APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

MURIGEYA (ORIGINAL DEFENDANT), APPELLANT, *v.* HAYAT SAHEB AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.* 1898. *March* 22.

Civil Procedure Code (Act XIV of 1882), *Secs.* 244, 278 *to* 283—*Questions arising between the decree-holder and the representatives of the judgment-debtor—Claims to attached property where representative judgment-debtor claims to hold the attached property as trustee of third party—Execution of decree.*

The plaintiffs sued for a declaration that certain property was liable to be attached in execution of a decree obtained by them in Suit No. 591 of 1888 against the estate of one Gulaya, deceased, who had been the head of a *math* situate in the Dhárwár District. The property had been attached in execution, but the defendant, who was Gulaya's successor in office, had obtained the removal of the attachment on the ground that the property belonged to the *math* and not to Gulaya personally, and was not, therefore, liable to satisfy the decree. The plaintiffs thereupon brought this suit. The lower appellate Court passed a decree for the plaintiffs and granted the declaration. On second appeal it was contended that under section 244 of the Civil Procedure Code (Act XIV of 1882) the question ought to have been decided in execution of the decree in Suit No. 591 of 1888, and that a separate suit would not lie.

Held, on the merits, that the decree of the lower appeal-Court should be reversed and the suit dismissed.

Per RANADE, J. :—Where the representative of a judgment-debtor puts forward a personal claim to property which is attached as assets of the judgment-debtor in his hands, the investigation of the claim must be made in execution under the provisions of section 244 of the Code of Civil Procedure (Act XIV of 1882). But where he asserts that he holds the property in trust for, or on behalf of, or as manager of some third person or body of persons, or of a religious charity or institution, the claim must be investigated under the provisions of sections 278 to 283, and the order passed therein cannot be challenged by an appeal, but must form the subject of a separate suit.

Per PARSONS, J. :—Sections 278 to 283 of the Code of Civil Procedure have no reference to any claim preferred or objection made by any person who is on the record as a party to the suit. Whenever a question arises between the representative of a judgment-debtor on the record (whether originally sued as such or added before or after decree) and the decree-holder as to whether property in the hands of the representative was of the assets of the deceased or not, that question must be determined by order of the Court executing the decree under the provisions of section 244.

* Second Appeal, No. 1200 of 1897.

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SECOND appeal from the decision of L. Crump, Assistant Judge of Dhárwár.

One Gulaya was the *Swami* or spiritual head of a *math* situate in the Dhárwár District. He died in 1874. The defendant was his disciple and successor in office.

The plaintiffs obtained a decree (in Suit No. 591 of 1888) against the assets of the deceased Gulaya in the hands of the defendant.

In execution of this decree, plaintiffs attached certain lands as forming part of the deceased's estate.

The defendant objected to the attachment on the ground that the lands were the property of the *math* and not the personal property of the deceased Gulaya. This objection prevailed and the attachment was raised.

Thereupon the plaintiffs in 1894 filed the present suit to obtain a declaration that the lands were liable to attachment and sale in execution of their decree.

The defendant pleaded (*inter alia*) that the lands belonged to the *math*; that the deceased Gulaya had no personal interest in them, and that under section 244 of the Code of Civil Procedure (Act XIV of 1882) the question ought to be decided in execution of the former decree, and that the present suit was not maintainable.

The Subordinate Judge following the ruling in *Seth Chand Mal* v. *Durga Dei*[1] held that the suit was not barred by section 244 of the Civil Procedure Code. He further held that the lands in dispute were attached to the *math* and that the deceased Gulaya did not hold them in his personal capacity. He, therefore, held that the lands were not liable to attachment and sale in execution of the plaintiff's decree in Suit No. 591 of 1888. This suit was accordingly dismissed.

On appeal, the Assistant Judge held that the lands were the personal inám of the deceased Gulaya, and as such liable to be attached and sold in execution of the plaintiff's decree. He, therefore, reversed the first Court's decree and granted the declaration sought.

(1) (1839) 12 All., 313.

