

(1920) 03 MAD CK 0008
In the Madras High Court

Haji Abdulla Sahib and Another

APPELLANT

Vs

Alanji Abdul Lathief Sahib and Another

RESPONDENT

Date of Decision : 02-03-1920

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 73(2)

Citation : 57 Ind. Cas. 854 : (1920) 12 LW 70 : (1920) 39 MLJ 91

Hon'ble Judges : Krishnan, J; John Wallis, J

Bench : Full Bench

Judgement

John Wallis, Kt., C.J.—A debt owing to the late Arcot Mohim was attached in execution of decrees of this court against his eldest son

Abdul Rahim, and garnishee orders were obtained on the Original Side of this court for its payment into court in satisfaction of the above decrees

against Abdul Rahim. The debt was not due to Abdul Rahim but to his deceased father, who was represented by the whole body of co-heirs,

including Abdul Rahim, who were entitled to share in the beneficial surplus of the estate of the deceased after satisfying his debts. The garnishee

order was therefore wrongly made, as it is well settled that debts owing to the judgment debtor and another are not the proper subjects of

garnishee proceedings, Macdonald v. Tacquash Gold Mines Co. (1884) 13 Q.B.D. 585 still less debts due to the estate of a deceased person of

whom the judgment debtor is merely a co-heir. Marshall v. James (1905) 1Ch. 432 and Burrell v. Read (1894) 11 T.L.R. 86 are authorities for

the proposition that a garnishee order so improperly made may be set aside and a refund ordered at the instance of the other parties interested in

the debt, such as the other co-heirs of the judgment debtor, or as in this case the Receiver appointed in Original suit No. 36 of 1913 in the Court

of the Subordinate Judge of North Arcot in execution of the decree in that suit against the representatives of the deceased. That Receiver who is

the present plaintiff instituted Original Suit No. 92 of 1916 in the Court of the Subordinate Judge of North Arcot which was transferred to this

Court for the recovery from the 1st defendant the garnishee and the 2nd and 3rd defendants the attaching decree-holders of the sums paid out to

the 2nd and 3rd defendants in the garnishee proceedings. Coutts Trotter, J. gave him a decree against the 2nd and 3rd defendants who have

appealed. Exhibit KK is an application put in by the other co-heirs of the deceased Arcot Mohidin under Rule 247 of Original Side Rules to raise

the attachment to the extent of 340 out of 480 shares, but the learned Judge acting apparently under Rule 264 read with Rule 262 of the Original

Side Rules made an order that the garnishee should pay the money into court and the attaching creditors be at liberty to apply to draw it out. The

order also provided that "" if the claimants herein shall have any good cause of action against the garnishees herein, that cause of action will be

entirely unaffected by this order."" The effect of this order in my opinion was in the exercise of the discretion vested in him under Rule 264, the

learned Judge declined to hear and determine the claim made by the other representatives of the late Arcot Mohidin and left them to enforce their

right by suit: but even if it be regarded as a decision as against the claimants, they would still be entitled under the Code to sue within the year to

establish their right.

2. In these circumstances it is I think clear in any view that the receiver who has been appointed in execution of a decree against the estate of the

late Arcot Mohidin in the hands of his representatives is entitled to recover monies forming part of that estate which have been wrongly paid to the

2nd and 3rd defendants under the garnishee proceedings already referred to. I am, also, clearly of opinion that the 2nd and 3rd defedants have no

claim to rateable distribution as their attachments are in execution of decrees against Abdul Rahim who could not himself prevent the suit debt,

which forms part of the estate of the late Arcot Mohidin, being taken in execution of the decree against himself and the other co-heirs of the late

Arcot Mohidin to the extent of his estate in their hands, the very decree in execution of which the plaintiff has been appointed Receiver. In this view

of the case no further question of the right to rateable distribution arises. In the result the appeal fails except as to the point dealt with by my learned

brother and is dismissed with costs of the Plaintiff. Memorandum of objections is dismissed with costs of 1st defendant.

Krishnan, J.

