

(1917) 07 CAL CK 0045**Calcutta High Court****Case No:** None

Panchanan Das Majumdar

APPELLANT

Vs

Kunja Behari Malo and Others

RESPONDENT

Date of Decision: July 2, 1917**Citation:** 42 Ind. Cas. 259**Hon'ble Judges:** Newbould, J; Fletcher, J**Bench:** Division Bench**Judgement**

Fletcher, J.

This appeal has been heard only against the respondent No. 7 who purchased lot No. 32 for the sum of Rs. 40, the case against the other respondents having been compromised. Now the fact relied on in this case is that the Court below, has found that there was, in fact, no attachment of this property before it was sold. It is urged, therefore, that having regard to Order XXI, Rule 64, Civil Procedure Code, there being no attachment, the Court had no jurisdiction to sell the property. The case has been argued ex parte as the respondent No. 7 has not entered appearance and the other respondents have compromised the case; but we think that the oases that have been referred to as well as the terms of the order support the view taken by the appellant. Order XXI, Rule 64, provides that any Court executing a decree may order that any property attached by it and liable to sale shall be sold. The Court having found that there was no attachment in this case, it is said that the Court had no jurisdiction to make the sale. The cases under the CPC of 1859 render no assistance because that Code continued no provision corresponding with Order XXI, Rule 64, of the present Code or Section 284 of the Code of 1882. There being nothing corresponding to that section, the cases, decided under the code of 1859 do not help us at all in the present case. Under the Code of 1882 a similar point was raised before the Judicial Committee in the case of *Macnaghten v. Mahabir Pershad Singh* 9 C. 656: 11 C. L. R. 494: 10 I. A. 25: 7 Ind Jur. 164: 4 S. P. C. J. 417: 4 S L. R. 285: 4 Ind. Dec (N. S.) 1086., but that point does not seem to have been decided. Under the present Code, the point has been decided in Bombay in the case of *Sorabji v.*

Kala Raghunath 12 Ind. Cas. 911: 36 B. 156: 13 Bom. L. R. 1193. At page 163, Page of 19 C. L. J.—Ed Scott, C. J., remarked that a property could only be brought to sale after it had been duly attached and that, if the attachment came to an end upon the payment into Court on the 22nd September 1909, the property was not duly attached at the time of the sale in January 1910. The point has also been referred to by Lord Moulton in delivering the opinion of the Judicial Committee in the case of Raja Thakur Barmha v. Jiban Ram Marwari 21 Ind Cas 936: 19 C. L. J. 161: 18 C. W. N 313: 12 A. L. J. 156: (1914) M. W. N. 118: 26 M. L. 3. 89: 15 M. L. T. 137: 16 Bom. L. R. 156: 41 C. 590. At page 164 Page of 19 36 B.—Ed. of the report Lord Moulton remarked: "Their Lordships are of opinion that this is a very plain case. That which is sold in a judicial sale of this kind can be nothing but the property attached and that property is conclusively described in and by the schedule to which the attachment refers." Although not exactly in point, it indicates the view of their Lordships that a property can only be sold when it has been duly attached. That, I think, is the only possible view to take with regard to the terms of Order XXI, Rule 64, Civil Procedure Code. The appeal as against the respondent No. 7 must, therefore, be allowed. We therefore, reverse the order made by the learned Subordinate Judge so far as the respondent No. 7 is concerned and set aside the sale made by him, The learned Subordinate Judge made no order as to the costs in the Court below. We also make no order as to the costs of this appeal.

2. As regards other parties, let a decree be drawn up in terms of the petition of compromise.

Newbould, J.

3. I agree.