Against this decision defendant preferred a second appeal to the High Court.

Manekśha Jehangirshah, for appellant (defendant) :—Section 244 of the Code of Civil Procedure is a bar to the present suit. The order passed in the execution proceedings for the removal of the attachment was an order between the parties to the suit and their legal representatives, and one relating to the execution of the decree. It falls, therefore, under clause (*c*) of that section. The only remedy, therefore, open to the party aggrieved by the order was to have it set aside in appeal and not by a separate suit—*Chowdhry Wahed Ali* v. *Mussamut Jumaee*[1] ; *Nimba* v. *Sitaram*[2] ; *Lallu* v. *Lallu*[3] ; *Punchanun* v. *Rabia Bibi*[4] ; *Ravunni* v. *Kunju*[5] ; *Seth Chana Mal* v. *Durga*[6].

Assuming that the suit is not barred by section 244 of the Code, we contend that the decision in *Jamal* v. *Murgaya*[7] is applicable to the present case, and the lands in dispute must be held to belong to the *math*, as they stand on the same footing as the lands which were the subject-matter of that suit.

Daji Abaji Khare, for respondents (plaintiffs) :—The plaintiffs seek to attach property, which they allege belongs to their deceased judgment-debtor. The defendant objects to the attachment on the ground that it is trust property. The defendant does not claim the property as his own, but sets up a *jus tertii*. His objection to the attachment was made, not on his own behalf but on behalf of the *math* of which he is the trustee. The case thus falls under section 278 and not under section 244 of the Code of Civil Procedure. If so, the order for removal of the attachment can only be set aside by a regular suit as provided by section 283—*Roop Lall Dass* v. *Bekani*[8] ; *Rajrup* v. *Ramgolam*[9] ; *Seth Chand* v. *Durga Dei*[10] ; *Sudindra* v. *Budan*[11].

RANADE, J. :—In this case the respondents-plaintiffs were mortgagees of certain land under a mortgage executed by one Gulaya,

(1) (1872) 11 B. L. R., 149.
(2) (1885) 9 Bom., 458.
(3) P. J. for 1896, p. 754.
(4) (1890) 17 Cal., 711.
(5) (1886) 10 Mad., 117.
(6) (1889) 12 All., 313.
(7) (1885) 10 Bom., 34.
(8) (1888) 15 Cal., 437.
(9) (1888) 16 Cal., 1.
(10) (1889) 12 All., 313.
(11) (1885) 9 Mad., 80.

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who was *jangam guru* of the appellant. On Gulaya's death, appellant, as his disciple and successor in the *matha*, brought a suit to eject the respondents from the possession of the lands, and obtained a decree in his favour, the mortgage being held to be invalid, and not binding on the appellant. The respondents thereupon sued for the money due on the mortgage-bond, and obtained a decree against the personal assets of the deceased Gulaya in the hands of the appellant. In execution of this decree, lands other than those mortgaged were attached as being the *jat inám* property of the deceased Gulaya, but the attachment was removed on the application of the appellant.

Thereupon the respondents brought the present suit for a declaration that the lands were *jat inám* of Gulaya, and liable to be attached and sold in respect of his debts, and this claim was disallowed in the Court of first instance. The Assistant Judge in appeal reversed that decree, and gave the declaration sought by the respondents.

The appellant has preferred this second appeal from the decree of the Assistant Judge, and Mr. Manekshah, pleader for the appellant, raised the objection that the respondents had no right to bring a separate suit, and that their remedy was by way of appeal from the order passed against them in the miscellaneous execution proceeding. It was contended that the order was an order between the parties to the suit and their legal representatives relating to the execution of a decree, and as such fell within clause (*c*) of section 244, and not under section 280, and no separate suit could be brought to set aside the order. The question for consideration is thus whether the order in the miscellaneous proceedings must be regarded as an order relating to a question arising between the parties and their legal representatives in the matter of the execution, discharge, or satisfaction of a decree, or whether it is an order under section 280, in which latter case a separate suit is maintainable.