3. This is an appeal against the decree passed in the Original Side of this Court in a suit brought by a receiver appointed by the Subordinate Court

of North Arcot in execution of a decree passed by that Court in O.S. No. 36 of 1913, on its file. That was a suit by certain creditors of a

deceased Mahomedan, one M. Hussain Sahib against all his heirs for payment of a debt due by him to them ; and a decree was passed in their

favour for the amount due to them against the assets of the deceased as well as against his son, Abdul Rahim personally. In execution of that

decree a debt due by the 1st defendant to the deceased was attached by them and to realise the money, if necessary by suit, the receiver was

appointed and he brings the present suit.

4. The 1st defendant is the person who owed the debt in question. The 2nd and 3rd defendants are two creditors of Abdul Rahim in Madras who

obtained decrees against him personally on the Original Side. After the attachment by the North Arcot Court they also attacked the same debt but

on the footing that the whole amount was due to their judgment-debtor, the son. Garnishee proceedings were taken out by them against the 1st

defendant and he paid the money into court.

5. He subsequently stated to the Court in an affidavit that the money was due to the estate of the deceased and not to the son and that it had been

attached by the North Arcot Court. It does not however appear that any notice was given to the North Arcot decree-holders under Rule 263 of

the Original Side rules. There was also a claim petition by the other heirs of Hussain to release their shares in the money from attachment. This was

rejected by the Court and a review of the Order applied for was also rejected. The whole of the money was then ordered by the Court to be paid

out to defendants 2 and 3 and they drew it out accordingly.

6. The 1st defendant pleaded that having paid the money into court under its order was not liable to pay the money over again; and defendants 2

and 3 pleaded that they were entitled to keep the moneys they got under orders

of Court and that plaintiff had no cause of action against them. The learned judge on the Original Side decreed the plaintiff's suit against defendants 2 and 3 treating it as one u/s 73(2). C.P.C. and dismissed it against the 1st defendant. Defendants 2 and 3 have appealed to us and there is a memorandum of objections by the plaintiff as 1st respondent against the 1st defendant claiming the money from him, if defendants 2 and 3 are to be exonerated.

7. It is not now denied that the debt in question was really due to the deceased and was part of his assets. Nor is any objection taken to the validity of the attachment by the North Arcot Court and of the appointment of the receiver. As a receiver appointed in execution to the estate of the deceased to realise the attached debt he combines in himself the rights of all the heirs of the deceased as well as the rights of the decree-holders resulting from the attachment.

8. It seems to me a distinction has to be made in this case between Abdul Rahim's share in his father's money and the shares of the other heirs. In the assets of the deceased his son had only a fractional share, the rest belonging to the other heirs and it is therefore clear that the son's personal creditors had no manner of right to proceed against that part of the debt due to the father which passed on his death to the other heirs. Plaintiff's right, as representing those heirs, to recover from defendants 2 and 3 the money due to them which the latter had obtained by a wrong process of court is thus perfectly clear. It is not pleaded that the order on their claim petition is any bar to the suit; nor can it be. As I understand the proceedings, their applications were by way of claim against the improper attachment of their shares of the money and Rule 247 applied to them.

There is no provision of law quoted in their petitions, Exhibits U and KK 14 but they were applications to release their shares from attachment and made by them suo motu and not on any notice served on them under Rule 263 of Original Side Rules. I am therefore inclined to think that the order on their claim petitions must be treated as made under Order 21, Rule 61. If that is correct, Rule 63 expressly provides for a suit. If however the order is to be treated as one made under Rule 264. It will still not be a bar to the present suit as the orders on them expressly reserved the right of suit to the claimants as pointed out by the learned Chief Justice. Defendants 2

and 3 have therefore no defence to the plaintiff's claim to that part of the money which belonged to the other heirs.

