

1897.

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v.  
JAMNADAS  
HATHISANG.

of uncertain gifts referred to in *Devshankar v. Motiram*<sup>(1)</sup>. The bequest was not in favour of good works, but of the appellant, who was expected to spend the money on good works.

The fact that the respondents have paid a large sum to the appellant under the terms of the will, both by way of interest and principal, without raising any objection on the grounds now urged by them, is also an additional reason for holding that they understood the gift to be absolute. In their written statement they expressed their readiness to make over the money under certain guarantees to the appellant. On the whole, we must decide this issue in appellant's favour, and against the respondents.

The only other point that now remains for consideration has reference to the cross objections put in by the respondents as regards the details of the payments made by them. There is no serious contest on that point, and we see no reason for disturbing the decision of the Court of first instance on that head. We reverse the decree of the lower Court, and restore that of the Court of first instance.

*Decree reversed.*

(1) I.L.R., 18 Bom., 136.

## APPELLATE CIVIL.

*Before Mr. Justice Parsons and Mr. Justice Ranade.*

NASSARVANJI, APPLICANT, v. KHARSEDJI DHUNJISHAH  
AND ANOTHER, OPPONENTS.\*

1897.

July 12.

*Civil Procedure Code (Act XIV of 1882), Sec. 25—Transfer of execution proceedings—Insolvency—Opposing creditor—Opposing creditor's right to apply for transfer of insolvency proceedings.*

The power of transfer given by section 25 of the Code of Civil Procedure (Act XIV of 1882) extends to execution proceedings as well as to suits.

An application to be declared an insolvent under the Civil Procedure Code (Act XIV of 1882) is a proceeding in execution, and as such can be made the subject of an order under section 25 of the Code.

A creditor who has received notice of an insolvency petition, and whose name is entered on the record of the execution proceedings as an opposing creditor, is a

\* Civil Application, No. 95 of 1897.

"party" within the meaning of section 25 of the Code of Civil Procedure (Act XIV of 1882), and may apply for a transfer of the proceedings under the section.

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THIS was an application to the High Court under section 25 of the Civil Procedure Code (Act XIV of 1882) for the transfer of certain execution proceedings.

A decree having been passed against one Kharsedji Dhunjishah (opponent No. 1) in the Presidency Small Cause Court at Bombay it was transferred for execution to the Court of the First Class Subordinate Judge at Dhulia, and in execution thereof he was arrested at Dhulia on the 11th December, 1896.

He thereupon applied to the Subordinate Judge at Dhulia to be declared an insolvent under the provisions of the Civil Procedure Code (Act XIV of 1882).

Notices of this application having been issued to his creditors, the applicant Nassarvanji Sorabji, who was one of them, made the present application to the High Court for the transfer of the execution proceedings, including the insolvency application, from the Subordinate Judge's Court at Dhulia to the Court of the Subordinate Judge at Poona.

The grounds on which this application was made were (1) that Kharsedji was a resident of Poona, (2) that most of his creditors who had claims against him to the extent of nearly Rs. 39,000, were also residents of Poona, (3) that the whole of his immovable property was situate in Poona, (4) that he had fraudulently assigned this property to his relations with the object of delaying and defeating his creditors, and (5) that the attendance of witnesses, &c., relating to this fraudulent transfer could not be procured at Dhulia without much trouble and expense.

The High Court issued a rule *nisi* to the decree-holder (opponent No. 2) and judgment-debtor (Kharsedji Dhunjishah, opponent No. 1) calling upon them to show cause why the execution proceedings should not be transferred as prayed for.

*S. V. Bhandarkar* for Kharsedji Dhunjishah, the judgment-debtor (opponent No. 1), showed cause:—The Court has no power to transfer execution proceedings. Section 25 of the Code of Civil Procedure applies only to the transfer of "suits." The section does not give the power to transfer execution proceedings,

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which are treated throughout the Code as distinct from suits. Section 647 of the Code as amended by Act VI of 1892 does not apply to applications for execution of decrees. The Legislature has made no provision for transfer of execution proceedings from one Court to another—*Kishori Mohun Sett v. Gul Mohamed*<sup>(1)</sup>.

