

APPELLATE CIVIL.

Before Sir Guy Ruddle, Kt., K.C., Chief Justice, and Mr. Justice Brown.

THE CHETTIAR FIRM OF S.R.M.M.R.M.

v.

TEO EE SAN.*

1927

Mar. 28.

Civil Procedure Code (Act V of 1908), section 47—Applicability to proceedings under Order 21, Rule 58—Parties to the suit, who are—Possession alone not to be considered where section 47 applies.

Ordinarily on applications for removal of attachment, Courts do not go into questions of title but confine their attention merely to the question of possession. But where the applicant, who was a defendant in the capacity of a legal representative of a deceased debtor, applies for removal of attachment to certain property which formed part of the deceased's estate on the ground that it was in the applicant's possession, having been given to him as a legacy and the same perfected by conveyance by the executor or administrator of the deceased's estate, held that section 47 of the Civil Procedure Code applies to this case; and the Court must consider the question of the title as well.

Iswar Chander v. Beni Madhub, 24 Cal. 62; *Ramaswami Sastrulu v. Kameswaramma*, 23 Mad. 361; *V. T. Annachellam Chetty v. Maung San Ngwe*, 2 Ran. 168—referred to.

A. B. Banerjee—for the Appellant.

Clifton—for the Respondent.

RUTLEDGE, C.J., AND BROWN, J.—This is an appeal from an order of the Original Side of this Court setting aside the order of the Deputy Registrar and directing that the attachment of certain premises be removed.

The appellant firm, in Civil Regular No. 40 of 1923, sued six persons including the respondent as the heirs and legal representatives of one Teo Kho Tee for a sum of nearly Rs. 34,000 on a mortgage suit and obtained a decree. The mortgaged property not having realised the decretal amount, the appellants

* Civil Miscellaneous Appeal No. 3 of 1926.

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obtained a personal decree against the deceased debtor's three executors, of whom the respondent's mother, Ma Sein Bye was the only active one. A personal decree was not obtained against the respondent as the estate was in the hands of the executrix, his mother.

In execution of this personal decree, the appellants attached premises known as 8, Tseekai Maung Khine Street. The respondent applied for removal of the attachment on the ground that his father had bequeathed this house to him by his will, that he had been in possession of it and collecting the rents of it and that his mother, the executrix, had executed a formal legal conveyance upon the 15th July 1925 before the date of the attachment.

The learned Deputy Registrar, after recording evidence, came to the conclusion that as the respondent was living in the house with the executrix and the other members of the family conveyance to him of the house, like the other conveyances by the executrix to her minor children, was not genuine but merely fraudulent for the purpose of defeating the creditors of the estate and that the house consequently was still part of the unadministered estate of the deceased debtor.

In the order under appeal, the learned Judge considered that the only point before him for determination was the question of possession and he held that at the date of the attachment, the respondent was in possession.

In an ordinary case of attachment, no doubt Courts do not go into questions of title, but confine their attention merely to the question of possession. But this is not an ordinary case of attachment. A serious question, which was not considered, is whether the questions that are raised must be decided

under section 47, Civil Procedure Code, or whether the appellants are to be relegated to a fresh suit. This has not been considered in the order under appeal.

For the respondent, it was urged that the section 47 cannot apply to this case as the respondent applies now in the capacity of a legatee under his father's will, strengthened by a conveyance of the property by his mother, the executrix; that he was not sued in such a capacity in the original suit, Civil Regular No. 40 of 1923; and that if he is a stranger to the suit, section 47 does not apply.

We are unable to accept this argument. We must consider the conduct of the parties, both respondent and his mother, in order to ascertain the real position. In this connection, we may refer to *Ramaswami Sastrulu v. Kameswaramma* (1), which is the decision of a full bench of the Madras High Court where the facts in their main features do not differ, very widely from the case before us. At page 366, the Court observes: "It was contended before us that a defendant in whose favour the suit is dismissed is not a party to the suit within the meaning of the section, because there is no decree which can be executed against him and that the words 'parties to the suit' in the section must be limited to the judgment-creditors and judgment-debtors, because they are the only persons between whom questions could arise 'relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof.' We do not think that this is a correct view of the section. We do not think that the words 'parties to the suit' can be limited in the way suggested. The Privy Council have more than once pointed out that a narrow construction should not be placed on

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the words of this section—the object of the enactment being to check needless litigation.”

On the same point we may refer to *Iswar Chander v. Beni Madhub* (2) and *V. T. Arunachellam Chetty v. Maung San Ngwe* (3).

We are consequently of opinion that the learned Judge should have decided the question raised in this case under the provisions of section 47 of the Civil Procedure Code. The obligation thrown upon the executrix to pay debts of every description before paying any legacy is perfectly clear. Section 325 of the Indian Succession Act, 1885, only states what has always been the law and section 361 of the same Act makes it clear that a creditor can compel a legatee who has been paid his legacy to refund. The respondent is the son of the executrix. He is living with her and he has no doubt been acting with her throughout and from their evidence as recorded by the Deputy Registrar it seems perfectly plain to us that the executrix conveyed the property in question to the respondent and other property to her minor son and her minor daughter fraudulently to defeat the appellants' personal decree; and that she knew perfectly well at the time she was conveying and the respondent knew perfectly well at the time that it was conveyed to him that the Chettiar's decree must be satisfied before any legacy mentioned in the will was given effect to. In such circumstances as these, the Court is not likely to press technical consideration so far as to work injustice.

For these reasons, we allow the appeal, set aside the order appealed from and restore the order of the Deputy Registrar. Appellants are entitled to costs in this Court and in the lower Court of three gold mohurs in each.