

**(1982) 03 CAL CK 0038**

**Calcutta High Court**

**Case No:** None

Parbatilal Chowdhury and  
Others

APPELLANT

Vs

Jaydeb Singh and Others

RESPONDENT

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**Date of Decision:** March 16, 1982

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 64
- Constitution of India, 1950 - Article 133

**Citation:** 86 CWN 717

**Hon'ble Judges:** B. C. Chakrabarti, J; Anil K. Sen, J

**Bench:** Division Bench

**Advocate:** A.C. Bhabra, Biswajit Ghosh, Samaresh Banerjee and Chameli Ghosh, for the Appellant; R. C. Deb, S. M. Mazumder and Suchit Kumar Banerjee, for the Respondent

**Final Decision:** Dismissed

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**Judgement**

1. An application under Order 21 Rule 58 of the CPC having been dismissed, the claimants have preferred the present appeal.
2. The appeal is directed against the order dated 11.8. 1980, passed in Misc. Case No. 8/78 arising out of Title Execution case No. 19 of 1970 of the 1st court of the learned Subordinate Judge at Alipore.
3. The appeal raises an important and a somewhat intriguing question of law. It arises in the following way:
4. The appellants petitioners (hereinafter called the petitioners) claim to have purchased 9 cottahs, 7 chittaks and 3sq. ft. of land comprised in premises No. 8/1D, Diamond Harbour Road forming a part of old 10A, Diamond Harbour Road and No. 2 Judges' Court Road, from one Bharat Sumsher Jung Bahadur Rana on 29.3.1972. After purchase the petitioners constructed pucca structures thereon which has

subsequently been renumbered as 8/1D, Diamond Harbour Road. The petitioners came to know sometime in February, 1978 that this property has been advertised for sale in execution of a decree. This put the petitioners to enquiry and after having obtained information from Court they came to learn that Title Execution case was started by the decree holder opposite party against the judgment debtor Maharaj Kumar Maloychand Mahatab and that the said execution case was eventually dismissed for default on 9.5.1972. There was an attachment of the vacant land in the said execution case on 3.8.1970. The judgment debtor filed a misc. case under Order 21 Rule 58 of the Code which was ultimately dismissed for non-prosecution on 8.4.1972. The order for sale and the advertisement were made in connection with the said execution case pursuant to an application by the decree holder for a fresh attachment on 27.9.75. This was proceeded by an order dated September 26, 1975, restoring the execution case to file on the prayer of the decree holder. Attachment was levied again on October 3, 1975, which the petitioner came to know in February, 1978 and having ascertained the facts filed the application under Order 21 Rule 58 of the Code on March 16, 1978. This application was registered as Misc. case No. 8/78.

5. The decree holder, opposite party filed an objection to the petition and by the impugned order the learned Subordinate Judge has dismissed the application. It appears upon a perusal of the judgment under appeal that the learned Subordinate Judge proceeded on the footing that the attachment was effected on August 3, 1970 and that the transfer effected thereafter by the judgment debtor to Bharat Sumsher Jung Bahadur Rana to the claimants were made during the subsistence of the order of attachment. The learned Subordinate Judge further held that the petitioners purchased the property without making proper enquiries from proper quarters and as such the purchase was not a bonafide one. In that view of the matter the petitioners were found not entitled to be release of the property from attachment as claimed.

6. Mr. Bhabra appearing on behalf of the appellants has challenged the propriety of the order by contending that even though the property might have been under attachment levied on August 3, 1970 at the time of the petitioners' purchase in 1972, the execution case having been dismissed for default thereafter the attachment could no longer subsist and that the second attachment being made in 1975 the purchase made by the petitioners in 1972 could not be affected thereby. The point thus raised comes to this as to what is the effect of dismissal of an execution case under Order 21 Rule 57 of the Code in so far as the attachment levied in the execution case is concerned and whether with the restoration of the execution case the attachment also is revived.

7. The learned Advocate appearing on behalf of the decree holder Respondent contends that there is no legal evidence to show the title of Bharat Sumsher Jung Bahadur Rana from whom the petitioners claim to have purchased and that in any

event with the restoration of the execution case in 1975 the attachment effected in 1970 was automatically revived so that the secant attachment effected in 1975 was a mere surplusage not having the effect of a fresh attachment.

