
(1943) 01 MAD CK 0010
In the Madras High Court

Chunduru Ramachandrayya

APPELLANT

Vs

Chunduru Nageswara Rao and Others

RESPONDENT

Date of Decision : 11-01-1943

Acts Referred:

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

Citation : AIR 1944 Mad 126 : (1943) 56 LW 372 : (1943) 2 MLJ 21

Hon'ble Judges : Somayya, J

Bench : Division Bench

Judgement

Somayya, J.—The decree-holder appeals against the order of the District Judge of Kistna which upheld the order of the District Munsiff of

Masulipatam in E.A. No. 1470 of 1938 in O.S. No. 211 of 1933. E.A. No. 1470 of 1938, was filed by some of the defendants in the action

asking that their shares in the property sought to be proceeded against in execution of the decree in O.S. No. 211 of 1933 should be exonerated.

This petition was allowed by the trial Court and that order was?", upheld on appeal. The suit (O.S. No. 211 of 1933) was filed by the appellant

for recovery of a sum of money. The first defendant was the father and the other, defendants were the sons. The suit itself was upon a promissory

note dated 9th April, 1930, executed by the first defendant in favour of the plaintiff's transferor; one Chanduru Venkataratnam. An application

under Order 38, Rule 5, Civil Procedure Code, was also filed seeking attachment before judgment of certain properties belonging to the family of

the first defendant and his sons. Notice and conditional attachment were ordered on this application and the properties were attached.

Subsequently owing to certain difficulties in service of notice on the sons, they were exonerated and a decree was obtained against the first

defendant, the father. Before this stage was reached, the first defendant's wife filed a claim petition objecting to the attachment of the property on the ground that the property belonged to her. This claim was allowed and the attachment was raised by order dated 15th August, 1933. The application for attachment before judgment came on for further orders on 9th September, 1933. On that day, a memo. was filed giving up the defendants 2 to 6 on the ground already stated, that there was some difficulty in serving them, On the application for attachment the following order was passed, ""Claim in respect of attached property has been allowed. Petition dismissed."" The decree-holder filed O.S. No. 35 of 1934 under Order 21, Rule 63 to set aside the claim order. The suit was dismissed by the trial Court on 18th March, 1935. There was an appeal against it and the appellate Court allowed the appeal and held that the property was attachable at the instance of the plaintiff. This was on the 22nd October, 1935. Thereafter the decree-holder filed an execution application to execute the decree by bringing the property that had already been attached before judgment to sale. He proceeded upon the footing that the attachment before judgment already made was still subsisting. The question is whether the attachment was subsisting Or, at any rate, whether it was restored when on appeal the claim of the first defendant's wife was dismissed.

2. As certain points were not very clear in the original judgment of the District Court, I called for findings by my order dated 4th November, 1941.

Two points were sent down for finding, (1) whether the shares of all the defendants had been attached before judgment in O.S. No. 211 of 1933

on the file of the District Munsiff's Court, Masulipatam, and (2) whether the partition alleged by the defendants was not a sham or collusive

transaction in order to its being effected fraudulently and with intent to defraud the creditors. On the first question the District Judge finds that the

shares of all the defendants had been attached before judgment. But he finds that it was not subsisting by reason of the fact that it ceased to exist

when the application for attachment before judgment was dismissed on the 9th September, 1923. The District Judge finds that the fact that

defendants 2 to 6 (the sons of the first defendant) were exonerated from the suit and that the suit proceeded only against the first defendant would

not make any difference in this matter. The father alone can be sued as the manager of the family and in this case it is found that he was clearly sued

as the joint family manager and that the attachment order of the 9th September, 1933, would bind the shares of the sons as well.

3. The order dismissing the application for attachment was based expressly on the ground that the claim in respect of the attached property had

been already allowed. It was not for any default of the decree-holder. The order on the claim petition was made the subject of a suit and the

plaintiff's contention was upheld though not by the trial Court but by the appellate Court. The question is whether when on appeal in the claim suit,

the plaintiff's right was upheld, the attachment before judgment became restored. When the application for attachment was not dismissed for any

default of the decree-holder, either Order 21, Rule 57, Civil Procedure Code, or the principle involved in it does not apply. That rule applies only

where the Court dismisses it for some default of the decree-holder. Here there was no default on the part of the decree-holder. A third party filed

a claim petition and the claim was allowed. It is doubtful whether the Court ought to have dismissed the execution petition at that stage and whether

it ought not to have kept it pending the result of any claim suit that might be filed by the unsuccessful party. But at the time when the claim suit was

filed and a decree was passed allowing the claim of the decree-holder there is no reason why the attachment should not be held to be restored.

The suit under Order 21, Rule 63 is a continuation of the claim proceedings. There is a decision of this Court in Anthaya Hegade and Another Vs.

