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FAYAZ-UD-DIN.

TER CHAND J.

a decree in favour of the plaintiff-appellant for possession of the *chabutras* Nos. 1, 2 and 3, the defendants being allowed six months from to-day within which they can remove the materials of the *sai bans*.

The suit as regards the *baithak* No. 6 is dismissed. The decree as regards shop No. 4, of course, stands.

Having regard to all the circumstances I would leave the parties to bear their own costs in both Courts.

HARRISON J.

HARRISON J.—I agree. On re-consideration I am of opinion that the view taken on the question of abatement by the late Martineau J. and myself in *Rup Chand v. Bunyad Ali* (1) was wrong.

A. N. C.

Appeal accepted in part.

APPELLATE CIVIL.

Before Broadway and Abdul Qadir JJ.

MELA MAL AND ANOTHER (PLAINTIFFS) Appellants

versus

BISHEN DAS AND OTHERS (DEFENDANTS)

Respondents,

Civil Appeal No. 140 of 1931.

Civil Procedure Code, Act V of 1908, Order XXXVIII, r. 5—Attachment before judgment by Civil Court in British India of property in Kashgar (China)—whether valid.

The plaintiffs sued on the basis of a partnership between them and the defendants which included a business at Kashgar (in China). Under Notification No. 2058-G of 4th October 1920 (Order in Council published in *Gazette of India*, dated 9th October 1920) the Court of the Consul-General at Kashgar is deemed to be that of a District Judge and the Code of Civil Procedure and the other Indian enactments relating to the administration of Civil Justice and to Insolvency

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and Bankruptcy for the time being applicable to Kashgar are to have effect *as if* Kashgar were a district in the Punjab. The question before the High Court was whether a Civil Court at Hoshiarpur is competent to attach before judgment moveable property of a defendant (a British Indian subject) which is in Kashgar in China.

Held, that the words "as if" in the Notification are significant and that all that it means is that for purposes specified in the Order in Council, so far as civil matters are concerned, the Consul-General at Kashgar exercises the powers of a District Judge in the Punjab and his Court is a District Court; but the exercise of such powers must be taken to be limited to purposes mentioned in the said Order in Council and cannot be taken to extend the authority of Courts in British India, so as to enable them to issue orders of attachment of property situated at Kashgar and to virtually treat that area as a part of British India.

For, the Civil Procedure Code recognises, apart from the Courts in British India, only Courts established by the order of the Governor-General in Council and this particular Court, having been created under the Foreign Jurisdiction Act, 1890, by His Majesty in Council, should be treated as not falling within the category of Courts established by the Governor-General in Council.

And, the Court at Hoshiarpur was therefore not competent to attach property situated at Kashgar.

Chaudhari Kanhaya Ram v. Dina Nath-Hardial Mall (1), distinguished.

Miscellaneous first appeal from the order of Lala Radha Kishen, Subordinate Judge, first Class, Hoshiarpur, dated the 31st October 1930, setting aside the order of attachment and ordering the release of the property attached.

FAKIR CHAND, for Appellants.

MEHR CHAND MAHAJAN, for Respondents.

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ABDUL QADIR J.—By order dated the 26th March 1931, Mr. Justice Jai Lal referred the following question of law to a Division Bench :—

Whether a Civil Court at Hoshiarpur is competent to attach before judgment moveable property of a defendant (a British Indian subject), which is in Kashgar in China?

The Civil Court which was asked to order the property of the defendant in Kashgar to be attached through the Consular Court of that place was a Court at Hoshiarpur and the defendants whose property was sought to be attached were British Indian subjects carrying on business at Kashgar. The plaintiffs had come to Court on the basis of a partnership, which is said to have existed between them and the defendants and which included the business at Kashgar, and had sued for the recovery of a large amount of money which the defendants are said to have failed to pay to them. The Court at Hoshiarpur was asked to order attachment of the property of the defendants at Kashgar before judgment, but it held that it could not do so.

The plaintiffs appealed to this Court and contended before the learned Judge, who has made this reference, that by virtue of an order of His Majesty in Council, dated the 11th March 1920, published in the *Gazette of India* of the 9th October 1920, as Notification No. 2058-G. of the 4th October 1920, the Court of the Consul-General at Kashgar is deemed to be that of a District Judge and the Code of Civil Procedure and the other Indian enactments relating to the administration of Civil justice and to insolvency and bankruptcy for the time being applicable to Kashgar, have effect as if Kashgar were a district in the Punjab.

We have heard Mr. Faqir Chand for the appellants and Mr. Mehr Chand Mahajan for the respondents. Mr. Faqir Chand argues that under the new Code of Civil Procedure it is not only within the limits of the jurisdiction of a Civil Court that the right to order an attachment of property before judgment can be exercised by such Court, but it is open to the Court to exercise that right even beyond the limits of its jurisdiction. He relies on Chaudhri *Kanhaya Ram v. Firm Dina Nath-Hardial Mal* (1), as an authority for the proposition that "the new Code means that an attachment before judgment can be of property *within* as well as *without* the jurisdiction of the Civil Court." Though there is some conflict of authority in other High Courts on this point, Mr. Mahajan concedes that in the light of the authority above cited as well as certain other decisions of the Lahore High Court, it is correct that attachment before judgment can be ordered by a Civil Court beyond the limits of its jurisdiction. He contends, however, that this rule is obviously restricted to Courts in British India and inasmuch as Kasghar is admittedly "foreign territory" the mere fact that a Consular Court has been created there by His Majesty for certain purposes, does not bring that territory within British India and the jurisdiction of the Civil Courts in India cannot extend to such a place. As observed in the order of reference, the point is arguable on both sides, but after carefully considering the notification relied upon by Mr. Faqir Chand, I am of opinion that Kashgar, for the purposes of the question before us, must be treated as outside British India, in spite of the fact that there exists a Consular

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Court, created under the orders of His Majesty, which is treated for certain purposes "as if Kashgar were a district in the Punjab." To my mind the words "as if" are significant and it seems to me that probably all that the said notification means is that for purposes specified in the Order in Council, so far as Civil matters are concerned, the Consul at Kashgar exercises the powers of a District Judge in the Punjab and his Court is a District Court; but in my judgment the exercise of such powers must be taken to be limited to purposes mentioned in the said Order in Council and cannot be taken to extend the authority of Courts in British India so as to enable them to issue orders of attachment of property situated at Kashgar and to virtually treat that area as a part of British India

Mr. Mahajan urges that, apart from the Courts in British India the Civil Procedure Code recognises only Courts established by the order of the Governor-General in Council and this particular Court having been created under the Foreign Jurisdiction Act, 1890, by His Majesty in Council should be treated as not falling within the category of Courts established by the Governor-General in Council. I am inclined to agree with this contention and my answer to the question under reference would be that the Hoshiarpur Court acted correctly in not issuing any order of attachment about property situated at Kashgar.

I would, therefore, dismiss this appeal with costs.

BROADWAY J.

BROADWAY J.—I concur.

N. F. E.

Appeal dismissed.