8. Before coming to consider the point of law involved in may be convenient to dispose of the question as to the title of Bharat Sumsher Jung Bahadur first. The contention of the learned Advocate for the Respondent is that there is no evidence on record that Bharat Sumsher Jung Bahadur had acquired the property by purchase from the judgment debtor and it is accordingly contended that the purchase by the petitioners from Bharat Sumsher Jung Bahadur is of no consequence whatsoever. This point however, need not detain us long. The petitioners categorically stated in their application under Order 21 Rule 58 of the Code that Bharat Sumsher Jung Bahadur Purchased from the judgment debtor an area measuring about 11 cottahs, 7 chittaks and 3 sq. ft. on 14.9.70 and thereafter sold 9 cottahs and odd to the petitioners on 29.3.1972. This part of the petitioners case was not specifically denied by the opposite party. The opposite party did not say in so many words that Bharat Sumsher Jung Bahadur did not purchase the property from the judgment debtor. All that was said was that assuming though not admitting that there was a transaction, it was void and illegal since the land in dispute at the relevant time was covered by an order of attachment. At the time of hearing of the Misc. case the title deed of the petitioners was exhibited, being exhibit-1. There are clear recitals in this document about the transfer by the judgment debtor to Bharat Sumsher Jung Bahadur. Exhibit 1 was proved by the solitary witness examined on behalf of the petitioners and there was no suggestion put to him that Bharat Sumsher Jung Bahadur had not acquired any title by purchase from the judgment debtor which he could pass on to the petitioners. The only witness examined on behalf of the Respondent also did not say a word about it. In fact the trial proceeded on the footing that there was factually a transfer effected by the judgment debtor to Bharat Sumsher Jung Bahadur who in his turn transferred the disputed land to the petitioners. This would be evident from the judgment under appeal itself. The learned Subordinate Judge says in his order "admittedly the property belonged to the judgment debtor, Maharaj Kumar Moloychand Mahatab. Admittedly the property was sold by him to Bharat Sumsher Jung Bahadur Rana on 14.9.1970." This being the admitted case on which the trial proceeded it is no longer open to the Respondent to contend that the petitioners failed to establish the title of their vendor. This disposes of the preliminary objection urged on behalf of the respondent.

9. The other point, the more important one, raising the point of law as stated earlier is a point not entirely free from doubt. The execution case was started in July, 1970. Attachment on the prayer of the decree holder was levied in August, 1970 and the execution case was dismissed for default on May 9, 1972 obviously under Rule 57 of Order 21 of the Code. Subsequently on an application on behalf of the decree holder the execution case was restored to file in September 1975. There is no dispute that

subsequent to the restoration of the execution case a second attachment was effected in October, 1975.

10. Section 64 of the CPC renders void private alienations of property after attachment to the limited extent as prescribed therein. It provides "where an attachment has been made any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment debtor of any debt, dividend or other monies contrary to such attachment, shall be void against all claims enforceable under the attachment." Mr. Bhabra therefore, contends that Section 64 does not go beyond this that any alienation after attachment is void as against all claims enforceable under that particular attachment and he further contends that with the dismissal of the execution case in 1972 the attachment also stood vacated with the result that the alleged incapacity attaching to the alienation by reason of the particular attachment effected in 1970 no longer subsisted. In support of this contention our attention was drawn to the provisions of order 21 Rule 57 of the Code as amended by the Calcutta High Court. The Rule after amendment reads as follows:

Where any property has been attached in execution of a decree but by reason of the decree holder's default as the court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease unless the court shall make an order to the contrary.

11. In the instant case there was no order passed by the court while dismissing the execution case that the attachment shall subsist. Therefore on the plain meaning of Rule 57 the attachment effected in 1970 ceased with the dismissal of the execution case. Formerly there was some controversy as to whether or not the dismissal of an execution case for want of prosecution did necessarily put an end to the attachment. The controversy has lost importance in view of the Calcutta amendment which provides that with the dismissal of the execution application the attachment shall cease unless an order to the contrary is made or in other words unless the attachment in spite of the dismissal, is kept alive.

12. Such being the provision of law Mr. Bhabra contends that even though the purchase by the petitioners were made at a time when the attachment was in force, the limited voidness attached to such a purchase has ceased to have any effect with the dismissal of the execution case. In support of this contention reliance was placed in the case of *Patringa Koer vs. Madhabananda Koer*, 14 CLJ 479. This decision lays down that revival of an execution proceeding does not operate as a revival of the attachment so as to prejudice the rights of strangers who have in the interval acquired a title to the property. The true object of attachment is to place the property in the custody of the court so as to make it available for the realisation of the fruits of the decree. If by reason of default of the decree holder the attachment

is dissolved, the property ceases to be in the custody of the court and upon reversal of the decree or upon cancellation of the order of dismissal for the default, the decree holder may ask the court to take the property back into its custody. It is further held that in the absence of statutory provisions to the contrary, the court cannot do so with retrospective effect so as to prejudice a title that may have been acquired in the interval by a stranger when the property admittedly was not in the custody of the court.

