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to this, and the evidence shows in addition that a coolness had arisen between the old man and the plaintiff whom along with her sister he had at one time intended to benefit by will. In our opinion the evidence establishes that the donor was perfectly sensible and competent at the time of the gift and the charge that the defendant exercised undue influence fails. We reverse the decree of the lower Court and dismiss the suit with costs throughout.

Attorneys for the appellants: *Messrs. Little & Co.*

Attorneys for the respondents: *Messrs. Pestonji, Rustomji and Kolah.*

H. S. C.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1914. *March* 24.

THE SHOP STYLED TAYABALLI GULAM HUSEIN (ORIGINAL DEFENDANTS), APPELLANTS, *v.* ATMARAM SAKHARAM (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), sections 268, 278, 283—Civil Procedure Code (Act V of 1908), Order XXI, Rules 58 and 63—Transfer of Property Act (IV of 1882), section 132, illustration (i)—Decree—Execution—Garnishee—Attachment of debt—Objections by Garnishee unsuccessful—Purchase by judgment-creditor—Suit by purchaser against Garnishee—Garnishee cannot raise the same defence—Suit by Garnishee, period of one year from the date of adverse order—Equity of cross debt—setting up without payment of Court fee—Garnishee's right of set-off—Prompt decision—Garnishee, trustee for the judgment-debtor.

A brought a suit against B and in execution of the decree attached a debt alleged to be due to B by T under section 268 of the Civil Procedure Code (Act XIV of 1882). T's objection to the attachment having failed A applied for the sale of the debt and having purchased it himself at the Court sale brought a suit against T, the Garnishee, for the recovery of the debt. Garnishee having set up the same facts in defence as he had set up when he unsuccessfully objected to the attachment,

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Held, that the equity arising from the cross debt could be set up by the defendant without payment of Court fee as on a counter claim, that if a cross debt were due to a Garnishee, there should be a right of set-off in his favour.

Held, however, that it was not open to the Garnishee to plead a defence which had already, in an execution inquiry, been unsuccessful, except in a suit instituted within one year from the date of the adverse order, that the property attached could be regarded as property in the possession of the Garnishee in trust for the judgment-debtor, and, therefore, could be attached.

Held, further, that a Garnishee's claims and objections should be decided as promptly as other objections to the attachment.

Chidambara Patter v. *Ramasamy Patter*(1), followed.

Mussamut Rambutty Kooer v. *Kamessur Pershad*(2), not followed.

SECOND appeal against the decree of J. Scotson, Assistant Judge of Khandesh, dismissing an appeal against the decree of V. G. Sane, Subordinate Judge of Chalisgaon.

The facts were as follows :—

One Baba Ismail Bohori owned two shops, one at Pachora and the other at Chalisgaon. He had dealings with a firm known as Tayaballi Gulam Husein. The proprietors of the firm were Rasoolbhai Tayaballi and his brother Khurbanalli Tayaballi. The firm had a stationery shop at Pachora and a Ginning factory at Saygaum. In the firm's books at Pachora there was a sum of Rs. 650 to the debit of the said Baba Ismail and in the books at Saygaum there were to his credit Rs. 594. The plaintiff Atmaram Sakharam obtained a decree, No. 689 of 1904, against his debtor the said Baba Ismail and in execution under a darkhast, No. 1533 of 1904, he attached by a prohibitory order Rs. 1,023-3 alleged to be due by the said firm to the judgment-debtor Baba Ismail and the firm was ordered to produce into Court the amount of the alleged debt. The firm, however, disputed its liability and objected to the attachment on the ground that no debt was due by

(1) (1903) 27 Mad. 67.

(2) (1874) 22 W. R. 36.

it to Baba Ismail. The Court overruled the firm's objection and on the plaintiff's application ordered that the debt of Rs. 594 due by the firm to Baba Ismail should be sold and it was purchased by the plaintiff for Rs. 55 at an auction sale on the 7th June 1906. The plaintiff made a demand on the firm for the payment of the debt and the demand not being complied with, he, on the 14th February 1908, brought the present suit against the firm represented by its two aforesaid proprietors for the recovery of Rs. 594 with interest at 9 per cent. from date of suit.

Defendant 1, Rasoolbhai Tayaballi, raised the defence of set-off which he had unsuccessfully pleaded in the execution proceeding, and further contended that the firm was not indebted in Rs. 1,023-8 to Baba Ismail, but the latter was, on the contrary, indebted to the firm to the extent of Rs. 56-12-6, that the plaintiff got nothing by his purchase, that the firm had kept separate books at their shops at Pachora and Saygaum, that the plaintiff had not disclosed with details the items by which Baba Ismail became the creditor of the firm to the extent of Rs. 1,023-8, that the suit was time-barred and that the plaintiff was not entitled to future interest.

