

Subrao Mangesh Chandavarkar Vs Mahadevi Manji Bhatta

Court: Bombay High Court

Date of Decision: July 25, 1913

Citation: AIR 1914 Bom 256 : (1913) 15 BOMLR 848

Hon'ble Judges: Shah, J; Batchelor, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Batchelor, J.

This is an appeal in execution proceedings, and it arises upon these facts.

2. The appellant on 1st November 1906 obtained a money-decree against one Bellabhattera. Prior to the decree, i. e., on 23rd October 1906, the

appellant had obtained attachment before judgment of the property in suit, as being the property of Bellabhattera. Some time in 1907 Bellabhattera

died. Admittedly he was in union with the respondent 2, and the property was joint family property, which on Bellabhattera's death would ordinarily

have passed to respondent 2 by survivorship Nothing further was done under the decree till 1909 and 1911 when the appellant made applications

for execution.

3. The question is whether, in these circumstances, the respondent's title by survivorship was defeated by the appellant's attachment before

judgment. Both the lower Courts have answered this question in the negative. In our opinion the is the correct answer.

4. It would seem that there is no reported decision which precisely covers the present facts, but the nearest discoverable authority is the judgment

of the Privy Council in Suraj Bansi Koer v. Sheo Persad Singh ILR (1879) Cal. 148. Both sides have accordingly relied upon this case, and the

determination of the present appeal turns mainly on the correct construction of the Privy Council's judgment. Now in Suraj Bansi Koer's case

there had been not a mere attachment before judgment, but an attachment in execution and an order for sale ; indeed the sale itself would have

taken place but for the judgment-debtor's applications for postponement. It was upon these facts that the judgment proceeded, their Lordships

saying that "" the execution proceedings, under which the mouza had been attached and ordered to be sold, had gone so far as to constitute, in

favour of the judgment-creditor, a valid charge upon the land "" which could not be defeated by the debtor's death before the actual sale. It would

appear, therefore, that the ground of the judgment was that in that case the judgment-creditor had carried execution proceedings so far as to give

himself a valid charge upon the property ; and this interpretation has the authority of Sir John Edge C. J. in Jagannath Prasad v. Sita Ram ILR

(1888) All. 302. If this view is right, then we think that the Privy Council's judgment is authority against the present appellant. For, prior to

Bellabhata's death, the appellant had not only not carried execution proceedings to a point where a charge might be held to have been created,

but had in fact instituted no execution proceedings at all. All that he had done was to obtain an attachment before judgment, a mere precautionary

measure which admittedly creates no charge. Indeed in Moti Lal v. Karrabuldin ILR (1897) Cal. 179, Lord Hobhouse, in speaking even of an

attachment in execution, says that it "" only prevents alienation, it does not confer title.

5. It follows from the above considerations that the appellant has taken no measure to which could be attributed the effect of defeating the

respondent's right by survivorship. And on principle we cannot see any ground upon which the appellant could succeed, for when the right by

survivorship accrued to the respondent, there was not in existence any competing right or title at all; in other words, there was nothing to arrest the

accrual of the respondent's right. This conclusion is supported by the decision of the Madras High Court in Kamanayya v. Rangappayya ILR

(1893) Mad. 144, where the right of the survivor was held to prevail despite an attachment before judgment. It is true that in that case the

defendant had died before the decree was passed, but that circumstance does not, we think, make any difference of substance; for in this case

owing to the absence of execution proceedings, as in that case owing to the death of the judgment-debtor before decree, the attachment before

judgment did not become effective to render the property available for sale until after the right of survivorship had accrued. For the attachment

before judgment, though it enured for the benefit of the creditor, did not avail to render the property saleable until the first application for execution

was made in 1909, that is, long after Bellabhata's death : see Pallonji Shapurji Mistry v. Edward Vaughan Jordan ILR (1888) Bom. 400.

6. This view as to the rights of the present parties has also the support of the high authority of Westropp C. J. in Udaram Sitaram v. Ranu Panduji

and Venku Panduji (1875) 11 B.H.C.R. 76 where the Chief Justice noticed the case of Goor Pershad v. Sheodeen (1872) 4 N.W.P. 137. With

the observations as to the alienability of a co-parcener's share in this Presidency we have no concern, but the judgment shows that the Chief

Justice and West J. "fully concurred" in the decision in Goor Pershad's case so far as that decision held that where the co-parcener's share had

been attached, and attached in execution proceedings, and the co-parcener had died before the actual sale, the judgment-debtor at his death had

left no right at all in the property, and there was consequently nothing in connection with it which was liable to be sold. It is true that though the

execution proceedings in Goor Pershad's case were not carried so far as in Suraj Bansi Koer's case, yet the former decision must be taken to

have been overruled by the Judicial Committee at least to this extent that it can no longer be held that the right by survivorship is to be defeated

only by an actual sale during the judgment-debtor's life-time. That, however, leaves matters only at this point that the right by survivorship is

defeated in a case where, a parcener's interest having been attached in his life-time under a decree obtained against him for his separate bond-

debt, and a sale having subsequently been held under the attachment, the judgment-debtor dies between the date of the attachment in execution

and the sale. Here the facts are much stronger in favour of the surviving co-parcener, since, as we have noticed, no proceedings in execution had

been taken by the creditor at the time of the co-parcener's death, nor was any sale ever held, but the solitary circumstance on which the creditor

can rely is the attachment before judgment. We are brought back, therefore, to the question whether such an attachment can be held to be

operative to defeat the survivor's right for, in Suraj Bansi Koer's case their Lordships say : " It seems clear upon the authorities that if the debt had

been a mere bond-debt, not binding on the sons by virtue of their liability to pay their father's debts, and no sufficient proceedings had been taken

to enforce it in the father's life-time, his interest in the property would have survived on his death to his sons, so that it could not afterwards be

reached by the creditor in their hands." On the facts of this suit we are of open for the reasons stated, that this is such a case, and the sufficient

proceedings have been taken by the creditor to enforce his claim during the debtor's life-time.

7. Mr. Patkar has contended, on the authority respectively of Ganu Singh v. Jangi Lal ILR (1899) Cal. 531 and of B. Krishna Rau v. Lakshmana

Shanbhogue I.L.R.(1881) Mad. 302, first, that an attachment before judgment stands for all purposes on the same footing as an attachment in

execution, and, secondly, that an attachment in execution creates a valid charge and is sufficient to defeat the right by survivorship. This latter

proposition, however, which is otherwise doubtful, no longer has the support of the Madras High Court: see Sankaralinga Reddi v. Kandasami

Tevan ILR (1907) Mad. 413 and Zamindar of Karvetnagar v. Trustee of Tirumalai, Tirupati, &c., Devasthanams ILR (1909) Mad. 429. And the

former proposition is equally devoid of authority; for all that the learned Judges decided in Ganu Singh's case was that an attachment before

judgment and an attachment after judgment had the same effect for one particular purpose, namely binding the property so as to prevent private

alienations. Here there is no question of any private alienation, and the appellant's contention must consequently be disallowed.

8. For these reasons we are of opinion that the lower Court's decree is right, and we dismiss this appeal with costs.