXII, rule 12, after the enquiry is concluded a final decree has to be passed in accordance with the result of such enquiry. There

(1) (1882) I. L. R. 5 Mad. 128.

can be no doubt that under the present Code the final decree will be a money decree, but I am doubtful if the decree for mesne profits before the amount is ascertained can, strictly speaking, be regarded a money decree. Such a decree cannot be executed until it is made final and one may at least conceive of a case, though such a case will be rare, where the result of the enquiry under Order XXI, rule 12, may disclose that nothing is recoverable as mesne profits. However that may be, the second point which I have indicated above seems to me to be a complete answer to the objection raised by the appellant in this case. The second proviso to Order XXI, rule 16, which has been relied upon by the appellant, must be read along with the main provisions of that rule and, as was pointed out in *Rameshwar Prasad Bhagat v. Ram Ratan Ram*⁽¹⁾, Order XXI, rule 16, is primarily intended 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. In the present case the decree which is sought to be executed is not the preliminary decree for mesne profits (if one may use that expression) but the final decree which has been passed by the court under Order XXI, rule 12, clause (2). The transfer in favour of Chandrika Prasad was made not after the final decree but before it, with the result that Chandrika Prasad is executing the present decree as a decree-holder and not as a person whose name has been substituted in place of that of the original decree-holder under Order XXI, rule 16. In these circumstances it appears to me that the second proviso to Order XXI, rule 16, has no application and the objection of the appellant was rightly dismissed by the learned Subordinate Judge. I would therefore dismiss this appeal with costs.

AGARWALA, J.—I agree.

J. K.

Appeal dismissed.

(1) (1084) I, L, R, 13 Pat, 519.

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