Manjaya Shetty, , where an attachment was, on the success of a claim proceeding, raised and the claim suit was ultimately decreed in favour of the

decree-holder, and it was held that the attachment stood revived. The learned Judges (Krishnan and Odgers, JJ.) held that the raising of an

attachment on the success of a claim proceeding is only provisional and the attachment is revived on the success of the suit by the attaching decree-

holder. There are other decisions of other High Courts which are referred to and followed by Krishnan and Odgers, JJ., in the case just cited. I am

of opinion that the principle of this decision applied to this case even though it is an attachment before judgment with which we are now concerned.

4. The learned advocate for the respondents argues that the claim suit was not allowed in the first Court in favour of the decree-holder, that the suit

was dismissed by that Court and that it is only on appeal that the plaintiff has succeeded. I do not see how this makes any difference. The decision

of this Court in *Balaraju Chettidr v. Masilamani Pillai* (1929) 58 M.L.J. 675 : ILR Mad. 334 deals with a case where the suit in which the

attachment before judgment was made was itself dismissed by the trial Court and was afterwards decreed on appeal. The basis for the attachment

before judgment, namely, a valid claim by the plaintiff for the suit amount having been decided against the plaintiff, it was held that the attachment

fell to the ground the moment the suit was dismissed and that the fact that in appeal the suit was decreed did not have the effect of restoring the

attachment. But we have nothing to do with a case of that kind here. "The claim of the plaintiff was not found against in this case. Even where the

suit is dismissed it is not always the case that the attachment falls to the ground and does not stand revived on the restoration of the suit. In

Saranatha Aiyangar Vs. Muthiah Mooppanar and Others, , Ramesam, J., sitting as a single Judge held that where the suit was dismissed for default

and afterwards restored to file, the orders on the interlocutory applications stood revived. It was a case of temporary injunction restraining the

defendant from interfering with the plaintiff's exercise of office and enjoyment of the land and the emoluments of the office. The suit was dismissed

for default, but soon afterwards it was restored to file. The question was whether the order of injunction stood restored with the suit which was

alone restored to file or whether it came to an end when the suit was dismissed for default. The learned Judge held that on the restoration of the suit

to file, the interlocutory order passed in the suit stood revived and he distinguished the Full Bench decision in *Balaraju Chettiar v. Masilamoni Pillai*

(1929) 58 M.L.J. 675 : ILR Mad. 334 on the ground that it related to the dismissal of the main suit itself. In the later decision of a Full Bench in

Veeraswami v. Ramanna (1934) 68 M.L.J. 444 : ILR Mad. 721 the view of Ramesam, J., in *Saranatha Aiyangar Vs. Muthiah Mooppanar and*

Others, was approved. In that case a security bond was given in the trial Court stating that if the suit was decreed in favour of the plaintiff, he might

recover the amount from the vendor and from his properties and if the suit was dismissed, the security bond was to stand cancelled. The suit was

dismissed for default but was afterwards restored to file. The question was whether on the dismissal of the suit, the security bond stood cancelled

or whether when the suit was restored to file, the security bond was also restored. It was held by the Full Bench that the security stood revived. In

this case the suit which the plaintiff brought on foot of that promissory note was not dismissed and hence the Full Bench decision in Balaraju

Chettiar v. Masilamoni Pillai (1929) 58 M.L.J. 675 : ILR Mad. 334 does not apply. We are really governed by the decision in Anthaya Hegade

and Another Vs. Manjaya Shetty, and I must hold that it does not make any difference whether the claim suit was decreed in the first instance or

on appeal. The claim suit having succeeded, the order allowing the claim stood cancelled and the effect of it is that the order of dismissal passed on

the application for attachment is also vacated and the previous state of things restored. In this case, the attachment had already been effected and

that attachment stood restored when the appellate Court in the claim proceeding declared that the property was not that of the claimant but

belonged to the defendant in the suit.

5. A further point is raised by the learned advocate for the respondents that there was no attachment for the reason that no prohibitory order was

served upon the first defendant. No such question was raised in the lower Court even when the matter was sent back by me for, finding whether

there Was an attachment. We have the order ""Notice and conditional attachment"" on Ex. XII and it is to be presumed that the notice drawn up by

the office was in conformity with the requirements of the rules. It is found by the learned Judge that notice was actually served on the first

defendant. The notice itself has not been produced and was not filed in the Court below. I cannot therefore take it that the notice did not contain all

that was necessary and that it did not include a prohibitory order.

6. The result is that the appeal is allowed 2nd the orders of the two lower Courts are set aside and E.A. No. 1470 of 1938 is dismissed with costs

in all the Courts. The execution application of the decree-holder will stand revived and a further execution will proceed. The appellant will have his

costs in all the Courts from the respondents.

7. Leave refused.