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of the Code of Civil Procedure. These restrictions leave still a difference between "a regular suit" and a testamentary suit. That the Legislature intended the difference to exist is apparent from the special provisions in the Court Fees Act (VII of 1870) for the valuation of Court fee in the case of an application for probate, as distinguished from a suit. As section 83 of the Probate Act brings a probate proceeding within the description of a suit by means of a statutory fiction the purposes of which are expressly limited to the provisions of the Code of Civil Procedure, we think we should be extending the scope of that fiction beyond its legitimate limits if we were to allow the argument of the learned Government Pleader. We hold, therefore, that the long standing practice of the Court as regards the valuation of Pleader's fees in probate proceedings should continue.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

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AMARSANG MAVSANG (ORIGINAL DEFENDANT), APPELLANT, *v.* JETHALAL MAGANLAL AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS*.

Toda Giras Allowance Act (Bom. Act VII of 1887), section 5†—Toda Giras allowance—Attachment and sale of in execution of a decree—"Money likely to become due," interpretation—How far can the allowance be attached and sold.

The plaintiff, who held a money-decree against the defendant, applied for its execution by sale of the *toda giras* allowance which the latter was entitled to receive periodically from the Mámlatdár's Kacheri. The specific prayer in the application was the attachment and sale of the allowance which was to become payable to the defendant during the twenty years following the application. The lower Courts held that the defendant's life interest in the *toda*

* Second Appeal No. 599 of 1907.

† The section runs as follows:—

"No *toda giras* allowance shall be liable to attachment or sale in execution of a decree:

"Provided that any money due or likely to become due to a judgment-debtor on account of a *toda giras* allowance may be attached in execution of the decree against him, but such attachment shall not affect any money which becomes due on account of such allowance after such judgment-debtor's death."

giras allowance computed at its valuation for twenty years, could be attached and sold in execution of the decree:—

Held, reversing the order, that it is clear from the language of section 5 of the Toda Giras Allowance Act (Bombay Act VII of 1887) that it is not the life interest of the judgment-debtor in a *toda giras* allowance, but something short of it that is allowed by the Act to be attached.

The words "money likely to become due" in section 5 of the Act must be restricted to the case where, for instance, during the life-time of the judgment-debtor, a sum of money is directed by the Collector to be paid to him on account of a *toda giras* allowance not immediately but on a date subsequent to the date of the order of direction, and the judgment-debtor dies before that date; and to other cases of a similar character.

Under what circumstances money is likely to become due on account of a *toda giras* allowance is a question which cannot be answered exhaustively and must depend on the facts of each case as it arises.

APPEAL from the decision of A. C. Wild, District Judge of Ahmedabad, confirming the decree passed by B. J. Desai, Subordinate Judge at Kaira.

Proceedings in execution.

There was a money decree passed in favour of Jethalal Maganlal against Amarsang Mavsang. In execution of this decree, the decree-holder applied for attachment and sale of the *toda giras* allowance of Rs. 303 payable every year to the defendant from the Mámlatdár's Kacheri at Mehmadabad. The allowance sought to be attached was that which was to become payable to the defendant during the following twenty years.

The defendant contended that the *giras* allowance could not be attached and sold; that the allowance for twenty years which the decree-holder sought to attach and sell as a debt had not become due; that what was uncertain and dependent upon the pleasure of Government could not be attached and sold; and that the allowance was paid to him for his maintenance.

The Subordinate Judge overruled the defendant's contentions and allowed the execution to be proceeded with. His reasons were stated as follows:—

It appears that the allowance in question is of a nature of a *toda giras* allowance (see the copy of the agreement, condition 1). In the case of the *Secretary of State* v. *Khemchand*, I. L. R. 4 Bom. 432, it has been held that a *toda giras*

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hak is not exempted from attachment. Section 5 of Act VII of 1887 (Bombay) exempts the *toda giras* allowance from liability to attachment and sale in execution of a decree but provides that any money due or likely to be due to a judgment-debtor may be attached in execution of a decree against him. It is thus evident that the money likely to be due to the judgment-debtor is expressly declared liable to attachment. I am, therefore, of opinion that the decree-holders in this case have a right to proceed in execution against the moneys likely to be due to the judgment-debtor on account of the *toda giras* allowance.

On appeal this order was confirmed by the District Judge on the following grounds:—

A 'giras' allowance which is a vested right and only to be discontinued under certain conditions is not a merely contingent or possible right or interest and section 266 (*k*), Civil Procedure Code, and the definition of contingent interest to be found in section 21 of the Transfer of Property Act do not come in the decree-holder's way.

It is admitted by appellant's pleader that this is a *toda giras* allowance but the ruling in I. L. R. 4 Bom. 432 of 1880 that a *toda giras* allowance is not exempted from attachment is of a date prior to the enactment of Act VII of 1887. Section 5 of this Act shows that the whole allowance is not attachable, but the proviso to the section permits cash payments likely to be due to the judgment-debtor until his death to be attached. Accordingly the 20 annual cash payments which will certainly be paid to judgment-debtor unless he first dies may be attached by the decree-holder.

In Government Resolution No. 3436 of 5th April 1906 the Legal Remembrancer expresses the opinion that the sale of a giras allowance for some years in execution of a decree is allowable under sections 268 and 284, Civil Procedure Code, but it is argued that a debt to be attached under that section must be one that is actually due not, as here one that became due from year to year. Here reference is made to I. L. R. 27 Cal. 38 and 14 Moore's Indian Appeals 40. In the first of these rulings it is laid down that the debt must be an actually existing debt not merely money that may or may not become payable at some future time; in the second it is held that the sum attached must not be inchoate but existing and definite. The liability of Government to pay the giras allowance is an existing liability though the allowance is to be paid in the future and annually. There is no uncertainty about the payment, and I, therefore, hold that the allowance comes within the definition of debt in Civil Procedure Code, section 266, and may be attached under section 268, Civil Procedure Code.

