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*Before Mr. Justice Starling and before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.*

*In re* PREMJI TRIKUMDAS.* [11th and 23rd March, 1893.]

*Civil Procedure Code—(XIV of 1882), s. 267—Practice—High Court Rule No. 183—Order made by a Judge in chambers on client to pay taxed costs of his attorney—Right of attorney to execute such order as a decree—Application under s. 622 of Civil Procedure Code (XIV of 1882) to review such order.*

An order obtained from a Judge in chambers by an attorney against his client for the payment of costs is a decree or order, to the execution of which the provisions of chap. XIX of the Civil Procedure Code (XIV of 1882) apply.

[515] Section 267 of the Civil Procedure Code is applicable to all the property of the judgment-debtor out of which the decree can be satisfied either by delivery in obedience to the decree or by sale.

The words "liable to be seized" contained in s. 267 of the Civil Procedure Code are words of description pointing out the kind of property in respect of which an enquiry can be held, *viz.*, any property which is attachable under the decree.

Property of a judgment-debtor which he has mortgaged is *prima facie* liable to be seized in execution of a decree against him, and the fact that he has mortgaged it will not prevent its being attached and sold in execution of the decree subject to the mortgage-debt.

A person may be examined, under s. 267, in respect of property which is *prima facie* the property of the judgment-debtor, although such person may allege that he is a mortgagee in possession of the attached property.

Section 622 of the Civil Procedure Code (XIV of 1882) does not apply to a case where the order of which review is sought, is made by the High Court. The Court referred to in s. 622 is a Court other than the High Court.

[R., 54 P.R. 1901=45 P.L.R. 1901.]

SUMMONS in chambers.

On the 26th January, 1893, Messrs. Bhaishankar and Kanga, attorneys, took out a summons calling on Premji Trikumdas to show cause why he should not be ordered to pay to them a sum of Rs. 6,256-2-1, being the balance of taxed costs due to them in respect of certain suits in which they had acted as his attorneys. The summons was obtained under Rule 183 of the High Court Rules, which is as follows:—

"An attorney, when he has taxed his bill of costs against his client, may obtain an order in chambers for payment of the sum allowed on taxation, and such order may be executed under chap. XIX of the Code of Civil Procedure."

On the 6th February, 1893, the above summons was made absolute, and Premji Trikumdas was ordered to pay Messrs. Bhaishankar and Kanga the said sum of Rs. 6,256-2-1.

On the 9th February, 1893, Mr. Bhaishankar Nanabhoy, the senior partner of the firm of Bhaishankar and Kanga, filed an affidavit, in which he alleged that the said Premji Trikumdas was concealing himself, and keeping out of the way, in order to delay and defeat the execution of the above order passed against him. He further alleged that Premji Trikumdas had mortgaged certain immoveable property to his wife, Premabai, and had pledged [516] valuable ornaments to a Marwari, Jana Ookha, and

* In the matter of suits Nos. 657 of 1869, 421 of 1883, 374 of 1890, 613 of 1890, 461 of 1891, and 580 of 1891.

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that these three persons, *viz.*, Premji Trikumdas, Premabai, and Jana Ookha, were able to give information as to property liable to be attached in execution of the said order.

Upon this affidavit an order was obtained on the 9th February 1893 under s. 267 of the Civil Procedure Code (XIV of 1882), requiring Premji Trikumdas, his wife Premabai and Jana Ookha to attend before the Judge in chambers to be examined in respect of any property in their possession liable to be seized in satisfaction of the order of the 6th February, 1893, and to answer all such questions as might be put to them, &c., and requiring the said Premabai to produce all deeds and documents relating to any of the immoveable property mortgaged, or alleged to have been mortgaged, with her by the said Premji Trikumdas, &c.

