

the date of the confirmation of the sale and if that was the extent of the charge that he was enforcing that will also be the extent of the charge which is extinguished.

The general rule is as stated in *Jugal Kishore Narayan Singh v. Bhatu Modi*⁽¹⁾ and *Kamatdhari Lal v. Tarachand Marwari*⁽²⁾. "It is settled that after a holding has been once sold in execution of a rent decree and has passed out of the possession of the tenant, it cannot again be sold in execution of any other decree for rent due by the same tenant". The rule is not abrogated by the decisions which recognise one special case in which the purchaser may become liable to pay rent accruing due before the date of sale or of its confirmation. That case arises when, as in *Haradhan Chatteraj v. Kartik Chandra Chattopadhyaya*⁽³⁾, notice has been given in the sale proclamation itself that the holding is being sold subject to a liability for earlier arrears of rent. The decisions of this Court which I cited above were considered in *Nrupenara Nath Chatterji v. Kuldip Misser*⁽⁴⁾ and with regard to the application of the exception *Jugal Kishore's case*⁽¹⁾ has not been accepted, but the general rule to which it is an exception has not been questioned and stands good.

The result will be that the appeal and cross-objection will both be dismissed with costs.

AGARWALA, J.—I agree.

S.A.K. *Appeal and Cross-objection dismissed.*

(1) (1923) 4 Pat. L. T. 640.

(2) (1934) 16 Pat. L. T. 78.

(3) (1902) 6 Cal. W. N. 877.

(4) (1938) I, L. R. 17 Pat. 694, F. B.

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APPELLATE CIVIL.

Before Agarwala and Rowland, JJ.

FIRM PIRTHI RAJ GANESH DAS

v.

BALMAKUND MARWARI.*

Code of Civil Procedure, 1908 (Act V of 1908), sections 42, 51 and Order XXI, rule 53(4)—Court to which decree has been transferred for execution, whether has jurisdiction to attach partition decree in favour of judgment-debtor.

The method of execution by attachment and sale of a decree in favour of the judgment-debtor is one of the methods of attachment which fall within clause (e) of section 51, Code of Civil Procedure, 1908. Also the attachment and sale of a decree in favour of a judgment-debtor falls within the method of attachment prescribed by clause (b) of section 51 of the Code. Whichever of these clauses of section 51 applies to a decree in favour of the judgment-debtor, he is clearly liable to be proceeded against in execution in the manner prescribed by the Code.

The words of section 42 of the Code that the Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself appear to mean that the Court to which the decree has been sent for execution is empowered to execute it in any of the ways prescribed by section 51 that is applicable to that particular kind of decree, and that, as by Order XXI, rule 53, of the Code, the method of attaching a partition decree is the method prescribed by sub-rule (4) of rule 53, the executing Court is, by reason of section 42, empowered to effect the attachment of a partition decree in favour of the judgment-debtor.

Prithvi Chand Lal Chaudhry v. Satya Kinkar Das(1), *Moti Ram Diwan Chand v. Dhanna Singh-Haveli Ram*(2), *Kalu Ram v. Firm Sneonand Rai Jokhi Ran*(3) and *Kunwar Jung Bahadur v. The Bank of Upper India, Ltd., Lucknow*(4), distinguished.

*Appeal from Original Order no. 207 of 1939, from an order of Babu Babindra Nath Ghosh, Special Subordinate Judge at Ranchi, dated the 19th April, 1939.

(1) (1931) I. L. R. 11 Pat. 94.

(2) (1934) I. L. R. 16 Lah. 68.

(3) (1932) I. L. R. 11 Pat. 580.

(4) (1928) 32 Cal. W. N. 790, P. C.

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April, 1.

Per ROWLAND, J.—The steps contemplated by Order XXI, rule 53(4), are things to be done in executing the decree and, therefore, in this matter the powers of the Court to which a decree has been sent are co-extensive with the powers of the Court which passed the decree.

Appeal by the decree-holder.

