

(1921) 08 CAL CK 0050
In the Calcutta High Court

A.D. Pickford

APPELLANT

Vs

Rai Bahadur Janoki Nath Roy

RESPONDENT

Date of Decision : 09-08-1921

Acts Referred:

Citation : AIR 1921 Cal 763 : 70 Ind. Cas. 488

Hon'ble Judges : Rankin, J

Bench : Single Bench

Judgement

Rankin, J.—In May 1919 the defendant and another person (since deceased) brought in this Court a suit against one Raja Mahendra Raj an Roy upon certain promissory-notes claiming some eight and a half lacs of rupees. The writ of summons was served, appearance was entered and on or about the 24th July the written statement was filed. Apart from orders for discovery, which were made at the end of July and beginning of August, nothing seems to have happened in the suit until the 17th November. On that date the plaintiffs in the suit presented a petition to the Court for attachment before judgment, alleging that on the 1st September 1919 the defendant had obtained some 17 lacs of rupees upon mortgage of nearly all property for the purpose of paying off his debts and of paying off this debt in particular. The petition further alleged that the petitioner's debt had not yet been paid, that the defendant in the suit had still to his credit some 15 lacs of rupees with the Bank of Bengal and that, unless the Court exercised the power of attachment before judgment, this fund was likely to be dissipated. On this petition an order was made on the 17th November *ex parte* calling upon the defendant in the suit to show cause why security should not be furnished for the plaintiff's claim, or why, in default, some eight and a half lacs of rupees to the credit of the defendant with the Bank of Bengal should not be attached until the final determination of the suit or other order. The order went on to direct that, until cause should be shown as directed, a writ of attachments should issue commanding the Sheriff to, attach the money at the credit of the defendant in the Bank of Bengal or so much thereof as was necessary to meet the plaintiff's claim. On the same day, the 17th November, a prohibitory order

was issued out of this Court attaching, until cause should be shown to the said order of the 17th November, the money at the Bank. This order restrained the Bank of Bengal from parting with the fund as regards some eight and a half lacs to any one and restrained the defendant in the suit from receiving" the same from the Bank. Between the 8th and the nth December correspondence took place between the Attorneys for the parties as a result of which a settlement was arranged. It was agreed that a cheque for the sum claimed should be handed over to the plaintiff's Solicitors upon the order nisi being discharged by consent, that this cheque was not to be presented to the Bank until the order discharging the order nisi and the interim attachment should have been served on the Bank. The defendant in the suit was to give a cheque in payment of the costs of the suit but no order was to be required to that effect. As regards the costs of the application for attachment before judgment each party was to pay his own costs. In a letter dated the 10th December the defendant's Solicitors state that they are not to be liable to pay the Sheriff's poundage. This is replied to by the plaintiff's Solicitors upon the nth saying that they do not think there is any question of poundage but that they did not see why the plaintiffs should have to pay if there was any. On the 22nd December the parties appeared before the Court and obtained an order by consent whereby the order nisi of 17th November was discharged and it was ordered that the interim attachment thereby directed be withdrawn. On the same day, the 22nd December, an office copy of that order was served on the Bank but no office copy was delivered to the Sheriff as required by Chapter XXV, Rule 6, of the Rules of this Court. On the 23rd December the cheques given to the plaintiffs' Solicitors were presented to the Bank and were duly honoured, On the 5th January 1920 the Sheriff by a letter of that date made his claim upon the plaintiffs in suit for poundage.

2. The plaint in the present suit was filed on the 18th May 1920 and it claims a sum of Rs. 21,900 as poundage due to the Sheriff in respect of the interim attachment. The grounds of the claim are put in the concise statement as follows:

The plaintiff sues to recover Rs. 21,900 for the poundage due to him as the Sheriff of Calcutta on the satisfaction and settlement of the defendant's claim in Suit No. 126Q of 1919 of this Court after and by reason of an interim attachment before judgment in the plaint mentioned.

3. A claim to poundage by a Sheriff must be made under the express terms of a Statute rule or order. He has no common law right to reward for executing a writ. *Woodgate v Knatchbull* (1787) 2 T.R. 148 : 1 R.R. 449 : 100 E.R. 80 and *Graham v.* (1814) 2 M. & S. 294 : 105 E.R. 391. In this Court poundage is a charge authorised by the 22nd item of Rule 77 of Chapter XXXVI of the Rules of Court. The provision is in these terms:

Poundage on sums levied by the Sheriff in execution or in the event of the claim being satisfied, compromised or settled upon the amount of such satisfaction, compromise or settlement"...then follows the rate of charge.

