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very similar, namely, that there should be a verbal or written gift; and it was found in that case also that there had been no verbal or written gift. Nevertheless it was held that by custom among *Gujars* of the Gujrat District a married daughter was entitled to succeed her father, a sonless proprietor, in a case where, though no definite act of donation was proved, it was a fair inference from the established facts that the sonless proprietor settled his daughter and her husband in his house and on his land with a view to their succeeding him as his heirs to the exclusion of his collaterals. This is on all fours with the present case and for the reasons given we dismiss this appeal but make no order as to costs.

P. S.

*Appeal dismissed.*

**APPELLATE CIVIL.**

*Before Addison and Din Mohammad JJ.*

SARAB SUKH (DEFENDANT) Appellant

*versus*

PREM DATT AND ANOTHER  
 (PLAINTIFF)

SUKHDESH LAL (DEFENDANT)

} Respondents.

**Civil Appeal No. 462 of 1936.**

*Civil Procedure Code, Act V of 1908, section 47 and Order XVI, rule 21: Dispute between a decree holder and his assignee — applicability of the section — Separate suit relating to the validity of assignment — whether competent — Judgment debtor — whether can file a suit for the refund of money realized from him by the assignee of the decree.*

*Held*, that a dispute between an assignee of a decree and the decree holder is not a dispute between the parties within

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the meaning of section 47 of the Civil Procedure Code, and a separate suit relating to the validity of the assignment is competent.

*Maganlal Mulji v. Doshi Mulji* (1), *Chanan Shah v. Sardar Khan* (2), *Achhru Ram v. Fazl Mohammad* (3), *Niamat Rai v. Hotu Ram* (4), *Bommanapati Veerappa v. Chintakunta Srinavasa Rau* (5) and *Ishar Das-Gorakh Ram v. Salig Ram* (6), relied upon — also Order XVI, rule 21, Civil Procedure Code, as amended by the Lahore High Court.

Hence, an assignee of a decree is not barred under the provisions of section 47 from urging, in a suit in which his assignment is being challenged, that his assignment was valid, although the Execution Court has decided against him on that point.

*Kala Chand Banerjee v. Jagannath Marwari* (7), referred to.

Held further, that a judgment debtor who has paid the decretal money to an assignee of the decree is competent to maintain a suit for its refund, if the decree holder has also recovered the same amount from him, the basis of the claim being failure to carry out the promise to credit the amount to the decree.

*A. K. R. M. M. C. T. Chetty firm v. Maung Tha Din* (8) and *Mahbub Ali v. Mohammad Husain* (9), relied upon.

*Second appeal from the decree of Mr. M. R. Kayani, District Judge, Gujranwala, dated 20th April, 1936, modifying that of Bakhshi Sher Singh, Subordinate Judge, 1st Class, Gujranwala, dated 7th November, 1935, and decreeing the plaintiff's suit against defendant No.1.*

MEHR CHAND MAHAJAN, SHAMAIR CHAND and YASHPAL GANDHI, for Appellant.

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|----------------------------------|---|
| (1) I. L. R. (1901) 25 Bom. 631. | (5) I. L. R. (1903) 26 Mad. 264.        |
| (2) 1935 A. I. R. (Lah.) 384.    | (6) 1929 A. I. R. (Lah.) 51.            |
| (3) 1935 A. I. R. (Lah.) 609.    | (7) I. L. R. (1927) 54 Cal. 595 (P.C.). |
| (4) 1933 A. I. R. (Lah.) 473.    | (8) I. L. R. (1929) 7 Rang. 310.        |
| (9) I. L. R. (1923) 50 All. 111. |   |

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JAGAN NATH AGGARWAL, MANOHAR LAL and  
GULLU RAM, for Respondents.

The judgment of the Court was delivered by—

DIN MOHAMMAD J.—The facts of the case out of which this second appeal has arisen are these. Dr. Sukhdesh Lal obtained a decree for Rs.4,824-13-4 against Pandit Hari Chand, who died some time after, leaving him surviving his sons Prem Datt and Gobind Ram. By an agreement privately entered into between Prem Datt and Gobind Ram, the liability for the decretal amount was accepted by Prem Datt. On the 29th September, 1932, he paid Rs.1,000 to Pandit Sarab Sukh, Advocate, who was in possession of a letter of authority from the decree-holder and had represented himself to be an assignee from him. On the 12th January, 1933, he paid another sum of Rs.1,025-13-0 to the same gentleman and further negotiated in his favour a promissory note of the value of Rs.2,500 and thus secured a complete discharge. In spite of this, on the 8th August, 1933, Dr. Sukhdesh Lal took out execution proceedings against both Prem Datt and Gobind Ram. In the course of those proceedings, Pandit Sarab Sukh made an application to the executing Court alleging that the decree had been assigned to him by the decree-holder on the 12th November, 1931, on the basis of which he had realised the entire decretal amount from Prem Datt, and praying that the said payment be certified under the provisions of Order 21, rule 2, Civil Procedure Code. This application was resisted by the decree-holder. On the 18th December, 1934, the executing Court dismissed this application on the ground, *inter alia*, that no valid assignment had been proved by the applicant. From this order the assignee preferred an appeal to

