

(1924) 02 CAL CK 0015
In the Calcutta High Court

Bahadurmull Rampuria

APPELLANT

Vs

Tricumdas Callianji and Others

RESPONDENT

Date of Decision : 20-02-1924

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5, 60(m)

Citation : AIR 1925 Cal 561

Judgement

1. These two appeals are directed against an order passed by the Court below under Order 38, Rule 5, Civil Procedure Code, attaching before judgment a sum of 3 lacs of rupees alleged to be due to defendant No. 1 from defendants Nos. 2 to 4. The facts of the case relevant to the present enquiry may be shortly stated thus:-The defendant No. 1 sold to defendants Nos. 2 to 4 (who may be shortly called the Rampurias) a certain mill called Callian Cotton Mills for Rs. 5 lacs by an Indenture dated the 21st July, 1921. The mill was under mortgage to one Manik Lal Mansukbhai and the sale was subject to the mortgage. On the same day an agreement was entered into between defendant No. 1 and the Rampurias under which the Rampurias bound themselves to pay half the charge which was estimated at Rs. 3 lacs and if the amount they had to pay to the mortgagee was less than that sum, or nothing at all, they would pay to defendant No. 1 the said sum of Rs. 3 lacs or the balance thereof less the sum paid to the mortgagee and if the sum payable to the mortgagee exceeded Rs. 3 lacs the purchasers would bear the excess. Previous to the sale, Manik Lal had brought a suit on his mortgage against the plaintiff and others and the Rampurias were subsequently added as defendants. The defendants have pleaded payment and the suit is still pending. Subsequent to the sale, the plaintiff instituted a suit against the defendant No. 1 and the Rampurias for recovery of the alleged balance of the consideration money of the sale of the said Mill by the plaintiff to defendant No. 1 and for the further relief that the amount found to be due to plaintiff from the defendant be declared to a charge on the said Mill as the lien of an unpaid vendor. In this suit, which is pending in the 3rd Court of the Subordinate Judge at Hooghly, the plaintiff applied to attach before judgment the sum of Rs. 3 lacs

above-mentioned in the hands of the Rampuria defendants. On 7th June, 1922, the Court below allowed the application and ordered the attachment. On 12th June the order was served on the Rampuria defendants and on 24th June they applied for a re-consideration of the order on the ground that it was passed in their absence and that it was an improper order. That application was rejected. The defendants have, therefore, preferred these two appeals against the order of the 7th June, 1922, Appeal No. 226 being by the first defendant Sukhdeo Das Rekhabdas and Appeal No. 303 by the Rampuria defendants. Both the appeals raise the same questions and are treated as analogous.

2. A preliminary objection has been taken by Sir Benode Mitter who appears for the plaintiff in Appeal No. 303 to the competency of the appeal by the Rampuria defendants. It is argued that a garnishee cannot appeal against a garnishee order under the Civil Procedure Code; he acquires a locus standi when the debt is sold in execution of the decree and the claim is sought to be enforced against him. It is not necessary to consider this question in the abstract, for in the present case the appellants are also defendants in the suit. It may safely be said that when a party to a suit feels himself aggrieved by a decree or an order from which he has a right of appeal the question as to whether the decree or order appealed from is to be revised at his instance, he not being materially affected by it, is one for the appellate Court to decide at the hearing of the appeal. It is urged by the learned Counsel that the Rampuria defendants are not affected by the order complained against, for, if the debt is not due by them, the order does not touch them and, if it is due, the order is a just and proper one and they cannot object to the payment of the money to any one to whom the Court directs them to pay. We do not think that this contention is well-founded. According to the plaintiffs' case these defendants have retained this sum of Rs. 3 lacs for payment to the mortgagee if any amount is found due to him. The order of attachment that has been served upon them prohibits them from paying that amount to any one, the effect of the order being that, in the event of the mortgagee securing a decree in his suit, the defendant will be unable to satisfy it and probably thereby prevent the sale of the Mill and of their other properties in execution of that decree. We accordingly hold that the appeal by defendants Nos. 2 to 4 is maintainable as they are parties to the suit and are thus affected by the order appealed from. It seems to us, however, that this question is not of much practical importance as the appeal by the defendant No. 1 whose right of appeal is unquestionable, will decide the same questions as are raised in the appeal by defendants Nos. 2 to 4.

3. The points raised in these appeals are, first, that the application made for attachment before judgment does not disclose facts on which an order under Order 38, Rule 5 can be passed and, secondly, that the money which has been attached is not a debt due to the defendant No. 1 within the meaning of Order 21, Rule 46. There are other minor objections taken which will be noticed in the course of the judgment.

4. With reference to the first question, no doubt, the petition filed by the plaintiff on 31st March, 1922, does not contain the allegations necessary to bring it under Order 38, Rule 5, but the affidavit accompanying it sworn by the plaintiff contains the requisite averments and we do not think that this contention is of much substance.

