
(1873) 12 CAL CK 0001

Calcutta High Court

Case No: Special Appeal No. 239 of 1873

Binda Bibee

APPELLANT

Vs

Lalla Gopeenath and
Others

RESPONDENT

Date of Decision: Dec. 3, 1873

Final Decision: Allowed

Judgement

Phear, J.

With reference for the view taken by the Judge of the lower Appellate Court in this case, it appears to us that the plaintiff has certainly, on the facts found by both the Courts below, established her claim against the defendants. The s. 270 of the CPC says, that, when a sale of the attached property takes place, the proceeds shall be applied to the satisfaction of the decree of the person who first attached. And it has been held by a Full Bench of this Court that these words give the person who first attached a right to sue any one else who may have been wrongly paid by the Court out of the proceeds in preference to him, in order to recover from such person the money which has been so paid Gogaram v. Kartick Chunder Singh B.L.R., Sup; 1022. The plaintiff in this case says, that, although the property of a certain person was sold in execution on the application of the defendants, yet at that time she, the plaintiff, had a prior attachment, and was therefore entitled to be paid her debt out of the proceeds of that sale in priority to the defendants. The attachment upon which the plaintiff relies was made on the 16th of February 1869; and the last attachment, made by the defendants before they obtained the order of sale, was effected on the 9th March 1869. We speak of it as the last attachment, because there was certainly another attachment made at the instance of the same persons previously, i.e., as early as September 1864, and there appears to have been between these two dates an abortive attempt to get the Court to attach the property on another occasion. If the attachment effected by the plaintiff on the 9th March 1869 was the actual commencement of the attachment which was subsisting when the defendants sold, then clearly the defendants' attachment is subsequent in date to that of the plaintiff. But the defence is that the attachment of September 1864 was a good and valid attachment within the

meaning of s. 270 of the Civil Procedure Code, and continued unbroken in force up to the 9th of March 1869, when the second attachment was made, and further continued in force down to the time when the sale was made:--in other words, the attachment of the 9th of March 1869 was altogether an useless and unnecessary act on the part of the Court. But we find upon looking to the facts which are presented to us by the lower Courts, that the attachments of September 1864 was a general attachment made after a certain decree for possession, and mesne profits had been passed in favor of the present defendants, but before the mesne profits had been estimated or assessed.

2. The petition for attachment did not specify any sum of money in respect of which the attachment was sought. And in truth, no such specification was possible, unless it was confined to a certain amount of costs, for at that time there had been no final decree--no final money-decree--passed. The present defendants, in that suit in September 1864, had only obtained a decree for possession of certain immovable property, and a right to have the mesne profits assessed in the execution proceedings. Until those mesne profits were assessed, clearly there was no final money-decree passed in their favor. There was no decree which they were in a position to call upon the Court to execute and to realize in the shape of money. And as it happened, either by reason of their own dilatoriness or by the delay of the Court itself, they did not get a final decree or assessment of any specific amount of mesne profits until the year 1866. So that, up to the year 1866 at any rate, they were not in possession of a decree for money which they could execute. Now the Full Bench decision, in the case of *Sri Ramnanik v. Tincowri Rai* 4 B.L.R., F.B., 63, distinctly lays down that the word "attached" in s. 270 means "attached in execution of a decree within the meaning of Ch. iv of the Code:" that is, obviously, as we think, execution of a decree which is a final decree for money, and which is capable of being completely executed at the time when the attachment is asked for and made.

3. The late Chief Justice in that case pointed out various inconveniences and anomalies which would occur, if the attachment spoken of in s. 270 were construed so as to include attachment effected before decree. And we need hardly remark that every one of those inconveniences and anomalies would manifestly present themselves here if the interpretation, which the present respondents desire us to put upon this word attachment, was adopted. An attachment before the final assessment of the mesne profits was made would be exactly in the same situation, as regards the Chief Justice's arguments, as attachment before a final money-decree was passed. It seems, therefore, very plain that the reasoning upon which the Full Bench placed its decision in that case obliges us to hold that an attachment made pending execution proceedings in the case of a decree for possession and mesne profits not assessed) is not an attachment such as is contemplated by s. 270. This being so, we think that the lower Appellate Court was wrong in holding that the defendant's attachment of September 1864 was an attachment within the meaning of that section prior to the present plaintiff's attachment, and therefore gave them, the defendants, a right to the money. At any rate it could only give them such a right to the extent of the costs which were awarded to them in their first decree. But,

although those costs were included in their application for attachment, it is clear that that attachment was not sought with a view to obtaining execution of the decree so far as it was then capable of being executed by realization of the amount of those costs, but for the purpose merely of keeping the property within reach of the Court and available for satisfaction of the amount of mesne profits as soon as that amount should be ascertained.

