

(1961) 11 BOM CK 0001

In the Bombay High Court

Case No : Appeal No. 350 of 1956

Dattatraya Baliram Naik and Others

APPELLANT

Vs

Rambhabai and Others

RESPONDENT

Date of Decision : 16-11-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 57, Order 38 Rule 11, 64

Citation : AIR 1962 Bom 236 : (1962) 64 BOMLR 280 : (1962) ILR (Bom) 452

Hon'ble Judges : Patel, J;Abhyankar, J

Bench : Division Bench

Advocate : R.B. Kotwal, for the Appellant; M.V. Paranjpe, M.A. Rane and G.S. Gupte, for the Respondent

Judgement

Patel, J.

(1) This is an appeal by the Plaintiffs, whose suit for possession, is dismissed by the Civil of property which was purchased in an execution providing. A few facts, out of which the appeal arises need be stated. The father of Plaintiffs Nos. 1,2 and 3 by name one Baliram Narayan Naik and a coparcener of his, filed a Suit No. 63 of 1924 in the Court of Jalgaon against one Sakharam alias Daulat Ramji Patil and Bhika Ganpat Chaudhari for the recovery of their dues on a Pro-note. Daulat was the son of Keshav and was adopted by his uncle Ramji. The family, however, apparently continued as before, On 24th March, 1924, the Plaintiffs obtained an attachment before judgment and actually levied the attachment. A decree (Exhibit 227) was passed in that suit on 9th July, 1924. By the terms of the decree the attachment before judgment was continued, During the course of years several Darkhasts were filed for execution of the decree. The first Darkhast No. 830 of 1924, was filed on 25th September, 1924. The judgment-debtor paid a sum of Rs. 1,000 and agreed to pay instalments as a result of which the Darkhast was disposed of on 23rd December, 1925. Again by the terms of the order in that Darkhast, the attachment was continued with the consent of the judgment debtor; consent being given by Dagdu Desav, his natural brother an

cousin by adoption, As no instalments were paid, a second Darkhast No. 230/31 was filed. It appears that the judgment creditors had not given particulars of the properties which were sought to be sold and they were, therefore, called upon to furnish the same. That is Exhibit 205. The third Darkhast, being Darkhast No. 778/34, was filed on 15th June, 1934, and it was sent to the Collector for execution. The property was ultimately sold on 27th November, 1941, and it was purchased by the decree-holders. The sale certificate in respect of those properties is at Exhibit 225. The properties purchased by the creditors were;

Survey No. 117 : 1 acre 13 Gs. Assessed at Rs. 32 Survey No.3/1: 1 acre 12 Gs. Assessed at Rs. 2/8-, 0 acres 10 Gs. (Kharaba) Survey No. 86 : 4 acres 18 Gs. Assessed at Rs. 11/15/- survey No.110: 3 acres 6 Gs. Assessed at Rs. 13/4/-.

After the purchase of the properties by the creditors, the judgment-debtor Daulat made an application for setting aside the sale under Order 21 Rule 19 but the application was dismissed for default. The decree-holder then made an application for possession and he was given symbolical possession on 30th April, 1943, as some of the defendants claimed to be possession in their own rights.

(2) Survey Nos. 110, 86 and 3/2 were sold by Daulat to Yadav Ganpat Patyil, father of Defendant No. 4 and his brother Defendant No. 5 who were his maternal uncles in the natural family. These sales were effected by Exhibits 114 and 115 dated 15th June, 1923, and 15th August 1923 before attachment. Defendant No. 6 Daji purchased parts of survey No. 117 by three separate deeds being Exhibits 105 , 106 and 107 D/- 22-5-1933, 16th July, 1931 and 22nd June, 1932. Defendant No. 7 is the nephew of Defendant No. 6 and is jointly interested in those lands with him. Defendant No. 8 purchased part of survey No. 117 by Exhibit 207 dated 31st May, 1933. All these Defendants had raised objections and therefore, the purchaser got only symbolical possession.

