

APPELLATE CIVIL.

Before Mr. Justice Brown.

V. E. R. M. FIRM

v.

MAUNG PO KYONE. *

1927

May 10.

Costs incurred in unsuccessful application for removal of attachment—Recovery of such costs in declaratory suit—Special reasons for disallowing such costs.

Held, that where a claimant's application under the provisions of the Civil Procedure Code for removal of attachment on his property has been dismissed, he can claim in his declaratory suit, in addition to the declaration, the costs he has incurred in the miscellaneous proceedings. If successful, he is entitled to them, unless, on account of his own default or other good cause, he ought not to be allowed those costs.

Kumarappa Chetty v. Nga Pyi, (1904-06) 2 U.B.R.(Civil Pro.) 18—*followed*.

Ganguli for the Appellant.

Shaffee for the Respondent.

BROWN, J.—The defendant-appellant obtained a decree against two persons, Maung Tha U and Ma Hmwe On, and, in execution of that decree, attached four head of cattle and four jaggery boxes. The plaintiff-respondent applied to the Court for removal of attachment on the ground that the property attached belonged to him. After hearing the parties the Court dismissed his application. He then filed a regular suit out of which this appeal arises. In that suit he asked for a declaration that the property in suit was his and for the costs incurred by him in the miscellaneous proceedings. Both Courts have found in favour of the plaintiff-respondent, and, so far as the title to the property is concerned, there is no further appeal. This appeal is directed only as to the order for payment of costs incurred in the miscellaneous proceedings.

* Civil Second Appeal No. 429 of 1926.

It is suggested that the question of costs was not properly in issue, or proved; but there is a very clear claim in the plaint for a sum of Rs. 53-6-0. No separate issue was fixed as to this matter of costs, but there was a general issue, namely, "To what relief is plaintiff entitled?"

The plaintiff-respondent himself stated on oath that he had incurred costs amounting to Rs. 54-6-0, and he filed a copy of the formal order in his miscellaneous application, which shows the total costs, including the sum he was ordered to pay the defendant-appellant, as Rs. 54-6-0. There was no denial of these facts by the defendant-appellant, and there seems no question as to the amount of costs incurred.

It is, however, further contended that, as the plaintiff-respondent was not awarded these costs in the miscellaneous proceedings, he was not entitled to claim them in the regular suit that followed. This question was considered at length in the case of *Kumarappa Chetty v. Nga Pyi* (1). In that case it was held that, when a person's goods have been wrongfully attached, in proceedings brought under section 283, of the Civil Procedure Code (corresponding to Order XXI, Rule 63 of the present Code), he was entitled to claim, in addition to a declaration, the costs incurred in the miscellaneous proceedings instituted by him for removal of attachment. Various authorities on the point were referred to in that case, including two Allahabad cases, which, at first sight, would appear to be in favour of the present defendant-appellant's contention. But in neither of those two cases were the circumstances exactly similar to those of the present case. Rule 58 of Order XXI of the Code of Civil Procedure

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(1) (1904-06) 2 U.B.R. (Civil Pro.) 18.

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provides for the making of an objection to an attachment by a third party. Rule 63 provides that the order of the Court in such cases shall be final subject to the result of a suit which the defeated party may institute to establish the right which he claims.

It is clear, therefore, that proceedings under Rule 58 and the following Rules are of a summary nature, and that the defeated party is debarred from appealing, but instead is allowed the remedy of having his claim adjudicated in regular proceedings. That being so, I can see no reason why, if the result of the regular proceedings is to set aside the order in the miscellaneous proceedings, the question of costs incurred in the miscellaneous proceedings should not also be dealt with. The party aggrieved in the miscellaneous proceedings, had he been given the right of appeal from orders passed in those proceedings, would undoubtedly have been able to appeal as to costs. Any other view of the question would mean that there was no remedy for a wrongful order as to costs except the difficult one by way of revision.

The view taken by the learned Judicial Commissioner of Upper Burma in 1905, has, so far as I know, been constantly followed in Upper Burma, since, and I can see no sufficient reason for departing from it. There may be circumstances in which the party to the proceedings in a suit under Rule 63 would not be entitled to claim damages in getting the attachment removed. The failure in the miscellaneous proceedings might be due to his own default, or the attachment might have been encouraged by his neglect; but it does not seem to me that any such circumstances have been established or pleaded in the present case.

I am of opinion, therefore, that the decision of the lower Courts on the point now in issue was correct.

I dismiss this appeal with costs.

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APPELLATE CIVIL.

Before Mr. Justice Das and Mr. Justice Baguley.

N. N. CHETTYAR FIRM

v.

TAN MA PU AND OTHERS.*

TAN BABU AND OTHERS

v.

N. N. CHETTYAR FIRM.

1927

Sep. 2.

Administration—Letters issued under Probate and Administration Act (V of 1881) in a case governed by the Succession Act (X of 1865), effect of—Powers of the administrator—Court's permission to sell does not imply permission to mortgage—Limited powers under one Act not extended unless Letters altered under the other Act.

A son obtained under the Probate and Administration Act (V of 1881), Letters of Administration of his deceased mother's estate, describing her as a Chinese Buddhist. She was, in fact, a Karen Christian and Letters would have been issued under the Succession Act (X of 1865) had she been correctly described. The administrator obtained leave of the Court to sell the immoveable property of the deceased to pay off debts, but instead he mortgaged it.

Held, that Letters issued under the Probate and Administration Act must be regarded as being under that Act and giving only the powers that they could give under that Act until and unless the powers under them are extended by the Letters being altered to Letters under the Succession Act of 1865. Under the former Act permission to the administrator to sell does not *ipso facto* give permission to mortgage. Hence the administrator had no power to bind the interests of any of the heirs except those who had given him authority to effect the mortgage.

Debendra Nath v. Administrator-General of Bengal, 35 Cal. 955 (P.C.) ; *Ram Dhon Dhor v. Sharf-ud-din*, 9 B.L.T. 236—*referred to*.

Ma Yait v. Maung Chit Maung, 49 Cal. 310 (P.C.)—*distinguished*.

* Civil First Appeals Nos. 199 and 206 of 1926 against the judgment of the District Court of Bassein in Civil Regular No. 3 of 1925.