

(1896) 12 CAL CK 0015
In the Calcutta High Court

Gouri Sunker Panday

APPELLANT

Vs

Abhoyeswari Dabee

RESPONDENT

Date of Decision : 21-12-1896

Acts Referred:

Transfer of Property Act, 1882 — Section 67, 99

Citation : (1897) ILR (Cal) 262

Hon'ble Judges : Knight, C.J;Trevelyan, J;Macpherson, J;Francis Maclean, J

Bench : Full Bench

Judgement

Maclean, C.J.—This case has been very elaborately argued, and many cases have been cited, and various sections of the Code and Acts of the Legislature referred to; but in my opinion the case is reduced to a short, and I do not think a really difficult, point.

2. The plaintiff is a judgment-creditor of the defendant, and the decree directing payment also gave him a charge upon certain property of the defendant I purposely refrain from expressing any opinion as to whether the plaintiff is a mortgagee within the meaning of Section 99 of the Transfer of Property Act; in the view I take of this case it is immaterial to say anything as to that. Having obtained his judgment he not unnaturally wishes to obtain the fruits of it. He has made two unsuccessful attempts to do this. On the 22nd September 1893 he obtained an order from this Court for the sale of the property, but that order was reversed on appeal. On the 7th August 1894 he obtained an order to send a certified copy of the decree to the Judge of the Assam Valley Districts for execution, and then applied in that Court, for a sale after attachment of the property, to the Judge of that Court, and on the 2nd March 1895 the Court made the order, notwithstanding the objection of the defendants, who urged that the properties could not be sold in execution of the decree, unless and until the plaintiff had instituted a suit for sale under the conjoint operation of Sections 99 and 67 of the Transfer of Property Act.

3. It is clear that the point raised, discussed, and decided in the Court at Dhubri

was, whether or not the property could be sold unless and until a fresh suit for sale had been brought u/s 67 of the Transfer of Property Act. There is nothing in the judgment as to mere attachment as opposed to a sale. The judgment did not deal with that point in any way. The judgment-debtor appealed, and the appeal was heard before Justices Norris and Gordon, and their judgment was given on the 27th May 1895. It is quite clear from what is stated in that judgment that the point really argued on the part of the judgment-debtor was that no order for the sale of the properties could be made, until the plaintiff had instituted a suit u/s 67 of the Transfer of Property Act. That was Sir Griffith Evans's contention. The contention of the plaintiff, as stated in that judgment, is perfectly consistent with this view. He contended that the decree was tantamount to an agreement by the debtor that the properties should be sold in default of payment of the installments. I have looked at the report of this case in ILR 22 Calcutta series, page 859, and there is not a suggestion in the arguments on either side that the question whether a mere attachment could not issue as opposed to a sale was ever (sic) the head-note of the case tends to show that the judgment was (sic) only with the question of a right to a sale.

4. (sic) Judges themselves say: We are of opinion that Sir Griffith (sic) must prevail." I have shown what his contention was. (sic) "Unless the construction of the decree is such as Mr. Hill (sic) it is clear that the plaintiff cannot sell without bringing a suit." But for the somewhat loose expressions at the end of the judgment, the point would have been in my opinion quite unarguable. I will read the sentence.

5. "As the decree stands, the plaintiff can realize the installments by execution by sale and attachment of any property of the defendant's, but if he wishes to sell and attach the properties charged, he must bring a suit." I do not quite understand what is meant by the expression "by execution by sale and attachment," and the expression "to sell and attach."

6. Those expressions appear to me to put the cart before the horse. I could understand them if they were "attachment and sale," or "attach and sell." In my opinion these words "and attachment," "and attach," have slipped into the language of the judgment by mistake: they are at variance with the arguments in the case, and with the reasons given for, and with the previous portions of the judgment and with the terms of the order as drawn up; and I do not think that by the use of those somewhat ambiguous phrases the Judges ever meant to decide, or that they ever did decide, that under the circumstances an order for attachment, as opposed to an order for sale, could not be made. In my opinion, by that judgment all that the Judges intended to decide and did decide was, that if the plaintiff wished to sell he must institute a suit.

7. In this state of circumstances, the judgment-creditor applied to the Court below that the case might be transmitted to the Court of the 24 Pargunnahs for execution by way of attachment. Mr. Justice Sale refused the application, holding that Justices Norris and Gordon had held, in the judgment I have criticised, that

an attachment could not issue; that upon that point the matter was *res judicata*, and that therefore the Court would not transmit the case, as there would be no object in so doing if an attachment could not issue. Hence the present appeal. It is clear from the case of *Chundra Nath Dey v. Burroda Shoondury Ghose* I.L.R.1895 Cal 813, (817) that the property could be attached; and it is clear to my mind from the various sections of the Code which have been referred to that certain advantages do accrue to a judgment (sic)editor from obtaining such attachment.