It is urged that to allow the sale of the allowance would be contrary to public policy as it is given to its recipient for services to be rendered to Government in keeping the peace and preserving order. It would appear however that the allowance is of the nature of compensation to free-booters for the loss of the black-mail which they used to levy, *vide* I. L. R. 4 Bom. 432. The

girasia in the sanads exhibits 13 and 14 binds himself not to plunder, and to serve Government if called upon. I understand however that no service is now required from the holders of giras allowances, and they certainly in no case will be allowed to plunder. It will therefore not be impossible to permit the present allowance to be attached.

The judgment-debtor appealed to the High Court.

T. R. Desai for the appellant:—A *toda giras* allowance is payable on certain conditions according to the terms of the sanad conferring it. The Government have always a right to demand services from the grantee. It can be revoked at any time: it is not certain and definite and the continuance of the allowance in future is not a matter of right. It is not a debt within the meaning of section 266 of the Civil Procedure Code; and so the amount that will accrue due during the next twenty years cannot be attached and sold. Refers to *Haridas Acharjia* v. *Baroda Kishore Acharjia*[1]; and *Syud Tuffuzzool Hossein Khan* v. *Rughoonath Pershad*[2].

Section 5 of the Toda Giras Allowances Act (Bombay Act VII of 1887) expressly excludes the right from attachment and sale. There may be attachment of what is actually due: but what is yet to become due in the future cannot be attached. The words "likely to become due" in the section should be strictly construed having regard to the nature of the allowance and the policy of the statute.

V. G. Ajinkya for the respondent:—The right to receive allowance is a right pertaining to the judgment-debtors. It is definite and regularly payable. The right is not within the proviso of section 5 of the Toda Giras Allowances Act (Bombay Act VII of 1887).

CHANDAVARKAR, J.:—The respondents, having obtained a decree for money against the appellant, applied for its execution by sale of the *toda giras* allowance which the appellant was entitled to receive periodically from the Mámlatdár's Kacheri at Mehmadabad. The specific prayer in the application was the attachment and sale of the allowance which was to become payable to the appellant during the twenty years following the application.

(1) (1899) 27 Cal. 38. (2) (1871) 14 Moo. I. A. 40.

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The appellant resisted the prayer upon the ground that the allowance could not be attached and sold, whether under section 266 of the Code of Civil Procedure or under section 5 of Bombay Act No. VII of 1887. This objection to the attachment and sale has been disallowed by both the Courts below.

Section 5 of Bombay Act VII of 1887 enacts that "no *toda giras* allowance shall be liable to attachment or sale in execution of a decree, provided that any money due or likely to become due to a judgment-debtor on account of a *toda giras* allowance may be attached in execution of the decree against him, but such attachment shall not affect any money which becomes due on account of such allowance after such judgment-debtor's death." The words "likely to become due" in this section have been construed by both the lower Courts to apply to the life-interest of the holder of a *toda giras* allowance. Accordingly they have held that such life-interest, computed at its valuation for 20 years, can be attached and sold in execution of a decree against the holder.

The difficulty in accepting this view of the lower Courts lies in the difference in point of language between section 5 and the preceding section. The latter (section 4 of the Act) provides that "no mortgage, charge or alienation of a *toda giras* allowance, or of any part thereof, or of any interest therein, by any recipient of the same, shall be valid as to any time beyond such recipient's natural life." That is, a private alienation by the recipient shall be valid to the extent of his life-interest but not beyond it. If the Legislature had intended the same to be the case as regards an alienation by way of attachment and sale in execution of a decree, similar phraseology would have been used in section 5. Nothing could have been simpler in that case than for the Legislature to have said in section 5 that such attachment and sale shall not be valid beyond the natural life of the holder of the allowance. But so far from using any such language, which would have been apt to show that that was their intention, the Legislature have used language in the enacting part of section 5 which prohibits in absolute terms the attachment and sale of a *toda giras* allowance in execution of a decree; and then in the proviso which follows they make an exception in the case of

"moneys due or likely to become due" to the judgment-debtor. But even as to such moneys the proviso says that the right to attach and sell in execution of a decree shall fail if they become due on account of such allowance "after such judgment-debtor's death." The meaning of this is obvious. Suppose, to take one of several cases that might be put in illustration, during the life-time of the judgment-debtor, a sum of money is directed by the Collector to be paid to him on account of a *toda giras* allowance not immediately but on a date subsequent to the date of the order of direction; the judgment-debter, however, dies before that date. Now, under the ordinary law, notwithstanding the death, when the date fixed for payment arrives, the money would become payable to the estate of the deceased as part of his assets, and it could be attached in execution of a decree against him, as a portion of his life-interest in the allowance. But the proviso to section 5 alters the ordinary law and provides that even in such a case there shall be no attachment.

It seems clear from this language of section 5 that it is not the life-interest of the judgment-debtor in a *toda giras* allowance but something short of it that is allowed by the Act to be attached. The words "money likely to become due" must, therefore, be restricted to such a case as the one we have mentioned above in illustration and other cases of a similar character. Under what circumstances money is likely to become due on account of a *toda giras* allowance is a question which cannot be answered exhaustively and must depend on the facts of each case as it arises.

For these reasons we must reverse the decree appealed from and remit the present darkhást for disposal according to law with reference to the foregoing observations. Costs to abide the result.

Decree reversed.

R. R.