

BOMBAY HIGH COURT

Secretary of State for India

Vs

Bai Somi

(John Beaumont, Kt., C.J. Murphy, J.)

01.02.1933

JUDGMENT

John Beaumont, C.J.

1. This is an appeal by the Secretary of State for India in Council against an order of the First Class Subordinate Judge at Ahmedabad dismissing the appellant's darkhast proceedings. It appears that the plaintiff in the suit obtained leave to sue as a pauper. In the suit she was claiming possession of a certain house. The suit was compromised on the terms that the plaintiff should receive a sum of Rs. 96 a year for maintenance, such maintenance to be recoverable out of the house in suit.

2. The present appellant has now applied in darkhast proceedings to attach the house out of which the maintenance is recoverable, and he seeks to do so under Order XXXIII, Rule 10. That rule provides:-Where the plaintiff succeeds in the suit, the Court shall calculate the amount of court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper ; such amount shall be recoverable by the Government from any party ordered by the decree to pay the same, and shall be a first charge on the subject-matter of the suit. That rule, in terms, applies where the plaintiff succeeds in the suit. But I will assume that it also applies to a case which the plaintiff, by way of compromise, succeeds in getting something out of the suit. But, in that case, I think, the charge can only be on the interest which the plaintiff recovers in the suit, and here what the plaintiff has recovered in the suit is a right to maintenance and not the house.

3. Mr. Rao, for the appellant, has contended that, if that is so, we ought to make an order appointing a receiver of the plaintiff's maintenance and direct the receiver to pay, out of the sums received by him, the amount due to Government, and in support of his contention he relies on a decision of the Madras High Court in *Secretary of State for India in Council v. Venkata Lakshamma*¹. That decision purported to follow a decision of the Privy Council in *Rajindra*

*Narain Singh v. Sundara Bibi*² in which the plaintiff was seeking to enforce a money decree. The head-note reads:-Held, the appellant's interest in the villages was 'a right to future maintenance' within Section 60, sub-section (1) (n) of the Code of Civil Procedure, 1908, and therefore could not be attached and sold ; but that a receiver should be appointed to realize the rents and profits, with direction to pay thereout a sufficient and adequate sum for the maintenance of the appellant and his family, and to apply the balance (if any) to the liquidation of the decree. Now, under Section 60 (n) of the Civil Procedure Code a right to future maintenance is not liable to attachment or sale, and it would certainly seem that an order appointing a receiver to collect future maintenance and pay the amount, or part of the amount, over to the judgment creditor is an order for attachment. Many payments, in addition to future maintenance, are exempted from attachment under Section 60, and such exemptions would appear to be based on considerations of public policy. If these exempted payments can be reached in execution by the appointment of a receiver by way of equitable execution, the protection afforded by the section is to a great extent lost.

4. I doubt whether the head-note in *Rajindra Narain Singh v. Sundara Bibi* is justified by the decision of the Board. It was a moot point in that case whether the property sought to be attached in execution of the decree was future maintenance or not. The learned trial Judge held that the property was a right to future maintenance within Section 60 (n) of the Code of Civil Procedure, 1908, and, therefore, not liable to attachment. On appeal, the High Court held that the property was not covered by the expression "a right to future maintenance", and could be seized in execution and that the appropriate form of execution was by the appointment of a receiver. The Privy Council commenced their judgment (delivered according to the report on the same day as the argument) by saying:-The Board is of opinion that the conclusion reached by the High Court by their judgment of the 2nd May, 1921, was correct. And later on. in their judgment, they set out a passage from the judgment of the High Court in these terms (p. 388):-the appropriate remedy is what is known as equitable execution or indirect execution, namely, by the appointment of a receiver who takes the place of the debtor and acts as an officer subject to the directions of the Execution Court in collecting and disbursing the debtor's income in accordance with the directions of the Execution Court towards the discharge of the claim of the decree-holder. And then the Board says (p. 388):-These views appear to the Board to be sound. But those views were all based on the finding of the High Court that the property in question was not future maintenance, and therefore was not made unattachable by Section 60 of the Civil Procedure Code.

5. There are no doubt passages in the judgment of the Board which suggest that the Privy Council considered that the property was future maintenance, that it was not attachable in law, but that it could be reached by the appointment of a receiver by way of equitable execution. But

there are no findings in this sense clearly expressed, and agreement with the conclusion of the High Court is clearly expressed. So far as I know the Courts in England have always refused to sanction any form of equitable execution over property not liable to attachment at law, See *Lucas v. Harris*³ and *Crowe v. Price*⁴ The Privy Council cannot, I think, have intended to hold that the appointment of a receiver by way of equitable execution is not attachment within Section 60 (1) of the Civil Procedure Code, 1908, in a judgment in which the question is not discussed. There may perhaps be a distinction between a case like *Rajindra Narain Singh v. Sundra Bibi*, in which the applicant was seeking to enforce a money decree, and a case, such as this, arising under Order XXXIII, Rule 10, in which the Crown is claiming to enforce a charge having priority to the right of maintenance sought to be attached. But even if we have jurisdiction to appoint a receiver in this case, I think we ought not to do so, having regard to the small amount of maintenance which is only Rs. 8 per mensem.

6. The appeal, therefore, must be dismissed with costs.

Murphy, J.

7. I think that on the record before us the learned Subordinate Judge's order is correct in fact, though not for the reasons he gives. His view was that the house sought to be attached, because the plaintiff's maintenance is charged on it, was not the subject matter of the decree under Order XXXIII, Rule 10.

8. The real point in the application is whether in view of Section 60 of the Civil Procedure Code the maintenance in question can be attached at all. The facts were that plaintiff who sued for possession of a house was allowed to do so as a pauper. She compromised with the then defendant, the terms being that she should receive maintenance at the rate of Rs. 8 per month, such maintenance to be a charge on the house, the subject matter of the suit. The Government Pleader then sought to recover the Court fees due on the plaintiff's success, and the application was dismissed for the reasons stated. In appeal a different complexion has been put on the matter by the argument that though direct execution cannot be levied on a claim for maintenance, this can be done indirectly, by appointing a receiver of the maintenance and directing him to make the payment asked for. The argument is based on two decisions, one being, Secretary of State for India in *Council v. Venkata Lakshamma*⁵ and the second, *Rajindra Narain Singh v. Sundara Bibi*⁶ The first of these cases follows the second, which is a Privy Council decision, and which decides that the difficulty of enforcing a claim against a right to maintenance can be avoided in the manner now suggested to us.

9. In the Madras case the maintenance sought to be attached was similar in character to the maintenance here. But in the Privy Council case it was not widow's maintenance, but a payment

agreed on by a compromise to be paid out of the income of certain property.

10. We have not got the High Court's judgment in that case, but from the report it appears that whether the allowance then in question was maintenance or not was a point taken in the appeal, and, as far as we can judge, was decided in the negative. The High Court, however, did not appoint a receiver, and it was held by the Privy Council that this should have been done. I think that what their Lordships were dealing with had been held not to be a right to future maintenance, though there are passages in the judgment and head-note which suggest a contrary conclusion, but if we are wrong, I agree that in this case we should not appoint a receiver, because no application for one has been made, or even an amendment to that effect sought.

Cases Referred.

1(1926) I.L.R. 49 Mad. 567

2(1925) I.L.R. 47 All. 385, s. c. 27 Bom. L.R. 849, P.C

32(1886) 18 Q.B.D. 127

4(1889) 22 Q.B.D. 429

5(1920) I.L.R. 49 Mad. 567

6(1925) I.L.R. 47 All. 385, s.c. 27 Bom. L.R. 849, P.C