(3) The present suit was filed on 26th November, 1953, claiming possession from the Defendants of these various survey numbers. At the date of the suit (Sakharam) Daulat was already dead. The Plaintiff alleged that the sale in favour of Yadav Pati and Vyankat Mayaram Patil is a sham transaction and never intended to operate as a sale, that even after the sale Daulat and his brother continued to remain in possession of the property. At the date of sale as Daulat was dead, his daughters Rambhabai, Sunderabai and Shewantibai were made Defendants Nos. 1 to 3. He also alleged the same infirmity in the other sales and also contended that these sales having Been effected after his attachment before judgment in suit, they were not binding on him and he was entitled to claim possession of the property. Defendant No. 9 is the Son of Dagdu, whose father Deshav was the brother of Daulat, Defendants Nos. 10 , 11 and 12 are alleged to be the tenants. The Defendants hotly contested the suit. Defendants Nos. 1 to 3 contended that Daulat had alienated the properties in favour of the various purchasers and they had no connection with those properties and did not claim any interest in them. Defendants Nos. 4 and 5 contended that their sale was of a date prior to the date of attachment before judgment; that it was a genuine sale

and that from the date of the sale they were continuously in possession of the properties and therefore, as against them the plaintiff was not entitled to succeed. They also challenged the attachment itself as not having been effected. Defendants Nos. 6 and 7 made the same contentions and also contended that even in their case the attachment was not effective to affect their interest. It was contended that Darkhast No.230 of 31st January, 1931, having been disposed of on the 15th of June, 1931, for default of the decree-holder, Order 21 Rule 57, applied and the attachment therefore ceased. That being so, on the date on which they made the purchase, no attachment was in existence and, therefore, their title was not affected. It was also contended by all the Defendants that they were holding possession of their respective properties sold to them for more than 12 years as owners adversely to Daulat and, therefore, they were protected by their adverse possession as against the Plaintiffs also.

(4) The learned Judge accepted all the contentions of the Defendants except some technical contentions, which no longer now survive. It is this judgment that is sought to be challenged in this appeal. After the appeal was heard on merits the Plaintiffs and Defendants Nos. 4 and 5, i.e., Respondents Nos 4 to 8, compromised. The terms of the compromise have been filed before us. It is, therefore, not necessary to deal with all the contentions raised in the appeal.

(5) The only questions that survive now are those in relation to Defendants Nos. 6, 7 and 8. Substantially their contention is that inasmuch as the Darkhast No. 230 of 1931 was disposed of on 15th June, 1931, because the Plaintiff failed to do what he was asked to do by the Court, the attachment before judgment came to an end; and if it came to an end, Plaintiff's title is subservient to their own. Reliance was placed for this purpose on the decisions reported in *Meyyappa Chettiar v. Chidambaram Chettiar*, ILR 47 Mad 483: AIR 1924 Mad 494; *Ardeshir Nusserwanji v. Usman Gani*, 31 Bom LR 1101 : AIR 1929 Bom 455; *Hari Sabaji Kamat v. Srinivas Vithal*, 33 Bom LR 1130; AIR 1931 Bom 550; *Thampi Md. Abdul Kadir v. Padmanabha Pillari*, AIR 1952 Tra Co 414 and *Kollu Kangayya Naidu Vs. Jayamangala Reddeyya*, . On the other hand, Mr. Kotwal seeks to differentiate an attachment before judgment from an attachment in execution and contends that Rule 57 has no application to such a case. He has in this connection placed reliance on the minority judgment in ILR 47 Mad 483: AIR 1924 Mad 494; *Abdul Hamid and Others Vs. Mst. Asghari Begum*, ; *Akheyram v. Basantlalm*, ILR 46 All 894: AIR 1924 All 860; *Ayezali Mir v. Mahanandabarui*, AIR 1949 Cal 320; *Shibnath Singh Ray Vs. Saberuddin Ahmed*, and *Moti Jha v. Hawala Prasad*, ILR 16 Pat 589: AIR 1937 Pat 626. The question is which of these rival contentions is the correct one.

