
(1972) 11 GUJ CK 0009
In the Gujarat High Court
Case No : First Appeal No. 411 of 1972

Krishnamukhlal Bhagwandas Shroff

APPELLANT

Vs

Sha. Bhagwan Kashidas and Others

RESPONDENT

Date of Decision : 20-11-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 54, Order 21 Rule 54(2)
Evidence Act, 1872 — Section 114

Citation : AIR 1974 Guj 1 : (1973) GLR 820

Hon'ble Judges : T.U. Mehta, J

Bench : Single Bench

Advocate : N.R. Oza and V.J. Desai, for the Appellant; K.H. Kaji, for the Respondent

Judgement

1. This appeal is preferred against the order passed by the Court of Joint Civil Judge, S. D at Surat on 20th April, 1972 in Special Darkhast No. 31/63 of his file. By this order, the learned Judge appears, to have disposed of applications Exhs. 106, 118 and 127. Before proceeding with the merits of this appeal, it would be necessary to state some necessary facts of this execution application which is being prolonged for one reason or the other ever since the year 1963.

2. The execution is preferred by the respondents who are the decree holders of a money decree for Rs. 1,07,312 passed in Special Civil suit No. 24/01 of the same Court "Me said decree was Passed on 28th February. 1963. An appeal against that decree was preferred but the decree was Confirmed even in that appeal on 15th December, 1970. This execution application which is registered as Special Darkhast No. 31/63 was Preferred by the decree-holder on 1-5-1963.

3. Initially by Ex. 18 the judge- debtor had raised certain objections to the Darkhast, but these objections were decided against him a 9-11-1965. Against that decision the judgment debtor approached this Court in Appeal, which was registered as F. A. 112/63 but even that appeal has been dismissed on 12-12-1969. During the course of this appeal the execution was stayed but the

said order stood vacated on the dismissal of that appeal.

4. Record of the case reveals that on 6th May, 1963 necessary notices were issued under Order 21. Rule 54 regarding attachment of several Properties both agricultural and non-agricultural, which were sought to be sold -in execution for the purpose of realising the decretal dues.

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12. The next contention of Shri Oza was that according to Order 21, Rule 54. if the property sought to be attached is revenue paying land. Then the order of attachment should be reclaimed by affixing a copy thereof in the office of the Collector of the district, in which the land is situate. According to Shri Oza this requirement of R. 54 is not satisfied in this case inasmuch as the judgment under appeal shows that even according to the learned executing Judge it is not possible to make out from the record of the case that attachment order was published in the office of the Collector. Shri Oza therefore. Contended that for want of the said -publication. The attachment does not operate at all and if that is so, unless this defect of the publication of attachment is removed, further Proceedings of the sale of the property cannot, be taken.

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15. Reference to Rule 54 of Order 21. C. P. C. shows that it pre- a procedure regarding attachment of Immovable property. Sub-rule (1) says that in Case of Immovable properties attachment shall be made by an order prohibiting the judgment debtor from transferring or charging the property in any way and all persons from taking any benefit from such transfer or charge. Sub-rule (2) provides that such an order of attachment shall be proclaimed at some Place on or adjacent to the property attached by beat of drums or other customary mode and a copy of the order shall be affixed on a conspicuous part of the Property and then UP01-1 a conspicuous part of the Court house. This sub-rule (2) further provides that where the Property is land Paying revenue to government then the said publication should be made by affix a copy thereof in the office of the Collector of the district in which the land is situated. It is thus clear that sub-rule (1) of Rule 54 of Order 21 provides for the manner of making attachment while Sub-rule (2) Provides for the manner of its publication. The provisions contained in both these sub-rules are undoubtedly mandatory, and should therefore, be carried out. Under the circumstances it cannot be disputed that a mere order of a Court to attach a particular property would not result in "a valid attachment so long as other formalities regarding the publication of the said attachment are not complied with. So far as this case is concerned there is no dispute about I lie fact that with regard to the agricultural lands which are attached. All the formalities except the formality of publishing a proclamation of attachment in the office of the Collector of the District, have been "complied with, So far as the publication in the office of the Collector is concerned, the Rojnama dated 6-5-1963 clearly shows. 1st the Court has ordered to send a copy of the attachment proclamation

for affixing the same on the notice board of the Collector, Surat. What is lacking is the evidence as regards the actual publication of a Copy of the attachment order on the notice board of the Collector. The report submitted by the Nazir about the publication does not refer to the fact of its Publication on Collector's notice Board. But that report is not supposed to make this reference because the above referred Rojnama shows that the Court had sent a copy of the attachment order for the publication on the notice board of the Collector's office not through the Nazir but by some other method. At any rate the evidence shows that all other modes of publication have been adopted by the Court and the Court has also been careful to send a copy of the attachment order for the publication on the notice Board of the Collector's office. In view of these facts. The pertinent question which arises to be considered is whether this Court would be justified in raising a presumption u/s 114 of the Indian Evidence Act regarding the Judicial and official act having been done as prescribed by law. Shri Oza contended that no such presumption can be drawn because the presumption contemplated by Section 114 Illustration E of Evidence Act is the presumption about the regularity of judicial or official act in question but not about the performance of the act itself. Therefore according to Shri Oza, it is for the decree-holders to Prove by Positive evidence that the act of publication of the attachment order on the notice board of the Collector's office was actually performed. I find that there is a fallacy in this contention of Shri Oza, because the act which is required to be performed is the act of publication of the attachment order. The requirement of Publication of the attachment order on the notice board of the Collector's, office is merely one of the several modes of publication. To put it differently the Publication on the notice board of the Collector being one of the "modes" of publication it would not constitute by itself the whole "act of publication" and if that be so, it is a mere formality. Therefore. if it is found that the Court was conscious of the necessity of Publication of the attachment order and "if the Court is actually found to have taken active steps for the satisfaction of different modes of publication contemplated in sub-rule (2) of Rule 54 of Order 21 then there would be no objection in raising a presumption that that act was regularly done. In other words, The presumption would be that the act of publication which the executing Court is found to have actually, taken was carried out by complying with all legally required formalities including the formality of affixing a copy of the attachment order on the notice board of the Collector. I find support for this view from the decision given by Privy Council in AIR 1934 217 (Privy Council) . In that case the concerned Judicial Commissioner had held that the attachment had "not been proved, because there was no direct evidence that the copy of the order was affixed in Collector's office in compliance with the requirements of sub-rule (2) of Rule 54. Their Lordships of the Privy Council were of the opinion on these facts that since there was evidence that the land was attached, in absence of any evidence to "the contrary, it ought to be -presumed that necessary formalities were complied with. The case, which was considered by their Lordships of the Privy Council was the case quite similar to the present one. In that case as in the instant case, the land in question was attached but

