(1918) 04 MAD CK 0055

Madras High Court

Case No: None

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| Ramiah Aiyar and Another | | APPELLANT |
| | Vs | |
| Gopalier and Others | | RESPONDENT |

Date of Decision: April 16, 1918

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 38 Rule 1, Order 38 Rule 2

Citation: (1918) ILR (Mad) 1058 : (1918) ILR (Mad) 1053

Hon'ble Judges: Coutts Trotter, J; Ayling, J

Bench: Division Bench

Judgement

Coutts Trotter, J.

The fourth and the fifth defendants in this case who are the appellants, brought a suit, Original Suit No. 305 of 1918 in the District Munsif''s Court of Ambasamudram, against the second defendant. The second defendant was brought under the machinery of Order XXXVIII of the Code of Civil Procedure, because an application was taken against him for his arrest before judgment on the ground that he was absconding from the local limits of the Court, and thereupon, in accordance with the procedure set out in Order XXXVIII, Rules 1 and 2, he was brought up before the Court to show cause why he should not furnish security for his appearance; and he proceeded under Rule 2 to deposit a sum of money and, in this case, Rs. 1,200 which was adjudged sufficient to meet the plaintiff''s claim, that is to say, the claim of the defendants Nos. 4 and 5 in this suit. The dates are important. The arrest was on the 15th July 1913 and the payment into the Court was on the 21st of July following. The fourth and the fifth defendants obtained a decree for the full amount claimed on the 18th August 1914; and meanwhile, on the 29th June 1914, the second defendant had filed his petition in insolvency. He was net adjudicated on that petition until the 17th of February 1915. But by relation back his insolvency will date from the petition on which he was adjudicated and accordingly the insolvency will date back to June

1914.

2. The question in this case is whether the money paid into Court in accordance with the provisions of Order XXXVIII, Rule 2, belongs to the fourth and fifth defendants as the successful plaintiffs in the suit. If it does not belong to them, rival claims may arise as between the Official Assignee, as Receiver of the estate of the second defendant and the plaintiffs in this suit who are prior decree-holders. But, if the true position be that the money in Court belongs to the fourth and the fifth defendants, the question of priority as between other parties to the suit will not arise. There is a good deal of authority on this question, though not any direct decision, as to whether this precise section is to be interpreted as giving a lien to the plaintiff in a suit in the circumstances of money being deposited to secure the defendant from arrest; there are decisions of this and other High Courts in regard to the corresponding sections of the Indian Code and also decisions of the English Courts relating to kindred situations. It is clear that attachment before judgment of property under Order XXXVIII, Rule 5, does not pass any title to the person at whose instance it is attached but merely its effect is to prevent alienation on the part of the person whose property is attached. It restricts the hands of the owner of the property, but does not make him cease to be the owner nor does it confer any specific lien on the person who seeks the attachment. This was laid down in numerous cases both in England and in this country, and Lord Hobhouse observed in Motilal v. Karrabuldin (1898) ILR 25 Cal 170. (P.C), that even attachment in furtherance of execution gives no title. This has been re-affirmed by this Court on a specific reference to Order XXXVIII, Rule 5, which relates to attachment of property before judgment in order to prevent the disposal of the property by the defendant in Errikulappa Chetty v. The Official Assignee, Madras ILR (1916) Mad., 903, a decision of Wallis, C.J., and Seshagiri Ayyar, J. The learned judges point out that what one may call a condition of the application on which the money was secured to safeguard the plaintiff''s interest is the abstaining of the defendant from making away with his property and so long as the property is not taken out of the jurisdiction of the Court or alienated and the defendant is ready to produce his property to the Court, then the condition is not broken, and as soon as ever the property was produced to the Court by the defendant on decree being obtained by the plaintiff, the object for which the money was deposited was gone and it could only be claimed by the person who deposited it. That is tantamount to saying that in contemplation of law it has been his property the whole time, only subject to certain control and retention by the Court. Similar principles have been applied to money deposited into Court under a Garnishee order in Jitmand v. Ramohan ILR (1905) Bom. 405. That is one class of case; but you get a totally different class of case where money is not deposited in Court in order to secure something being done by the person who deposited it, such as abstaining from going away or removing his property from the jurisdiction of the Court but where money is paid to the credit of the suit or ear-marked for the suit, the Courts have always held that, when that is

done, the money belongs to the plaintiff in the event of his success and that it cannot pass to the general creditors of the person who pays it in or to any person who claims under him. That distinction has been very clearly laid down by the English Courts in the case of In Re Pollard (1903) 2 K.B., 41. In that case some money in a bank belonging to an alleged defaulting executor and trustee were sequestrated by letters of sequestration taken out in the Chancery Division which for ordinary practical purposes may be described as proceeding in the nature of attachment. The defaulting trustee was adjudicated a bankrupt and it was held that the sequestrated fund in the hands of the bank did not pass to the plaintiffs in an action by the cestius que trustent who, it was said, had been defrauded, but passed to the Official Receiver as part of the estate of the bankrupt. And Romer, L.J., in his judgment at page 48 explains why it was so and points out very clearly the distinction between the two classes of cases. He says:

He (i.e., the plaintiff) might have obtained a special charge by obtaining some special order having that effect. I think, therefore, that the only question is whether the payment of the money into Court, under the circumstances of the present case, did give the appellants, who are no doubt in the position of creditors of the bankrupt, a special right to or charge upon the money so paid in. In my opinion, for the reasons which I will shortly state, the order for payment into Court did not convert the money into the property of the creditors or give them any special charge upon it. The order was to pay the money, not to the general credit of the action, but to the special account of the sequestrators. That left the money as part of the debtor''s property received by the sequestrators as sequestrators. Had the order gone on to say that after payment of the costs of the sequestrators, the balance should be paid over to the general credit of the action, the result would have been different; but that was not done.

