# Joseph Vs Scaria and Another

**Court:** High Court Of Kerala

**Date of Decision:** Aug. 20, 1964

**Acts Referred:** Civil Procedure Code, 1908 (CPC) â€" Order 21 Rule 103, Order 21 Rule 54

**Citation:** (1964) KLJ 1192

**Hon'ble Judges:** T. C. Raghavan, J

**Bench:** Single Bench

**Advocate:** E.P. Varghese, Joseph Augustine and V.M. Kurien, for the Appellant; Manuel T. Paikaday, for the Respondent

**Final Decision:** Dismissed

## Judgement

Raghavan J.

1. The additional 2nd appellant before the lower appellate court, who claims under the 2nd plaintiff, is the appellant and defendants 1 and 2, the

respondents. The father of the respondents obtained the decree in O.S. No. 536 of 1100 against the 3rd defendant and he attached the 3rd

defendant''s properties, including the suit property. Thereafter, the 3rd defendant executed a hypothecation bond to a Venkiteswara Iyer in 1101

who filed O. S. No. 686 of 1104 for the mortgage money and obtained a decree. The hypotheca including the suit property was sold and

purchased by Venkiteswara Iyer himself and he obtained delivery of possession On 3rd Kumbhom 1108. He then leased the properties to the 3rd

defendant himself. The 3rd defendant kept rent in arrears and therefore Venkiteswara Iyer filed O. S. No. 714 of 1117 for eviction with arrears of

rent. The 3rd defendant then disputed the lease, whereupon Venkiteswara Iyer converted his suit into one on title and obtained a decree. Pursuant

to the decree Venkiteswara Iyer''s assignee sought recovery of possession, when the 3rd defendant pleaded that the property was already

delivered over to the father of defendants 1 and 2. Now it may be noted how the father of defendants 1 and 2 obtained possession of the

property. He executed the decree in O. S. No. 536 of 1100, brought the attached property to sale and purchased it himself. Ultimately, the sale

was confirmed and the property was delivered to him on 6th Meenam 1112. The assignee from Venkiteswara Iyer applied for removal of the

obstruction caused by defendants 1 and 2; but the court upheld the obstruction. The present suit under O. 21, R. 103, which followed, has been

dismissed by both the lower courts; and the second appeal is by the assignee from the 2nd plaintiff. The first question urged before me is that there

was no vaild attachment in O. S. No. 536 of 1100 and therefore the mortgage in favour of Venkiteswara Iyer and the suit and further proceedings

in pursuance thereof must be allowed to stand and the purchaser of the property in court auction should be allowed to take possession of it. The

invalidity of the attachment is claimed to rest on the facts that the attachment was not effected in accordance with O. 21, R. 54 of the Code of Civil

Procedure. Ext. D. 5 is the report of the amin who made the attachment; and the contention is that since Ext. D. 5 does not disclose compliance

with R. 54, O. 21 of the Code, it must be held that the attachment is not valid. Such a plea was not taken before the trial court, nor was it taken in

the memorandum of appeal before the lower appellate court. It was urged for the first time only at the stage of arguments before the lower

appellate court.

2. The learned counsel of the appellant cites decisions like AIR 1937 671 (Lahore) and AIR 1939 284 (Lahore) for the proposition that no

property can be declared to be attached, unless the order for attachment has been issued and in execution thereof the other things prescribed by

the rules in the CPC have been done; and also for the proposition that where the process-server''s report about the attachment does not show that

a copy of the order was posted on a conspicuous part of the court-house, the initial presumption is that what is not mentioned therein was not done

and that the report is sufficient to shift the onus to the one who claims that a valid attachment was effected. These propositions may be correct; but

they do not arise in this case. The factum of attachment cannot be denied in this case because there is Ext. D5, the report of the amin. The question

is only whether the amin complied with the formalities of R.54, of 0.21 of the Code. In such a case the observation of the Privy Council in AIR

1934 217 (Privy Council) that where there is evidence that the land was attached, in the absence of any evidence to the contrary, it ought to be

presumed that all necessary formalities were complied with. The learned counsel of the appellant tries to distinguish this case; and he invites my

attention to Murugappa Chettiar v. Thirumalai Nadar ( AIR 1948 M. 191). I do not think that that decision will serve that purpose. In that case the

order for attachment was merely pending; and that there was no evidence that the order was actually issued and that the formalities of attachment

were complied with. In the case before me the attachment was actually effected; and the question is only whether the formalities for a valid

attachment were complied with. In such a case, unless there is evidence contra to the effect that the formalities were not complied with, it must be

presumed, as observed by the Privy Council, that all the necessary formalities were complied with.

3. On this question the learned counsel of the respondents has drawn my attention to two decisions. The first is Muhammad Mytheen Pilla

Muhammad Kannu v. Chaithu Mytheen Pilla Gulamytheen Pilla (30 T.L.J. 400). In that case the decreeholder in a suit of 1099 attached the suit

property on 21st Chingam 1111. On 5th Kanni the Judgment-debtor executed a mortgage in respect of the property attached in favour of a

stranger. The equity of redemption over the property was attached by another creditor on 15th Vrischigam, brought to sale and purchased by

himself. He transferred his rights to the petitioner before the High Court; and the petitioner paid off the mortgage and obtained possession of the

property. The decreeholder in the suit of 1099, who first attached the property, brought it to sale and purchased it in court auction on 1st

Vrischigam 1112 and transferred his rights to the respondent before the High Court. The respondent then applied for delivery, when the petitioner

resisted; and the resistance was removed and the respondent was allowed to take possession of the property. The learned Judge of the

Travancore High Court held that though the subsequent sale through court extinguished the earlier attachment, still, the subsequent mortgage would

not be validated; and the benefit of the removal of attachment would not avail to the mortgagee, whose mortgage was created only pending

attachment. The Judge consequently upheld that the petitioner who obtained possession from the mortgagee must relinquish it in favour of the

respondent. The decision supports the respondents in that, even the court sale vacated the earlier attachment, the benefit of that must go to the

earlier attaching creditor.

4. The next decision is of the Madras High Court in S.A.No. 328 of 1951 reported in 1954 M.W.N. (Short Notes) 53. In execution of a money

decree the defendant attached a property of the debtor; and the latter thereafter mortgaged the property to the Co-operative Bank. The Bank

obtained an award on the mortgage against the debtor; and the debtors wife purchased the property paying off the debt. She then filed a claim

against the attachment; and Krishnaswami Nayudu J. held that the mortgage in favour of the Co-operative Bank being subsequent to the

attachment, the claim under the decree had priority and was enforceable against the wife of the debtor. Therefore, it is clear that in this case, since

the mortgage of Venkiteswara Iyer, which resulted in the decree and subsequent proceedings which conferred rights on the appellant, was after the

attachment, those proceedings are all ineffective against the attaching creditor.

5. The next ground urged is that the earlier judicial sale, in which the appellant"s predecessor purchased the property, released the attachment and

the benefit of such release must go to the appellant. The discussion hereinbefore has already shown that the benefit must go to the attaching

creditor and not to the subsequent purchaser in court auction, who purchased at a court sale pursuant to the subsequent mortgage. Therefore, this

contention has also no force. The counsel of the respondents has another contention that the suit is also barred by limitation. In the view I have

already taken, there is no need for deciding this question; because, even if the suit is not barred, it has to be dismissed.

The second appeal is dismissed with costs.