

(1926) 04 AHC CK 0018

Allahabad High Court

Case No: None

Badri Prasad

APPELLANT

Vs

Chokhey Lal

RESPONDENT

Date of Decision: April 22, 1926**Citation:** AIR 1926 All 406 : (1926) ILR (All) 510 : 95 Ind. Cas. 828**Hon'ble Judges:** Walsh, J; Dalal, J**Bench:** Full Bench**Final Decision:** Allowed

Judgement

Dalal, J.

This is a difficult matter to settle. It has arisen out of interlocutory orders passed by a Subordinate Judge without proper attention to the rules dealing with procedure as to attachment prior to judgment. In a suit for a recovery of money the plaintiff applied under Order 38, Rule 5 for attachment prior to judgment. The Court passed an ex parte final order of attachment without having any jurisdiction to do so. Under Clause 3 of that rule the Court is given permission to direct a conditional attachment of the whole or any portion of the defendant's property while proceedings are pending regarding the question as to whether the defendant should furnish security for the claim of the plaintiff or not. After the order of attachment no proceedings, such as are directed in Clause 1, were taken by the Court. A pleader of the Court, Mr. Mohammad Ibrahim, was appointed attaching officer and directed to attach the defendant's stall on the 3rd of November 1922, and attached cloth of the value of Rs. 910. I shall not discuss the details of the attachment, or the manner in which it is alleged the cloth was made over to the custody of one Badri Prasad. It appears that Badri Prasad wrote out an undertaking that he would produce this attached property whenever so directed by the Court or by the Commissioner. The Commissioner thereupon made a report to the Court stating that he had made over the property to Badri Prasad, and had completed the performance of the task allotted to him. His report is of importance. No permission as to the action taken by

him was desired by the Commissioner from the Court. Subsequently the suit was dismissed, and the defendant applied that the attachment before judgment may be removed. This application was made under Rule 9, Order 38. On this application the Commissioner was directed to make over the property to the defendant, but it appears that the Commissioner was unable to recover it, and he made such a report to the Court. The Court thereupon called upon Badri Prasad to restore the property, and his defence was that he was not really a custodian on behalf of the Court. His defence was not accepted, and a decree for Rs. 910 was passed against him. He came here in revision, and the applicant, Chokhey Lal, was made a party respondent to the application.

2. When the application was heard on the 13th of April 1926, this Bench was of opinion that the Commissioner ought to appear before it and show cause why directions should not be given to him to make good the loss suffered by Chokhey Lal. To day it was argued on behalf of the Commissioner by his learned Counsel that this Bench had no jurisdiction to bring the Commissioner on the record as a party. There is no necessity of bringing him on the record. He is already, as Commissioner appointed by the lower Court, an officer of the Court, and as such within the jurisdiction of this Court which appointed him. Under Order 21, Rule 43 the attaching officer is bound to keep the property in his own custody, and is held to be responsible for the due custody of that property. He is responsible just as much to this Court as to the Court of trial. We are, therefore, of opinion that we have authority to pass any order we think appropriate against him under the circumstances of the present case.

3. Under additional rules made by this Court under Order 21 (see Book of Rules framed by this Court u/s 122 of the Code of Civil Procedure), in Rule 123 directions are given as to what is to be done by the attaching officer when movable property is such as could not be immediately removed from the place where it is attached. In that case under Rule 123 the attaching officer shall, subject to the approval of the Court, make such arrangements as would be most convenient and economical. In the next rule it is stated that one of the arrangements may be to put one or more persons in special charge of such property; but for that purpose the attaching officer must obtain the permission of the Court. In the present case the attaching officer presumably acted under Rule 124 when he placed Badri Prasad in special charge of the property; and to make Badri Prasad liable to the jurisdiction of the Court, it was necessary for the Commissioner to obtain the permission of the Court. No such permission was obtained. As already pointed out in the report which the Commissioner submitted to the Court as to the action he had taken with regard to the commission issued to him, he made no request that permission may be granted to him to place the property in special charge of Badri Prasad.

4. The Commissioner's learned Counsel pointed out that when the defendant applied to the Court that the custodian had died, and some fresh orders should be

passed for the safe custody of the property, the Court directed the Commissioner to appoint another custodian. The learned Counsel desired us to draw the conclusion from this order that the Court had granted permission to the Commissioner to appoint Badri Prasad in special charge of the property. We cannot agree with this view of the facts of the case. The permission ought to be obtained at the proper time before or immediately after the custodian is appointed, and the presiding officer of the Court must bring his mind to bear on the facts of the case and determine whether the person was a proper person or not to remain in charge of the property. In the present case no permission having been obtained, Badri Prasad was not an officer of the Court, and the Court had no jurisdiction to direct him to refund to the defendant the price of the attached property, which is not forthcoming.

5. I have purposely refrained from making any observation on the legal relations between the Commissioner and Badri Prasad. These will have to be determined when the Commissioner brings a suit, if any, for the recovery of the property or of its price against Badri Prasad. In my opinion the Commissioner is, under the circumstances of the present case, the only person liable to the Court to produce the attached property, or to pay its price. I am, therefore, of opinion that the order against Badri Prasad should be discharged, and an order passed against the Commissioner for payment into Court of Rs. 910 to reimburse Chokhey Lal for the loss suffered by him by the disappearance of the property.

