(1869) 05 CAL CK 0041

Calcutta High Court

Case No: Special Appeal No. 2067 of 1868

Baboo Ramacharan Lal and Others		APPELLANT
	Vs	
Jhatu Sahu and Others		RESPONDENT

Date of Decision: May 20, 1869

Judgement

Macpherson, J.
It appears from the facta found by the Judge that the plaintiffs (respondents) sued for possession, after foreclosure, of certain estates, including, among others, one called Moramin. The plaintiffs" mortgage bears date the 3rd of January 1863. The appellants resist the plaintiffs" claim, on the ground that, prior to the 3rd of January, that is to say on the 28th of March 1862, the property had been attached by one Karu Sing, who held a decree against the mortgagors; and that the appellants became the purchasers of the property at a sale, which was held in execution of that decree on the 3rd of November 1863. The contention is that the mortgage to the plaintiffs is void as against the appellants because made at a time when the property was under attachment. After the attachment of the 28th March, 1862, i.e., upon the 18th July 1862, the judgment-debtors applied for a review of judgment. This application remained undisposed of until the 28th of April 1863, when it was rejected. After that, on the 3rd of September 1863, the decree-holder caused the property to be again attached. On the 3rd of the following month of November the sale took place and the appellants were declared the purchasers. The Subordinate Judge says, that "the first attachment seems to have been made null and void by a subsequent attachment of the same property by the same decree-holder dated 30th September 1863. It is evident, from the last process of attachment, that the first attachment was withdrawn in consequence of the execution of decree case being struck off the file. Otherwise there is no other way of accounting for the issue of the second attachment."

2. Mr. Madocks, the Judge of Bhagulpore, before whom the case came on appeal, says:--"In appeal, it is contended, that as the first attachment was never raised, it was still in force when the deed of sale was executed. I am of opinion that the first attachment was extinguished, 1stly, by lapse of time; 2ndly by the case being struck off the file as

admitted by the pleaders. Were the appellant''s contention good, it would be equivalent to saying that an attachment can subsist for eighteen mouths, notwithstanding the execution case may have been struck off the file in the interim. There is no necessity for a special order for raising an attachment; it appears to me, if property is attached and no further steps are taken on the attachment within a reasonable period, that the attachment would be void as against third parties, even if the execution case was from any oversight or error not struck off the file. But when it is so struck off, and a party has shown by his own acts he deemed a second attachment necessary, there cannot, it appears to me, be any doubt about an attachment, which was effected eighteen months previously and on which no further steps had been taken in furtherance of the sale, being null and void. The appeal is therefore dismissed with costs."

3. There is much in this judgment in which I cannot concur. I know of no reason why an attachment should not subsist for eighteen months, whether that which is called "the execution case" has or has not been struck off the file in the interim, unless the attachment has been withdrawn or set aside in such manner as the law provides. It appears to me to be clear that if property is once attached, the attachment will subsist, if not expressly abandoned by the party at whose suit it was issued, until an order is issued for its withdrawal, even although no further steps are taken on the attachment within a reasonable period.

4. Section 235 of Act VIII of 1859 enacts that "where the property shall consist of lands, houses, or other immoveable property, the attachment shall be made by a written order prohibiting the defendant from alienating the property by sale, gift, or in any other way, and all persons from receiving the same by purchase, gift, or otherwise."

5. Section 240 provides, that "after an attachment has been duly made, any private alienations of the property, whether by sale, gift, or otherwise, during the continuance of the attachment, shall be null and void."

6. Section 245 enacts, that "if the amount decreed with costs and all charges and expenses which may be incurred by the attachment be paid into Court, or if satisfaction of the decree be otherwise made, an order shall be issued for the withdrawal of the attachment, and if the defendant shall desire it and shall deposit in Court a sum sufficient to cover the expense, the order shall be proclaimed or intimated in the same manner as hereinbefore prescribed for the proclamation or intimation of the attachment; and such steps shall be taken as may be necessary for staying further proceedings in execution of the decree."

7. It is true that in its terms section 245 provides for the issue of orders of withdrawal of attachments only in cases in which the decree has been satisfied, But the course indicated in that section is clearly the course to be followed in any case, in which it is intended to abandon or not to proceed further under the attachment. Section 235 puts no limit as regards time to an attachment, while section 240 declares void any alienation

made "during the continuance of the attachment." I confess that it appears to me that the question whether "an execution case" has or has not been "struck off the file" is of very little importance as affecting the validity and continuance of an attachment, except in so far as the "striking off" may be a legal proceeding binding upon the person at whose suit the attachment issued, and operating as a legal withdrawal of all the proceedings in execution or of the attachment. If the case arose, I should probably have little hesitation in holding that a "striking off," such as I fear often occurs, when the proceedings are struck off by the Court of its own motion and without notice to the parties, on any legal ground whatever, in no degree withdraws or affects the validity of an attachment, and is not binding upon the judgment-creditors.