Premabai thereupon filed an affidavit, in which she stated that on the 3rd December 1891 Premji Trikumdas had mortgaged certain immoveable property to her, and that having failed to pay her the interest due on the mortgage he had given her possession of the property on the 21st October 1892, since which date she had continued in possession; and that on the 9th February Messrs. Bhaishankar and Kanga had attached the said property under an order of 6th February 1893. On the allegations contained in this affidavit she, on the 17th February 1893, obtained a summons calling on Messrs. Bhaishankar and Kanga to show cause why the above order of the 9th February 1893 should not be set aside.

The summons now came on for hearing.

*Macpherson*, for Messrs. Bhaishankar and Kanga showed cause.

*Jardine*, for Premabai in support of the summons.

The following authorities were referred to:—*Bhugobat Singh* v. *Ram Adhin Singh* (1); *Maharajah Rajendro Kishore Singh Bahadoor* v. *Hyabul Singh* (2); *Kassirav* v. *Vithaldas*(3); Civil Procedure Code (XIV of 1882), ss. 267, 647—649.

ORDER.

13*th March* 1893. STARLING, J.—In this matter Mr. Bhaishankar, on having obtained an order for payment of costs in a number [517] of suits against his client Premji Trikumdas, attached certain property of which Premji was the owner, but which it was alleged he had mortgaged to his wife, Premabai, and of which he subsequently put her in possession.

On the 9th February, 1893, Mr. Bhaishankar obtained an *ex parte* order from me under s. 267 of the Civil Procedure Code, directing Premabai to appear and be examined. On the 17th February, 1893, Messrs. Bicknell, Merwanji and Motilal on behalf of Premabai obtained a summons from me calling upon Mr. Bhaishankar to show cause why that order should not be set aside.

The grounds on which the order was sought to be set aside were that Mr. Bhaishankar was not a decree-holder; that the section only applies to property which, under the decree, had to be given up *in specie*; and that, if it did apply to property which could be attached and sold in execution of a decree, then that the property in question was not "liable to attachment, as Premabai was a mortgagee in possession, and that this property was not liable to be seized," as it had already been attached.

Section 267 provides that "the Court may, . . . on the application of a decree-holder, summon any person whom it thinks necessary, and examine him in respect to any property liable to be seized

(1) 22 W.R.C.R. 330. (2) 17 W.R.C.R. 379. (3) 10 B.H.C.R. 100.

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in satisfaction of the decree, &c." Now, the High Court Rule No. 183 provides that "an attorney when he has taxed his bill may obtain an order in chambers for payment of the sum allowed in taxation, and such order may be executed under chap. XIX of the Code of Civil Procedure." Section 647 of the Civil Procedure Code provides that 'the procedure prescribed in the Code shall be followed in all proceedings in any Court of civil jurisdiction other than suits and appeals;' and s. 649 provides that "the rules contained in chap. XIX shall apply to the execution of any judicial process for the arrest of a person or the sale of property or payment of money, which may be desired or ordered by a Civil Court in any civil proceeding."

Taking all these provisions together I must hold that an order obtained by an attorney against his client for the payment of costs is a decree or an order to the execution of which the provisions of chap. XIX of the Code apply; and as s. 267 is[518] a portion of that chapter, its provisions are also applicable to proceedings taken in the execution of such an order. Then, is property which is desired to be attached in execution of a money decree "property liable to be seized in execution of a decree"? I think it is. The words are not "property ordered to be delivered under or in execution of a decree," which might limit the powers of the Court to the ascertaining what the property was to which the decree referred, but "property liable to be seized in *satisfaction* of a decree," and, in my opinion, the word "satisfaction" causes the section to be applicable to all the property of the judgment-debtor out of which the decree can be satisfied, either by delivery in obedience to the decree, or by sale.

I am further of opinion that the words "liable to be seized" do not point to any particular period of time at which the enquiries may be made, so as to confine the operation of the section to a period anterior to the issue of process, but are words of description pointing out the kind of property in respect of which an enquiry can be held, *viz.*, any property which is attachable under the decree. The only point now to be determined is whether the allegation by Premabai, that she is a mortgagee in possession, prevents the property being "property liable to be seized." The property in question is admittedly the property of the judgment-debtor, and therefore, *prima facie*, is liable to be seized in execution of a decree against him; and the fact that he has mortgaged it will not prevent its being attached and sold in execution of the decree subject to the mortgage-debt.