(6) It is desirable to consider the question on the provisions of the CPC and first principles apart from authorities in the first instance. Order 21 relates to execution proceedings in which provision is made for attachment of property during process of execution for realisation of the decree. Order 38 makes provision for attachment of the property of a defendant during the pendency of a

suit for the safeguarding of the interest of the plaintiff in respect of his money claim. The essential purpose and the ambit of both these provisions seems to be slightly different though in law the effect is almost the same. In the case of an attachment before judgment, the purpose is to safeguard the plaintiff against the disposal of property and to see that the plaintiff's decree is satisfactorily discharged. It is for this reason that two alternatives are provided (1) that of security and (2) on failure to furnish security attachment of property. So far as Order 21 is concerned, its essential purpose is to see that the process of the Court is not defeated once execution starts and no other. Separate provisions have been made in the CPC for attachment before judgment and attachment in execution proceedings. Provisions of Order 38 clearly show that it is a self-contained and a complete provision by itself and it is only in certain procedural respects that the provisions of Order 21 in relation to attachment are made applicable to attachment before judgment. In other respects as shown by Rules 7, 9 and 12 of Order 38, there is material difference. If security had been furnished it could not have been urged that it came to an end on the dismissal of the Darkhast.

(7) Now, by its terms Order 21 Rule 57 applies to cases "where any property has been attached in execution of a decree". Rule 57 occurs in O. 21 along with several other provisions dealing with attachment in execution proceedings. Rule 54 deals with attachment of immovable property. Rule 55 provides that where the conditions specified therein are satisfied, the attachment shall be deemed to be withdrawn and in a case of immovable property the withdrawal shall be proclaimed if the judgment-debtor so desires. The circumstances under which attachment levied has to be withdrawn are:

1. That the amount decreed with costs and all charges and expenses resulting from the attachment are paid in Court, or
2. That the decree is satisfied otherwise through the Court or
3. That the decree is set aside or reversed.

It is for that reason that Rule 57 provides that if the Darkhast or the application for execution is dismissed for default of the decree-holder, then the attachment made in execution of decree ceases. Sub-rule (1) of Rule 58 provides for investigation of claims to, and objections to attachment of, any property in execution of a decree. The very language would suggest that in a case where property is attached before judgment, it has no application. If by its own force the rule has to be applied, the words "in execution of the decree" must be omitted for which there is no justification. The words are used to make it abundantly clear that the rules are dealing with execution proceedings. As pointed out, difficulty also would be created in interpreting Rule 58. The intention of the Legislature must be ascertained as expressed by the language used, or by the clearest implication in the language. Even if a certain effect was intended by the Legislature but it is not effectually expressed, then the Court is not entitled

to alter the language of the section in order to fit in with the supposed intention of the Legislature. It is not possible, therefore, on the language of Order 21 to come to the conclusion that in the circumstances of such a case attachment ceases. Order 38, which is again a self-contained Order, clearly provides by Rule 8 for investigation of claim to property attached before judgment. It states that such claim shall be investigated in the manner provided for investigation of claims to property attached in execution of a decree for the payment of money, This rule only provides that the procedure for both the purposes must be the same. As there was a conflict at one time as to whether fresh attachment was necessary for the purpose of execution where an attachment before judgment was already taken out by the plaintiff. Rule 11 provided that in such a case it was not necessary to apply for re-attachment of the property. it is argued that this rule in effect makes attachment before judgment the same as an attachment in execution of a decree. But this argument, however, cannot be accepted. On the contrary, it clearly emphasises the distinction between the two and it is only because of the difference which existed between the two that it became necessary for the Legislature to provide that re-attachment was not necessary. If the Legislature intended that both should be the same and an attachment before judgment could be deemed to be an attachment in execution proceedings, the Legislature could easily have provided that an attachment before judgment would be deemed to be attachment in execution at least after a decree is made. It at best creates an exception to the ordinary rule that attachment is necessary for effecting a sale in execution, for if an attachment is operative as it is intended to be until the decree is satisfied, then there would not be any necessity for protecting the property by re-attachment.