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

N. N. Sen, for the appellant.

S. A. Khan and *G. C. Das*, for the respondent.

AGARWALA, J.—This is an appeal by the decree-holder from a decision of the Subordinate Judge of Ranchi holding that he has no power to attach a decree for partition obtained by the judgment-debtor against whom it is sought to proceed in execution. The relevant facts are that the appellant obtained a decree on the Original Side of the Calcutta High Court against the Firm Ganpat Rai Balabux. This decree was transferred for execution to the Court of the Subordinate Judge of Ranchi. An application for execution at Ranchi having proved infructuous the decree-holder applied to the Calcutta High Court under Order XXI, rule 50, for leave to proceed against the respondent Balmakund Marwari as a partner in the debtor-firm. Execution was then taken out against Balmakund Marwari and resulted in decree being satisfied in part. A further application was then taken out in which it was sought to attach a partition decree which had been obtained by Balmakund Marwari in 1936. A writ of attachment was issued and Balmakund entered appearance. By a petition he objected to the execution proceedings on the ground that he had already transferred his interest in the partition decree to one Kanhaya Lal for consideration. The date on which he is alleged to have done this was 5th of February, 1939, a few days after service of writ of attachment. This objection was heard by the Court below on the 19th of April, 1939,

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when the Court found against Balmakund on the question of the transfer of the partition decree; but the Court gave effect to another objection which was raised at the hearing by the judgment-debtor, namely, that under Order XXI, rule 53(4), it is only the Court which passed the decree and not the Court to which a decree has been transferred for execution that has jurisdiction to attach a decree passed in favour of a judgment-debtor. Rule 53 of Order XXI, prescribes the method by which decrees may be attached. Sub-rules (1) and (2) refer to the method of attaching a decree for payment of money or for sale in enforcement of a mortgage or charge. Sub-rule (4) refers to decrees of the nature other than those mentioned in sub-rule (1). It prescribes that in such cases

"The attachment shall be, made by a notice by the court which passed the decree sought to be executed, to the holder of the decree sought to be attached."

It is contended on behalf of the respondent in this appeal, as it was in the Court below, that the words "the Court which passed the decree" do not in the sub-rule include the Court to which the decree has been sent for execution. Reference was made to the provisions of rules 16 and 50 where the phrase "Court which passed the decree" occur and to decisions interpreting that phrase. Rule 16 refers to applications for execution by a transferee of the decree and provides that the transferee may apply for execution of the decree to the Court which passed it. In *Prithvi Chand Lal Chaudhry v. Satya Kinkar Das*(¹) it was held that an application for execution by a transferee of a decree can be entertained only by the Court which actually passed the decree. Since then the rule in this Court has been amended by empowering the Court to which the decree has been transferred to entertain an application by a transferee for execution of the decree. *Moti Ram-Diwan Chand v. Dhanna Singh-Haveli Ram*(²) is also a case in which

(1) (1931) I. L. R. 11 Pat. 94.

(2) (1934) I. L. R. 16 Lah. 63.

it was held that an application under Order XXI, rule 16, is not entertainable by a Court to which a decree has been sent for execution. In that case, however, it was held that the judgment-debtor had waived the irregularity in the exercise of its jurisdiction by the Court to which the decree had been transferred. Rule 50 of Order XXI, provides for execution of the decree passed against a firm and against a person who has been individually served as a partner with summons and has failed to appear. By sub-rule (2) it is provided that where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clauses (b) and (c), as being a partner in the firm, he may apply to the Court which passed the decree for leave to proceed against such a person. In *Kalu Ram v. Firm Sheonandan Rai Jokhi Ram*(1) it was held that an application under sub-rule (2) was entertainable only by the Court which actually passed the decree and not by the Court to which the decree has been transferred for execution. This rule has also been amended by this Court and by the amendment the Court to which the decree has been transferred for execution has been empowered to entertain an application under sub-rule (2) of rule 50 of Order XXI. In *Kunwar Jang Bahadur v. The Bank of Upper India, Ltd., Lucknow*(2) it was held by the Privy Council that it is only the Court which passed the decree and not the Court to which it has been sent for execution that may entertain an application for execution against the legal representative of the deceased judgment-debtor under section 50 of the Code of Civil Procedure. In that case their Lordships held that where substitution has been made by the Court to which the decree has been sent for execution the irregularity may be waived by acquiescence and that when it has been so waived the party acquiescing cannot subsequently question the jurisdiction of the

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(1) (1932) I. L. R. 11 Pat. 580.

(2) (1928) 32 Cal. W. N. 790, P. C.