13. The next case cited by [Kumar Pashupatinath Malia and Another Vs. Deba Prosanna Mukherjee](#), though does not touch the real point involved in the case, is yet not without relevance because of certain observations made therein. That was a case in which by reason of some arrangement between the decree holder and the judgment debtor, the court passed an order striking off the execution case while keeping the attachment in force. It was held in the facts of the case that the order striking off the execution case was a final order disposing of the execution case and that it was competent to the court while doing so to keep the attachment of Rule 57 of the code. It further lays down that Rule 57 of the Code. It further lays down that Rule 57 envisages 3 kinds of orders namely (1) adjourn the proceeding for good reason which will automatically keep the attachment alive, or (2) simply dismiss the application which will automatically destroy the attachment or (3) dismiss the application but specifically keep alive the attachment by an express order. It was held that the order passed in that case was really an order falling in category 3.

14. Mr. Bhabra also referred to a case, [Maheshwari Khetan Sugar Mills \(P.\) Ltd. and Others Vs. Ishwari Khetan Sugar Mills and Others](#), . This was a case relating to transfer of shares of company in respect of which there was an order of attachment. It was held that a private transfer of shares in a company after the attachment thereof is not wholly void but is void as against all claims enforceable under the attachment and not otherwise. Section 64 of the Code, it was held was intended to safeguard the interest of creditors; it was meant not to deprive the owner of his interest in the property under attachment. In case the legislature had the intention to declare the transfer to be completely void the words against all claims enforceable under the attachment" would not have been incorporated in the section. Therefore, it was argued that the transfer to the petitioners was not enforceable as against the attachment effected in 1970 but since that attachment ceased to have any effect the transfer cannot be invalidated by reason of subsequent restoration of the execution case and a second attachment levied long after the purchase.

15. As against this learned Advocate for the Respondent contended that restoration of an execution case which had been dismissed for default is not unknown to law and that the restoration had the effect of reviving the execution case along with all interlocutory orders including an order for attachment passed therein. He also sought to distinguish the case of a purchaser who has acquired interest after the

attachment ceased to have effect and a purchaser who had acquired the interest during the subsistence of the attachment which attachment stood vacated by reason of subsequent default of the decree holder in the execution case. In support of the contention that the purchase of the petitioners was hit by the original attachment, he referred to several decisions. In the first place the case of Pratap Chandra Vs. Sarat Chandra 25 CWN 514 was referred to. In that case there was an attachment of certain properties whereupon the purchasers preferred a claim under Order 21 Rule 58. The property was released from attachment after which another person took lease holder of the property from the purchasers, thereafter the decree holder instituted a suit under Order 21 Rule 63 to set aside the order for release made in the claim case. It was held that the order for release from attachment did not put an end to the attachment so as to leave the claimant free to deal with the property, as he liked. Relying on and reaffirming the principles laid down in the case of Patringa Koer v. Madhabananda (Supra) it was observed that in a case of attachment before judgment the revival of the execution proceeding does not operate as revival of the attachment as to prejudice the rights of strangers who had in the interval acquired title to the property. The reason behind the decision in this case rested on the theory that the order for release of the property from attachment made under Order 21 Rule 58 of the Code did not really put an end to the attachment in view of the subsequent decree passed in a suit under Order 21 Rule 63. The effect of such a decree is to maintain uninterrupted the attachment originally made. In the case before us there is no question of setting right an improper order of release by a suit or appeal. In a case where the order of release is set at naught the effect of such an order is as if there was no valid order for release at all.

16. The next case cited, Sushila Bala Vs. Guest Keen Williams. I. L. R. (1949) 1 Cal 177, is a case where also the point involved was different. This was not a case where the execution case was dismissed and the attachment released by virtue of an order under Rule 57 of Order 21 of the Code. In this case an order for releasing the property attached was ultimately set aside on appeal with the direction to the executing court to proceed with the execution. It was held that where an order releasing property from attachment is set aside no fresh attachment is necessary, the reason being that the attachment is deemed to have continued throughout. Unless this was so a fresh attachment would have been necessary. In coming to this decision reliance was placed in the case of Pratap Chandra vs. Sarat Chandra already referred to.