the District Court but he withdrew it later. On the 20th December, 1934, Prem Datt instituted a suit for the recovery of money paid to Pandit Sarab Sukh on the ground that the original decree-holder had sued for the execution of his decree and that he was repudiating the assignment on the strength of which the decretal debt had been realised from him by Pandit Sarab Sukh. He also claimed some damages and interest on that amount. Both Pandit Sarab Sukh and Dr. Sukhdesh Lal were impleaded as defendants. Both the defendants resisted the suit but on different grounds. Dr. Sukhdesh Lal urged that the suit was barred by the provisions of section 47, Civil Procedure Code, on account of the previous decision of the executing Court, dated the 18th December, 1934, dismissing the assignee's claim. The Subordinate Judge framed the necessary issues arising from the pleadings of the parties, of which, in the present appeal, we are solely concerned with issue No.4. This issue runs as follows:—

“ What is the effect of the decision of the executing Court, dated 18th December, 1934, on the pleadings of the parties ? ”

The Subordinate Judge held that the question of the validity of the assignment had already been decided against the assignee and could not be re-agitated by him. He, consequently, dismissed the suit against Dr. Sukhdesh Lal, but decreed it against Pandit Sarab Sukh. The claim for interest and damages was disallowed. On appeal by Pandit Sarab Sukh, the District Judge affirmed the decision of the Court below on the question now before us. Hence this second appeal by Pandit Sarab Sukh.

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This appeal can be disposed of on the short question, whether in the suit by Prem Datt, the assignee could raise the plea that his assignment was valid, in spite of the finding of the executing Court against him. If the assignee's contention on this point succeeds, the case shall have to be remanded to the trial Court for further enquiry.

Counsel for the appellant contends that the decision of both the Courts below on the question before us is legally erroneous. He urges that section 47, Civil Procedure Code, does not apply inasmuch as the question of the validity of the assignment did not arise between the parties to the suit or their representatives. He argues that sub-section (3) of section 47, Civil Procedure Code, is ancillary to sub-section (1) of the same section and a dispute between a party and its own representatives is not one contemplated by this section. In support of his contention he has referred us to *Maganlal Mulji v. Doshi Mulji* (1), *Chanan Shah v. Sardar Khan* (2) and *Achhru Ram v. Fazl Mohamad* (3), *Niamat Rai v. Hotu Ram* (4), *Bommanapati Veerappa v. Chintakunta Srinivasa Rau* (5) and *Ishar Das-Gorakh Ram v. Salig Ram* (6).

In *Maganlal Mulji v. Doshi Mulji* (1), a Division Bench of the Bombay High Court observed that even if an auction-purchaser could be assumed to be a representative of the judgment-debtor, section 244, Civil Procedure Code, did not apply to a question between a party to the suit and his representative. In *Chanan Shah v. Sardar Shah* (2), a Single Judge of this Court held that section 47 (3), Civil Procedure Code, must be

(1) I. L. R. (1901) 25 Bom. 631.

(2) 1935 A. I. R. (Lah.) 384.

(3) 1935 A. I. R. (Lah.) 609.

(4) 1933 A. I. R. (Lah.) 473.

(5) I. L. R. (1903) 26 Mad. 264.

(6) 1929 A. I. R. (Lah.) 51.

read subject to sub-section (1) of the same section and does not apply to a case in which the question is between the rival representatives of one party. In *Achhru Ram v. Fazl Mohammad* (1), an application for execution had been made by the assignee of the decree-holder and the judgment-debtor had contended that the assignment was not valid. On the assignment being upheld by the executing Court, the judgment-debtor, preferred an appeal to this Court. It was held that the appeal was not maintainable as the judgment-debtor had no interest in the issue decided. He was entitled to get a discharge from the person entitled to the decree, but which of the rival claimants was so entitled did not concern him at all. In *Niamat Rai v. Hotu Ram* (2), Sir Alan Broadway observed that an order passed by an executing Court under Order 21, rule 16, which deals with assignment, was not open to appeal. In *Bommanapati Veerappa v. Chintakunta Srinivasa Rau* (3), a Division Bench of the Madras High Court observed that a suit lies at the instance of the assignee of a decree for a declaration as to the validity of his assignment. This decision was followed in *Ishar Das-Gorakh Ram v. Salig Ram* (4), where it was laid down that a judgment-debtor can maintain a suit for a declaration that the assignment of a decree against him by the decree-holder is invalid as being fraudulent.