3. Similarly in Bird v. Barstou (1892) 1 Q.B.D. 94, a woman got leave to defend an action under Order XIV (Summary judgment) on terms that she brought into Court ₹500. She paid the ₹500 and she lost the case. Then she tried to raise a point that she being a married woman, an inquiry would have to be held to see whether it was money belonging to her separate estate which in the ordinary course of events would be the only fund against which the execution could proceed. The court of appeal consisting of Lord Esher, M.R., Fry, L.J., and Lopes, L.J., refused to go into that enquiry on the short ground put by Lord Esher that:

the meaning of such an order, in my opinion, is to give security to the plaintiff that, if he succeeds in the action, he shall obtain the fruits of success.

4. And in other cases too it has uniformly been held in England that where, as a condition of granting leave to defend the suit, money is paid into Court, thai; money is the property, subject to his proving his claim, of the plaintiff and that it cannot be attached by the creditors or assignee in bankruptcy of the person who paid it in. And that has been followed in this country in the Madras courts in two different sets of

cases. In one case it has been decided that if money has been deposited under order XLI, Rule 5, as a condition of leave to appeal, it is earmarked to the appeal. In Subramania Chettiyar v. Rajarajeswara Sethupathi (1917) M.W.N., 872 immovable property, not money, had been given as security by the judgment-debtor as a condition of his appeal and it was held that the successful decree-holder could realize the decree without bringing a separate suit for the purpose of realizing the security; and of course the necessary implication is that the property was ear-marked to the successful litigant and could be taken possession of by him without further proceedings of any kind. The learned Judges say at page 874:

The effect of immovable property being given as security is something more than attachment because it makes the property applicable solely in discharge of the judgment-debt and not liable to rateable distribution among other judgment-creditors.

5. Similarly a Bench of this Court in Gopalaiyar Vs. Tiruvengadam Pillai, late a minor by his Guardian and maternal uncle Kendasami Pillai, but now declared a major by Order of this Court dated this 22nd December 1916 and Another, held, following the English cases, that where money was brought into Court by the defendant as a condition of being allowed to defend under Order XXXVII of the CPC (Summary Proceeding in this country on negotiable instruments) the amount paid into Court must be regarded as ear-marked to the action of the plaintiff and in the event of success, the judgment amount must be regarded as being charged upon it.

6. These are principles which seem to us to be clear and the question is which side of the line it is that cases coming under Order XXXVIII, Rule 2, fall. Order XXXVIII, Rule 1, no doubt, says that a defendant when arrested on a warrant is to be brought before the Court to show cause why he should not furnish security for his appearance; and the argument, as we understand it, is that, that being the nature of the enquiry, the section which tells us what the Court can do must have regard solely to the matter of furnishing security for his appearance. If that were so, the section would fall within, the same principles of decisions as under order XXXVIII, Rule 5, that the mere furnishing of security or payment of money into Court as security for the appearance of the defendant does not create a lien or ear-mark it, for the purpose of the action. But what happens when the defendant does appear under a warrant is this, that the Court may make alternative orders:

The Court shall order him either to deposit in Court money or other property sufficient to answer the claim against them, or to furnish security for his appearance at any time when called upon while the suit is pending.

7. It seems to us that there are two alternative courses open. One is the defendant may give security for his appearance; such security will be merely conditional for his appearance in Court and could not be paid, to be to the credit of the suit or ear-marked to the general purposes of the suit. It is a specific security. The

alternative is that he may deposit money or other property sufficient to answer the claim. We think that it is not security for his appearance, but is an alternative by which liberty is given to him to pay into Court sufficient money to meet the suit and we think that payment would be ear-marked to the suit and would be subject to the lien of the plaintiff in the event of his success. As was pointed out during the argument, the words are to deposit in Court money ... to furnish security ...." not, "to furnish other security" which one would expect if the deposit mentioned in the first part of the rule is merely an alternative way of furnishing security mentioned in the second part. We think that the first alternative described by the rule is undoubtedly the one pursued in this case, that is, the money was paid into Court to the general credit of the action, as such, charged with lien on the plaintiff obtaining a decree in his favour and we think that neither the assignee of the bankrupt''s estate nor the general body of creditors nor any specific creditor has a claim which can prevail over the title of the plaintiff.

8. The result is, the appeal is allowed and the suit dismissed with costs throughout. The Official Receiver (out of the estate) and the plaintiffs will pay the costs.