Walsh, J.

6. I entirely agree. The order which we are making is the only possible solution, and I am satisfied that, on the facts proved before us, it is the only just order which we can make. The decision we arrived at on the (Sic) occasion to summon the person most concerned before us in person, has enabled us, as it sometimes does where there is an insoluble problem presented by the proceedings of the Court below, to see daylight. Where there is a wrong, it has been said, there is always some remedy, and if the defendant in this case had no remedy, an irreparable injury would have been inflicted upon him, for no cause whatever, for which he was either legally or morally responsible. But the mere fact that the acts of the Court itself have created an irreparable injury upon one of the litigants, it is not a sufficient ground for relieving that litigant by inflicting an injury upon another innocent person and it was that aspect of the case and the very unsatisfactory nature of the judgment before us, which made us feel that this was an order which could not be supported. So far as I can see, except that Badri Prasad has perhaps done a foolish thing out of either good nature or indolence, a thing which may happen to almost anybody in the course of his life, he has done nothing in relation to these goods in any way suggesting a shadow of legal or moral responsibility for their loss. And although one is bound to feel sincere sympathy as both members of the Court do for the vakil who undertook this duty voluntarily at the invitation of the Court below, and

probably because the Court respected him and trusted him as a responsible member of the profession to look after the administration of the Court's work on this occasion, and although he found himself in a difficult situation to round off (if I may use the expression) what was necessary to complete the full discharge of his duty, and although the unfortunate accident of the loss of these goods occurred as it happens in consequence of that slight omission upon his part on a cold and late night, out in a country district, nonetheless he is the person undoubtedly legally responsible, and, therefore, we have no alternative but so to decide.

7. I regret to say that I am compelled to draw the attention of the learned Judge in the Court below to the fact that it is really his conduct which is responsible for the whole of this unfortunate case. From some untoward combination of circumstances it has gone on for 4 years, a thing in itself suggesting a grave reflection upon the administration of justice, because the whole controversy merely relates to the temporary custody of some cloth, which was not difficult, either to identify or to take charge of, during the short period of six months which was necessary for dismissing an unsuccessful suit. The learned Judge in our view got out of his depth both in dealing with the original application of the plaintiff, and in dealing with this application, by reason of a failure, which is so often the case, to study the provisions of the Code. It is necessary to draw his attention and the attention of Judges in subordinate Courts to certain general principles which the Civil Justice Committee has recently emphasised, and to certain matters of practice and procedure which might be improved upon in the provincial Courts. There is nothing about which they have spoken so strongly as the reckless issue of ex parte orders. Cases in which either an attachment or an injunction ought to be issued before judgment are extremely rare. The plaintiff ought to be able to satisfy the Court of the practical certainty of success, and of the existence of grave danger, and of a real fear that a dishonest defendant, undoubtedly liable, is making away with the probable fruits of the judgment. Nothing of the kind existed here, because the defendant succeeded in the suit. It follows, as a matter of course, that if cases in which such orders ought to be made are rare, cases in which they ought to be made ex parte are very exceptional. In a case of this kind, as my brother has pointed out, the Code provides the alternative of a conditional order, and even if the Judge had been satisfied that there was any danger at all in this case, he could have got over the difficulty by simply granting an ex parte injunction restraining the defendant from selling or alienating in any way the cloth until the question of a further order or attachment could be discussed in the presence of the defendant himself. Thirdly, in the very rare cases in which such orders are made, in England the established practice is never to issue it under any circumstances without making the applicant give an undertaking, which has the force of a contract and also the force of a personal submission to the order of the Court, to be responsible in damages for any loss in consequence of the exceptional order which he is seeking. If that had been done in this case no trouble would have arisen, and both Chokhey Lal and the vakil would have been saved from

this unfortunate disaster. I have taken the trouble to compare the provisions of the English law and the Indian law in this matter. The provisions of the Civil P.C. are precisely the same as the rules of the Supreme Court in England. The practice of asking for an undertaking is merely the exercise of a discretion which the Court always has under its inherent powers. It enables the Court to avoid an abuse of the process of the Court, and to say to the applicant "I will not give you an order unless you undertake to be responsible for any loss resulting from it," because to grant such an order and to inflict an injury upon a party, which in the ultimate result cannot be repaired, is in fact an abuse of the process of the Court. Therefore the English practice has grown up under which Judges insist upon such an undertaking as part of terms of the exercise of their discretion. I have made such orders in this High Court. I have never granted an injunction pending an appeal without insisting upon this undertaking, and I see no reason why a similar practice should not grow up in the lower Courts.

8. The order of the Court is that the application is allowed, that Mohammad Ibrahim, vakil, is ordered to refund the loss of the goods in the sum of Rs. 910, to Chokhey Lal defendant. Under the circumstances, this misfortune being partly due to the orders of the lower Court, we direct all parties to pay their own costs, and we allow Mohammad Ibrahim three months to pay the first half, and another three months to pay the second half of the amount.