

Nancy John Lyndon

Vs

Prabhati Lal Chowdhury and Others

Civil Appeal No. 3535 of 1982

(O. Chinnappa Reddy, M. H. Kania JJ)

19.08.1987

JUDGMENT

KANIA, J. -

1. This is an appeal directed against the judgment of a Division Bench of the High Court of Calcutta in appeal from Original Order No. 282 of 1981 with C.R. No. 3842(M) of 1980. The relevant facts for the purpose of this appeal can be shortly stated. In August 1969, the appellant before us obtained a money decree in High Court at Calcutta against the judgment debtor Maharaj Kumar Maley Chand Mahatab. On July 31, 1970 the appellant filed a petition for execution of the decree, numbered as Title Execution Case No. 19 of 1970. On August 3, 1970 attachment was levied in execution on open land belonging to the judgment debtor admeasuring about 19 Kathas at 10-A Diamond Harbour Road, and portion of premises No. 2 Judges Court Road, now, numbered as 6/1-D Diamond Harbour Road and 2/A, Judges Court Road, 24-Paraganas respectively. On September 14, 1970, the judgment debtor sold a portion of the attached property admeasuring a little over 11 Kathas to one Bharat Shamshere Jung Bahadur Rana. On March 29, 1972 Bharat shamshere Jung Bahadur Rana sold a portion of the said land admeasuring a little over 9 Kathas (referred to hereinafter as 'the said property') to Prabhatilal Chowdhury and others who are the respondents in the present appeal. On May 9, 1972 the aforesaid execution petition, namely, Title Execution Case No. 19 of 1970 was dismissed for default. On September 16, 1975, on an application by the appellant, the said Title Execution Case No. 19 of 1970 was restored. On a petition dated September 26, 1975 the said property was again attached. Thereafter, a proclamation for sale of the said property was issued under Order 21 Rule 66 of the Code of Civil Procedure. The respondents Prabhatilal chowdhury and others filed a petition under Order 21 Rule 58 of CPC for releasing the said property from attachment. This application was registered as Misc. Case No. 8 of 1978. On August 11, 1980 the said Misc. Case No. 8 filed by Prabhatilal and others was dismissed. On March 16, 1982 the aforesaid appeal from Order No. 282 of 1981 and C.R. No. 2843(M) of 1980 was allowed by the Calcutta High Court. It is this decision allowing the said appeal which is assailed before us.

2. Mr. Sanghi, learned counsel for the appellant urged that the sale of the said property by the judgment debtor to Bharat Shamshere Jung Bahadur Rana and the sale of the said property by the said Bharat Shamshere Jung Bahadur Rana to the respondent were both effected during the subsistence of the attachment. Although the attachment ceased on the dismissal of the said title execution case on May 9, 1972, the said attachment was revived by reason of restoration of the said case on September 16, 1975. It was submitted by him that, in view of the provisions of Section 64 of the Code of Civil Procedure, the sale of the said Property by the judgment debtor to Bharat Shamshere Jung Bahadur Rana and the sale of the same by Bharat Shamshere Jung Bahadur Rana to

the respondent are both void as against the appellant decree holder.

3. Section 64 of the code of Civil Procedure runs as follows :

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 as against all claims enforceable under the attachment.

4. There is an Explanation to this section, but it is not material for our purposes.

5. Order 21 Rule 57 as it stood prior to its amendment in 1976 and as amended by the Calcutta high Court ran as follows :

Where any property has been attached in execution of a decree but by reason of the decree holder's default 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.

6. The words "unless the court shall make an order to the contrary" have been added by way of amendment to the said rule made by the Calcutta High Court.

7. In view of the plain wording of the aforesaid rule, it is clear that when the aforesaid title execution suit was dismissed for default, the attachment levied ceased as no order to continue that attachment was made by the court. The question is as to what is the effect of the restoration of the said title execution suit, that is, whether the said restoration would restore the original attachment and, if so, to what extent. In this connection, it has been held by the Calcutta High Court that where an order for releasing property from attachment is set aside on appeal, the effect is to make the property still subject to the attachment and to restore the state of things which had been disturbed by the order or release. It makes no difference whether the order for releasing the attachment under Order 21 Rule 63 of the Code of civil Procedure is passed in appeal or revision. (See *Sushila Bala Dasi v. Guest Keen Williams. Ltd.* (ILR (1949) 1 Cal 177))

8. A Division Bench of the Madras High Court in *Annapurna Patrani v. Lakshmana Kara* (AIR 1950 Mad 740 : (1950) 1 Mad LJ 454) has held that where in execution of decree property is attached but the petition for execution is dismissed for default and on appeal the order of dismissal for default is set aside, the effect of the appellate order is to restore the order attaching property and the trial court would have to proceed with the execution application from the stage at which it had interrupted it by dismissing it for default. The appellate 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. A similar view has been taken by a learned Single Judge of the Bombay High Court in *Pradyut Natwarlal Shah v. Suryakant N. Sangani* (AIR 1979 Bom 166 : 1979 Mah LJ 72).