17. The next case relied upon by the respondent, Shib Nath Vs. Sk. Sabiruddin, ILR 56 Cal 416 also is beside the point. This was a case where there was an order for attachment before judgment. The suit was decreed and an appeal from the decree was dismissed. On the decree holder's prayer for execution a fresh attachment was taken out which was ultimately dismissed for default and another application for execution was made. The question between the parties turned upon whether or

not, on the date of the plaintiffs' purchase the property was under attachment. Order 38 Rule 11 provides that property attached before judgment need not be reattached in execution of the decree. It was contended that upon an application for execution being made the attachment before the judgment became an attachment in execution so as to be subject to all the infirmities of attachment in execution. The contention was negatived and it was held that there is nothing in Rule 11, Order 38 to give colour to the view that for the purpose of Rule 57, Order 21 "attached in execution" is a term, which covers attachment before judgment. It is, therefore, clear that this being a case of attachment before judgment stood on a different footing altogether.

18. The next case relied on, [Annapurna Patrani and Others Vs. Lakshmana Kara and Another](#), is also of no avail to the respondent. No doubt the decision lays down that an order restoring attachment would relate back to the date when the attachment was first made and would render invalid any alienation in the interim period, yet this was so held entirely, under different circumstances. There the order for dismissal of the execution case for default was set-aside in appeal. The effect of the appellate order consequently was to restore the order attaching the property. The logic behind the decision is imple to understand. The order for dismissal being set aside an appeal. It was necessarily implied that the order was an in valid order, as if there was no dismissal at all.

19. Gokul Prasad vs. Kashi Nath, reported in ILR 42 All 39 also lays down the same principle namely that an order of the High Court restoring an attachment which has been released by an order of an inferior court relate back to the date when the order was first made. For the reasons already stated this case too is clearly distinguishable.

20. It seems upon a perusal of the provisions contained in Order 21 Rule 57 read with Section 64 of the Code that when an attachment is effected in execution of a decree and the execution case itself is dismissed for default, the attachment stands vacated unless there is an order to the contrary. The mere fact that the dismissal is subsequently set aside by condoning the default of the decree holder does not seem to revive the attachment also. Setting aside an order of dismissal on appeal or review cannot be equated with condonation of the default and resultant restoration of the Execution case. In the latter case attachment does not automatically revive. That appears to be the plain meaning of the provisions of Order 21 Rule 57.

21. It was however, contended that setting aside of an order of dismissal for default by the executing court itself on sufficient cause being shown for the default is not unknown to law and that once the execution case is restored, it is so restored along with all the ancillary orders including an order for attachment. In support of such contention reliance was placed on two decisions, [Nandipati Rami Reddi and Others Vs. Nandipati Padma Reddy and Others](#), and [Thavvala Veeraswami Vs. Pulim Ramanna and Others](#), . Neither of the two cases appear to be relevant. It was held in

the former case that subject to such exceptions where rights of strangers or third parties are brought in to play during the time when the suit stood dismissed and the time when it was restored under Order 9 Rule 9 of the Code in general rule is that when the suit is restored the interlocutory orders and their operation during the period of interregnum are revived. The Madras case relates to an attachment before judgment. The suit was dismissed for default but latter on restored and decreed. It was held that the order dismissing the suit for default being set aside the suit remained as it was on the day when it was dismissed and all proceedings, taken up to that date must be deemed to be in force when the dismissal is set aside, and all interlocutory orders will be revived. I have already indicated that this was a case of attachment before judgment made during the pendency of the suit. The general principle that with the revival of the suit or the execution case, interlocutory orders passed prior to the dismissal are deemed to be revived, does not seem to apply to the case of an attachment made in execution, the attachment ceasing to be in force by reason of dismissal of the execution case in view of the special provision in that behalf. Attachment in execution stands on a different footing as specific provision as to how an attachment is to be dealt with even after dismissal of the execution case is made in regard to other interlocutory orders. Consequently the general principle would stand abrogated by the special provision relating to attachment in execution.

22. The matter may be looked at from another angle. In view of the Calcutta amendment of order 43 of the Code an order under Rule 57 of Order 21, directing that an attachment shall cease or directing or omitting to direct that an attachment shall continue is an appealable order. In the instant case the court while dismissing the execution case did not specifically say or direct that the attachment shall continue nor did it say that the attachment shall cease. It was not necessary to say specifically that the attachment shall cease for unless the contrary is as indicated, that is the effect of the law. But omitting to say that the attachment shall continue is a point which can be taken in appeal. Since no appeal was taken the effect of the order namely that the attachment stood vacated became final and binding between the parties. It is not open to the decree holder to contend that the attachment continued in spite of the dismissal. It is not equally competent to the decree holder to contend that with the restoration of the execution case the attachment also stood revived, on the general theory that restoration would relate back to the date of the dismissal. The reason why this is so has already been explained.

