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Dular Singh Vs Ram Chander and Another

Court: Allahabad High Court

Date of Decision: Sept. 22, 1933

Citation: AIR 1934 All 165 : 147 Ind. Cas. 509

Hon'ble Judges: Rachhpal Singh, J

Bench: Division Bench

Final Decision: Disposed Of

Judgement

Rachhpal Singh, J.
This is a defendant''s second appeal arising out of a suit for a declaration. The facts which have given rise to the second

appeal may briefly be stated as follows: Ram Chander, plaintiff, instituted a suit against Pearey Lai, defendant, to recover a sum of money on 29th

April 1927 and on the same date he applied for attachment before judgment of a decree which Pearey Lai held against one Jwala Prasad. The

application for attachment was granted by the Court. Earn Chander''s suit was first decreed ex parte, but later on the ex parte decree was set aside

and the suit was dismissed by the first Court. Earn Chander appealed with the result that his suit was decreed. On 2nd June 1927, subsequent to

the date on which the attachment order had been passed, Pearey Lai executed a deed of as signment under which he assigned his rightsin the

decree against Jwala Prasad to Dular Singh, defendant-appellant. After the suit of the plaintiff had been decreed by the appellate Court, he made

an application for execution and attached the aforesaid decree of Pearey Lai against Jwala Prasad. Dular Singh successfully objected to the

attachment. Thereupon, Earn Chander, plaintiff, instituted a suit for a declaration that the decree held by Pearey Lai against Jwala Prasad was

liable to be sold in execution of his own decree against Pearey Lai. The suit was dismissed by the first Court. The plaintiff appealed against that

decree which was reversed by the lower appellate Court and his suit for a declaration Vas decreed. Dular Singh, defendant 1, has come up in

second appeal before this Court.

2. Two points had been taken up before the lower appellate Court on behalf, of the defendant-appellant: one was that there had not been any valid

attachment of the decree of Pearey Lai and therefore it created no right in plaintiff''s favour; the second point taken was that even if it be held that

the attachment was valid, nevertheless, the plaintiff could not ask for the sale of the decree after the dismissal of his suit by the first Court, which

had the effect of putting an end to the attachment made at his instance. I proceed to consider these two points. Section 64, Civil P.C., lays down

that where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the

judgment-debtor of any debt, dividend, or other moneys, contrary to such attachment, shall be void as against all claims enforceable under the

attachment. For the purposes of this section the attachment must have been made in the manner and form prescribed by the Code. The mere

passing of an order of attachment or the mere issue of an order from the office is not sufficient to make the attachment; but the process must be

followed by actual attachment and the person prohibited cannot be deemed to know that he is prohibited unless the prohibition is served upon him

or is made known in the manner recognised by law. Until therefore an attachment is actually effected the debtor is free to alienate his property, and

such alienation would be valid. It follows therefore that in judging whether an alienation made by the judgment-debtor can be avoided, the date that

must be looked to as the starting period of possible avoidance, is not the date of the order of the attachment but that of actual attachment, that is

the actual attachment cannot have a retrospective effect from the date of the order. The words ""where an attachment has been made"" in Section

64, Civil P.C., mean an actual attachment effected in the manner prescribed by law, and do not refer to the order of the attachment passed by the

Court. In Muthia Ghetti v. Palaniappa Chetti AIR 1928 P.C. 139 their Lordships of the Privy Council made the following observations:

No property can be declared to be attached unless, first, the order of attachment has been issued, and secondly, in execution of that order the

other things prescribed by tie rules in the Code have been done.

3. As remarked by Mahmud, J., in Ganga Din v. Khushali Bam (1885) 7 All. 702

before property could be subjected, to the restriction imposed by this section there must be a perfected attachment.