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executing Court. In my view, none of these cases is of material assistance in the present appeal. Section 42 of the Code provides

“ A court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself.....”

Section 51 specifies the various ways in which a decree may be executed: clause (b) empowers a Court to execute a decree by attachment and sale or by sale without attachment of any property: and clause (e) empowers a Court to execute a decree in such other manner as the nature of the relief granted may require. Clauses (a), (c) and (d) have no application to the facts of the present case. They refer to execution by delivery of properties specifically decreed, to execution by arrest and detention in prison and to execution by appointment of a receiver. Clause (e) appears to refer to those special methods of execution which are provided for in certain rules of Order XXI, for example, a decree for specific movable property (rule 31), a decree for restitution of conjugal rights or for an injunction (rule 32), a decree for execution of document or endorsement of negotiable instrument (rule 34), an application for execution by attachment of a decree (rule 53) and execution of an order for payment of coin or currency notes (rule 56). In my view the method of execution by attachment and sale, of a decree in favour of the judgment-debtor, is one of the methods of attachment which fall within clause (e) of section 51. Also it seems to me that the attachment and sale of a decree in favour of a judgment-debtor falls within the method of attachment prescribed by clause (b) of section 51. Whichever of these clauses of section 51 applies to a decree in favour of the judgment-debtor, he is clearly liable to be proceeded against in execution in the manner prescribed by the Code. The words of section 42 that the Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself appear to me to mean that the

Court to which the decree has been sent for execution is empowered to execute it in any of the ways prescribed by section 51 that is applicable to that particular kind of decree, and that, as by Order XXI, rule 53, the method of attaching a partition decree is the method prescribed by sub-rule (4) of rule 53, the executing Court is, by reason of section 42, empowered to effect the attachment. To take the view contended for by the respondent would lead to an absurdity in a case where the only property of the judgment-debtor is a decree. In such a case, if the argument of the learned Advocate for the respondent is valid, the executing Court to which the decree has been sent for execution would not be able to execute the decree at all although it is solely for the purpose of executing it that the decree is transmitted to it by Court which passed it. Such a result cannot be favoured in construing the Code of Civil Procedure.

In my view the Court below has taken a wrong view of the law and I would, therefore, allow the appeal and set aside the order of the Court below and direct that the attachment be restored and the execution proceed. The appellant is entitled to his costs in this Court and in the Court below.

ROWLAND, J.—I agree.

Section 38 of the Code says that the decree may be executed either by the Court which passed it or by the Court to which it is sent for execution; and then we have section 42 which says that the Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. It has, however, been held in numerous cases that where the Code confers certain powers on the Court which specifically passes the decree it does not necessarily follow that these same powers are exercisable by the Court to which the decree has been sent. These are generally speaking cases in which the powers which are brought into play are not powers being exercised "in executing such decree" within the

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meaning of section 42; but I have no doubt that the steps contemplated by Order XXI, rule 53(4), are things to be done in executing the decree and, therefore, in this matter the powers of the Court to which a decree has been sent are co-extensive with the powers of the Court which passed the decree even without the addition in the rule of words specifically permitting the Court to which a decree has been sent to do a particular thing. There was, therefore, in my view, no irregularity in making the attachment. There was no illegality to condone and, as my learned brother has said, none of the decisions cited to us is directly in point.

K.D.

Appeal allowed.

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April, 2.

Before Agarwala and Rowland, JJ.

DEBENDRA NATH HALDAR

v.

G. A. ARATOON.*

Code of Civil Procedure, 1908 (Act V of 1908), sections 50 and 99—order under section 50 made by the Court to which decree has been transferred for execution—defect of procedure only—appellate Court, whether should interfere with the order, where merits of the case not affected by irregularity—section 99.

When the Court to which a decree has been transferred for execution makes an order for substitution under section 50, Code of Civil Procedure, 1908, it is a matter of procedure and not of jurisdiction.

Kunwar Jung Bahadur v. The Bank of Upper India, Ltd., Lucknow(1), relied on.

*Appeal from Appellate Order no. 329 of 1939, from an order of T. Luby, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 9th August, 1939, confirming an order of Babu Bahindra Nath Ghosh, Subordinate Judge of Ranchi, dated the 18th July, 1939.

(1) (1928) 32 Cal. W. N. 790, P. C.