4. The language of the rule as regards the 22nd item illustrates the fact that some features of English legal procedure have become embedded in the English language. The phrase "sums levied in execution" belongs to the system under which a writ issues to the Sheriff commanding him to cause to be made of the goods and chatties of the defendant a sum of money for which the defendant has suffered judgment. Unless the course of execution is interrupted the Sheriff is authorised by the writ of *fi fa* to seize, to hold and to sell. In India; under the Code of Civil Procedure, execution proceeds first by attachment: after attachment, an order has to be obtained from the Court and a proclamation issued before there can be a sale. The process being thus out into parts, the first part, the attachment, can then more readily be looked at by itself. It can be and is made applicable before judgment, that is, to cases where attachment is required to preserve a fund or other property, to keep it in *medio* pending a decision. In such cases attachment, while it proceeds by the same means, according to the nature of the property, is not a stage or phase of a process for the enforcement of a judgment by the levying of a sum of money adjudged to be due. The language of Order XXXVIII of the Code distinguishes "attachment before judgment" from "attachment of property in execution of a decree." This distinction is not to be obliterated by any argument as to whether attachment before judgment is or is not strictly speaking a form of execution. Nor is it the less important as a distinction because of the fact that if the "Court decides that security should be given, and if security is not given, and if further, judgment goes against the defendant, no second attachment will be required before an order for sale can be made.

5. The wording of the rule begins by granting to the Sheriff poundage "on sums levied by the Sheriff in execution." So far it is doing exactly what was done by the Statute, 28 Eliz. Chap. 4 and it is keeping the old name for the old charge. It is maintaining also the principle of the old charge, viz., that it is to be a payment upon results. If, however, the rule had stopped there it would have left without provision a comiribn and important class of case well known to have occasioned difficulty., Where an execution is in progress but is not completed, payment of the debt and costs may be made to the Sheriff. Or it may be made to the creditor. Or a compromise may be arranged to the satisfaction of the creditor. In such cases there is a problem of long standing as to whether the judgment-creditor who has so received the benefit of the execution can escape payment of poundage on the ground that the money so received has not been "levied." This problem has raised questions as to what is involved by the word "levy" and these were dealt with in such cases, as *Alchin v. Wells* (1793) 5 T.R. 470 : 101 E.R. 265 : 2 R.R. 641; *Mortimore v. Cragg* (1878) 3 C.P.D. 216 : 47 L.J.C.P. 348 : 38 L.T. 163 : 26 W.R. 363; *Bissicks v. Bath Colliery Co.* (1878) 47 L.J. Ex. 408 : 3 Ex. D. 174 : 38 L.T. 163 : 26 W.R. 215, *Lee v. Dangar Grant and Co.* (1892) 1 Q.B. 231 : 66 L.T. 162; *In re Thomas Ex parte Sheriff of Middlesex* (1899) 1 Q.B. 460 : 68 L.J. Q.B. 245 : 47 W.R. 259 : 80 L.T. 62 : 6 Man. 1. In the result, these cases settled that "levy" meant "turning the goods into money;" that *prima facie*

this involved sale as well as seizure; but that in cases of payment or of compromise after seizure and preventing sale, the words "shall so levy" mean "shall seize and -thereby get the money." "It is sufficient if by reason of the seizure the money is obtained directly or indirectly." In this way the "merits" of the matter, the principle, of payment upon the results, received due recognition but not without difficulty. Since 1888 these questions have been set at rest in England by an order under the Sheriffs Act of 1887 which will be found in *In re Thomas, Ex parte Trustee* (1899) 1 Q.B. 66 : 68 L.J.Q.B. 247 : 79 L.T. 356.

6. I come now to the second or alternative part of the provision as to poundage in Rule 77 of Chapter XXXVI. The alternative arises only "in the event of the claim being satisfied, compromised or settled." Mr. Langford James points out that the word "claim" is wider than "decretal amount" or "judgment-debt." "On this it may be observed that, even if the word is intended in this context to apply more widely, it may well be rather because of the plaintiffs costs of execution than because of any intention to comprise a substantive claim not yet prosecuted to judgment. But in any case the question is, what is "the claim" In my opinion, the words can only refer to that claim which, but for the satisfaction, compromise or settlement, would, presumably, have resulted in a sum of money being levied by the Sheriff in execution. "Poundage on sums levied by the Shariff in execution or in the event of the claim being satisfied, compromised or settled," must I think mean the claim in execution as contemplated by the first portion of the words. The rule does not give the Sheriff a commission "upon the settlement of evey man"s claim or even upon the settlement of every claim made in a suit. So much is admitted. The definite article can only be intended with reference to the preceding words of the provision. The whole provision is directed to proceedings in which the Sheriff is employed about the levying of a sum of money in execution. The alternative part applies to such a proceeding in an event, viz., where the process is interrupted before completion but in a manner which produces the same or a similar result. In such a case the debtor merely anticipates by means less distressing to himself the result of a coercive process already in mid career. He can safely be deemed to have paid, not only in the course of the execution, but under stress of the execution. It can safely be said of the Sheriff "he seized and thereby get the money." No one can be heard to the contrary. This explains the most salient feature of the provisions of this rule, ziz., that it certainly does not contemplate or allow an enquiry in any case as to whether the exertions of the Sheriff are or are not in fact the effective cause of the settlement.