8. Mr. Woodroffe contends that attachment and sale constitute one step only in the path of execution. I am quite unable to accept that view. Attachment is one thing, sale is another. There may be an attachment, not of necessity to be followed by sale, and there may be a sale not necessarily the result of an attachment. But the respondents urge, as they did in the Court below, that the matter is *res judicata* by reason of the judgment of Justices Norris and Gordon. I am by no means satisfied that, looking at what is now asked, and what was asked before Justices Norris and Gordon the question of *res judicata* is not disposed of against the respondent by a mere comparison of what the two applications were, and that the question of *res judicata* ought not properly to have been left for decision, when, if at all, an application is made in the mofussil Court for an attachment. However, the point has been argued and decided in the Court below, and I will deal with it.

9. I need not lay down at this time of day what is necessary to constitute a *res judicata*, nor need I refer to Section 13 of the Code. The principle is now, I think, well established. The only difficulty is as to its application to the particular circumstances of each particular case. The question here is, did the learned Judges intend to decide, and did they in fact decide, that an attachment, as opposed to a sale, could not issue ? I have stated before what I think the real point before them was, and what they really decided and intended to decide. They were asked to direct a sale "after attachment," and they refused to do so; they were never asked merely to make an order for attachment. So far as I am aware no such application has ever been made in this Court. In my opinion the case is not one of *res judicata*. I think that Mr. Justice Sale has misapprehended the true purport and effect of the judgment of Justices Norris and Gordon, that his conclusion was consequently erroneous and that this appeal must be allowed with costs.

Macpherson, J.

10. I agree. The decision of the Division Bench of this Court does not, I think, prevent the plaintiff from attaching this property in execution of his decree. There was in that case an order for sale after attachment. The appeal was against the order for sale, and the contention before the Court was that as the present appellant had, by the decree which besought to execute, a charge upon the property attached, he could not sell it without instituting a suit u/s 67 of the Transfer of Property Act. The contention prevailed, but I see nothing in the

judgment to indicate that the Court considered or dealt with the appellant's right to attach the property under his decree as distinct from his right to sell it. There is certainly one loose expression at the end of the judgment, in which it is said "if he wishes to sell and attach the properties charged he must bring a suit," but the circumstance that the sale is referred to before the attachment indicates, as is apparent from the rest of the judgment, that the right to sell after attachment was the question which the Court was considering.

11. The question which the Court had to determine in the present case was whether the decree should be transferred to the District Court for execution u/s 223 of the Civil Procedure Code. If the plaintiff has the right to attach the property within the jurisdiction of the Court to which he wishes the decree to be transferred, the Court was, I think, bound to make the order for transfer. Whether, having made the attachment, he can proceed further or can get anything out of the attachment, is a matter for the Court executing the decree to decide, and this may possibly to some extent depend upon events which may yet happen.

12. I see nothing in the law to prevent an attachment in execution of the money decree, even if before the property could be sold in pursuance of the attachment it is necessary for the appellant to take further proceedings.

Trevelyan, J.

13. I agree that this appeal should be allowed, and that the respondent should pay to the appellant the costs of the application and of the appeal.

14. There are two questions---(1) whether this application is barred by the law of res judicata; (2) whether, if it be not so barred, the plaintiff is entitled to an order which can apparently lead to an attachment only, and not be followed by an order for sale.

15. On the first question I think that the right to an attachment per se has not been judicially determined between the parties.

16. The only question which arose in the matter which eventually came up on appeal before Norris and Gordon, JJ., was whether the judgment-creditor was entitled to obtain an order for sale. This is, I think, clear from the memorandum of appeal and from the judgment. The whole judgment is directed to a consideration of the right to a sale, and it is only an expression at the end of it which can give any handle to the contention that the question is now barred.

17. There is no discussion in the judgment as to the right to an attachment independently of the right to a sale, and this right cannot be said to have been directly or substantially in issue, or to have been finally or at all decided. I read the judgment and the order as setting aside the attachment, only because it was ancillary to the sale.

18. I would, therefore, hold that the matter of the present application is not res

judicata.

19. As to the second question I am exceedingly doubtful whether Mr. Justice Sale had any power to determine the question as to whether land situate outside the limits of the original jurisdiction was capable of being attached under this decree. It is not necessary to determine this question here; but it is capable of contention that the duty of the Judge transmitting the decree is confined to determining whether there is a bond file application to transmit a live decree, and whether the conditions contained in Section 223 of the CPC have been fulfilled.

20. Assuming that he had power to decide this question, I cannot agree with the view which he has taken of it.

21. An attachment and a sale are not so indissolubly wedded as never to be capable of separation. It is true that, as a rule, a sale is the ordinary consequence of an attachment, but a mere attaching creditor has certain rights apart from his right to a sale; for instance, he has a right to participate in the proceeds of sale u/s 295 of the Civil Procedure Code, and he has a right, to redeem the property under the Transfer of Property Act. The CPC itself deals with an attachment as a proceeding separate from a proceeding to sell (see Sections 235, 274, and 284). I am not prepared to say that if there is no right to sell there cannot, under any state of circumstances, be an attachment.

22. Whether in this particular case the Court should allow an attachment is, in my opinion a matter to be determined only by the Court to which the decree is sent for execution. I would allow the appeal.