The distinction between the two sets of orders was considered by the Allahabad High Court in *Bahori Lal* v. *Gauri Sahai* [1], and by the Calcutta High Court in *Punchanun Bundopadhya* v.

(1) (1886) 8 All., 626.

Rabia Bibi [1]. In the last of these cases, it was laid down that section 244 must be liberally construed, and whatever diversity of opinion might have at one time prevailed on this point, it is now settled law that all objections by the legal representative of a judgment-debtor that the attached property is not part of the assets of the deceased judgment-debtor available for satisfaction of the decree against him, but belongs to the legal representative, in his own independent private right, must be disposed of under section 244—*Chowdhry Wahed Ali* v. *Mussamut Jumace* [2]; *Ravunni* v. *Kunju* [3]; *Nimba* v. *Sitaram* [4]; *Lallu Tribhowan* v. *Lallu Bhagwan* [5]; *Rajrap Singh* v. *Ramgolam Roy* [6]; *Punchanun Bundopadhya* v. *Rabia Bibi* [7]; *Seth Chand Mal* v. *Durga Dei* [8]. At the same time, an exception has been recognized in the case of objections raised by the legal representative as trustee for a religious endowment or charity, that the property attached is not liable to be sold in execution of a decree against his predecessor-in-title. Such objections have always been considered as made under section 278, and from orders passed on such applications there is no appeal, and a separate suit is the only remedy. This distinction is based on the wording of section 280, which expressly applies not only to cases where the property attached is not in the possession of the judgment-debtor, or of some person in trust for him, but also to cases in which the judgment-debtor's possession was not on account of himself, or as his own property, but on account of or in trust for other persons. The incumbent for life of devasthán or *wakf* property comes within this latter class of cases.

When a judgment-creditor attaches such property in execution of his decree against the incumbent for life, and the legal representative objects on the ground that it is trust property, a different set of issues arise which have no relation to the execution, discharge, or satisfaction of the decree as between the parties to it. Besides, even if the legal representative remains quiet, the attachment might be with equal efficacy questioned by a third

(1) (1890) 17 Cal., 711.
(2) (1872) 11 Beng. L. R., 149.
(3) (1886) 10 Mad., 117.
(4) (1885) 9 Bom., 458.
(5) P. J. for 1896, 754.
(6) (1888) 16 Cal., 1.
(7) (1890) 17 Cal., 711.
(8) (1889) 12 All., 313.

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party interested in the worship of the shrine, and the legal representative thus really asserts a *jus tertii* in such matters, *i. e.*, rights of persons who are not parties to the decree, or their representatives. The force of these considerations has been acknowledged in a large number of decisions. In *Sudindra* v. *Budan*[1], it was expressly laid down that a new trustee of a *matha* could not raise in execution proceedings any question about the non-liability of the *matha* property to be attached in execution of a decree against the previous trustee. In *Nath Mal Das* v. *Tajammul Husain*[2] a suit by a Mutavalli judgment-debtor to have it declared that certain property attached in execution of a decree against him was *wakf* property, was allowed on the ground that such a suit was brought by him in a character separate from his private capacity. The cases of *Shankar Dial* v. *Amir Haidar*[3] and *Nimaye Churn* v. *Jogendro Nath*[4] are still earlier authorities on the same point. In *Roop Lall Dass* v. *Bekani Meah*[5] it was held that when a judgment-debtor objected to the attachment of property on the ground that it was *wakf*, the case fell under section 280, and not section 244. In *Rajrup Singh* v. *Ramgolam Roy*[6], Mr. Justice Wilson expressly recognized this exception to the general rule laid down by him, as resting on considerations which did not apply to cases falling under section 244. In *Seth Chand* v. *Durga Dei*[7], a similar exception was made on the same grounds.

