

1880

JAN. 6.

APPEL-  
LATE  
CIVIL.

4 B. 323=5 Ind. Jur. 257.

APPELLATE CIVIL.

*Before Mr. Justice M. Melvill and Mr. Justice F. D. Melvill.*HARILAL AMTHABHAI (*Plaintiff*) v. ABHESANG MERU AND OTHERS  
(*Defendants*).<sup>\*</sup> [6th January, 1880.]4 B. 323=  
5 Ind. Jur.  
257.*The Code of Civil Procedure (Act X of 1877), ss. 268, 278 and 287—Prohibitory order—Attachment of a debt due to judgment-debtor—Proclamation of sale—Decree—Execution.*

A decree-holder by a prohibitory order issued under s. 268 of the Civil Procedure Code, attached a debt due to his judgment-debtor. The person served with the order applied, under s. 278, to have the attachment removed.

*Held*, that the application could not be entertained under s. 278, that section having no application to the case; but that before issuing a proclamation of sale, in execution of a decree, of the debt so attached, it is the duty of the Court, under s. 287 of the Code, to ascertain all that the Court considers it material for the intending purchaser to know in order to judge of the nature and value of the property proclaimed for sale. If the property, of which sale is sought, is a debt, and the Court receives notice from the alleged debtor that no debt exists, the Court should satisfy itself as to the existence, or otherwise, of the debt, and, if it comes to the conclusion that no debt exists, should abstain from proceeding to sale.

[F., 10 M. 194 (196); R., 27 M. 67; 14 C.P.L.R. 124; *Disappr.*, 3 Bur. L.T. 34=8 Ind. Cas. 608.]

THIS was a reference under s. 617 of the Code of Civil Procedure (Act X of 1877) for the orders of the High Court by Rao [324] Saheb R. Desai, Subordinate Judge, Nadiad, who stated the case as follows:—

"The points are:

"1. Can an application by a person, served with a prohibitory order under s. 268 of the Civil Procedure Code (Act X) of 1877, to have the attachment raised, on the ground that the debt did not exist at the time of the attachment, be entertained under s. 278, Civil Procedure Code?

"2. If not, can the attachment be raised on his satisfactorily proving his allegation, in the investigation under s. 278, Civil Procedure Code?

"In this case the decree-holder, Harilal Amthabhai, obtained a decree in suit No. 184 of 1878 against Abhesang Meru and others for the sum of Rs. 28-5-3. In execution of this decree, the said decree-holder applied to the Court to have the debt due by one Galabhai Becherdas to his judgment-debtor, Abhesang Meru, attached, under s. 268 of the Civil Procedure Code, and a prohibitory order was accordingly served on the said Galabhai Becherdas on the 23rd ultimo, prohibiting him from making the payment of the debt, until the further order of this Court. The same Galabhai now applies under s. 278, Civil Procedure Code, to have the attachment raised, alleging that he had paid off the amount due by him to the judgment-debtor, Abhesang, before the receipt of the prohibitory order. \* \* \*

"In a precisely similar case (*Mansukh Umed v. Bhagwandas Jumna-das* (1)) under Act VIII of 1859, their Lordships have, on 14th January

\* Civil Reference, No. 23 of 1879.

4 B. 324-N.

(1) NOTE.—In the case of *Mansukh Umed v. Mohanlal Madhav* the question submitted for the decision of the High Court was "whether or not an objection, taken

1868, on reference from the then Judge of the Court of [325] Small Causes at Ahmedabad, ruled, that the Court issuing the prohibitory order should, upon application, inquire into the existence of the debt attached, and this ruling does not seem to have been expressly overruled. \* \* \* \*

"I am bound to bring it to the notice of the Honourable the High Court that in *Lallu Girdhar v. Shankardas Ramji* (1), a case referred by the Judge of the Court of Small Causes at Ahmedabad, their Lordships have, on the 17th July 1877, ruled, that on application under s. 246 of Act VIII of 1859, by a person served with a prohibitory order under s. 234 of the said Act, to have the said order cancelled, cannot be entertained by that Court, and that their Lordships have observed that they did not perceive how the person served with the prohibitory order could in any wise be damned by the said order; but, as stated above, I respectfully beg to submit, that a person served with a prohibitory order is in the same position as any other person whose property is wrongfully attached. Besides, this ruling does not seem to have been reported, nor does it expressly overrule the ruling in the case of *Mansukh Umed v. Bhagwandas Jamnadas* referred to above, though opposed to it. Again, I do not see the use of the words "or of some person in trust for him" in s. 280 of the Civil Procedure Code, if the persons served with the prohibitory orders were to be held debarred from applying [326] to have the attachment raised under s. 278 of the Civil Procedure Code.

