

APPELLATE CIVIL.

Before Mr. Justice Maung Ba.

MA SHWE MRA PRU AND ONE

v.

MAUNG BA ON.*

1927

July 5.

Civil Procedure Code (Act V of 1908), s. 47—Judgment-debtor's legal representative claiming attached property whether a question between parties.

Held, that where a person is sued as a legal representative of a deceased person and he objects to the attachment of certain property in execution of the decree, claiming it as his own property, the question is one between the parties and their representatives and falls within the scope and purview of section 47 of the Civil Procedure Code.

Puuchannu Bundopadhyia v. Rabia Bibi, 17 Cal. 711—referred to.*Sein Tun Aung*—for Appellants.*R. M. Sen*—for Respondent.

MAUNG BA, J.—This second appeal arises out of an execution case involving an important point of law whether the objection raised to an attachment of the deceased's property by the judgment-debtor, against whom a decree was passed as a legal representative, alleging that the property is not liable to be attached as it belongs to him by virtue of a gift made to him by the deceased prior to the suit or decree, is a matter which falls within the scope of section 47 or within the purview of Rule 58 of Order 21, Civil Procedure Code.

The Subdivisional Judge of Kyauktaw treated the objection as an ordinary application for removal of attachment under Order 21, Rule 58. If that procedure were correct, no appeal would lie from an order passed by the Subdivisional Judge. The learned

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District Judge of Akyab was of opinion that the objection was a matter falling within the scope of section 47, and that therefore an appeal lay.

It is now urged that that view of the learned District Judge is incorrect, and that section 47 is not applicable. Maung Ba On was one of the defendants sued as legal representatives of the deceased U Kyaw Khine in the original suit. In execution of the decree passed against him and the other legal representatives, certain property was attached as forming part of the deceased's estate. Maung Ba On preferred a claim to one-half of that property, alleging that the same had been gifted to him by a gift made about four years previously. The question to be decided therefore is whether that portion of the property has descended to him as the representative of the deceased and is liable to be attached in execution of the decree against him as such representative or whether it belongs to himself and not in such representative character. Surely this is a question arising between the parties to the suit in which the decree was passed relating to the execution of the decree. That being so, the question is one falling within the scope and purview of section 47.

The learned Advocate wishes to draw a very fine line between a case where a legal representative bases his claim upon a title acquired before the decree and that based upon a title acquired after the decree. He urged that section 47 would be applicable only in the case of a claim based upon title acquired after the decree. I do not see any reason for drawing such a distinction. Ba On is no doubt a party to the suit, and the question whether the property attached is attachable as being part of the estate or not attachable as being his own property is a question relating to the execution of the decree

passed against him as a legal representative. If he were to bring a regular suit to decide that dispute, it would have to be decided in that suit whether the property in dispute was liable to be attached as part of the deceased's estate or that it was not liable to be attached as it belonged to Ba On. The matter to be decided in the regular suit under Order 21, Rule 63 is therefore practically the same as that to be determined under section 47. Since it is a matter that may as well be determined by the Court executing the decree, the Legislature has laid down that in such circumstances that matter should be determined by the Court executing the decree and not by a separate suit. The Judicial Committee has pointed out that it is of the utmost importance that all objections to execution should be disposed of as cheaply and as quickly as possible. Consequently in order to attain that object a wide and liberal construction has always been placed on section 47 in order that all questions which can possibly be determined in execution proceedings should be so determined. A Full Bench of the Calcutta High Court in the case of *Punchanun Bundopadhya v. Rubia Bibi and others* (1), has put the same construction upon section 244 of the old Code (now section 47 of the new Code). The Full Bench held that an objection taken by a person who has become the representative of the judgment-debtor in the course of the execution of a decree to the effect that the property attached in satisfaction thereof is his own property, and not held by him as such representative, is a matter cognizable only under section 244 of the Code of Civil Procedure, and not the proper subject-matter of a separate suit.

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The learned District Judge in allowing the appeal has not expressly declared that the claim is to be allowed only in respect of half of the property.

The appeal is accordingly dismissed with costs, but I note that in the decree it should be clearly stated that the attachment is to be released only from half of the property.

APPELLATE CIVIL.

Before Mr. Justice Maung Ba.

U PO NYUN AND ONE

v.

MA PAN ME. *

1927

July 11.

Civil Procedure Code (Act V of 1908), O. 23, r. 3—Compromise decree, its contents.

An agreement or compromise arrived at between parties to a suit, in whole and not in part, is to be recorded, and the decree is then to confine its operation to so much of the subject-matter of the suit as is dealt with by the agreement. An effectual method would be for the decree to recite the whole of the agreement and then to conclude with an order relative to that part that was the subject-matter of the suit, or it could introduce the agreement in a schedule to the decree; but in either case, although the operative part of the decree would be properly confined to the actual subject-matter of the then existing litigation, the decree taken as a whole would include the agreement.

Hemanta Kumari Debi v. Midnapur Zamindari Co., 47 Cal. 485—referred to.

Kyaw Din—for Applicants.

Guha—for Respondent.

MAUNG BA, J.—This revision arises out of Civil Regular Suit No. 51A of 1926 of the District Court of Tharrawaddy. In that suit applicants, U Po Nyun and his second wife Ma Ohn, brought an action against his adopted daughter Ma Pan Me to have a deed of gift executed in her favour set aside on the

* Civil Revision No. 137 of 1927.