5. The second point, however, is more substantial and requires close examination. The indenture by which the defendant No. 1 sold the Mill to the Rampuria defendants recites the consideration as Rs. 5 lacs subject to the mortgage of Manik Lal Mansukhbhai. It is, on the face of it, a sale of the equity of redemption for Rs. 5 lacs. There is an agreement of the same date by which the Rampurias agree to pay to the defendant No. 1 any sum that may be left in their hands after satisfying the mortgage-decree if it is not for more than Rs. 3 lacs. On the documents placed before us, it is evident that this agreement though contemporaneous, did not form a part consideration of the sale of the property which was only the equity of redemption. It is significant that no mention of it is made in the deed of conveyance. Our attention has been drawn to a statement made by defendant No. 4 in an affidavit that the Rampurias have purchased the property for Rs. 8 lacs. It may be assumed to be correct in one sense, namely, that that is the value of the entire interest in the property without the encumbrance. Besides, such a statement cannot vary or supersede the contract embodied in solemn deeds. We are, therefore, of opinion that the sum of Rs. 3 lacs does not form a part of the consideration of the sale and the defendant No. 1 has no interest in it under the contract of sale.

6. It is argued by the appellants that the sum attached is not a debt as it is indefinite, unascertained and contingent on the happening of an event in the future. In our judgment this contention ought to succeed. It is not an amount in which the defendant No. 1 has a vested interest in praesenti of which the payment is deferred to a future time. In *O'Driscoll v. Manchester Insurance Committee* (1915) 3 K.B. 499 Bankes, L. J., quotes with approval the law on the subject stated in the Annual Practice—"But the distinction must be borne in mind between the case where there is an existing debt, payment whereof is deferred, and the case where both the debt and its payment rest in the future. In the former case there is an attachable debt, in the latter case there is not." The law, as we gather from authorities, is that a debt, in order to be attachable, need not be ascertained but must be accruing or have accrued, a debitum in praesenti solvendum in futuro. Looking at the facts of the present case in the light of the law as above stated, we are of opinion that the interest of the defendant No. 1 has not yet accrued in the money attached or in any portion of it and is not, therefore, an attachable debt. Reference may be made in this connection to the case of *Hutt v. Shaw* (1887) 3 T.L.R. 354, where a certain sum of money was deposited with a stock-broker as "cover" for any loss upon speculations in stocks and shares. It was held that it was not a debt due or accruing to the judgment-debtor, Lord Esher, M.R., observes:—"This sum was not in the hands of Shaw to be re-paid on demand. When the Garnishee Order Nisi was served the accounts

were not settled." The present case is stronger in favour of the garnishee than Hutt's case (1915) 3 K.B. 499. There the money belonged to the judgment-debtor and he had deposited it with the garnishee as "cover" for certain speculative transaction. In the case before us, as we have observed, neither the sum of Rs. 3 lacs nor any portion of it belongs to the defendant No. 1 nor has he any present interest in it. On the facts of this case, the same considerations on which unaccrued maintenance or unearned salary is held unattachable ought to apply and the principle of law on which the case Syud Tuffuzzool Hossein Khan v. Rughoonath Pershad (1871) 14 M.I.A. 40, Haridas Acharjya v. Baroda Kishore (1900) 27 Cal. 38, and Sher Singh v. Sriram(1908) 30 All. 246, were decided should govern the present case. The conclusion we have arrived at is, that the defendant No. 1 has at the most a contingent claim in this sum of Rs. 3 lacs which is not liable to attachment u/s 60, Clause (m), Civil Procedure Code. We observe that the learned Subordinate Judge has not considered this question, though it was raised before him, and we have not the advantage of his view on the point.

7. The order of attachment is also defective in other ways. In the first place, it restrains the Rampurias from paying the amount to any one not even excepting the mortgagee. This is in contravention of the terms of the contract between them and the defendant No. 1 and the plaintiff as an attaching creditor cannot have a right which the defendant No. 1 did not possess, Further, the agreement provides that the Rampuria defendants will contest the claim of the mortgagee up to the final Court of Appeal as the defendant No. 1 may direct, at the cost and expense of the latter. They will presumably be entitled to reimburse themselves from any sum that may be available to the defendant No. 1 out of the sum of Rs. 3 lacs. So, in no event, will the entire sum of Rs. 3 lacs be available to the defendant No. 1.

8. We may mention that the mortgages Manick Lal has claimed a sum of Rs. 3 lacs and 17 thousand due on his mortgage in the suit brought by him. The plaintiff as a defendant in that suit pleaded payment of the entire amount and the other defendants also have taken the same defence. Subsequent to the order of attachment from which this appeal arises, the plaintiff filed an application in Manick Lal's suit not only withdrawing his defence but also praying that a decree for the amount claimed might be passed in favour of Manick Lal. Sir Benode Mitter for the plaintiff urges that as a Court of Appeal we are not entitled to take notice of this fact which has happened subsequent to the order appealed from. In the view we take on other points it is not necessary for us to consider this question but we are inclined to the view that we are justified in taking cognizance of a fact which materially affects the rights of the parties to an appeal.

9. In accordance with the above observations the appeals are allowed and the order of the Court below, dated the 7th June, 1922 is set aside. The attachment made under that order is withdrawn. The appellants are entitled to their costs in this Court which we assess at 5 gold mohurs in each appeal.