
(1870) 02 CAL CK 0008

Calcutta High Court

Case No: None

Cowar Rajkumar Roy

APPELLANT

Vs

S.M. Kadambini Debi

RESPONDENT

Date of Decision: Feb. 24, 1870

Judgement

Norman, J.

This case has been referred to a Full Bench of this Court in consequence of the decision in Misree Begum v. Punnoo Singh 8 W.R. 362, which is at variance with an earlier decision in Monohur Khan v. Troylocko Nauth Ghose 4 W.R. 35. The decision in Misree Begum v. Punnoo Singh 8 W.R. 362 is as follows:--A person had preferred a claim u/s 246 of Act VIII of 1859, alleging that of certain property, which had been attached, fourteen annas five gandas belonged to him. The Court directed that the fourteen annas five gandas claimed should be released from attachment, and afterwards proceeded to sell the rights and interests of the defendant in the property, without confining itself to the sale of the remaining one anna fifteen gandas. In delivering the judgment of the Court in a subsequent suit, in which the effect of the sale, which so took place, came into question, Mr. Justice Mitter said "the proceeding exempting a portion of the property from sale is illegal on the face of it." The substantial question, which is raised by this reference, is whether, where the claim preferred to, or the objection offered against, the sale of lands or other immoveable property attached in execution of a decree, is a claim to, or objection offered against, the sale of an undivided fractional part of such property, the claim is one which can be adjudicated upon under the 246th section.

2. On referring to the 213th section, we find that "when the application is for an attachment of land or other immoveable property belonging to the defendant, it shall be accompanied with an inventory or list of such "property, containing such a description of the property as may be "sufficient to identify it, together with a specification of the defendant"s share or interest."

3. Now, down to the word interest," it appears to be clear that what is referred to as property is that which is the property (proprium) of the defendant himself. If the

defendant's property consists of a particular share (say eight annas) of certain land, the property to be described in the inventory is to be the property of the defendant, viz., the eight-anna share, and not a description of the land a part of which only is the property of the defendant. Then, after the word "interest comes the word "therein," and the word "therein creates a little confusion, because the use of it shows that at the instant of writing that word there was present to the mind of the draftsman of the Act the word property in a different sense from that in which it had been previously used. It looks as if, at the time, in the mind of the draftsman, he was contemplating as property that subject of property whereof the defendant's property was merely a part.

4. The 235th section refers to the attachment, and it provides for the attachment not only of lands and houses, but other immoveable property, which is large enough to include an undivided share in lands or houses.

5. In the 239th section, we find the words where the property is land, or any interest in land," and provision is then made as to what is to be done in fixing up a notice in such cases.

6. The 244th section makes provision for the case where the property attached consists of land or a share in land. It is clear, therefore, that, when we come to the 246th section, and find the words land or any other immoveable property," we have words which are large enough to include not only lands or houses divided off by metes and bounds, but undivided shares in such lands or houses.

4. The 246th section enacts that, if it shall appear to the satisfaction of the Court that the land or other immoveable property was not in the possession of the party against whom execution is sought, the Court shall pass an order for releasing the said property from attachment."

5. If the words "immoveable property" are large enough to include undivided shares in land, it follows that when it is found that any undivided shares are not in the possession of the party against whom execution is sought, it becomes the duty of the Court to pass an order for releasing the undivided share, in the same way as it would be the duty of the Court to release divided and separate properties from attachment.

6. Four questions are referred to as. As I understand the first question, reading it with reference to the order for the attachment, and the petition of the claimants, the two-eighths share is a two-eighths share out of the supposed moiety, or half share, of A., which had been attached. The attachment was of the moiety, or half share, which belonged to Parbati Charan Chuckerbutty. The claimants say that the moiety was purchased by themselves and Parbati Charan Chuckerbutty jointly, and that they are entitled to two-eighths of such purchased property. It appears to me that this was a claim preferred to property, and an objection offered against the sale of the eight-anna share which had been attached in execution, within the 246th section, and which the Court is

bound to investigate and adjudicate upon under that section.

7. In answer to the second question, which arises out of the first, it appears to me plain that if the claimant proves his claim to the two-eighths of the eight-anna share, which was of Parbati Charan Chuckerbutty, the Court must pass an order releasing such two-anna share from attachment.

8. The answer to the third question depends upon what is the meaning of an attachment of the right, title, and interest of A, in certain lands. Now I may observe that the 213th section says nothing of the attachment of the right, title, and interest of anybody. The attachment is to be an attachment of the property of the judgment-debtor, that is the thing which is his property, not of his property in the thing. The decree-holder is to specify to the best of his belief, and as far as he is able to ascertain, the judgment-debtor's share or interest in the property attached. It appears to me that an attachment of right, title, and interest is not an attachment such as is provided for in that section. It may be doubtful whether it is a good attachment at all.

