1900

THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. NRITYA GOPAL ADHIKARY.

support the order not on these grounds, but on the grounds stated by the Munsif.

We have no doubt whatsoever that the opinion expressed by the Munsif is correct. No order or notification can be made under any Act having the authority of law, until that Act has come into operation. The order made under s. 1 on the 27th December 1881, declared that the Act shall take effect in the District of Burdwan on the 1st January, 1882. The notification of the same date (27th December 1881) purporting to be under s. 6 could not be made under that section, because the Act was not then in operation in the District of Burdwan, to which the notification related. The result is that the acts of the officers of Government under that notification are without any legal authority, and plaintiffs are entitled to their legal remedies against them, so far as they affect their rights of property.

The second appeal does not challenge any of the findings of the Lower Courts on the merits of the suit, and, therefore, this second appeal must be dismissed with costs.

It is unnecessary to notice the grounds upon which the Subordinate Judge has held that the canal officer could not act, because the Collector had not issued public notice under s. 8, beyond stating that they are not sound. This neglect of the Collector might affect claims to compensation, but it could not affect the acts of the canal officers to carry out the objects of the notification under s. 6, if such a notification had been properly made. As it is, there has been no such notification.

M. N. R. *Appeal dismissed.*

Before Mr. Justice Ghose and Mr. Justice Pratt.

1900. Dec. 18, 19, 20.

H. MATHEWSON (DEFENDANT No. 1) *v.* GOBARDHAN TRIBEDI AND ANOTHER (PLAINTIFFS).*

Civil Procedure Code (Act XIV of 1882), ss. 244, 276—Decree—Execution—Attachment—Judgment-debtor, representative of—Specific Relief Act (I of 1877), s. 42, (d) and (g)—Declaratory suit—Cause of action—Receiver.

A property was attached in execution of a decree against the judgment debtor and placed in charge of a Receiver appointed by the Court. While the

* Appeal from Original Decree No. 256 of 1899, against the decree of Babu Sarada Prasad Chatterjee, Subordinate Judge of Manbhum, dated the 8th of April 1899.

attachment was pending, the judgment-debtor granted a lease of the property to *M*, who thereupon set up a right to hold possession of the property and to pay to the Receiver only the rent due from him under the lease.

Held, that *M* was a representative of the judgment-debtor within the meaning of s. 244 of the Code of Civil Procedure, and that a declaration that the lease was invalid and inoperative as against the decree-holder must be sought for under that section and not by a separate suit.

Semble: That the decree-holder was, in the circumstances, entitled to such a declaration.

THE plaintiffs obtained a decree for money against the defendant No. 2, and in execution of the decree got a mehal owned by the said defendant under a maintenance grant attached on the 29th September 1891. Thereupon, under the order of the Court passed on the application of the said defendant, the aforesaid mehal was placed in charge of a Receiver with direction to repay the money due to the plaintiffs and other decree-holders from the proceeds thereof.

It appears that the defendant No. 1 produced before the Receiver in June 1898 an *ijara* lease without any fixed term, in respect of the said mehal, alleging to have obtained it from the defendant No. 2 on the 7th November 1896 at a rental of Rs. 3,000 a year; and that he applied to the Receiver that rent might be received from him according to the terms of the lease.

Thereupon the plaintiffs instituted the present suit for a declaration that the *ijara* lease of the 7th November 1896, obtained by the defendant No. 1, was null and void as against them.

The defendant No. 1 contended that the plaintiffs' decree was fraudulent, that the suit was barred under s. 244 of the Code of Civil Procedure, that the lease in dispute was not liable to be set aside, and that the suit ought to be dismissed for want of cause of action.

The Subordinate Judge, who tried the case, held that the defendant No. 1 was not a representative of the defendant No. 2 within the meaning of s. 244 of the Code of Civil Procedure, and that therefore s. 244 was no bar to the suit. He also held that the decree obtained by the plaintiffs was not fraudulent, that the attachment of the mehal made at the instance

1900

MATHEWSON v. GOBARDHAN TRIBEDI.

of the plaintiffs was a valid one, that the *ijara* lease was therefore null and void as against the plaintiffs, that the plaintiffs had a good cause of action, and accordingly decreed the suit.

The defendant No. 1 appealed to the High Court.

1900, DECEMBER 18, 19 and 20. Babu *Jogesh Chunder Roy* (for Babu *Bhawani Charan Dutt*), for the appellant.

Babu *Saroda Charan Mitter* and Babu *Munindra Nath Bhuttacharjee*, for the respondents.

1900, DECEMBER 20. The judgment of the High Court (GHOSE and PRATT, JJ.) was as follows :—

This appeal arises out of a suit instituted by a decree-holder against his judgment-debtor and a person to whom the judgment-debtor had granted an *ijara* of the property, which he (the decree-holder) had caused to be attached in execution of his decree. The attachment is said to have taken place on the 29th September 1891, and the *ijara* was executed on the 7th November 1896.

