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*Murphy, J.*

resumed by His Highness' Government, and that plaintiff has therefore no title to it.

For these reasons, I agree with my Lord the Acting Chief Justice that the original Court's decree must be reversed and plaintiff's suit dismissed with costs.

Respondent No. 1, Madhavrao Raghunathrao, shall pay his own and the Sar Subha of Baroda State's costs of the appeal.

*Decree reversed.*

B. G. R.

## APPELLATE CIVIL.

*Before Mr. Justice Pathar and Mr. Justice Baker.*

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MARIA URSULA AND OTHERS (ORIGINAL APPLICANTS), APPELLANTS v. THE FIRM OF PANA NAVLAJI AND Co. (ORIGINAL OPPONENTS), RESPONDENTS.\*

*Provincial Small Causes Courts Act (IX of 1887), sections 27, 32, 33—Civil Procedure Code (Act V of 1908), sections 42, 47, 102, and Order XXI, rules 60 and 63—Small Cause Suit—Decree—Execution—Attachment—Objection to attachment by legal representatives of judgment-debtor—Objection allowed by Subordinate Judge—Appeal to District Court—Jurisdiction—Second appeal.*

A suit of a Small Cause nature was filed in the Court of the First Class Subordinate Judge against one N. Pending the suit N died and his brother S was brought on the record as his heir. The decree was passed against the estate of N for the amount of Rs. 184-8-0. After the decree S died and his heirs were brought on record. In execution of the decree, the proceedings were transferred to the ordinary jurisdiction of the First Class Subordinate Judge, and attachment was levied on certain immoveable property in the hands of S's heirs as the property of N. The heirs of S raised an objection that the property belonged to them and not to N. The Subordinate Judge passed an order upholding the objection but on appeal his finding was set aside by the District Court. On second appeal, it was contended that no appeal lay to the District Court because the order was passed by the Subordinate Judge in execution of a decree of a Small Cause Court; and because the appellants being not the representatives of the judgment-debtor N, the order fell within the ambit of Order XXI, rule 60 of the Civil Procedure Code, 1908.

*Held*, (1) that the order made by the Subordinate Judge was appealable as it amounted to a decree under section 2, clause (2) of the Civil Procedure Code, 1908;

(2) that the order fell within section 47 of the Code, as it was passed between the plaintiffs and the representatives of S, and related to the execution, discharge and satisfaction of the decree;

\*Second Appeal No. 549 of 1926.

(3) that the execution of the decree being transferred to the regular jurisdiction of the First Class Subordinate Judge, under section 42 of the Civil Procedure Code, 1908, the application for execution must be held to be one in a regular suit and therefore the appeal lay to the District Court, notwithstanding sections 27 and 32 of the Provincial Small causes Courts Act, 1887 :

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*Adhar Chandra Gope v. Pulin Chandra Shaha*,<sup>(1)</sup> followed :

(4) that no second appeal lay to the High Court owing to section 102 of the Civil Procedure Code, 1908 :

*Narayan v. Nagindas*,<sup>(2)</sup> followed.

SECOND appeal against the decision of K. C. Sen, District Judge at Thana, reversing the decree passed by S. A. Gupte, First Class Subordinate Judge at Thana.

Proceedings in execution.

The plaintiff firm filed a Small Cause Suit No. 324 of 1921 against one Niklav in the Court of the First Class Subordinate Judge at Thana. Niklav died before decree and his brother Sebastiaiv was brought on record as his heir. The decree was passed against the estate of Niklav for the amount of Rs. 184-8-0; after the decree Sebastiaiv died, and the appellants, his heirs, were brought on record in his place.

The decree-holder filed Darkhast No. 71 of 1924 in the Court of the First Class Subordinate Judge and in execution attached Survey No. 357, falni No. 1, belonging to Niklav. The heirs of Sebastiaiv applied under Order XXI, rule 58, Civil Procedure Code, to raise the attachment, contending that the property belonged to them and Niklav had no interest therein. The First Class Subordinate Judge inquired into the objection and found that there was no evidence to hold that the house site belonged to Niklav. The application was, therefore, granted and attachment was raised.

On appeal the District Judge held the property under attachment belonged to Niklav. The order of the

<sup>(1)</sup> (1914) 19 Cal. W. N. 1085.

<sup>(2)</sup> (1905) 30 Bom. 118.

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Subordinate Judge was, therefore, set aside and attachment was granted.

The heirs of Sebastiaiv appealed to the High Court. *G. N. Thakor*, with *K. A. Badhye*, for the appellants. *P. B. Shingne*, for respondent No. 1.