7. On the other hand, if the contention of the present plaintiff is correct, how stands the matter. In the present case, judging from the written statement and from the strenuous affidavit filed on behalf of the defendant in the suit I should, if I was entitled so to do, guess that the defendant had no real defence and that the attachment before judgment Was the thing which brought him to his senses. But, on the face of Rule 77, the right to poundage can depend upon no such enquiry. The contention must be, and as I understand learned Counsel, is that if

for a plaintiff's benefit an attachment is effected for any purpose or at any stage of a suit then any subsequent settlement of the claim in the suit gives rise to a right to poundage. In my opinion any such construction of the alternative part of the clause in question does some violence to its language and stretches the principle which underlies it. Why such a right should be introduced as a conditional alternative to the right given where a sum of money is levied in execution it is difficult to see. If, on the other" hand, the words are taken as intended simply to apply the principle of *Alchin v. Wells* (1793) 5 T.R. 470 : 101 E.R. 265 : 2 R.R. 641 and *Mortimore v. Cragg* (1878) 3 C.P.D. 216 : 47 L.J.C.P. 348 : 38 L.T. 116 : 26 W.R. 363 they are given a meaning which is warranted by their context. Again, where the only order in a suit is an order for interim attachment intended simply to preserve a fund until cause can be shown to an order nisi, i.e., until it can be decided whether the defendant should be ordered to give security the position has no necessary analogy at all to the case of a judgment-debtor rescuing his chattels from sale in execution. The order nisi may be discharged security may be given the defendant may succeed in his defence. If the inconvenience of the attachment produces in the defendant a desire for peace and causes him to settle with the plaintiff before judgment, he may or may not be in effect anticipating a result which due course of law would demand or bring to pass. In any case, he is not merely anticipating the result of a coercive process already authorized for the purpose of effecting that result. He is not paying under the Court's order and because the Court by its process has effectively compelled him to obedience. In addition, it has to be remembered that the only property attached before judgment may be of small value though the claim in the suit amount to lacs of rupees. The defendant may for the most cogent and diverse of reasons desire to settle with his adversary. To attribute what the plaintiff obtains upon a compromise before judgment to the fact that something no matter what or of what value--was being held in medio; to regard the settlement by a conclusive presumption, as the result of the labours of the Sheriff; to grant him poundage as though he had "caused it to be made" is to make charge on principles not hitherto recognised in connection with poundage. It converts poundage into a new charge altogether. When judgment has passed and defendant does not pay until execution has begun, whatsoever he pays may be regarded as collected by the Sheriff. Where there is no decree and no execution of a decree the fact that the defendant has been compelled in effect to give security in case the plaintiff's claim turns out to be well founded, does not necessarily mean that virtually or in truth the Sheriff has collected whatsoever the plaintiff may get on a settlement. The question for me is, whether the terms of Rule 77 of Chapter XXXVI require me to hold that in such a case the Sheriff is in the same position as if execution of a decree had been in progress. I cannot think that they require or warrant this conclusion.

8. Rule 45 of Chapter XVII of the Rules of Court makes Rules 15 to 25 of that Chapter applicable *mutatis mutandis* to "warrants" of attachment before judgment, I fail to find anything in these rules that justifies any claim for

poundage outside the provisions of Chapter XXXVI, Rule 77. regard the question as depending in the end entirely on the correct construction of Rule 77 as a charging provision. Rule 20 of Chapter XVII refers to "the amount direct to be levied by such writ" and also "poundage." These references are inapplicable altogether to an attachment before judgment. The words "mutatis mutandis" in Rule 45 stand in the way of any false analogy.

9. I regret if the result of this judgment should be that the Sheriff is not under the rules adequately remunerated for his work in connection with the carrying out of attachments before judgment, but in my opinion the suit must be dismissed with costs.