It follows from these authorities that a dispute between an assignee and the decree-holder is not a dispute between the parties within the meaning of section 47, Civil Procedure Code, and a separate suit relating to the validity of the assignment is competent.

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(1) 1935 A. I. R. (Lah.) 609.

(3) I. L. R. (1903) 26 Mad. 264.

(2) 1933 A. I. R. (Lah.) 473.

(4) 1929 A. I. R. (Lah.) 51.

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The point is made further clear by the amendment introduced by this Court in rule 16 of Order 21, Civil Procedure Code. In the first proviso to this rule which provided for a notice of an application under rule 16 to be given to the transferor and the judgment-debtor, the words "and the judgment-debtor" have been omitted by this Court. The obvious effect of this amendment is that the judgment-debtor is no longer to be considered a necessary party to the application by the assignee of a decree for the judicial recognition of his assignment.

Applying the principles of law enunciated in the judgments cited above and the amended rule to the facts of the present case, it is obvious that Pandit Sarab Sukh is not barred under the provisions of section 47, Civil Procedure Code, from urging in a suit in which his assignment is being challenged that his assignment was valid. The executing Court had no doubt decided against him but that will not debar him from re-agitating the matter in a separate suit, and if he is not so debarred, he can surely defend his assignment in a suit in which he is impleaded as a defendant by the judgment-debtor. Reference may in this connection be made to *Kala Chand Banerjee v. Jagannath Marwari* (1). The question that arose for decision in that case was whether a decree obtained in the absence of a receiver of an insolvent's estate was not *res judicata* against him, so as to affect his right to redeem, even if the Court in rejecting an application by him to be made a party, had heard and rejected his objection to the decree being made. Their Lordships of the Privy Council answered this question in the negative. Though the facts of that case

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(1) I. L. R. (1927) 54 Cal. 595 (P. C.).

are different from the facts of the case before us, the principle deducible from that decision does in a way apply to it.

Counsel for the appellant has next contended that the rule of *res judicata* does not bar defence, even if it may bar an attack. He has relied on certain authorities of the different High Courts in India, but we do not propose to discuss that matter here, as in view of our finding on the main question, this point does not arise. Moreover, there is a divergence of opinion on that question, and the point is not so clear as is stated by the appellant's counsel.

It has been urged on behalf of the decree-holder that the suit by Prem Datt was not competent inasmuch as it related to the execution, discharge or satisfaction of the decree and that such suits were barred by sub-section (1) of section 47, Civil Procedure Code. He has not, however, been able to cite any authority in his favour, while as against him there is a clear authority in *A. K. R. M. M. C. T. Chetty firm v. Maung Tha Din* (1) and *Mahbub Ali v. Mohammad Husain* (2). In *A. K. R. M. M. C. T. Chetty firm v. Maung Tha Din* (1), a judgment-debtor had paid a certain sum towards the partial satisfaction of a decree and the decree-holder had failed to certify the payment and had executed the whole decree. On a suit brought by the judgment-debtor to recover the sum already paid by him, it was held that section 47 did not bar such suits, as the claim was based on a failure to carry out the promise to credit the amount to the decree, and although this had a bearing on the question of satisfaction, yet it was not a question directly relating to

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(1) I. L. R. (1929) 7 Rang. 310. (2) I. L. R. (1928) 50 All. 111.

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satisfaction of the decree. In *Mahbub Ali v. Mohamad Husain* (1), a judgment-debtor had made a part payment to a judgment-creditor out of Court and an application for its certification was resisted and ultimately rejected by the executing Court. It was held by a Division Bench of the Allahabad High Court that although the payment, not having been certified, could not be taken into account as a part satisfaction of the decree, the plaintiff was entitled as the consideration for the payment had failed, to claim back the money which he had paid, as money in the hands of the defendant received by him to the use of the plaintiff. Here also it is admitted by Pandit Sarab Sukh that he had received the entire decretal amount from Prem Datt. It is also not denied that during the pendency of the suit, Dr. Sukhdesh Lal has also realized the decretal amount from the judgment-debtor. The judgment-debtor cannot be made to pay the same sum twice over and, in our view, the law is not so helpless as to deny him the proper relief to claim refund of the extra amount realized from him.

On these grounds, we allow the appeal, set aside the decrees of the Courts below and remand the case under Order 41, rule 23, Civil Procedure Code, to the trial Court for disposal in accordance with law. The Court-fee on the appeal before us will be refunded to the appellant; costs will abide the event.

P. S.

*Appeal accepted.*