8. In the case before us, the Judge says he has no doubt whatever that the first attachment became worthless when the execution case was struck off, because the execution-creditor showed, by taking out a fresh attachment, that be deemed a second attachment necessary. In my opinion, it is impossible to say whether the first attachment became of no effect or not without knowing precisely under what circumstances the case was struck off and the second attachment was applied for. I agree with the Judge that if the case was struck off with the consent of the judgment-creditor, or in such manner as the law provides, or if he subsequently applied of his own accord for the second attachment, considering the first one was non-existent, then the first attachment must be deemed to have been abandoned and worthless. If on the contrary, the judgment-creditor did not intend to abandon his execution, and if he took out the second attachment merely because the Court considered that the first had dropped, and that it was essential that he should begin de novo, then, as it seems to me, the first attachment remained in force up to the date of the sale at which the appellants purchased.

9. I think the case should be remanded for further investigation, as to the circumstances under which the "execution case" was struck off, and under which the second application for attachment was made.

10. Whether if the facts are proved to be such as would, according to my view of the law, lead to the conclusion that the first attachment remained good to the end, and whether if the case should come up again to this Court in appeal, it may become necessary to refer the question to a Full Bench, I need not now stop to consider, I concur with the Chief Justice in the remarks which he made recently in the case of Musst. Zahuran Vs. W. Tayler and Another . I find no authority in Act VIII of 1859 for saying that an attachment is at an end if the execution case is struck off the file; and therefore if it became necessary to decide upon that point, I should refer the case to a Full Bench. No one, I presume, will contend that if a Judge finds that he has struck off an execution case improperly, be cannot restore it to the file; but that the case must proceed de novo. There has been no case cited which goes to the extent of holding, that if an execution case is struck off the file and a proclamation issued upon the attachment, which had issued before the case was struck off, the sale would be subject to all encumbrances created by the debtor between the time the attachment was made and the time the property was sold, on the

ground that the effect of the attachment was destroyed for ever by the striking the case off the file."

11. We have not before us new facts sufficient to enable us to decide the case. There must therefore be a remand in order that the facts connected with the execution proceedings and the two attachments, and the circumstances under which the second order of attachment was issued, may be fully and accurately inquired into, as found by the Judge.

12. Another point raised before us was, that the appellants had not received notice of purchase, and were therefore not bound by the foreclosure proceedings. But as this point was not urged before the Judge, and as the Judge was not pressed to decide it, and has in fact not alluded to it, we decline to allow the question to be re-opened at this stage.

13. The case is remanded for retrial by the Judge on the issue, as to whether the first attachment remained in force up to the time of the sale under which the appellants claim.

E. Jackson, J.

I concur in the remand proposed by Mr. Justice Macpherson in order that further inquiry may be made as to the grounds upon which the execution case was struck off; and also to ascertain if it ever really was struck off. It seems to me that the Judges of the lower Courts have only inferred that it was struck off, because so long a period elapsed from the data on which the execution proceedings commenced and the date on which they were brought to a conclusion, and because a second attachment issued. When, however, the judges can distinctly satisfy themselves on these points by sending for the record of the execution case, I think they should send for it and ascertain exactly what was done, and not decide upon inferences arising from the perusal of one or two papers out of the execution record. It by no means follows that the first attachment was taken off, because it was made in March 1862, and the sale did not take place under November 1863. In the first place there was an application for review which was preferred by the judgment-debtor in July 1862, but which was not decided until April 1863. The judgment-creditor could hardly carry on execution of his decree while his decree was still in question. Had he attempted to do so, he would probably have been stopped by an order of Court, still the judgment-creditor is not to lose the benefit of his attachment, because the judgment-debtor asks for a review. As regards the second attachment all turns upon the ground upon which it was made. And whether the first attachment was really abandoned or not, if the second attachment was only made at the intimation of the Court that it was necessary, it would in no wise interfere with the first attachment. The Judge says that the execution-creditor delayed to carry on his execution after attachment for eighteen months. In reality however his delay was only after April 1863, and as the second attachment took place in September 1863 the utmost delay which can be attributed to him is one of four months" duration, and it is possible if the execution proceedings are looked to that it may be found that there was no delay at all attributable

to the laches of the judgment-creditor.