

(1926) 11 CAL CK 0005
In the Calcutta High Court

Firm Chaitanya Krishna Mandal and Others

APPELLANT

Vs

Jagat Chandra Banikya and Others

RESPONDENT

Date of Decision : 29-11-1926

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 92, 151

Citation : AIR 1927 Cal 240

Hon'ble Judges : Mukerji, J;Graham, J

Bench : Full Bench

Judgement

Mukerji, J.—This Rule is directed against an order passed by the Subordinate Judge of Tippera dated the 26th of April 1926 and also against an order passed by the Munsif, 3rd Court of Chandpur, dated the 14th of November 1925. The facts which led up to the application upon which this Rule has been issued are the following:

The petitioners in this Rule obtained a decree for money against the opposite party. The said decree was passed in a suit which had been instituted by the petitioners for recovery of money and during the pendency of the said suit on or before the 11th of June 1923, the petitioners attached before judgment three properties belonging to the opposite party. The decree was passed on the 26th of September 1923 and in execution of the said decree the three properties were advertised for sale. In the meantime another person, namely, one Nagarbashi obtained another money decree against the opposite party and attached one of the properties namely Lot No. 1 out of the aforesaid three properties and the said lot was put up to sale and purchased by the said decree-holder Nagarbashi. The petitioners thereafter put in a petition stating that Lot No. 1 had already been sold as above stated and consequently that it could not be sold again and praying that only Lots Nos. 2 and 3 might be sold. Lots Nos. 2 and 3 were then sold in execution of the petitioner's decree and were purchased by the petitioners. The sale was confirmed and the execution case relating to the petitioner's decree was struck off on part satisfaction.

2. Within 30 days of the sale of Lot No. 1 the opposite party paid in the decretal amount due on Nagarbashi's decree and in consequence of the said payment the sale of Lot No. 1 was not confirmed but was set aside. Thereafter the petitioners proceeded against the said Lot No 1 in execution for recovery of the balance of the decretal amount due to them and the said lot was again put up to sale and was purchased by the petitioners on the 24th of October 1925. Thereafter certain claims were put in on behalf of parties who are not before us but those claims were not allowed. The sale in favour of the petitioners in respect of Lot No. 1, however, was set aside by the learned Munsif by an order passed on the 24th of November 1925. The Munsif held that the sale of Lot No. 1 had taken place without attachment and was therefore void. He therefore, in the exercise of his powers u/s 151 of the CPC set aside the sale and refused to confirm it. Against this order the petitioners preferred an appeal which was dismissed by the Subordinate Judge of Tippera on the 26th of April 1926, the learned Subordinate Judge being of opinion that the appeal was incompetent. The petitioners have thereafter moved this Court and obtained the present Rule.

3. In the Rule two questions have been urged on behalf of the petitioners. The first is to the effect that the order which had been passed by the learned Munsif may very well be regarded as one passed under the provisions of Order 21, Rule 92 of the CPC and that, therefore, the learned Subordinate Judge was wrong in holding* that no appeal lay from the said order.

4. The second question that has been raised is as regards the propriety of setting aside the sale and refusing to confirm it in the view that a fresh attachment was necessary after the sale in favour of Nagarbashi had been set aside.

5. It is not necessary to deal with the first of the aforesaid contentions; for the Rule is directed not merely against the order which the learned Subordinate Judge has passed but also against the order which was passed by the learned Munsif and we are of opinion that the latter order should be set aside by us in the exercise of our powers u/s 115 of the Code of Civil Procedure. Lot No. 1 it is admitted was attached before judgment at the instance of the present petitioners. Under Order 38, Rule 11, it was not necessary for the petitioners to re-attach the said lot upon an application for execution of the decree which the petitioners had obtained on the 26th of September 1923 and the attachment before judgment which had been made at the instance of the petitioners became by virtue of the petitioners' application for execution an attachment in execution. When this attachment was existing Nagarbashi attached the property over again and put it up to sale which, as I have already stated, was eventually set aside and not confirmed. If the sale had been confirmed the effect of that would have been to put an end to all attachments that might have existed prior to the date of that sale. This is a proposition which is well settled and was laid down in the case of Kashi Nath Roy Chowdhry v. Surbanand Shaha [1885] 12 Cal. 317.

6. It was observed in that case that on the happening of a judicial sale, all previous attachments effected upon the property sold fall to the ground. If the

sale in execution of Nagarbashi's decree had been duly confirmed by the Court the title of Nagarbashi would have dated back to the date of the sale and all previous attachments would have fallen through. But the effect of refusing to confirm that sale was to remit the property to the estate in which it was before the sale. It follows, therefore, that when this sale was set aside the attachment which had existed in respect of this property in execution of the decree which the petitioners had obtained by reason of the fact that the petitioners had got an attachment of it before judgment was revived and if thereafter the property was sold and purchased by the petitioners, as it has been, it cannot be contended that the sale took place without an attachment.

7. Some argument has been advanced before us based on the provisions of Order 21, Rule 57 of the CPC and it has been urged that in view of the provisions of this rule the attachment cannot be said to have been subsisting at the date at which the sale took place. Now, it is not necessary on the present occasion to go into the question whether an attachment before judgment is an attachment which comes within the purview of Order 21, Rule 57 of the Code of Civil Procedure, a question with regard to which there appears to be a conflict of judicial opinion : see for instance, the case of Ganesh Chandra Adak v. Banwari Lal Ray [1916] 16 C.W.N. 1097 and Meyyappa Chettiar Vs. Chidambaram Chettiar, , because it is conceded that in the present case no question of dismissal of an execution petition for the decree-holder's default such as is contemplated by that rule has arisen. It is clear therefore, that having regard to the provisions of Order 38, Rule 11 of the Code of Civil Procedure, and the considerations to which I have already referred, there can be but one conclusion at which we can arrive, namely, that the attachment which the petitioners had obtained prior to judgment in this suit remained operative until the sale took place in execution of Nagarbashi's decree and when that sale was not confirmed the said attachment was again revived and it was not necessary to re-attach the property over again. The contrary view taken by the learned Munsif, in my opinion, seems to be wrong.

8. The Rule in this case therefore should be made absolute and the orders against which it is directed must be set aside and we would further order that the learned Munsif will now proceed to confirm the sale in view of the provisions of Order 21, Rule 92 of the Code of Civil Procedure. The petitioners are entitled to the costs of this Rule as well as of the costs in the Court of first instance. Hearing-fee in this Rule is assessed at two gold mohurs.

Graham, J.

9. I agree.