9. However, in the present case the restoration of the title execution case was not made on an appeal or revision, whereby order of dismissing the said same for default was set aside, but the said suit has been restored on an application made for restoration. Such an order for restoration cannot be equated with an order passed on appeal or in revision setting aside the dismissal. In this case we are not called upon to consider what is the effect of an order dismissing the execution application for default being set aside on appeal or revision, and we do not propose to express any opinion in that

connection. In a case which is more relevant for determination of the question before us, namely, *Tavvala Veeraswami v. Pulim Ramanna* (AIR 1935 Mad 365, 366 : 68 Mad LJ 444 : 157 IC 528) which was decided by a Full Bench of the Madras High Court an order dismissing a suit for default was set aside on an application for that purpose. It was held that where an order dismissing a suit for default is set aside on an application for that purpose, the suit remains 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 on the setting aside of the dismissal. Similarly, an order for attachment of property will also be revived. In that case an attachment before judgment was raised on security being furnished. The suit in which the attachment was levied was dismissed for default, but was restored on an application made for that purpose and decreed and the decree holder sought to enforce the security bond. It was held that on the restoration of the suit, all ancillary orders were restored without any further order, and that therefore, the security bond given for the raising of attachment before judgment was also restored and the decree holder was entitled to enforce the security bond. It was observed by Beasley, C. J., who delivered the judgment with which other learned judges concurred, as follows :

It does not seem to me reasonable that the plaintiff in a suit who has got an attachment before judgment should have again, after the restoration of the suit after its dismissal for default, to apply to the court for a fresh attachment and that having done so, the defendant should have to apply to raise the attachment by producing a surety or sureties. The common sense view of the matter is that all ancillary orders should be restored on the suit's restoration without any further orders.

10. In the present case, both, the sale by the judgment debtor to Bharat Shamshe Jung Bahadur Rana and the sale by Bharat Shamshe Jung Bahadur Rana to the respondent, were effected during the subsistence of the attachment and before the title execution case was dismissed for default. In our view, even if a doubt were to be entertained as to whether an order for restoration of the suit or execution application would have the effect of restoring the attachment retrospectively so as to affect alienations made during the period between dismissal of the suit or execution application and the order directing restoration, it is clear that an order of restoration would certainly restore or revive the attachment for the period during which it was in subsistence, namely, prior to the dismissal of the suit or execution application.

11. The learned counsel for the respondent drew our attention to the decision of the Division Bench of the Calcutta High Court in the case of *Patringa Koer v. Madhavanand Ram* ((1911) 14 Cal LJ 476) where it was held that a revival of execution proceedings does not operate as revival of the attachment so as to prejudice the rights of strangers who have in the interval acquired a title to the property. The reversal of judicial order leaves unaffected the rights of strangers, bona fide purchasers, whether under execution sale or under private sale, who have acquired title on the assumption that such orders were valid in law. A careful reading of this decision shows it is of no assistance to the case of the respondent because the judgment makes it clear that what was really held was that in the absence of statutory provisions to the contrary, the court cannot cancel the order of dismissal for default of an execution application with retrospective effect so as to prejudice the title that might have been acquired in the interval by a stranger, when the property was admittedly not in the custody of the court. This decision might have helped the respondents if the alienations in question had been effected during the interval between the dismissal of the title execution case and its restoration. But, in the present case, the alienations were effected when the attachment was subsisting as we have already pointed out and hence this decision is of no assistance to the respondents. We are not called upon to consider as to whether the aforesaid decision lays down good

law or as to what have been the effect of the restoration of the title execution case had the alienations been effected during the aforesaid interval and we do not propose to say anything in this regard.

12. In our view, the Division Bench of the Calcutta High Court was in error in taking the view, in the judgment appealed against, that by reason of the dismissal of the said title execution case, the attachment came to an end and the order of restoration of the said case would not affect any alienation made before the restoration although such alienations might have been made during the subsistence of the attachment.

13. We may mention that our attention was drawn to the amendment of Rule 57 of Order 21 made by the Calcutta High Court, but in our view that amendment merely provides that although under Rule 57 of Order 21 the attachment would cease on an order dismissing the application for execution it is open to the court to make an order to the contrary which would mean that the court could make an order to continue the attachment for some time. The amendment, however, is of no relevance in the case before us.

14. In the result, the appeal is allowed, the impugned judgment set aside and the order of First Subordinate Judge at Alipore in Misc. Case No. 8 of 1978 which was set aside by the Calcutta High Court restored. The respondents must pay to the appellant the cost of the appeal.

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