In our own Presidency, the point has not yet been formally decided. In *Gangadhar Bhikaji* v. *Gangadhar Trimbak*[8], the point was incidentally raised, but the case was decided on other grounds. In *Shri Ganesh Dharnidhar* v. *Keshavrao*[9], an opinion was expressed that there was nothing to prevent a succeeding trustee of devasthán property from questioning in execution proceedings the alienations made by a previous trustee. On the authority of this case, it was laid down in *Venubai* v. *Dhondo*[10] that a manager of sansthán might dispute the validity of a

(1) (1885) 9 Mad., 80.
(2) (1884) 7 All., 36.
(3) (1880) 2 All., 752.
(4) (1874) 21 Cal. W. R., 365.
(5) (1888) 15 Cal., 437.
(6) (1888) 16 Cal., 1.
(7) (1889) 12 All., 313.
(8) P. J. for 1891, 207.
(9) (1890) 15 Bom., 625.
(10) P. J. for 1892, p. 250.

decree passed against his predecessor in execution proceedings without being obliged to bring a separate suit. None of these decisions go to the length of ruling that such new trustee or manager is obliged to raise his objection in execution, and that no separate suit will lie.

In the present case, the suit was brought, not by the new manager or trustee of the *matha*, but by the judgment-creditor. His right to bring such a suit rests on the same foundation as that of the legal representative or successor of the judgment-debtor in the incumbency of the devasthán or charity. It may, therefore, be safely laid down that the respondents' suit in this case was properly instituted. I would, therefore, overrule the objection raised by the appellant's pleader.

On the merits, the case must follow the ruling in *Jamal Saheb* v. *Murgaya Swami*[1], which was a decision between the parties to this suit in respect of other lands, but the contentions of the parties were virtually the same as in the present case. The nature of the tenure of the lands must depend upon the terms of the inám settlement made in regard to it. The extracts clearly show that both the lands are attached to the Virakta *matha*, and that both Gulaya and appellant are only vahivatdárs. The statement made by Gulaya's *guru* before the Inám Commissioner is a self-serving statement, and as such cannot be received as evidence so as to destroy the effect of the trusts created by the Government grant.

Under these circumstances, following the ruling in *Jamal Saheb* v. *Murgaya Swami*[2], I would reverse the decree of the District Judge, and restore that of the Court of first instance, with costs throughout on the respondents.

PARSONS, J.:—My learned colleague has fully stated the facts and mentioned all the cases which bear upon the first point that was argued before us, and has come to the conclusion that, where the representative of a judgment-debtor puts forward a personal claim to property which is attached as assets of the judgment-debtor in his hands, the investigation of the claim must be made

(1) (1885) 10 Bom., at p. 40. (2) (1885) 10 Bom., 34.

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in execution under the provisions of section 244 of the Code of Civil Procedure, but that, where he asserts that he holds the property in trust for, or on behalf of, or as manager of, some third person or body of persons or a religious charity or institution, the claim must be investigated under the provisions of sections 278 to 283, and the order passed therein cannot be challenged by an appeal, but must form the subject of a separate suit. He holds, therefore, that the present suit has been properly brought, and that the Courts below had jurisdiction to hear and determine the suit and the appeal.

I do not agree with this, but I do not consider it necessary or advisable to dissent therefrom, seeing that, first, this litigation dates from 1838, the decree sought to be executed was passed in 1892, and that this suit was filed in 1894, and, secondly, that in this second appeal we are dealing with the appellate decree in appeal of the same Court as would have heard the appeal from the order in execution, so that, if we reversed the present proceedings and referred the respondents to an appeal from the order, the second appeal to this Court would be precisely the same as this and would have to be decided on the very same materials, and with the same result. I shall, therefore, content myself with placing on record my opinion that sections 278 and 283 have no reference to any claim preferred or objection made by any person who is on the record as a party to the suit. If this were not so, it would not have been necessary to have used the general words in section 278 "as if he was a party to the suit." I do not see that any distinction can be drawn from the fact that the words used in section 280 "on account of or in trust for some other person" are joined to the words "not on his own account or as his own property" by the word "but". These words, I think, refer only to the nature of the proof to be adduced and the case to be established. In my opinion, whenever a question arises between the representative on the record (whether originally sued as such or added before or after decree) and the decree-holder, as to whether property in the hands of the representative was of the assets of the deceased or not, that question must be determined by order of the Court executing the decree under the provisions of section 244.