PATKAR, J.:—In this case, the respondent firm obtained a decree for Rs. 184-8-0 against the estate of the deceased Niklav Santago Pereira in Small Cause Suit No. 324 of 1921. In execution of that decree, the respondents judgment-creditors attached the property alleged to belong to Niklav. The appellants, the heirs of Niklav's brother Sebastiaiv, claimed in execution that the property was not liable to attachment in execution of the decree against Niklav on the ground that the property did not belong to Niklav but belonged to Sebastiaiv. The learned Subordinate Judge allowed the application and raised the attachment holding that the property was not liable to attachment and sale as belonging to Niklav. The respondents-judgment-creditors appealed to the District Court of Thana. The learned District Judge held that the property under attachment belonged to Niklav, and, therefore, set aside the order of the lower Court. The heirs of Sebastiaiv have filed this second appeal.

It is urged on behalf of the appellants that no appeal lay to the District Court as the order of the Subordinate Judge fell within the ambit of Order XXI, rule 60, of the Civil Procedure Code. It is urged that the decree sought to be executed was passed by the First Class Subordinate Judge in Small Cause Suit No. 324 of 1921 and no appeal lay to the District Court against the order in execution of the decree of the Small Causes Court under section 27 of the Provincial Small Causes Courts Act, IX of 1887. It is further urged that the finding of the lower appellate Court was not conclusive and

binding in second appeal. It is contended, on the other hand, that the order of the Subordinate Judge in execution fell under section 47 of the Civil Procedure Code as Sebastiaev was a party to the Small Cause suit and the appellants are the representatives of the parties in Suit No. 324 of 1921, and the question related to the execution, discharge and satisfaction of the decree, and an appeal lay to the District Court. It was further urged on behalf of the respondents that the Small Cause Court suit was transferred to the ordinary jurisdiction of the First Class Subordinate Judge and an appeal lay to the District Court, and further that the finding of the lower appellate Court on a question of fact was binding in second appeal.

The first question is whether the order of the Subordinate Judge fell under Order XXI, rule 60, or whether it fell under section 47 of the Civil Procedure Code. If the appellants are considered to be strangers to the decree in the Small Cause Civil Suit No. 324 of 1921 obtained by the respondents, it is clear that the order of the Subordinate Judge would fall under Order XXI, rule 60, and would be conclusive under Order XXI, rule 63, and no appeal would lie to the District Court against the order of the Subordinate Judge. It has, however, been held that if the property in the hands of the legal representative is attached and the legal representative objects to the attachment on the ground that the property attached is his own property and does not form part of the estate of the deceased judgment-debtor, the objection to the attachment would fall under section 47 of the Civil Procedure Code on the ground that it is made by a representative of a party to the suit: see *Murigeya v. Hayat Saheb*,<sup>(1)</sup> *Vengapayyan v. Karimpanakal Parvati*,<sup>(2)</sup> *Kali Charan v. Jewat Dube*,<sup>(3)</sup>

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<sup>(1)</sup> (1898) 23 Bom. 237.

<sup>(2)</sup> (1902) 26 Mad. 501.

<sup>(3)</sup> (1905) 28 All. 51.

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*Madhusudan Das v. Gobinda Pria Chowdhurani*,<sup>(1)</sup> and *Chowdry Wahed Ali v. Mussamut Jumaee*.<sup>(2)</sup> In the present case the decree was obtained by the respondents after the death of Niklav but his brother Sebastiaiv was made one of the parties to the suit. The decree was passed against the estate of Niklav. If Sebastiaiv had been alive and had been made a party to the execution proceedings and had raised an objection to the execution on the ground that the property belonged to him and not to Niklav, it would follow from the cases cited above that the order of the Subordinate Judge rejecting his application for raising the attachment would fall within the ambit of section 47 of the Civil Procedure Code, for it would be a question arising between the parties to the suit or their representatives relating to the execution, discharge or satisfaction of the decree. Does it make any difference on the ground that the execution is now sought not against Sebastiaiv but against the appellants who are the representatives of Sebastiaiv? The decision in *Gokulsing Bhikaram v. Kisansingh*<sup>(3)</sup> would support the contention on behalf of the respondents that the objection of the legal representative of the defendant would fall within section 244 of the Civil Procedure Code of 1882 corresponding to section 47 of the present Code. In *Chunital v. Kashibhai*,<sup>(4)</sup> it was held that where a creditor sued the father and the son, and obtained a decree against the estate of the son only, the father, though the suit had been dismissed against him, was still a party to the suit within the explanation to section 47 of the Civil Procedure Code, and any question arising between him and the decree-holder with regard to the execution of the decree would have to be determined by the Court executing the decree and not by a separate suit. According to the explanation to section 47, the