The facts, as set out in the plaint, are that, after the property was attached at the instance of the decree-holder, a Receiver was appointed by the Court to take charge thereof, and to make over the proceeds of the property to the plaintiffs and the other attaching creditors; and that subsequently, while the Receiver was in possession of the property, the defendant No. 1, the *ijaradar*, presented before the Receiver the *ijara pattah* and asked that the rent payable by him under the *ijara* might be received. But what took place upon that application being made is not stated. It is, however, alleged that this *ijara* was granted at a very low rent with the object of throwing difficulties in the way of recovery of the money due to the plaintiffs, and the other decree-holders. The plaintiffs upon these allegations asked that it might be declared that the said *ijara* of the 7th November 1896 was null and void as against them.

The suit was contested by the *ijaradar* upon the ground that the question raised by the decree-holders should be decided by the Court executing the decree under s. 244 of the Code of Civil

Procedure, that there was no attachment properly so-called upon the property, and that the property in question being only a maintenance grant for the lifetime of the judgment-debtor, could not be attached and sold. A further question was raised, namely, whether the plaintiffs had any cause of action.

The Subordinate Judge has negatived all the objections of the defendant, and given the plaintiffs the declaration that they asked for.

The defendant, the *ijaradar*, has appealed against this decree.

Two main points have been discussed before us by the learned vakil for the appellant: *first*, whether the plaintiffs have any cause of action, and *secondly*, whether the suit is barred by the provisions of s. 244 of the Code of Civil Procedure. It would seem that these two questions are intimately connected with each other. Taking the first question however by itself, we should not be prepared to say that the plaintiffs have no cause of action. The terms of s. 42 of the Specific Relief Act are such as would favour a case like this. We need only refer in this connection to two of the illustrations given in that section. The first of these two illustrations, namely (*d*), is: "*A* alienates to *B* property in which *A* has merely a life-interest. The alienation is invalid as against *C*, who is entitled as reversioner. The Court may, in a suit by *C* against *A* and *B*, declare that *C* is so entitled." The other illustration, (*g*), is: "*A* is in possession of certain property. *B*, alleging that he is the owner of the property, requires *A* to deliver it to him. *A* may obtain a declaration of his right to hold the property." It is, we think, impossible to say that, if the *ijarapattah* was set up by the defendant, the *ijaradar*, before the Receiver, in respect of a property which had been attached at the instance of the plaintiffs, and from which property they (the plaintiffs) were entitled to have their decree satisfied, upon such a claim being preferred by the *ijaradar*, the plaintiffs would not be entitled to come to Court and ask for a declaration that the *ijara* set up by the defendant is invalid and inoperative as against themselves. But, however that may be, if the plaintiffs or the Receiver, had brought the matter to the notice of the Court, the Court would have, as we take it, made some order or other upon

1900

MATHEWSON v. GOBARDHAN TRIBEDI.

the matter, *viz.*, whether the Receiver was bound to receive from the *ijaradar* the rent payable under the *ijara pattah* or should he in accordance with the orders of the Court, which had been made, receive the whole of the collections from the property in question. Here comes the consideration of the question, whether this matter could have been dealt with under s. 244 of the Code of Civil Procedure. The words of that section are :—

"The following questions shall be determined by order of the Court executing a decree and not by separate suit (namely) :—(*c*)"—omitting (*a*) and (*b*) which are not material for the purpose of the present question—"Any other questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree."

There can be no doubt that the matter that was raised upon the application of the *ijaradar* was a matter relating to the discharge or satisfaction of the decree, which was then being executed, as we take it, because the action of the Receiver in receiving the rents and profits of the property under orders of the Court and applying the same towards satisfaction of the claims of the various decree-holders was a part of the execution of decrees. That being so, the only question which demands consideration is whether the *ijaradar* could be regarded as a representative within the meaning of the section. For, if he might be so regarded, there could be no doubt that the question now raised by the plaintiffs might well have been dealt with by the Court executing the decree. Whether the defendant No. 1, who, subsequent to the alleged attachment, took a lease of the property and is bound under the lease to pay only a portion of the usufruct of the property as rent thereof for a term of years, is a representative of the judgment-debtor, is a question which is not altogether free from difficulty. But having regard to some of the cases to which our attention has been called by the learned vakil for the appellant, we are not prepared to say, that he is not a representative within the meaning of s. 244 of the Code. In the case of *Lalji Mal* v. *Nand Kishore* (1), where a decree-holder brought a

(1) (1897) I. L. R. 19 All. 332.

suit for declaration that in execution of his decree a certain property, which had been attached at his instance, but which had subsequent to the said attachment been sold to another party, was liable to be brought to sale in execution of his decree, it was held that the purchaser was a representative within the meaning of s. 244 of the Code. The learned Judges' in the course of their judgment, made, amongst others, the following observations :—

"Convenience, which is not always a good reason for laying down a proposition of law, would suggest that a sale which was contrary to the provisions of s. 276 of the Code of Civil Procedure, should, if challenged by the decree-holder, be a matter to be adjudicated upon under s. 244. In our opinion, as the property in question was under attachment at the time the sale took place, the purchaser must be treated as a representative of the judgment-debtor, on the same principle as he would have been a representative of the judgment-debtor by reason of his purchase, if the decree had been one for sale of a particular property. The position of a purchaser of a property affected by a decree for sale was discussed by this Court in *Madho Das* v. *Ramji Patak* (1)." And they accordingly dismissed the suit upon that single ground.