I admit that the balance of authority seems opposed to this view, but I think that the point has not received the attention it deserves. In most of the cases cited, the claim was of a personal nature and there was an opinion only expressed as to the other claim. No doubt the decision in *Seth Chand Mal* v. *Durga Dei*[1] is distinctly contrary to my opinion, but the decision in *Kuriyali* v. *Mayan*[2] is, I submit, in favour of it, for there the claim in respect of two parcels of land was that they were tarvad property which the deceased judgment-debtor had no power to alienate and of which the representative was then in possession as the manager of the tarvad. I lay stress on this latter case because it was quoted with approval by their Lordships of the Privy Council in *Prosunno Coomar* v. *Kasi Das*[3]. I also cite in my favour the opinion of O'Kinealy, J., in *Punchanun Bundopadhya* v. *Rabia Bibi*[4] to the effect that sections 278 to 283 do not cover the case of any contest between parties to the suit or their representatives on the record of the suit in regard to the execution, discharge or satisfaction of a decree, whether the claim set up be a claim on the ground that the property is that of a person on the record or belongs to any third party. It seems to me (he says) that the effect of the decision between such parties is, that the right to enforce or oppose execution against the property in dispute is decreed and finally determined under section 244, subject to the result of such appeal as is given to them by law. Prinsep, J., was of the same opinion.

Upon the next point, I agree with my learned colleague. The Assistant Judge wrongly placed the *onus* of proving the inalienability of the lands in suit upon the appellant. The statement in Exhibit 20, said by the Assistant Judge to be that of Gulaya, but which really is the statement of his predecessor in management, Shidlinga, that the lands were his, ought not to have been given any weight to, especially when taken along with the other statements made by him as to how the lands were acquired. It is clear from the Exhibits 56, 57, 42 and 43 that the lands belonged to the *math* and were not the private inām property of any manager, much less of Gulaya. The *ratio decidendi* adopted

(1) (1889) 12 All., 313.
(2) (1883) 7 Mad., 255.
(3) (1892) 19 I. A., 166.
(4) (1890) 17 Cal., 711.

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in the case between the same parties reported at I. L. R., 10 Bom., p. 34, though it deals with other lands of the *math* is applicable to these lands, the title to which rests upon exactly the same basis. The decision of the Subordinate Judge in this case is undoubtedly correct, and it is only by a clear error of law that the Assistant Judge has come to a different finding.

We reverse the decree of the lower appellate Court and restore that of the Court of first instance, with costs throughout on the respondents.

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

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GOVIND (ORIGINAL PLAINTIFF), APPELLANT, *v.* GANGAJI (ORIGINAL DEFENDANT), RESPONDENT.*

Limitation Act (*XV of* 1877), *Sch. II, Art.* 138—*Article applicable to suits by assignees of auction-purchaser—Assignee of auction-purchaser.*

Article 138 of the Limitation Act (XV of 1877) is not limited to suits by the auction-purchaser himself but applies also to suits by his assignees.

Limitation runs from the date of the sale.

Mohima Chunder v. *Nobin Chunder*(1) dissented from.

SECOND appeal from the decision of Ráo Bahádur Thakurdas Mathuradas, Assistant Judge of Ratnágiri.

The defendant Gangaji Anaji Ghane was the owner of certain land which was sold on the 5th March, 1884, in execution of a decree obtained against him. It was purchased by one Atmaram Janardhan Desai.

The sale was confirmed on 30th May, 1884, but Atmaram was not put into possession.

On the 19th July, 1890, Atmaram sold his rights as auction-purchaser to the plaintiff.

On the 29th May, 1896, plaintiff filed the present suit to recover possession of the land from defendant.

The Court of first instance dismissed the suit as barred by limitation under article 138, Schedule II, of Act XV of 1877, as

* Second Appeal, No. 1187 of 1897.

(1) (1895) 23 Cal., 49.