(8) There are no overwhelming reasons either of equity or justice why we should adopt a forced construction either of Rule 57 Order 21 or Rule 11 Order 38 in order to hold that an attachment before judgment must be vacated merely because in execution proceedings the decree-holder made some default. As pointed out by the learned Chief Justice in ILR 47 Mad 483 : AIR 1924 Mad 494 it may be due to several factors and it may be that a decree-holder may not be the person to be blamed. It has not been contended and there is no authority for the proposition that if the decree-holder, who has obtained attachment before judgment sits quiet upon the last day of the three years provided for execution of the decree then the attachment suffers in any respect. It would be strange that if such a decree-holder made an application for execution of the decree next day after it was passed but because of some exigency his application came to be dismissed, then the attachment ceases. We are in complete agreement with the reasons given in the minority judgment of the learned Chief Justice and Mr. Justice Wallace in the above case for holding that Rule 57 does not come into operation in the case of an attachment before judgment.

(9) Coming to the case law the most important case in favour of Mr. Gupte's contention is the majority view taken in case of ILR 47 Mad 483: AIR 1924 Mad 494. Mr. Justice Coutts-Trotter, while agreeing with the other learned Judges,

who were in favour of holding otherwise, expressed his disagreement with the view that mere passing of a decree with the view that mere passing of a decree converts an attachment before judgment into an attachment in execution. Mr. Justice Ramesam while dealing with Order 21 Rule 11 says:

"Sale without attachment is permissible only in a decree for sale. Therefore, in a decree for money, there must be an attachment in execution proceeding the sale."

He then poses the question: "Where is the attachment in execution proceeding the sale as required by Order 21, Rule 11 in a case where there has been an attachment before judgment and no reattachment?" The foundation of the decision is the reasoning that for a valid sale attachment is necessary. It seems to us that this view cannot be supported under the present Civil Procedure Code. Section 51 of the CPC provides that subject to such conditions, and limitations as may be prescribed, the Court may order the execution of a decree by attachment and sale or sale without attachment of the property. It is true that Order 21 prescribes the mode of executing the decree. But even Order 21 Rule 11 recognises that sale may take place without attachment of property. By Rule 30 it is provided that a decree for payment may be executed by detention or attachment and sale of property or by both. Yet the rules do not make attachment of property a condition of the exercise of jurisdiction to sell conferred by the law. This view was taken in *Namdev Krishna v. Govardhan Nanabhoy*, ILR 1939 Bom 420: AIR 1939 Bom 277. Even if we are wrong in this view, in view of Order 38 Rule 11, the case of attachment before judgment can only be treated as an exception to the ordinary rule.

(10) Mr. Justice Ramesam relied upon cases which held that an attachment before judgment becomes an attachment in execution. These are *Pallonji Shapurji v. Edward Vaughan*, ILR 12 Bom 400, *Swedutt Roy v. Shree Canto Maity*, ILR 33 Cal 639 and *Bhagwan Chandra v. Chandra Mala*, ILR 29 Cal 773.

(11) In the first case ILR 12 Bom 400, the learned Judge was dealing with the question as to whether an application was necessary before a decree-holder became entitled to retable distribution in a case where attachment was levied before judgment, and was concerned with section 490 of the old Code which was in the same terms as Rule 11 of Order 38. The other provisions of the Code were not considered. The learned Judge made an observation that the only effect of section 490 was that it did not require re-attachment of the property and added that the attachment before judgment enures and becomes an attachment in execution. It is this observation that has been followed in subsequent cases.