It is quite true that a mortgagee in possession may come in and get removed an attachment against the property of which he is in possession; yet I do not think that the fact that the person who is sought to be examined alleges, even on oath, that he is a mortgagee in possession (such allegation not having been tried and determined by the Court) deprives the Court of the power to order such a person to be examined respecting the property; because it must be remembered that at the time the order has to be made, in all probability it is not known whether the mortgagee is in possession or not, and it is possible that, on examination, the Court might be of opinion that the examinee was either not in possession at all, or not in possession *as mortgagee*, [519] and thereafter order an attachment to be placed or continued on it. To hold that such an allegation would prevent the Court examining such a person, would be, in my opinion, placing a premium upon judgment-debtors setting up persons to prefer false claims as mortgagees in possession, and would thus hamper the Court in giving to judgment-creditors that assistance to which they are entitled

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at its hands. Consequently I hold that the order of 9th February, 1893, was rightly made, and the summons of the 17th February, 1893, must be dismissed with costs. Counsel certified for.

*Summons dismissed.*

On the 23rd March, 1893, *Lang* (Acting Advocate General) on behalf of Premabai applied to the Court (consisiug of Sargent, C.J., and Telang J.) in its extraordinary jurisdiction for revision of the order made by Starling, J., on the 9th February, 1893, under s. 622 of the Civil Procedure Code (XIV of 1882), and for a rule *nisi* calling on Messrs. Bhaishankar and Kanga to show cause why the said order should not be set aside, and also for an *interim* stay of the said order.

JUDGMENT.

SARGENT, C. J.—We do not think we have power to grant the application under s. 622. That section does not seem to apply to a case like this, where the order, of which a review is sought, was made by the High Court. We think the Court referred to in the section, whose records may be called for, is a Court other than the High Court, and we must, therefore, refuse this application.

*Application refused.*

Attorneys:—Messrs. *Bhaishankar and Kanga*, and Messrs. *Bicknell, Merwanji and Motilal.*

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## [520] ORIGINAL CIVIL.

*Before Mr. Justice Farran, and on appeal before Sir. Charles Sargent, Kt., Chief Justice, and Mr. Justice Starling.*

JAFFERBHOY LUDHABHOY CHATTOO (*Defendant*), *Appellant v.* THOMAS D. CHARLESWORTH AND OTHERS (*Plaintiffs*), *Respondents.** [17th and 18th March, 1893.]

*Principal and agent—Principal and factor—Consignment for sale—Advances by factor on consignment—Right of factor to sell goods consigned to him for sale below the limit of price prescribed by consignor.*

In January 1889 an agreement was made between the plaintiffs and the defendant which provided that the defendant in Bombay was to act for the plaintiffs "in influencing consignments of produce" to the care of the plaintiffs in London. Such produce was to be sold by the plaintiffs in London for a certain commission and brokerage. One of the terms of the agreement was that the business in England was to be worked entirely in the defendant's name and the defendant was to "undertake to guarantee the plaintiffs free of all loss in connection with the said consignments and to guarantee the payment of redrafts, &c."

On the 25th January 1889 the defendant consigned 435 packages of cloves to the plaintiffs in London and drew against the consignment a draft for £2,100 on the plaintiffs. In his consignment letter the defendant stated that the consignment was from his constituent Chatturbhuj Khimji, but that as Rs. 30,000 had been advanced to him, the consignment was shipped in the defendant's name. The letter continued: "The cost is 9½d. per pound, but he expects more, and *not to be sold under the above rate.*"

The sum drawn against the cloves (£2,100) was £400 in excess of their value, and on receipt of the consignment letter on the 11th February 1889, the plaintiffs at once telegraphed to the defendant to remit by cable £400 against overdraft

* Suit No. 139 of 1890; Appeal No. 735.