*V. G. Bhandarkar* for the decree-holder (opponent No. 2):—We also object to the transfer. Assuming that section 25 applies to execution proceedings, the applicant has no right to move for a transfer of this case. He is not a party to the execution proceedings; he is neither the decree-holder nor the judgment-debtor. He is, therefore, not a 'party' within the meaning of the term as used in the section.

*Manekshah Jehangirshah*, for the applicant, *contra*:—Section 25 of the Civil Procedure Code clearly extends to execution proceedings, as such proceedings are but a continuation of the proceedings in the original suit. Section 647 of the Code as amended expressly says so. That being the case, this Court has the power to transfer the present case. The point is, moreover, covered by authority—*Balaji Ranchoddas*<sup>(2)</sup>; *Krishna v. Bhanu*<sup>(3)</sup>; *Gaya Parshad v. Bhup Singh*<sup>(4)</sup>. As to the applicant's right to move the Court under section 25 of the Code, he is already served with a notice of the insolvency application, and his name is entered on the record as an opposing creditor. He is, therefore, a party within the meaning of the section.

PARSONS, J.:—In execution of a decree of the Bombay Court of Small Causes transferred to the Court of the First Class Subordinate Judge at Dhulia the judgment-debtor was arrested by order of the latter Court. Thereupon he applied to it to be declared an insolvent.

The applicant, who is one of the creditors on whom notice was served, has now moved this Court to transfer the whole of the execution proceedings, including the insolvency application, to the Court of the First Class Subordinate Judge at Poona. Very good cause has been shown for the transfer: for instance, creditors of the judgment-debtor to the amount of some 30,000 rupees

(1) I. L. R., 15 Cal., 177.

(3) I. L. R., 18 Bom., 61.

(2) I. L. R., 5 Bom., 689.

(4) I. L. R., 1 All., 180.

reside at Poona and Sholápur, the whole of the immoveable property of the judgment-debtor which he is charged with having fraudulently disposed of is at Poona, and all the evidence relating to the charge *pro* and *con* is at Poona. The judgment-debtor has a residence both at Dhulia and at Poona, the judgment-creditor lives in Bombay, so that it is as easy, if not easier, for him to go to Poona as to Dhulia, and his debt is only a small amount, some 275 rupees. The opponents' objection to the transfer is based merely on the fact that they have spent some money at Dhulia in engaging pleaders which they will have to spend over again at Poona. The applicant, however, has offered to pay this back to them.

Everything, therefore, being in favour of the transfer and nothing against it, the only point is whether this Court has jurisdiction to make it. In my opinion it has. An application to be declared an insolvent under the Civil Procedure Code is a proceeding in execution; it is, therefore, a proceeding in a suit and as such can be made the subject of an order under section 25 of the Code of Civil Procedure. This has always been so ruled by this Court. See *Balaji Ranchoddas*<sup>(1)</sup>; *Krishna Velji v. Bharu Mansaram*<sup>(2)</sup>.

We make the rule absolute and transfer to the Court of the First Class Subordinate Judge at Poona the execution proceedings and the application of insolvency made therein.

The additional costs incurred at Dhulia by the parties to the decree in engaging pleaders, &c., are to be taxed and paid by the present applicant. All other costs will be costs in the proceedings.

RANADE, J.:—There can be little doubt that, quite apart from the allegations of collusion which are not satisfactorily proved, the balance of convenience is decidedly in favour of the transfer of execution proceedings from Dhulia to Poona, as applied for. The Poona creditors of the judgment-debtor represent debts amounting to 40,000 rupees, and the property said to have been fraudulently conveyed by him to his near relations is also at Poona. It is not shown that the Bombay creditor, who seeks execution of the Small Cause Court's decree for a small sum by

(1) I. L. R., 5 Bom., 680.

(2) I. L. R., 18 Bom., 61.

