APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Hosking.

VARAJLAL MOTICHAND (ORIGINAL DECREE-HOLDER), APPLICANT, *v.* KACHIA GARBAD KHUSHAL (ORIGINAL APPLICANT), OPPONENT.*

1896. *September* 17.

Execution—Attachment—Attachment of property of third person—Payment into Court of amount of decree by owner of property in order to release property—Application in execution for refund of money so paid—No jurisdiction to order refund—Separate suit necessary—Practice—Procedure—Civil Procedure Code (Act XIV of 1882), *Sec.* 278.

A certain box was attached in execution of a decree against one Mathur, whose father, alleging that it was his property and not Mathur's, paid the bailiff the amount of the decree in order to release it from attachment. He then applied to the Judge to have the money refunded to him. The Judge held the box to be his property, and directed repayment.

Held, that in making the order for repayment the Judge acted without jurisdiction, there being no provision in the Civil Procedure Code (Act XIV of 1882) under which it could be made. The proper course was to have taken steps under section 278 of the Code to have the attachment on the property raised. By paying the amount of the decree into Court it became necessary to file a suit for the recovery of the money so paid.

APPLICATION under the extraordinary jurisdiction of the High Court (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Khán Sáheb Nowroji Byramji, Subordinate Judge of Umreth, in the Ahmedabad District.

In execution of a decree obtained by Varajlal against one Mathur Garbad, the bailiff attached a certain box in the house in which Mathur Garbad resided with his father Kachia.

Kachia alleged that the box was his, and was not liable to attachment, but in order to save it he was obliged to pay the bailiff the amount of the decree, and two days afterwards he applied to the Court to have the amount refunded to him. The money was still in Court and had not been paid over to the decree-holder.

The Subordinate Judge granted the application and directed repayment to be made, holding that Kachia had proved that the box was his.

* Application No. 144 of 1896 under the Extraordinary Jurisdiction.

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Varajlal, the decree-holder, thereupon applied to the High Court and obtained a rule *nisi* calling upon Kachia to show cause why the order of repayment made by the Subordinate Judge should not be set aside.

Chimanlal H. Setalvad appeared for the applicant (Varajlal) in support of the rule:—The order of repayment was made in execution. There is no provision in the Civil Procedure Code for such a refund. Kachia should have brought a separate suit for the money—*Dulichand* v. *Ramkishen*[1]; *Jugdeo Narain Singh* v. *Raja Singh*[2].

Nagindas T. Marphatia for the opponent (Kachia) showed cause:—The money being still in the custody of the Court, and not having been paid over to the decree-holder, the Subordinate Judge had power to order the refund. He has found that the money was paid under protest, and that the box was really Kachia's property and was not liable to attachment. The Court surely has power to restore money which it finds after inquiry its own officer has wrongfully taken, and which is still in its hands, without putting the person wronged to the trouble, delay and expense of bringing a suit and having a fresh inquiry.

FARRAN, C. J.:—We think that in making the order which the Subordinate Judge has made in this case he acted without jurisdiction. The property in question, a box, was attached by the Názir, and to procure its release the opponent paid to the Názir the amount of the decree against his son. The Subordinate Judge has ordered the amount so paid to be repaid to the opponent. There is no provision in the Civil Procedure Code to which we have been referred under which such an order can be made.

Under similar circumstances the plaintiff in the case of *Dulichand* v. *Ramkishen*[1] brought a suit to recover the amount he had paid under compulsion, which went on appeal to the Privy Council. Their Lordships (at page 653) say: "It was also objected that the remedy is not the proper one, and that some further proceedings should have been taken in the execution suit;

(1) I. L. R., 7 Cal., 648. (2) I. L. R., 15 Cal., 656.

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but none were pointed out by Mr. Arathoon which would afford a suitable remedy or which would preclude such an action as the present." The opponent's course, if he desired the matter to be summarily disposed of, was to have taken steps under section 278 to have the attachment on the box raised. By paying the amount of the decree into Court he has entailed upon himself the necessity of filing a suit if he desires to recover it.

Rule absolute to set aside the order as made without jurisdiction. The applicant is entitled to his costs.

Rule made absolute.

APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Hosking.

CHINTAMAN BIN VITHOBA (ORIGINAL DEFENDANT), APPELLANT, *v.* CHINTAMAN BAJAJI DEV AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1896. *September* 24.

Decree—Execution—Powers of Court in executing decree—Code of Civil Procedure (Act XIV of 1882), Sec. 244.

The validity of a decree of which execution is sought cannot be disputed in execution proceedings under section 244 of the Code of Civil Procedure (Act XIV of 1882).

APPEAL from the decision of G. Jacob, District Judge of Poona, in darkhást No. 7 of 1893.

In 1874 one Chintaman Bajaji succeeded to the office of manager and trustee of the Chinchwad Savasthán.

In 1880 he instituted Suit No. 1 of 1880 in the Court of the District Judge of Poona against Chintaman bin Vithoba to obtain a declaration that certain mortgages of savasthán property made to the said Chintaman bin Vithoba by Lakshmibai, one of the widows of Dharnidhar the predecessor of Chintaman Bajaji as trustee and manager of the Chinchwad Savasthán, were not binding upon him.

That suit was settled by a consent decree passed on the 13th July, 1880, by which the defendant Chintaman bin Vithoba was to be paid Rs. 23,000 and interest, by annual instalments of

*Appeal, No. 32 of 1895.