4. But, however, this may be, we think that there is another even more complete obstacle to the maintenance of the right set up on the part of the defendants, because we think that it is beyond question in this suit, on the facts which have been found by both the lower Courts, that the attachment of September 1864, whatever was its value, was at an end,--altogether at an end,--and removed, before the attachment of the 9th March 1869 was effected. We observe in the first place that, on the 16th March 1865, in the course of the execution proceedings of the former suit, that is to say the suit in which the present defendants had obtained their decree, both parties had notice to appear before the Court in the matter of those execution proceedings, for the hearing and final determination thereof. But inasmuch as notwithstanding that notice, the present defendants failed to appear, the Court struck off the case. That act by itself can scarcely under the circumstances bear any other meaning than that the Court thereby effected a complete termination of the case: if we knew nothing more than this of the matter, the order then made must be taken to have had the effect of removing the attachment and putting an end to the execution proceedings altogether. No doubt at a later hour in the course of the same day, the present defendants did come into Court, and induced the Court to restore the proceedings, but no order seems to have been made at that time to the effect that the attachment also should be restored.

5. However this may have been at that time we need not now greatly trouble ourselves to ascertain, because we find that nearly three years afterwards, namely on 25th January 1868, the present defendants applied to the Court again in those very execution proceedings in order to get satisfaction of the complete decree for mesne profits, which they had then obtained, by the sale of certain specified property, belonging to the judgment-debtors, which we understand was the property, or part of the property originally attached and the subject of the final sale. On this application, the Court, in the exercise of the discretion which it was bound to apply to the matter, acted as if there was no attachment at that time subsisting. It expressly said that there was no attachment subsisting, and by an order made on the 6th February 1868 called upon the applicants to pay tallabana fees for effecting the necessary attachment. This the applicants, i.e., the present defendants failed to do, and accordingly on the 18th of the same month the case was struck off. Ten months after this, again the present defendants did apply for a fresh attachment, namely on the 31st December 1868, the attachment was made on the 9th March 1869. And it was upon that attachment so following upon that application that the sale-proceedings eventually took place. That suit is not now before us; the parties in this appeal are not the parties to that suit; we cannot now review what was done in that suit; it

would be beyond, our jurisdiction to say that the order of the Court in those execution proceedings was a vain order or a wrong order.

6. We are not here called upon to satisfy ourselves as to what was the effect of some doubtful, or ambiguous proceeding on the part of the Court which was charged with the execution of the decree in that case. We have no such question before us as that very common one, whether or not the Court by striking the execution proceedings off its file meant to terminate them altogether and to remove the attachment. We have before us the express finding of the Court that there was no subsisting attachment, and the order which it made thereon. We must take it that it was a right order between those parties that the judgment-debtor's property in that suit was not attached before the 9th March 1869. So that it appears to us there is really no occasion as between the present parties to enquire what was the effect of the earlier proceedings of September 1864, and so on. All that matter has been put at rest. There was clearly no attachment subsisting at the instance of the present defendants in the suit, and immediately before the 31st December 1868. And consequently, as has already been remarked, if that be the case, the present plaintiff's attachment was within the meaning of s. 270, and was indisputably a prior attachment. The plaintiff is, therefore, in our opinion upon the facts of the case as stated by the lower Appellate Court, entitled to recover in this suit. The Munsif held that she was so entitled, and the Munsif's decision was therefore right, and the lower Appellate Court's decision was wrong in law. We, accordingly, reverse the decision of the lower Appellate Court and affirm that of the Munsif. The appellant will have her costs in this Court and in the lower Appellate Court.