(12) In ILR 33 Cal 639 Mr. Justice Woodroffe also sitting a Single Judge followed the judgment of Mr. Justice Scott where the question that arose was similar to the one in *Pallonji*'s case, ILR 12 Bom 400. In ILR 29 Cal 773 the question arose with reference to section 285 of the old Code, a section corresponding to section 63 of the present Code. It prescribes the Court which has to determine any claim

to the attached property and the objections to the attachment thereof, and the words "under attachment in execution of a decree" were construed to include attachment before judgment also. There seems to be some difficulty in the application of the section, to a case where an attachment is levied by a Court in respect of property situate outside its jurisdiction, which it is entitled to do under the Code, since it is only the Court, which has issued the order. It might also create difficulties in cases where different attachments are levied by different Courts in respect of properties in the jurisdiction of neither of the Courts. All these difficulties could be obviated if this forced construction of section 63 or Order 38 Rule 11 is not adopted. We doubt very much the advisability of such a construction. Some Courts have taken the view that attachment before judgment can become attachment in execution when an order of sale is made. What is to happen at the earlier stage in such cases is difficult to imagine.

(13) The second reason for the majority view is that the Court applied in *Arunachallam Chetty v. Pariasami*, ILR 44 Mad 902: AIR 1921 Mad 163 Article 11 of the Limitation Act to a suit challenging an order in a claim petition when attachment was levied before judgment. In that case the main consideration for applying Article 11 was that in the Code of 1859 same period of limitation applied to a suit to challenge orders in claim petitions in cases where attachment was levied in execution proceedings and in cases where attachment was levied before judgment and that

"this did not cease to be any the less a cardinal and most essential feature of this procedure, when in the supposed interests of uniformity the period of one year was omitted from the Code and transferred to the Limitation Act of 1871."

It was also not disputed in that case that the period of one year continued to be prescribed by the Limitation Acts of 1871 and 1877 and therefore, it was said that it was unlikely that the Legislature could consciously intend to lay down the longer period under Article 120.

"seeing that the effect of the alteration is to defeat what has always been the essential feature of this procedure, the speedy settlement of titles."

It seems to us that the basis of the reasoning is not justified. By the Limitation Act of 1871 the last twelve words of section 246 of the Code of 1859 were deleted. But no period of limitation was provided. By Art. 14 one year's period was provided for setting aside only sales in execution. Article 15 could not apply in that the proceedings in execution would still be proceedings in a suit. It seems that by not providing any period of limitation for setting aside orders in claim petitions, Section 246 was brought into uniformity with section 247. In 1877 both Codes were re-cast. The CPC was divided into several Chapters one dealing with execution, viz., Chapter 19, and that dealing with attachment before judgment viz., Chapter 34. Claims in execution were dealt with by sections 278 to 282. Section 283 made the order final subject to the result of a suit. Section 487, which concerned with investigation for claims provided that the same

procedure was to be followed as in case of attachment in execution. It did not provide any finality to the order so passed. It seems, it is for this reason that in the Limitation Act of 1877 one year's period was provided for suits only in respect of orders under sections 280, 281, 282, or 335 of the Code. The underlying assumption therefore in ILR 44 Mad 902: AIR 1921 Mad 163 was not justified. It is indeed true that we are not concerned with the construction of Article 11. It has become incidentally necessary to refer to this position to point out that the main reason by which the learned members of the Full Bench were impressed for holding that Article 11 applied even to a case of attachment before judgment does not exist. It is not necessary to consider, AIR 1952 Tra-co 414 and Kollu Kangayya Naidu Vs. Jayamangala Reddeyya, since they followed the Madras Full Bench case.

(14) We need now deal with only two more cases decided by this Court. In the case of 31 Bom LR 1101: AIR 1929 Bom 455 Mr. Justice Madgavkar followed the Full Bench decision in ILR 47 Mad 483: AIR 1924 Mad 494 disagreeing with the Calcutta and Allahabad High Court and previous decisions of the Madras High Court in the other cases, observed that he preferred the wide construction adopted by the majority of the learned Judges in ILR 47 Mad 483: AIR 1924 Mad 494. With respect, that construction is a forced construction for which there is no justification. It also does not appear to us that it is a case of preference of the wider construction over the narrower. If security had been furnished by the defendant, it could not have come to an end merely because the Darkhast was dismissed and we do not see any reason why attachment should cease when it is intended to take the place of security when the defendant is recalcitrant and does not furnish security. We agree with respect with the natural and ordinary construction placed by the learned Judges in the minority view in ILR 47 Mad 483: AIR 1924 Mad 494 and in other cases which accept that view.