In a later case before the same Court, namely, the case of *Gur Prasad* v. *Ram Lal* (2), the same view was accepted. In that case the plaintiff was the purchaser, and it was determined that the suit brought by him was not maintainable, it being held that he was a representative of the judgment-debtor within the meaning of s. 244 of the Code of Civil Procedure.

Then, in a case decided by a Full Bench of this Court, namely, the case of *Ishan Chunder Sirkar* v. *Beni Madhub Sirkar* (3) the question was raised what was the exact significance of the word "representative" as mentioned in s. 244 of the Code. The facts of that case were that after a mortgage decree was passed, the equity of redemption subsisting in the mortgagor was sold in execution of a money decree at the instance of a third party,

(1) (1894) I. L. R. 16 All. 286.
(2) (1898) I. L. R. 21 All. 20.
(3) (1896) I. L. R. 24 Calc. 62.

1900

MATHEWSON v. GOBARDHAN TRIBEDI.

and the question was raised, whether in the course of the execution of the mortgage decree, he (the purchaser) could be allowed to come in under s. 244 as a representative of the judgment-debtor. It was held that he could come in, and it seems to us that, though the observations that were made by Mr. Justice Banerjee, who delivered the judgment of the Court, had reference to the facts of the particular case before them, yet they were such as to indicate that the word "representative" occurring in s. 244 had a wider significance than "legal representative;" namely, that it includes a person, who is a representative in interest of the judgment-debtor; and this is the view which was substantially accepted by the Allahabad High Court in the case of *Lalji Mal* v. *Nand Kishore* (1), to which we have already referred.

Having regard to the principle that underlies these cases, we think we ought to hold that the *ijaradar* in this case is a representative of the judgment-debtor, and it does not, to our minds, make any substantial difference in that principle, that he has not acquired the whole interest of the judgment-debtor. Suppose the latter sold a fifteen-sixteenth share of the property, which had been attached in execution of a decree, could it be rightly said that, because he retained in his hands a one-sixteenth share, therefore the assignee of the fifteen-sixteenth share of the property was not his representative *quoad* that share? The *ijaradar* in this case has under his *ijara* acquired a substantial interest in the property, he is bound under the terms of his *ijara* to pay, as it is alleged, a small share of the proceeds of the property, he being entitled to appropriate to himself the rest; and, so far as regards the share of the proceeds which has thus been transferred to him, though for a term of years, he might well be regarded as a representative of the judgment-debtor.

Upon these grounds we are of opinion that the contention raised by the learned vakil for the appellant that the present suit is not maintainable, having regard to s. 244 of the Code, ought to prevail.

(1) (1897) I. L. R. 19 All. 332.

1900

MATHEWSON v. GOBARDHAN TRIBEDI.

In this view of the matter, it is not necessary to discuss the other questions raised before us.

The result is that this appeal will be allowed and the suit dismissed, but having regard to the fact that the objection, which has been raised by the defendant, and upon which he has succeeded, is an objection as to the form of action, and does not really go to the merits of the case, and, inasmuch as the merits were in the Court below found entirely against him and in favour of the plaintiffs, we think that each party should bear his own costs in both Courts.

M. N. R. *Appeal decreed.*

ORIGINAL CIVIL.

Before Mr. Justice Harington.

TOOLSI DASS KURMOKAR *v.* MADAN GOPAL DEY.*

1901 *April* 24.

Will, Construction of—Hindu Law—Hindu widow—Adoption—Testator—Alienation—Administrators—Title derived from such Administrators.

When, by will, an authority to adopt is given to a Hindu widow, it does not necessarily follow that the widow takes only a life-estate in the property left to her under the will, especially when the power of disposition over the property is given to her. The intention of the testator must be gathered from the terms of the will itself.

The defendant purchased certain immoveable property from the administrators to the estate of the widow of *R.* who, by his will, left all his moveable and immoveable properties to the widow, authorizing her to take in adoption one or two sons according as she might desire; the will gave her also the power of disposition over the estate:—

Held, that *R.* bequeathed his estate in favor of his widow absolutely; and that the title obtained by the defendant through the administrators of the deceased widow could not be impugned.

Punchoo Money Dossee v. *Troylucko Mohiney Dossee* (1) discussed and distinguished.

ONE Roop Chand Karmokar, a Hindu inhabitant of Calcutta, died in June 1877, leaving him surviving an only widow, Attor-

* Original Civil Suit No. 423 of 1897.

(1) (1884) I. L. R. 10 Calc. 342.