23. It seems therefore, that the decision in *Patringa Koer's* case (Supra) governs the filed and the ratio of that revival of execution proceedings does not operate as a revival of the attachment itself. It was however, strongly contended on behalf of the Respondent that the decision really lays down the proposition what the attachment cannot be deemed to have revived for a limited purpose namely, to prejudice the rights of strangers who have in the interval acquired a title to the property. In the case before us the claimant obviously did not claim to have acquired the property after the dismissal of the execution case. His purchase was prior thereto and at a



time when the first attachment effected in 1970 was in force. There fore, it was argued that he case of the claimants is not covered by the decision in Patringa Koer"s case. But for the observations made towards the concluding portion of the decision such a contention might have been possible to be raised. In that case it was held that after dismissal of the execution case the attachment does not remain in suspense pending the result of a possible appeal or an application for review. It was argued that if there was no subsisting attachment in force a claim or an objection could not be preferred under Rule 56. This proposition was found to be technically correct and it was further observed that as there was no attachment in force the decree holder ought strictly to be called upon to attach the property. This observation necessarily means that a second attachment is necessary, obviously because the revival of the execution proceeding did not operate as a revival of the attachment. In fact the decree holder in this case before us had asked for a second attachment after restoration of the execution case and such an attachment was actually levied in 1975. In that view of the matter it follows, relying on the authority of Patringa Koer"s case that whatever infirmity that initially attached to the purchase of the petitioners were lost with the cessation of the first attachment.

24. The other finding of the court below that the purchase of the claimants is not without notice of attachment and consequently not bonafide is based upon his view that the earlier attachment effected in 1970 was still subsisting and that the claimants had a duty to make enquiries from court before the purchase. It has been found that the earlier attachment ceased to have any effect at the date the claim was lodged and such a claim could not be avoided by reason of section 64 of the Code which renders void alienation of property against all claims enforceable under that attachment. That attachment being non-existent. Section 64 cannot be called in aid to defeat the petitioners claim. This apart, it is not understood how the claimants could make enquiries from court unless they had knowledge of the pendency of the Execution case. There is nothing on record to indicate that they had the requisite knowledge.

25. In that view of the matter the impugned order dismissing the Misc. case cannot be sustained. The appeal is accordingly allowed. The impugned order is set aside and the Misc. Case is allowed on contest. The disputed property be released from attachment.

The alternative application and the Rule, namely, C.R.No. 3842(M)/80 stand disposed of. There will be no order for costs.

Preparation of a formal decree in the appeal is dispensed with.

Let the records go down to the court below forthwith.

26. Certificate under Article 133(1) of the Constitution is prayed for on behalf of the Respondent and is granted in view of the point involved and its importance.

27. As and when certified copy of the judgment is applied for, let it be issued forthwith.

28. Anil K. Sen J. : I agree with My Lord that the claim put forward by the appellant in this case should be allowed. No doubt the appellant purchased the disputed land, on which he has since built his own house at a time when the previous attachment was in force and, as such, subjected to the claim enforceable under the said attachment, but that claim along with the attachment stood dissolved when the execution case was thereafter dismissed for default and there was no special order continuing the attachment in view of the specific provision of Order 21 Rule 57 of the Code as it stands on the Calcutta Amendment (since incorporated in the Code itself).

29. Where the order of dismissal has been correctly made restoration of such an execution case by recalling such an order of dismissal on the explanation furnished by the decree holder making out sufficient ground for his default does not restore the original attachment because if it be so then much of the effect of the specific provision in Rule 57 would be nullified. I agree with my Lord that invalid orders releasing an attachment of dismissing the execution case must be distinguished from valid orders of dismissal for default contemplated by Order 21 Rule 57 because the former do not strictly come within the terms of Rule 57. I think this view finds support from the decision of Sir Ashutosh Mookerjee referred to by My Lord hereinbefore and I find no valid ground to differentiate a third party purchaser who purchases after the dismissal of the execution case from a third party purchaser who purchased before such dismissal but who gets release on dismissal of the execution case for default. The effect of restoration of an execution case on the explanation furnished by the decree holder furnishing sufficient grounds for his default is to restore the execution case along with previous attachment, then even a third purchaser who purchases after such dismissal would be equally bound by the revived attachment.

I, therefore, entirely agree with the order proposed by My Lord and the reasons given therefore.