9. The claim to Abdul Rahim's share of the debt stands on a different footing: for it was attachable by his personal creditors and was attached by

them. Though the attachment was made by defendants 2 and 3 of the whole money as belonging to him, it must be held to have taken effect against

Abdul Rahim's share of it. We have then to consider as between competing attaching decree holders, one party being the father's creditors and

the other the son's, what should be done with the money. It was suggested that it should be rateably distributed but I consider the father's

creditors have a prior claim as the money belonged to the father and could be taken by the son only subject to their rights to have their debts paid

from it (See *Bhola Nath v. Maqbulunnissa* ILR (1903) All 28. It is true that the son is not prevented from dealing with his share of the father's

assets because of the existence of a debt due by the father ; but in this case the father's creditors had already exercised their right of recourse to

the father's assets in the son's hands by attachment in execution of their decree and any dealing by the son with it subsequently and any attempt of

his own creditors to deal with it must be subject to their rights. In fact the order passed by Bakewell, J, when directing payment of the money into

Court recognised this position as the order expressly said that it was ""subject to any subsisting attachments thereon"" evidently refer-ring to the

North Arcot attachment which was the only one on it. It is unfortunate that at later stages this was overlooked and it resulted in wrong orders being

passed in the garnishee proceedings. I am of opinion that plaintiff as representing the rights of the decree-holders of North Arcot was entitled to be

paid out the amount of his decree even from Abdul Rahim's share in preference to defendants 2 and 3 and they must be looked upon as holding

the money for him.

10. It has however to be considered whether the garnishee proceedings by which defendants 2 and 3 got the money is a bar to the plaintiff's claim.

As already stated the decree-holders in North Arcot were not parties to the garnishee proceedings as no notice seems to have been sent to them

and they are not bound by them. It is a well established rule in English Law, as pointed out by the learned Chief Justice, that in garnishee

proceedings the Court which passed the order has, for correcting any injustice done, an inherent power, on the application of any party injured, to

vacate it and to direct the repayment into court of moneys realized and paid out by it if it is proved that the order was wrong and has worked to

the prejudice of any person. see Moore v. Peachey: The Charing Cross Bank....Garnishte 66 L.T. 198. Marshall v. James (1905) 1 Ch. 432 and

Burrell & Sons v. Read (1894) 11 T.L.R. 36 . There is no reason why this rule should not be adopted here. There are no garnishee proceedings in

the mofussil and there are no provisions regarding them in the CPC In the Presidency town too there is nothing in the Original Side rules against the

adoption of that view. It is quite clear that the garnishee orders in the present case were erroneous and has worked to the prejudice either of the

decree-holders in North Arcot or to the garnishee if he has to pay again. The orders may thus be vacated by this Court on a proper application to

it and as the matter is before us I think we are justified in treating them as set aside without a separate application for it. Those orders therefore

cannot be pleaded in this Court as giving defendants. 2 and 3 any rights against parties properly entitled to the money.

11. It was suggested that on setting aside the garnishee orders we should only direct the refund of the money into Court and leave it there for the

parties to work out their rights in execution. I do not think that that course is a necessary or proper one. The parties 2re all before us and the

plaintiff claims for his decree-holders and we must therefore decide who is entitled to it. For the reasons given above I would hold that the plaintiff

is entitled to the whole of it having a priority of claim over defendants 2 and 3 as to Abdul Rahim's share and being solely entitled to the shares of

the other heirs.

12. My learned brother Coutts Trotter J, has in his Judgment put the receiver's right of suit u/s 73 Clause (2) but I find some difficulty in following

his view. To sue under Clause (2) a person must be entitled to rateable distribution under the section, that is, under Clause (1) and for it an

application by him such as is described in Clause (1) to the Court holding the assets was necessary. I feel great difficulty in holding that that

condition was fulfilled in the present case. But however in the view I am taking it is not necessary to express a definite opinion on the point.

13. The appeal of defendants 2 and 3 then fails but there is a minor point brought to our notice regarding the form of the decree. It is drafted as a joint one against defendants 2 and 3. There is no joint liability as each is only liable to repay what he received. The decree must be modified to make it a several one against each defendant for what he has to refund. With this modification the appeal must be dismissed with costs of plaintiff. The memorandum of objections is not pressed and is also dismissed with costs of 1st defendant.