4. It should be borne in mind that Section 64 is applicable to attachment before judgment as well to attachment made after a decree has been

obtained. I may remark that the creditor who has obtained the decree against his judgment-debtor has an undisputable right to attach his debtor''s

property; but the case of a creditor asking for attachment stands on a somewhat different footing. An attachment prior to the passing of a decree is

not an attachment for the enforcement of the decree, but it is a step taken merely for preventing the debtor from delaying or obstructing such

enforcement when the decree subsequently passed is sought to be executed. A creditor asking for attachment before judgment has no absolute

right to ask for it; the matter is entirely in the discretion of the Court which has to be very carefully and sparingly exercised and that only after

certain conditions laid down in Rule 5, Order 38, Civil P.C., have been proved to the satisfaction of the Court. Whenever a creditor wants an

attachment before judgment he has to apply to the Court under Rule 5, Order 38, Civil P.C. That rule enacts: Where at any stage of a suit, the

Court is satisfied, by affidavit or otherwise, that the defendant, with intention to obstruct or delay the execution of any decree that may be passed

against him: (a) is about to dispose of the whole or any part of his property, or (b) is about to remove the whole or any part of his property, from

the local limits of the jurisdiction of the Court, the Court may direct the defendant, within a time to be fixed by it, either to furnish security in such

sum as may be specified in the order, to produce and place at the disposal of the Court, the value of the same, or such portion thereof, as, may be

sufficient to satisfy the decree, or to appear and show cause why he could not furnish security. (2) The plaintiff shall, unless the Court otherwise

directs, specify the property required to be attached and the estimated value thereof. (3) The Court may also in the order direct the conditional

attachment of the whole or any portion of the property so specified Rule 6 lays down that

where the defendant faila to show cause why he should not furnish security, or fails to furnish tb.8 security required, within the time fixed by the

Court, the Court may order that the property specified or such portion thereof as appears sufficient to satisfy any decree which may be passed in

the suit, be attached.

Rule 7 says:

Save as otherwise expressly provided the attachment shall be made in the manner provided for the attachment of the property in execution of a

decree.

5. The rule applicable to ''case s where attachment of a decree held by the judgment-debtor is sought is to be found in Order 21, Rule 53, Civil

P.C. It appears that the decree which the plaintiff holds was passed by the same Court which had decreed the suit of ;Pearey Lai against Jwala

Prasad. When the plaintiff applied for attachment before judgment of this decree of Pearey Lal the Court passed an order attaching it, but did

nothing more beyond passing ''that order. The question for consideration is whether that order was valid. In my opinion, it was not. It appears to

me that the meaning of the ""saving clause"" in Rule 7, Order 38, Civil P.C., is that attachment before judgment in order to be effective must comply

with the provisions of Rules 5 and 6 or Order 38, Civil P.C. In the case before me the attachment was made by the Court in utter disregard ;of the

provisions of these rules. Rule 5, Order 38 clearly lays down that before an order of attachment can be made it is incumbent on the Court to direct

the defendant to furnish security or to show cause why he should not furnish security. Rule 6 provides that if the defendant fails to give security or

to show cause, then the Court may order the attachment of the property specified in the application of the plaintiff. The Court under Rule 5, Sub-

clause 3 has powers to direct the conditional attachment of the property specified in the application but no such order of conditional attachment

could be passed without an order under Clause 1 of the same rule. In Abdul Karim v. Noor Mohammad, reported in AIR 1920 Cal 526, it was

held that a conditional order of attachment " before judgment under Sub-rule. 3, Clause. 5, Order 38 could not be made without an accompanying

order under Clause 1 of the rule directing the defendant to furnish security or to show cause. In Natku Mai v. Kishori Lal AIR 1914 All. 511 a

Bench of two learned Judges of this Court held that an order of attaehment before judgment could only be made after a defendant had failed to

show cause to the contrary or to furnish ,the security required and that conditional {attachment permissible under Clause 3, Rule 5, ORDER 38

had effect only until the defendant, to whom notice had been issued, either furnished the required security or appeared to show cause. I am in

agreement with the view expressed in these cases, which in my opinion, should be fo11owed. In the case before me I find that the provisions of