<sup>(1)</sup> (1899) 27 Cal. 84.<sup>(2)</sup> (1872) 11 Beng. L. R. 149, P. C.<sup>(3)</sup> (1910) 34 Bom. 546.<sup>(4)</sup> (1923) 25 Bom. L. R. 440.

defendant, against whom a suit has been dismissed, is a party to the suit. There must be a legal representative brought on the record as a party before a valid decree is passed against the estate of a deceased defendant, otherwise the decree would be a nullity: see *Shivaji v. Vithal*.<sup>(1)</sup> Sebastiaev was, therefore, a party to the Small Cause suit. It would, therefore, follow that the decision of the Subordinate Judge in this case would fall within section 47 of the Civil Procedure Code as it was between the plaintiffs and the representatives of the defendant in the suit and related to the execution, discharge and satisfaction of the decree. We think, therefore, that the order of the Subordinate Judge was appealable to the District Court as it would amount to a decree under section 2, clause (2), of the Civil Procedure Code.

The next question is whether the appeal to the District Court was barred under section 27 of the Provincial Small Causes Courts Act. Reliance is placed on behalf of the appellants on the decisions in *Mavula Ammal v. Mavula Maracoir*,<sup>(2)</sup> *Narayan v. Nagindas*<sup>(3)</sup> and *Murlidhar Damodar v. Sakharam Govind*.<sup>(4)</sup> At first sight these decisions would support the contention on behalf of the appellants that the decree being passed by the First Class Subordinate Judge in a Small Cause suit, an appeal in the execution proceedings would be barred under sections 27 and 32 of the Provincial Small Causes Courts Act. In the present case, the execution of the decree was transferred by Exhibit 8 to the ordinary jurisdiction of the First Class Subordinate Judge. Under section 7 (a) (iii) so much of the body of the Code as relates to the execution of decrees against immoveable property shall not extend to Courts constituted under the Provincial Small Causes Courts Act, 1887, or

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<sup>(1)</sup> (1926) 28 Bom. L. R. 1367.

<sup>(2)</sup> (1906) 30 Mad. 212.

<sup>(3)</sup> (1905) 30 Bom. 113.

<sup>(4)</sup> (1889) P. J. 278.

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to Courts exercising the jurisdiction of a Court of Small Causes under that Act. Under Order L, rule 1 (a) (ii), so much of the schedule as relates to the execution of decrees against immovable property shall not extend to Courts exercising the jurisdiction of a Court of Small Causes under the Provincial Small Causes Courts Act; and under Order XXI, rule 82, sales of immovable property in execution of decrees cannot be ordered by a Court of Small Causes. It was, therefore, necessary to transfer the Small Cause Court decree to the First Class Subordinate Judge's ordinary jurisdiction in order to enable the Court to sell the immovable property in execution of the Small Cause Court decree. Section 34, clause (a), of the Provincial Small Causes Courts Act regulates the procedure of transfer of execution by a Court invested with Small Cause Court jurisdiction to its ordinary jurisdiction. Under section 33 of the Provincial Small Causes Courts Act, a Court invested with the jurisdiction of a Court of Small Causes with respect to the exercise of that jurisdiction, and the same Court with respect to the exercise of its ordinary jurisdiction shall, for the purposes of that Act and the Code of Civil Procedure, be deemed to be different Courts. Under section 42 of the Civil Procedure Code, "the Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself." Therefore, the First Class Subordinate Judge's Court executing the decree in its ordinary jurisdiction shall have the same powers in executing the decree as if it had been passed by it in its ordinary jurisdiction, and its order in executing such decree shall, according to section 42 of the Civil Procedure Code, be subject to the same rules in respect of appeal as if the decree had been passed by itself. Therefore, in considering the question of appeal, regard must be had not to the power

