

**Mukhtar Ahmad Vs. Muqarrab Husain**

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**SooperKanoon Citation :** [sooperkanoon.com/454410](http://sooperkanoon.com/454410)

**Court :** Allahabad

**Decided On :** May-15-1912

**Reported in :** (1912)ILR34All530

**Judge :** Karamat Husain and ;Tudball, JJ.

**Appellant :** Mukhtar Ahmad

**Respondent :** Muqarrab Husain

**Judgement :**

Karamat Husain and Tudball, JJ.

1. In this case property was attached on the 17th of July, 26th of July, 27th of July, 28th of July, and 12th of August, 1909. The decree-holder along with his application filed an affidavit, dated the 15th of May, 1909, giving full particulars as required by Order XXI, Rule 66. After all these proceedings the judgment-debtor objected to the execution of the decree. His objection was disallowed and his appeal to the High Court was also dismissed. When the record went back to the court below in September, 1910, notice was issued to the judgment-debtor under Order XXI, Rule 66, and the decree-holder was directed to file an affidavit under the same rule. But as no affidavit was filed by him, the court, on the 11th of November, 1910, struck off the case for default. The order runs as follows :--'The decree-holder notwithstanding two adjournments has failed to prosecute the proceedings. The case, therefore, can-not be adjourned any more. The proceedings are struck off.' The court, however, subsequently discovered that that order was a wrong order, and that in fact there was no default of prosecution on the part of the decree-holder. It, therefore, held that the former attachment subsisted and that no fresh attachment was necessary, and it decided to go on with the execution proceedings. The judgment-debtor objected that a fresh attachment was necessary, but his objection was disallowed.

2. From that order disallowing the objection this appeal is preferred. A preliminary objection to the hearing of the appeal is taken by the learned Counsel for the other side. The substance of his contention is that this order is a mere interlocutory order and does not come within the purview of Section 47 of the Code of Civil Procedure. The words of Section 47 are, no doubt, very wide, and if taken in their literal sense will cover every order of an interlocutory nature that may be passed in execution proceedings. But that does not seem to have been the intention of the Legislature. In our opinion the view taken by Banerjee, J., in *Jogodishury Debea v. Kailash Chundra Lahiry* (1897) I.L.R. 24 Calc. 725 is a sound one. On page 739 he remarked as follows :--'It is not every order made in execution of a decree that comes within Section 244. If that were so, every interlocutory order in an execution proceeding, such as order granting or refusing process for the examination of witnesses, would be appealable ; and far greater latitude would be given of appealing against orders in such proceedings than is allowed as against orders made in suits before decree--a thing which could hardly have been intended. See *Sreenath Roy v. Radhanath Mookerjee* (1883) I.L.R. 9 Calc 773 and *Behary Lal Pundit v. Kedar Nath Mullick* (1891) I.L.R. 18 Calc. 469. An order in execution proceedings can come under Section 244 only when it determines some question relating to the rights and liabilities of parties with

reference to the relief granted by the decree ; not when, as in this case, it determines merely an incidental question as to whether the proceedings are to be conducted in a certain way. I may add that the language of Section 244, which enacts that certain 'questions shall be determined by an order of the court executing the decree, and not by separate suit,' clearly indicates that the questions contemplated by the section must be of a nature such that it is possible to suppose that but for the section they could have formed the subject of determination by a separate suit. But a question of an incidental character can never come under that description, and an order determining such a question cannot, therefore, be a decree as defined in Section 2.' We agree with this view, which applies very aptly to the circumstances of this case now before us. The result is that we hold that no appeal lies from the order of the court below, and we dismiss the appeal with costs.

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