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the arrest of the judgment-debtor in Dhulia, will be seriously prejudiced by the transfer of the proceedings to Poona, where the judgment-debtor had previously applied without success to be declared an insolvent.

The point of law involved in the matter is of some complexity. Though the Calcutta High Court has all along held that section 25 relates only to the transfer of suits, and that it has no application to execution proceedings—*Kishori Mohun Sett v. Gul Mohamed*<sup>(1)</sup>, *Kedarnath Mahata v. Bungshree Dhur Roy*<sup>(2)</sup>—this Court as well as the Allahabad High Court have not followed this view—*Balaji Ranchoddas*<sup>(3)</sup>, *Krishna v. Bhan*<sup>(4)</sup>, *Gaya Parshad v. Bhup Singh*<sup>(5)</sup>. It has always been held by these Courts that under the combined effect of section 25 and section 547, execution proceedings may be transferred for sufficient cause from one Court to another. The Madras High Court would seem also to be in favour of the more liberal interpretation—*Muttalagiri v. Muttayyar*<sup>(6)</sup>. Moreover, the ruling in *Kedarnath Mahata v. Bungshree Dhur Roy*<sup>(7)</sup>, in which the Calcutta High Court first decided this point in the negative, was passed on section 6 of Act VIII of 1859, which has been considerably modified by the Code of 1882. Finally, that Court appears to have adhered to its previous decision chiefly as a rule of practice—*Kishori Mohun Sett v. Gul Mohamed*<sup>(1)</sup>—and does not appear to have considered the effect of the larger powers conferred by section 13 of the Letters Patent. We must, therefore, in this matter follow the previous decisions of this and the Allahabad Court, and hold that the power of transfer extends to execution proceedings as well as to suits.

It was, however, contended that the applicant before us is not a party within the meaning of that word as used in section 25 of the Code. This objection seems, however, to have little force. The applicant has received notice, and his name is on the record of the execution proceedings as an opposing creditor. In the second Bombay case referred to above, the transfer was effected

(1) I. L. R., 15 Cal., 177.

(4) I. L. R., 18 Bom., 61.

(2) 17 W. R., 45.

(5) I. L. R., 1 All., 189.

(3) I. L. R., 5 Bom., 680.

(6) I. L. R., 6 Mad., 357.

(7) 17 W. R., 45.

on the application of the judgment-creditor in a Small Cause Court decree, who desired to share in the proceeds of the execution taken out by another creditor under a decree in the First Class Subordinate Judge's Court. Moreover, section 25 permits transfer upon the application of parties, as well as of the Court's own motion without such application. We must, therefore, overrule this objection and grant the application.

*Application granted.*

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## APPELLATE CIVIL.

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*Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Candy.*

GURSHIDAWA (ORIGINAL PLAINTIFF), APPELLANT, v. GANGAYA  
AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.\*

1897.

July 13.

*Civil Procedure Code (Act XIV of 1882), Sec. 315—Court-sale—Sale of property in execution in which judgment-debtor has no interest—Suit by purchaser to recover purchase-money paid at sale—Limitation—Accrual of the cause of action.*

Under section 315 of the Civil Procedure Code (Act XIV of 1882), a suit will lie to recover purchase-money paid at a Court sale for property to which it is found that the judgment-debtor has no title. The cause of action in such a case does not accrue till the purchaser is deprived of the property which was sold to him.

SECOND appeal from the decision of T. Hamilton, District Judge of Dhárwár, reversing the decree of Ráo Bahádur K. B. Marathe, First Class Subordinate Judge.

The plaintiff sued to recover the amount paid by him for certain land at a Court sale, it having been held that the judgment-debtor had no interest therein.

The circumstances which led to the suit were as follows:—The plaintiff bought the land in question at a sale held in execution of a decree obtained against defendant No. 3, and was duly put into possession.

One Vasistha thereupon sued for the land, alleging that it belonged to him and not to the judgment-debtor (defendant No. 3). He obtained a decree on the 15th October, 1887, the Court holding

\* Second Appeal, No. 884 of 1896.