9. In the case of *Nga The Yah v. Burn* 2 B.L.R.F.B. 91, Peacock, C.J., said that, in a particular case, *Nitokalee Dabee v Kripanath Roy* 8 W.R. 358, what had been attached was not the whole or any specific part of the mehal, but only the right and title of the judgment-debtor therein." He said, an "attachment in general terms of the rights and interests of the judgment" debtor would be no attachment; an attachment must specify what is attached;" and then, after referring to section 213, and pointing out the difference between an attachment and a sale, Peacock, C.J., said: It would not do to stick up in the Zilla that the creditor attached all the rights and interests which the debtor possesses in any property in the "entire Zilla."

10. The question now, however, is, assuming the attachment to be irregular, whether or not a person whose lands are included within such an attachment in execution of a decree against another person, has not a right as against the judgment-creditor making the attachment to treat it as an attachment of the entire property. I think that he has. I think that the attachment must be taken to be an attachment of the property as the defendant's property. In the absence of any qualification, I think it must be taken on a portion that the defendant is in possession of the entire property, there being nothing to show that anything less than the attachment of the entirety of the lands was intended. I don't understand the Chief Justice in the case to which I have referred, to concur in the opinion which Mr. Justice Mitter had expressed in the case of *Nitokalee Dabee v. Kripanath Roy* 8 W.R. 358, that an investigation was not necessary under the 246th section, because the attachment had been in that irregular form,

11. In answer, then, to the third question I would say that in this case, M. had a right to come in and claim his own two-twentieths, and that the Court was bound to investigate and adjudicate upon that claim. And in answer to the fourth question, I would say that if the claimant in the case put proves his claim to two-twentieths, he has a right to an order

releasing such two-twentieths from attachment. He has also probably a right to object to the sale of the land as not being in the possession of the party against whom the execution is sought, and to contend that the sale should not proceed, upon the ground that the attachment is irregular, and tends to affect his interests.

12. The costs of this reference will be the claimants' costs in the cause. If the claimants succeed in the cause, they will obtain the costs of this hearing; if they fail, each party will have his own costs of this reference.

Loch, J.

13. I concur in the answer proposed to be given to this reference.

Phear, J.

14. I concur. I think that section 213 of the CPC obliges the judgment-creditor to specify the property which he conceives to belong to the judgment-debtor, and which he desires to attach. In other words, I am of opinion that the attachment, in order to be good, must distinctly specify a subject of property independently of any reference to the judgment-debtor's rights with regard to it. It appears to me that an attachment, simply of the rights and interests of the judgment-debtor in a specified subject of property, without more description of the extent of the property intended to be attached, is not a proper proceeding within the provisions of Act VIII of 1859. I quite agree, that undivided shares, abstract interest in subjects of property may be the subject of attachment, and I think that u/s 246 of that Act, the attachment of such a subject may be objected to by the person who either claims himself to have a share in that subject, or has any other good reason within the provisions of the remaining part of the section, to object to that subject of attachment being sold as described.

15. With these views, my answer to the first question would be, that M. has a right, u/s 246, to come in and object to the attachment, and if he proves the state of things upon which he relies, I think that the judgment-creditor's attachment ought to be released, so far as regards the margin in excess of A's actual share; because it appears to me that his right to object, if he has any at all, goes to that full extent. He is, in fact, injured by a third person being introduced into the co-parcenership, on a pretended title, in excess of that of his assignee's title, however small the excess may be.

16. With regard to question four, it seems to me to follow from the views which I have endeavoured to express, that if M. proves his claim, he is entitled to have the whole attachment discharged.

Norman, J.

17. I desire to add with regard to the observations of Mr. Justice Phear, upon the first question put to us, that I do not think it necessary to express any opinion at present as to

whether the release should go beyond the two-eighths claimed and extend to the amount of the whole of the alleged moiety of A.

L.S. Jackson, J.

18. What has fallen from Mr. Justice Phear renders it necessary for me to say that, at present, my opinion goes to this extent only that, upon the claimant, M., making out his objection, he is entitled to have the attachment released or dissolved so far as relates to the share or interest in the property which he shows himself to be in possession. I do not desire at present to go beyond that.

19. It may be, as in the first of the cases put by Mr. Justice Macpherson, that it is impossible to say, on the face of the objector's petition, that the share in the property to which he is entitled, is, in any way, even wholly, encroached upon by the sale of the share which the attachment specifies. Still, he may, I conceive, have a very good right indeed, to object to a purchaser being introduced even into a show of co-parcenership with him, upon the footing of the particular share, which is so attached. If this is a grievance sufficient to support an objection u/s 246, I am inclined to think that Mr. Marindin is right in arguing that an undivided shareholder cannot come in under that section at all. But of course the merits of the objection made u/s 246 must be judged of and determined with reference to the circumstance of the judgment-debtor's alleged enjoyment of the subject of property which is attached.

Macpherson, J.

It appears to me to be unnecessary to decide the question as to what particular order should be made in such cases as this, further than to say that the claimants are certainly entitled to that for which alone they pray, namely, that the attachment may be removed quoad their share in the property attached.