(15) The decision in 33 Bom LR 1130: AIR 1931 Bom 55 is the decision of a Division Bench to which again Mr. Justice Madgavkar was a party. In that case the question under review did not specifically arise. The real question was as to whether the attachment ceased even in respect of those properties for sale of which, no Darkhast was filed, and in the view taken by the Court Mr. Justice Madgavkar said:

"Strictly speaking it is not necessary for us to consider the first aspect of the case.

The observations, therefore, adopting the majority view in the Full Bench case of ILR 47 Mad 483 : AIR 1924 Mad 494 must be regarded as obiter.

(16) In the result it must be held that in the case of an attachment before judgment Order 21 Rule 57 does not operate and the attachment still continues. If this is so, the conveyances in favour of defendants Nos. 6 and 7 and defendant No. 8 are clearly hit by section 64 and they are inoperative and void against the purchaser.

(17) Mr. Gupte invited out attention to the finding made by the learned trial Judge wherein he says that attachment was not in fact levied and if it was levied it was not proved to have been legal. With all respect to the learned Judge, we find it very difficult to appreciate his reasoning for this conclusion. It must be remembered that the attachment was levied as early as in 1924 and the first suit that could possibly have been filed could not have been earlier than in 1944 when the purchaser received possession of the property. The record by that time was bound to have been destroyed. The decree-holder produced the intimation of the Court that the record was not available and was destroyed. The documents produced were an order of attachment and the order which continued the attachment. The provisions of section 114 of the Evidence Act enable the Court to raise a presumption that official work is properly and legally done in the course of business as required by law. The fact that an attachment was made had also been further admitted when the judgment-debtor agreed to pay instalments and the attachment was continued. It is no doubt true that the document at Exhibit 219 is signed by Dagdu Keshav as "Khud" but that does not mean that the judgment-debtor had not authorised him to sign the document. The learned trial Judge has not even noted the fact that Daulat and Keshav, the father of Dagdu were true brothers and that Daulat was adopted by his own uncle. Normally, therefore, unless it was shown by any one that Dagdu and Daulat were separated members, the ordinary presumption would be that they were members of a joint family and the remark of the learned Judge, therefore, that Dagdu was a stranger and that there would be no consent on half of Adult cannot be accepted. These statements both in the decree and in a subsequent application clearly must enable the court to raise the presumption that attachment was levied and properly levied. The plaintiff gave evidence to that effect and so far as we are able to see, there is no cross-examination on that matter. It is clear, therefore, that the learned trial Judge was in error in holding that there was in fact no attachment of the property.

(18) The learned Advocate has also contended that his clients were holding adversely to the judgment-debtor and also to the plaintiff and, therefore, the plaintiff is not entitled to succeed. Now, it must be remembered that the title of these defendants was derived from Daulat. There can be no question, therefore, of their holding adversely to Daulat in the sense in which that expression is understood in law. The decree and the execution proceedings were binding on the judgment-debtor and inasmuch as the defendants claimed their title by virtue of a sale-deed after the properties were attached it cannot be said that they were holding adversely to the purchaser. The right of the purchaser for recovering possession came into existence for the first time when he purchased the property and got symbolical possession. Even counting from the date of the sale, it cannot be said that the defendants were in adverse possession for the requisite period. There is, therefore, no substance in this contention also.

(19) In the result the decree of the learned trial Judge will be set aside so far as respondents Nos. 4 to 8 are concerned. The consent decree will be substituted in

place of the trial Court's decree. So far as the rest of the defendants are concerned, the decree of the trial Court is set aside and it is directed that defendants do hand over possession of the properties in their possession to the plaintiff. Defendants also to pay mesne profits for a period of three years before suit and from the date of suit till realisation. Mesne profits to be determined under Order 20 Rule 12 of the Code of Civil Procedure. So far as the respondents Nos. 4 to 8 are concerned, there will be no order as to costs. Defendants Nos. 6, 7 and 8 will pay proportionate costs to the plaintiff.

(20) Order accordingly.