Rule 5, Order 38 were not complied with at all. No notice of the application made by the plaintiff asking for attachment before judgment was given

to Pearey Lai, the defendant in that case. He was not called upon to furnish the security or to show cause as provided for under the provisions of

Rule 5, Order 38, Civil P.C. An attachment which did not comply with the provisions of Rule 5, Order 38 was illegal and ultra vires and the

plaintiff therefore cannot claim any benefit under it. The second point taken by the defendant-appellant is that even if it be held that the attachment

of the decree of Pearey Lai against Jwala Prasad was valid he was not entitled to enforce any claim under that attachment. In my opinion, this

contention is also well founded and must prevail. The learned Subordinate Judge in his judgment remarked that there was no direct authority

bearing on this point, but this is not so. The case reported in Nageshivar Tewari v. Bup Narain (1926) 97 I.C. 547, decided by a learned Judge of

this Court, is a direct authority on the point in issue. In that case King, J., held that

a transfer by a judgment-debtor of property attached in execution of a decree against him, after such attachment had ceased by virtue of Order 21,

Rule 57, Civil P.C., and before a re-attachment of the same, is not void u/s 64, Civil P.C., against the claims of a purchaser of the property in

execution sale, inasmuch as the property is sold in pursuance of the second attachment and not the first.

6. The important words in Section 64, Civil P.C., so far as the case before me is concerned, are ""claims enforceable under the attachment."" The

question for consideration is whether it can be said that the plaintiff is seeking to enforce a claim under the attachment made at his instance during

the pendency of the suit on 29th April 1927. The answer to this must be in the negative. The law on the subject is quite clear. When a suit is

dismissed an attachment before judgment terminates without any order of the Court and if the judgment is reversed on appeal or annulled on

review the judgment does not revive it so as to affect alienations made before the date of such reversal. It is said that the reason for this is that

Order 38, Rule 9 contains no provisions corresponding to Order 21, Rule 63 which makes the order in the claim case and the release from

attachment thereupon subject to a regular suit. In the case before me the attachment which had been made at the instance of the plaintiff on 29th

April 1927 came to an end as soon as his suit was dismissed. Whatever claim the plaintiff might have been able to enforce under that attachment

came to an end as soon as the attachment automatically ceased on account of the dismissal of his suit by the first Court. The plaintiff after the

decree of the lower appellate Court has re attached the property in suit and it is under this second attachment that he is enforcing his claim. There is

no claim to be enforced now under the first attachment of April 1927 which ceased on the dismissal of his suit. In my opinion, the correct view of

the law on the subject is this : If an attachment before judgment is made under the provisions of Order 38, Civil P.C., then the plaintiff becomes

entitled to the benefit of Section 64 of the Civil P.C. ""Where property is under attachment by virtue of the provisions of Order 38 and a decree is

subsequently passed in favour of the plaintiff, it will not be necessary upon an application for execution of such decree to apply for a re-attachment

of the property. The property is already under attachment and the attachment continues to subsist till the decision of the suit. When the plaintiff

obtains a decree he can apply for the sale of the attached property. If, after the attachment, the judgment-debtor has made any alienation it will be

void against his claims enforceable under his attachment ; but the whole aspect of the case immediately changes as soon as the suit, in which the

attachment was made is dismissed by the Court. As already explained the attachment before judgment ceases and then it is no longer open to the

plaintiff to say that he is enforcing a claim under that attachment because the order of dismissal of his suit has been upset by the appellate Court. I

may remark that the only effect of the attachment before judgment is to prevent the judgment-debtor from making a transfer of the attached

property during the continuance of the attachment so that the benefit of attachment may be available to him when he seeks to enforce his decree

which might subsequently be passed. The order of attachment does not create a charge in his favour and therefore as soon as the attachment

ceases the plaintiff loses all rights to enforce any claim under it.

7. For the reasons given above I am of opinion that the decree of the lower appellate Court cannot stand and the appeal must succeed. The appeal

is allowed, the decree of the learned Subordinate Judge is reversed and the plaintiff''s suit stands-dismissed with co3ts in all the three Courts.