of the Court which passed a Small Cause Court decree, but we have to consider the decree as if it had been passed by the First Class Subordinate Judge in his ordinary jurisdiction, and if the First Class Subordinate Judge had passed the decree in his ordinary jurisdiction, an appeal would clearly lie to the District Court. The order, therefore, in execution passed by the First Class Subordinate Judge after transference of the decree to his ordinary jurisdiction would be appealable to the District Court under section 42 of the Civil Procedure Code. This view is supported by the decision relied on on behalf of the respondent in the case of *Adhar Chandra Gope v. Pulin Chandra Shaha*.<sup>(1)</sup> It does not appear from the cases of *Marula Ammal v. Marula Maracoir*<sup>(2)</sup> and *Murlidhar Damodar v. Sakharam Govind*<sup>(3)</sup> whether the execution was transferred from a Court exercising Small Cause Court jurisdiction to a Court in its ordinary jurisdiction. In *Narayan v. Nagindas*,<sup>(4)</sup> it must be assumed that the decree was transferred from the Small Cause Court jurisdiction to the ordinary jurisdiction as immoveable property was attached in execution. The order in execution in *Narayan v. Nagindas*,<sup>(4)</sup> would according to section 42, be subject to the same rules in respect of appeal as if the decree had been passed by the Court executing it. The decree in that case was for Rs. 155-3-0, and even if the decree had been passed by the First Class Subordinate Judge in his ordinary jurisdiction, a second appeal would not lie under section 102 of the Civil Procedure Code. The question whether a first appeal lies against the order of the First Class Subordinate Court in its ordinary jurisdiction in execution of a decree transferred to it from its Small Cause Court jurisdiction depends, under section 42 of the Civil Procedure Code, upon the character of the

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<sup>(1)</sup> (1914) 19 Cal. W. N. 1085.

<sup>(2)</sup> (1906) 30 Mad. 212.

<sup>(3)</sup> (1889) P. J. 278.

<sup>(4)</sup> (1905) 30 Bom. 113.



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tribunal executing the decree and not upon the nature of the claim. The construction of the words "suit of the nature cognizable in Courts of Small Causes" in section 586 of the Civil Procedure Code of 1882, corresponding to section 102 of the present Code, does not depend upon the tribunal in which the suit is brought, but is equally applicable where the suit is brought in a Court of Small Causes or in any other Court. I think, therefore, that though a second appeal may not lie under section 102 of the Civil Procedure Code, an appeal lay to the District Court. This view is supported by the decisions in the cases of *Perumal v. Venkatarama*,<sup>(1)</sup> *Lala Kandha Pershad v. Lala Lal Behary Lal*,<sup>(2)</sup> *Bhimaraju v. Sreerama Sastrulu*<sup>(3)</sup> and *Atwari v. Maiku Lal*.<sup>(4)</sup> It, therefore, follows that the appeal to the District Court is not barred by sections 27 and 32 of the Provincial Small Causes Courts Act. According to the decision in *Narayan v. Nagindas*<sup>(5)</sup> no second appeal lies against an order in execution of a decree in a suit of the nature cognizable by the Court of Small Causes. In the present case, the decree was passed by the First Class Subordinate Judge of Thana in his Small Cause jurisdiction and related to an amount of Rs. 184-8-0, and under section 102 of the Civil Procedure Code no second appeal would lie.

It is, therefore, unnecessary to go into the question whether the finding of the lower, appellate Court is binding on us in second appeal.

We would, therefore, dismiss the second appeal with costs.

BAKER, J. :—This appeal, though at first sight very simple, raises a number of points of law. The original suit was by a creditor against one Niklav who died

<sup>(1)</sup> (1887) 11 Mad. 130.

<sup>(2)</sup> (1898) 25 Cal. 872.

<sup>(3)</sup> (1919) 87 Mad. L. J. 303.

<sup>(4)</sup> (1908) 31 All. 1.

<sup>(5)</sup> (1905) 30 Bom. 113.

before decree, and his brother Sebastiaiv was brought on record as his heir. The decree was passed against the estate of Niklav for the amount of Rs. 184-8-0. After decree Sebastiaiv died, and the present appellants, his heirs, were brought on record in his place. On an application being made by the decree-holder to attach the immoveable property in dispute as the property of Niklav, the appellants successfully objected that the property belonged to them and not to Niklav, but on appeal this finding was set aside by the District Court, which held that the property under attachment belonged to Niklav until his death, and the appellants' application was therefore dismissed. The appellants make this second appeal.

The first point raised is that the suit being of a Small Cause Court nature, no appeal lay to the District Court, and, therefore, the decree of the District Court is *ultra vires* and without jurisdiction, and the decree should be set aside, and the decree of the first Court restored. It appears, however, that the execution of the decree was transferred to the regular jurisdiction of the First Class Subordinate Judge, as was necessary, as a Court of Small Causes has no authority to attach and sell immoveable property under section 7 of the Civil Procedure Code, Order XXI, rule 82; and Order L. There was an application for transfer of the darkhast to the regular jurisdiction of the First Class Court, and under section 42 of the Civil Procedure Code the application for execution must be held to be one in a regular suit. The appeal, therefore, to the District Court would not be barred by reason of the suit being originally one of a Small Cause Court nature.