Defendant 2, Khurbanalli Tayaballi, was absent.

The Subordinate Judge found that as the Court-purchase by the plaintiff took place on the 7th June 1906 and the suit was filed on the 14th February 1908, the claim was time-barred. He, therefore, dismissed the suit.

On appeal by the plaintiff the Subordinate Judge's decree was reversed and the case was sent back for trial on the merits.

On the remand the Subordinate Judge found that the defendant was not entitled to claim a set-off inasmuch as he had elected not to pay the Court fee necessary for

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the set-off. He, however, passed a decree for the plaintiff for Rs. 594 on the admission of the defence "that Rs. 594 are to the credit of Baba Ismail in their Saygaum account and the right to recover the same being attached by the plaintiff, he is entitled to recover the same".

With respect to the set-off the Subordinate Judge observed :—

* * * If the defendants want to set off the amount to their credit in the Saygaum books against the claim in suit, their prayer for the same cannot be given effect to unless they first pay the necessary Court fees. Set-off is in the nature of a counter claim and the institution fees have to be first paid. I therefore find * * that the defendants are liable to pay the Court fees.

On appeal by the defendants the Assistant Judge confirmed the decree on the following among other grounds :—

Dealing first with the question of set-off. It was urged in the lower Court that the Rs. 1,000 credited in the Saygaum shop books were for payment made by Baba Ismail towards his debit at the Pachora shop. The lower Court has considered this point and decided on grounds which seem good to me, that such was not the case. The position then is that Baba Ismail had two separate accounts at Saygaum and Pachora ; in the former he was at credit and the latter at debit. The plaintiff in this case purchased the debt due to Baba Ismail, that is to say, the credit to Baba Ismail at the Saygaum shop, and sues the present defendants for what was owing to Baba Ismail on that Khata. He stands in Baba Ismail's shoes as far as that claim is concerned. He is in no way responsible however for Baba Ismail's debts and the defendants are not entitled to claim from him for Baba's indebtedness to them.

Defendants say however that for the whole they were not indebted to Baba Ismail and therefore plaintiff got nothing by his purchase. I cannot agree with this. There was no reason whatever why, the accounts being separate (as they have been held to be), Baba should not have sold his credit on one Khata even although he were indebted on another and similarly that credit should be attached and sold.

This being so, defendants cannot possibly claim that the other Khata should be taken into account, for the plaintiff has not made himself responsible for Baba's debts—he has only purchased one of his assets.

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There can therefore be no question either of set-off or reduction of plaintiff's claim by the amount due to the Pachora shop.

The defendants preferred a second appeal.

Shortt with *M. V. Bhat* for the appellants (defendants).

Weldon with *R. R. Desai* for the respondent (plaintiff).

SCOTT, C. J. :—In execution of a decree in Suit 689 of 1904 against Baba Ismail, a debt of Rs. 1,023, alleged to be due to the judgment-debtor by the firm of Tayaballi Gulam Husein, the present defendants, was attached by the judgment-creditor, the present plaintiff, under section 268 of the Code of 1882. The Garnishees received notice to bring into Court the amount of the alleged debt, but as they disputed their liability they objected to the attachment and the judgment-creditor having put in an answer they gave evidence before the executing Court to prove that they in fact owed nothing to the judgment-debtor as although Rs. 594 were due by them to the judgment-debtor's Chalisgaon shop, Rs. 676 was due to them by the judgment-debtor's Pachora shop. This evidence was given on the 4th of September 1905 and thereafter on the same day the plaintiff applied for sale of the debt of Rs. 594. The executing Court then ordered that this debt should be sold. On the sale it was purchased by the plaintiff who now brings this suit to recover the Rs. 594 from the Garnishees.

The Garnishees set up the same facts in defence as they set up when they unsuccessfully objected to the attachment. The learned Judge in the lower appellate Court was of opinion that the Chalisgaon and the Pachora accounts being separate the defendant could not claim that the Pachora debt should be taken into account, for the judgment-creditor had not made himself

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responsible for the judgment-debtor's debts having only purchased one of his assets. If this were the only question in the case we should reverse the decree of the Assistant Judge, for, as decided in *Tapp* v. *Jones*(1), if a cross debt were due to the Garnishee at the date of the attachment it is obviously just that there should be a right of set-off in his favour: this principle is recognised by the Indian Legislature in the Transfer of Property Act, section 132 (see illustration (*i*)). We also do not agree with the Subordinate Judge in the trial Court that the equity arising from the cross debt could not be set up by the defendants except on payment of a Court fee as on a counter-claim.

