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Ratanchand
Shrichand
v.
Hanmantrav
Shivbakas.

The order of the Court is, that the application to file the appeal be refused, but that the petition be returned with an endorsement directing the party to present it to the Court of the District Judge.

Application refused.

Aug. 26

Civil Petition.

In re R. J. Abraham.

Attachment before judgment—Execution of decrees in Presidency Town—Act XXIII. of 1840—Act VIII. of 1859, Sec. 81

It is competent to the High Court, under Act XXIII. of 1840 to order a warrant of attachment before judgment issued by a Mofussil Court to be executed within the limits of the High Court's ordinary original civil jurisdiction.

This was an application to set aside an order made by Melvill, J., by which he directed the Sheriff of Bombay to execute a warrant of attachment before judgment issued by the Assistant Commissioner of Berar, and by him sent to be enforced within the limits of the ordinary original civil jurisdiction of the High Court.

Melvill, J., endorsed the warrant, and directed it to be executed by the Sheriff of Bombay, in accordance with the provisions of Act XXIII. of 1840.

The petition came on for hearing before GIBBS and MELVILL, JJ.

Gerguson for the Petitioner: The warrant of the Assistant Commissioner is bad on its face, or at least it is one which he had no jurisdiction to issue, and which, therefore, the High Court will not endorse. The procedure of the Court in Berar is governed by the Code of Civil Procedure, and that Code, it is submitted, gives no power to Courts to attach property before judgment out of the limits of the district in which they are situated. Sec. 81 shows that the mischief to be prevented is the removal of property by sale or otherwise from the jurisdiction of the Court in which the suit is pending; for a removal of property into a foreign

State does not come within its scope, unless the property is removed from the jurisdiction of the Court where the suit is pending. For instance, a man against whom a suit is pending in Tanna might remove his property from Bombay to England. Besides, no means are provided by the Code for the attaching before judgment of property out of the jurisdiction of the trying Court, though the manner in which such property is to be attached is laid down in Sec. 85, namely, the manner in which property, according to its nature, is attached in execution of a decree for money. That manner is pointed out in the set of Sections from 232 to 245, headed "Of the execution of decrees for money by attachment of property," to which Sec. 85 plainly refers. "The execution of a decree out of the jurisdiction of the Court by which it is passed" is provided for by another set of Sections, 284 to 296, to which there is no reference in the sections relating to the attachment of property before judgment. Besides, the portion of the Code headed "Of attachment before judgment" follows an almost identical set of sections, headed "Of arrest before judgment," and these latter sections make no provision for executing their process outside the jurisdiction, but contain minute directions for its execution within the jurisdiction. If the Court cannot execute the one process out of its jurisdiction, it might be argued that it cannot execute the other, seeing that the mischief to be prevented in both cases is identical. If, then, the District Courts cannot attach property before judgment in another District, there is no Act that confers upon them the power to execute such process within the local limits of the High Court. Act XXIII. of 1840 does not even purport to enlarge the jurisdiction of the District Courts; it merely confers upon the High Court certain powers which it did not before possess—that of executing the processes of the Mofussil Courts—the processes that such Courts have jurisdiction to issue. If they have not this jurisdiction *ab initio*, Act XXIII. of 1840 does not confer it upon them. If this is held to be otherwise, you have the curious anomaly in the comity of Courts all acting under a common Code of Procedure that a Mofussil Court can attach property before judgment within the local limits of

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the High Courts, and cannot do so within the local limits of another Mofussil Court.

GIBBS, J.:—One Hardayal Govindram brought an action against one Charles Smith in the Court of the Assistant Commissioner of Berar to recover a sum of money, and at the same time made an application, under Sec. 81 of the Code of Civil Procedure, to attach some moneys belonging to the said Charles Smith, and in deposit in the Oriental Bank Corporation, at Bombay. The application having been granted, a warrant was accordingly issued from the Court to attach those moneys. In conformity with the procedure laid down in Act XXIII. of 1840, Sec. I, for serving processes of Mofussil authorities within the local limits of the High Court in its ordinary original jurisdiction, my learned colleague endorsed the warrant, and directed the Sheriff to execute the same according to the nature thereof. In obedience to this direction, the Sheriff attached a sum of one thousand rupees, in deposit at the oriental bank, belonging to the defendant abovenamed.