Then it is contended that the present appellants were not the representatives of the judgment-debtor Niklav, and therefore the order was made under Order XXI, rule 60, and there would be no appeal. Niklav died

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during the hearing, and Sebastiaiv, his brother, was brought on record as his legal representative. Sebastiaiv died after the decree, and the present appellants were brought on record as his legal representatives. It has been held that if property in the hands of a legal representative is attached, and he objects to the attachment on the ground that the property attached is his own and does not form part of the estate of the deceased judgment-debtor, the claim falls under section 244 (section 47 of the present Code) of the Code of Civil Procedure on the ground that it is made by a representative of the party to the suit: see *Murigeya v. Hayat Sahab*.<sup>(1)</sup> The decree was passed against the estate of Niklav, and any objection by Sebastiaiv against the attachment on the ground that the property belonged to him would have fallen under section 47 of the Civil Procedure Code. Although the decree was against the estate of Niklav, the estate must be represented by somebody. It was represented by Sebastiaiv after the death of Niklav, and the present appellants have been brought on record as the representatives of Sebastiaiv after his death. They must, therefore, be regarded as representatives of the parties to the suit, and their objection falls under section 47, and an appeal certainly lay to the District Court. The question is, however, whether a second appeal will lie to this Court. In view of the ruling in *Narayan v. Nagindas*,<sup>(2)</sup> which lays down that no second appeal lies against an order in execution of a decree in a suit of the nature cognizable by a Court of Small Causes, it appears that no second appeal will lie. The facts of that case are indistinguishable from those of the present. The decree was passed by the First Class Subordinate Judge in his small cause jurisdiction for the recovery of Rs. 155-3-0, and in the present case the

<sup>(1)</sup> (1898) 23 Bom. 237.

<sup>(2)</sup> (1905) 30 Bom. 113.

decree was passed by the same judge in his Small Cause Court jurisdiction for recovery of Rs. 184-8-0. In *Narayan v. Nagindas*<sup>(1)</sup> two houses were attached in execution of the decree under the ordinary jurisdiction of the First Class Subordinate Judge, and defendant No. 5 applied for removal of the attachment on the ground that he and the husband of the deceased were united brothers and the attached property belonged to him. In these circumstances I am of opinion that no second appeal will lie, and it is unnecessary to go into the merits. There is no question of jurisdiction, and the appeal must therefore be dismissed with costs.

*Appeal dismissed.*

J. G. R.

<sup>(1)</sup> (1905) 30 Bom. 113.

## CRIMINAL REVISION

*Before Mr. Justice Patkar and Mr. Justice Baker.*

EMPEROR *v.* SYED A. M. VAZIRALLY, ACCUSED.\*

*Indian Penal Code (Act XLV of 1860), section 294A (second part)—Lottery—Publishing a proposal for distribution of prizes by chance—“Drawing,” meaning of.*

The accused, who was the agent of a Cigarette Company at Belfast, published a pamphlet advertising a prize of Rs. 5 which could be automatically obtained by purchasers of Park Drive Cigarettes. The accused sent ten currency notes of Rs. 5 each to the manufacturers of Park Drive Cigarettes at Belfast, who put each note in a separate packet of cigarettes, mixed those packets with other packets which contained no notes, and sent them out to the accused in India. On a prosecution of the accused under second part of section 294A of the Indian Penal Code :—

*Held*, (1) that the scheme published by the accused for distribution of prizes by lot or chance amounted to a lottery :

*Barratt v. Burden*<sup>(1)</sup>; *Hunt v. Williams*<sup>(2)</sup> and *Taylor v. Smetten*,<sup>(3)</sup> relied on ;

(2) that as there was no proposal to pay any sum on any event or contingency relative to the *drawing* of any lot the publication of handbills did not fall under section 294A (second part) :

*Emperor v. Mukandi Lal*,<sup>(4)</sup> followed.

The word “drawing” is used in the first and second part of section 294A of the Indian Penal Code in its physical sense and that the actual drawing of lots is an essential ingredient of the offence under section 294A.

\* Criminal Revision Application No. 128 of 1928.

<sup>(1)</sup> (1893) 68 L. J. M. C. 33.

<sup>(2)</sup> (1888) 52 J. P. 821.

<sup>(3)</sup> (1888) 11 Q. B. D. 207.

<sup>(4)</sup> (1917) 18 Cr. L. J. 768.

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