The more serious question for the defendants is, we think, whether the defence of set-off is open to them after their failure to raise the attachment as no suit has been filed by them within a year from the 4th of September 1905 to establish the right alleged by them and not allowed by the executing Court.

The point was not taken by the plaintiff in the lower Court and was just suggested from the Bench in this appeal. We have now heard arguments upon the point.

The defendants' Counsel relies upon the decision in *Mussamut Rambutty Kooer* v. *Kamessur Pershad*(2) which upon the facts found was a similar case to the present. We are, however, unable to accept it as an authority for two reasons. First, because section 246 of the Code of 1859 provided that the party against whom an order might be given on investigation might bring a suit to establish his right within one year from the date of the order: a provision which the Court held would not necessarily prevent the Garnishee from setting up the same defence upon an action brought against him by the purchaser of the debt. This ruling is no longer

(1) (1875) L. R. 10 Q. B. 591 at p. 593. (2) (1874) 22 W. R. 36.

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applicable, for section 283 of the Code of 1882 (Order XXI, Rule 63 of the present Code) provides that the order on the investigation shall, subject to the result of such suit, if any, be conclusive. It is, therefore, no longer open to a Garnishee to plead a defence which has already in an execution inquiry been unsuccessful except in a suit instituted within one year from the date of the adverse order. Secondly, we are unable to follow the argument of the Calcutta Judges based upon other sections of the Act of 1859 for it seems to ignore the finding arrived at that the property attached was not money but a debt, and the provisions of section 265 which provided for the delivery of debts *sold* in execution.

The other case relied on by the appellants was *Harilal Amthabhai* v. *Abhesang Meru*[1] in which on an unargued reference for opinion from a Subordinate Court the Judges expressed the opinion that section 278 of the Code did not apply to objections to the attachment of debts but that the Court should satisfy itself that a debt was existent before selling it. This decision does not appear to us wholly consistent with that in *Mansukh* v. *Bhagwandas* mentioned in the Subordinate Judge's reference in *Harilal Amthabhai* v. *Abhesang Meru*[1]. We cannot accept an expression of opinion on an unargued reference as a binding authority. A different view of section 278 has been taken by a Full Bench of the Madras High Court after argument in *Chidambara Patter* v. *Ramasamy Patter*[2] overruling *Basavayya* v. *Syed Abbas Saheb*[3], a decision based upon *Mussamut Rambutty Kooer* v. *Kamessur Pershad*[4]. We agree with the Full Bench of the Madras High Court. It is of importance that Garnishee's claims and objections should be decided at least as promptly as other objections to attachment.

(1) (1880) 4 Bom. 323.
(2) (1903) 27 Mad. 67.
(3) (1900) 24 Mad. 20.
(4) (1874) 22 W. R. 36.

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Order XXI, Rule 58 applies in terms to any property attached in execution and thus relates to debts so attached. The sum of Rs. 594 appearing due, in one set of the Garnishees' books, to the judgment-debtor was not liable to attachment if it was in fact cancelled by another debt due by the judgment-debtor to the Garnishee in another set of books. If it was not so cancelled it was attachable property constructively in the possession of the judgment-debtor. In another view also the question raised by the Garnishee called for investigation under section 278 and the following sections, for the debt attached could be regarded as property in the possession of the Garnishee in trust for the judgment-debtor, see *Vinall* v. *De Pass*[1] per Lord Halsbury. We dismiss the appeal without costs.

Appeal dismissed.

G. B. R.

[1] [1892] A. C. 90 at p. 95.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1914. *March* 26.

SHAH VELCHAND CHHAGANLAL, PLAINTIFF, v. LIEUTENANT R. C. C. LISTON, DEFENDANT.*

Civil Procedure Code (Act V of 1908), sections 115 and 151—Money-lender and debtor—Arbitrator's award—Decree without inquiry into the nature of the award—Manual of High Courts' Circulars, Chapter VI, para. 2—Inquiry—Real point of difference—Decree set aside—Abuse of judicial process.

The plaintiff, a money-lender, filed in Court an arbitrator's award passed against the defendant debtor and prayed for a decree in the terms of the award. The Court having presumed that there was a real point of difference between the parties passed a decree in the terms of the award without instituting inquiry

* Application No. 271 of 1913 under extraordinary jurisdiction.