Subsequent to the date of the attachment, two checks, drawn on the date of the attachment, in favour of the petitioner, Mr. Abraham, for services rendered as attorney, were presented for payment, which of course, was refused, and Mr. Abraham was referred to the drawer. Hence this application to set aside the attachment.

It has been contended by the learned counsel that the High Court had no jurisdiction to attach the moneys before judgment, as they were beyond the jurisdiction of the Assistant Commissioner's Court at Berar, whose warrant was therefore bad on the very face of it; and that if it were held otherwise, a strange anomaly would be the result, namely, that while the processes of the High Court would not be executed in the Mofussil, those of Mofussil Courts would be executed in Bombay.

We are of opinion that Sec. 81 of the Code of Civil Procedure, under which the warrant issued, does not require the property to be attached before judgment to be within the

jurisdiction of the Court issuing the warrant. That Section sets out two states of facts: (1) if a defendant is about to dispose of his property, or any part thereof; or (2) to remove any such property from the jurisdiction of the Court where the suit is pending, in either case the Court may direct that any property, moveable or immoveable, belonging to the defendant shall be attached. As regards the property mentioned under the first state of facts, it does not matter whether it be within or without the jurisdiction of the Court. The Code further provides that attachment before judgment shall be made in the same manner as attachment after judgment in execution of a decree for money. The procedure for enforcing attachment warrants within the town and island of Bombay is provided for in Act XXIII. of 1840. Some time ago we had to consider this Act in Chambers, and we found that it was in full operation. The order made by Mr. Justice Melvill for executing the warrant was in accordance with the Act. And the fact that the warrant to be executed was for attachment before judgment, does not, in our opinion make any difference.

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It has also been contended that this is the first instance in which attachment before judgment has been asked to be executed by the Mofussil Courts. Whether that be so or not, we entertain no doubt that the Mofussil Courts have the power, under the Code of Civil Procedure, to order and direct attachments before judgments, and there is nothing shown why this Court has not power to enforce such warrants through the Sheriff within the town and island of Bombay. If the order of the Berar Court was illegal, and the defendant was not satisfied with it, it was open to him to appeal under S. c. 85 of the Civil Procedure Code. The only cases on this subject are in Perry's Oriental Cases, p. 402, *Kharsedji v. Dadabhai*, and p. 403, case of Dharwar Process. In the former case Perry, C. J., commenting on Act XXIII. of 1840, says: "The plain object of the Act appears to me to be to prevent the frustration of justice by the jurisdiction of the Supreme Court interfering with the execution of Mofussil process over persons and property subject to the Mofussil Courts."

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 R. J. Abraham. and I think that, to carry out this object, it is the duty of this Court to be forward in lending its assistance to back any Mofussil process that may be presented to it; and I would, therefore, strive to make the act of the Judge as ministerial as possible, and would never refuse to endorse except on grounds that appear to me irresistible." In the latter case it is true the same learned Judge held that the endorsement by Queen's Judges is judicial and not ministerial, but that this was concurred in by Yardley, J., seems doubtful; and it was said to be opposed to an opinion of the then Chief Justice of Calcutta, Sir Lawrence Peel.

Without deciding whether the act of endorsement is a purely ministerial duty or not, we consider that no objection to the legality of the order has been shown, and we therefore decline to interfere.

Petition rejected.

Sept. 2.

Civil Petition.

Mahashankar Harishankar *Petitioner.*
 Valibhai Umanji *et al* *Opponents.*

*Extraordinary jurisdiction—Regular Suit—Reg. II. of 1837,
 Sec. 5—Civ. Proc. Code, Secs. 270, 271.*

In cases not appealable the High Court will not usually interfere in the exercise of its extraordinary jurisdiction where the petitioner applying has his remedy by regular suit.

This was a petition against an order made by the Acting Senior Assistant Judge at Broach in Miscellaneous Appeal No. 3 of 1869, rejecting an appeal from an execution order made by the Munsif of Broach.

The petitioner obtained two decrees against one Pai Raja in the Sadr Amin's Court at Broach, and applied for the execution of his decrees out of the balance of the proceeds of the sale of Bai Raja's *bhag*, after satisfying the claim of an attaching creditor, Parshotam Bhaishankar, who had obtained a decree against the said Bai Raja in the Court of the Munsif of Broach, and had caused the said property to be attached and sold on the 10th of November 1866.