"The points on which I solicit their Lordships' opinion are of general importance, and I myself feel doubt as to the course I should follow. I, therefore, deem this reference necessary.

"My opinion on the first point is in the affirmative.

"My opinion on the second point is in the negative.

"My view of the law being as above, I have admitted the application, contingent upon the decision of the Honourable the High Court."

There was no appearance on either side.

to the sale of an alleged debt and deposit, should be duly inquired into under s. 246 of Act VIII of 1859—the objection being, that such debt and deposit do not exist." This section corresponds to ss. 278, 280, 281, and 283 in a modified form. The decision of the Court was: "The Court is of opinion that the Court, by which the prohibitory order has been made, should, upon the application of the alleged debtor, inquire into the existence of the debt, and, if there does not appear to be *prima facie* evidence of it, should set aside the prohibitory order.

#### 4 B. 325-N.

(1) NOTE.—In the case of *Lallu Girdhar v. Shankardas Ramji*, the Judge of the Court of Small Causes at Ahmedabad submitted this question: "Can the Small Cause Court, under s. 246 of Act VIII of 1859, entertain any application for the cancelling of a prohibitory order under s. 234 of the Act, on the ground that the person served with such order is not in possession of the property mentioned in such order?" The Judge was of opinion that s. 246 did not apply, and that he had no authority to make any such order. He maintained that a prohibitory order under s. 234 of Act VIII of 1859, which in a modified form corresponds with s. 268 of the new Code, the applicant was in no way damned. He need do nothing till he was sued by the execution purchaser, and could then set up his own defence. The High Court's decision was as follows:— "This Court concurs in the opinion of the Judge of the Court of Small Causes at Ahmedabad, that this Court cannot entertain an application to cancel a prohibitory order issued under s. 234 of Act VIII of 1859, on the ground that the person served with such order is not in possession of the property mentioned in such order; nor in such case does this Court perceive how that person can in any wise be damned by that order. 17th July 1877."

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## PER CURIAM.

The Court is of opinion that s. 278 of Act X of 1877 has no application to the case stated by the Subordinate Judge. But s. 287 renders it the duty of the Court executing a decree, to ascertain, before issuing a proclamation of sale, all that the Court considers it material for the purchaser to know, in order to judge of the nature and value of the property. If, therefore, the property, of which sale is sought, is a debt, and the Court receives (as in the present case) notice from the alleged debtor that no such debt exists, the Court should satisfy itself as to the existence, or otherwise, of the debt; and if it comes to the conclusion that the debt does not exist, should abstain from proceeding to sale.

4 B. 326 = 5 Ind. Jur. 259.

## APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice (Officiating),  
and Mr. Justice M. Melvill.

GIRDHAR NARAN (*Plaintiff*) v. UMAR AJU (*Defendant*).\*  
[27th January, 1880.]

Stamp Act XVIII of 1869, s. 9—*One-anna stamp—Account stated—Interest.*

Under Act XVIII of 1869, s. 9, a one-anna stamp is the proper stamp for a document containing an account stated, and stipulating for payment of interest.

THIS case was referred for the opinion of the High Court by N. N. Nanavati, Subordinate Judge (Second Class) at Viramgam, in the District of Ahmedabad, with the following statement:—

[327] "The plaintiff, Girdhar Naran, has presented this day a plaint in which he sues to recover a sum of money, with interest, due on foot of an account stated and signed by the defendant Umar Aju. The account runs to this effect in plaintiff's book:—

" *Khata* of Sipai Umar Aju.

*Cr.*

29 Balance struck on 10th January 1879 (corresponding with)  
Pass Vad 3rd, after adjustment of account.

(Signed) Umar Aju.

Written by self, Rupees twenty-nine is the balance due; it is correct. Interest to be paid at one pie per rupee per mensem. This balance is struck on 10th January 1879.

" This account bears an anna stamp.

" The question is, whether this account, which stipulates for payment of interest, is duly stamped?

" I am respectfully of opinion that it is not.

" The *khata* having been adjusted, acknowledged and signed by the debtor on 10th January 1879, the law applicable to it is the General Stamp Act, XVIII of 1869.

" It is argued for the plaintiff that this account falls within art. 5 of sch. II of Act XVIII of 1869, according to which an anna stamp is to be affixed to an acknowledgment of account. \* \* \* \*

\* Civil Reference No. 16 of 1879.