what was not shown by Positive evidence was that the copy of the proclamation attachment was in fact published on the notice board of the Collector's office. In support of these facts their Lordships of the Privy Council made a presumption u/s 114 of the Evidence Act and came to the conclusion that all necessary formalities should be presumed to have been complied with. This decision of the Privy Council has been referred and distinguished by Rajamannar J. of Madras High Court in *Murulgappa Chettiar v. Thirumalai Nada* AIR 1948 Mad 191 Shri Oza, therefore, relied upon this Madras decision and contended that the court should refuse to draw any Presumption about the actual fact of the Publication of the proclamation of attachment on the notice board of the Collector's office. After referring to the facts of this Madras case, I find that it has no application to the facts of the case before me. In that Madras case there was merely, an order of attachment and the court concerned had not taken any positive steps to see that the order of attachment was duly published. The court, therefore, held that the mere fact that an order of attachment was pending was not sufficient to establish the factum of attachment because passing of an order was one thing while the making of an attachment was quite another. For this proposition Rajamannar J. relied upon the following observations of their Lordships of the Judicial Committee in *Muthiah Chetty v, Palaniappa Chetti* ILR Mad 349 : (AIR 1928 PC 139)

"In view of these Provisions the Board listened with some surprise to a protracted argument which culminated in the proposition that a property was in law attached whenever an order for attachment was made. My result, if this were so, would be that a person hold- an order could dispense with attachment altogether, as an operation of a fact. Their Lordships need not repeat in another form these propositions. The order is one thing the attachment is another. No property can be declared to be attached unless first the order for attachment has been issued and secondly in execution of that order the other things Prescribed by the rules in the Code have been done."

Relying upon these observations of the Judicial Committee, Rajamannar J. observed that a bare order of attachment would not be effective. Now the facts of the case before me are altogether different. Here the court has not only passed the order of attachment but has also complied with all necessary formalities for publication of the same. It has also taken care to send a copy of that order for its Publication on the notice board of the Collector, Surat. Therefore there would be a presumption that the Collector of Surat to whom the copy was sent for publication has in his official capacity carried out his official duty of Pub Whine the same as desired by the court. This presumption would of course, be rebuttable and, therefore unless judgment-debtor has shown that the Collector has not carried out the directions issued by the court as regards the publication of the attachment order on his notice board, it cannot be held that the attachment order was not published on the notice board of the Collector as required by law.

16. At any rate, since it is found that the order of attachment of the properties has been sufficiently published. They want of that publication on the notice board of the Collector is merely an irregularity Of course, in this case we are not concerned whether that irregularity would vitiate the sale or not, because, consideration of that stage has not still reached. Under the circumstances, if it was found by me that the irregularity should. in interest of justice, be cured at this stage. I would have surely done so by ordering the executing court to make the publication of the attachment order even at this stage as required by law. But I do not find that any such Procedure is necessary.

17. There is another important aspect of the matter, which should also be borne in mind while considering the contention of the Judgment-debtor that execution Proceedings of the sale of immovable properties cannot proceed without a valid attachment as contemplated by Order 21, Rule 54. C. P. C. That aspect is that the law does not require that an immovable property cannot be sold in execution without its attachment. This will be evident by reference to clause (b) of Section 51 of the Civil Procedure Code, which provides in clear and unequivocal terms that the court may order the execution of a decree "by attachment and sale or by sale without attachment" of any property. This provision, therefore, shows that attachment of an immovable property is not a sine qua non for sale in execution. It is undoubtedly true that Rule 64 of Order 21 empowers the court to order attachment of the property to be sold. This rule is in the following terms:

"Any court executing a decree may order that any Property attached by it and liable to sale. or such Portion thereof as may seem necessary to satisfy the decree, shall be sold and that the proceeds of such sale, or a sufficient portion thereof shall be paid to the part-, entitled under the decree to receive the same."

It is Obvious that this rule nowhere says that the sale of a Property in execution should be carried out only after attaching this property. In fact, even if the rule says so. it could not have overriding effect over the specific provision of clause (b) of Section 51 of the Civil Procedure Code. In these circumstances, it is a wrong proposition to say that no Property could be sold in execution of a decree without attachment. If any decision on this point is required the same" would be found in a Division Bench decision of Bombay High Court in Namdev Krishna Chaudhari v. Govardhan Nanabhai Gujarathi 41 Bom LR 463 : (AIR 1939 Dom 277) . A similar decision is also recorded by the Division Bench of Allahabad High Court in Haji Rahim Bux and Sons and Others Vs. Firm Samiullah and Sons, . Therefore, even if it is believed for the sake of argument that the attachment of agricultural lands in this case is either irregular or invalid, the said aspect of the matter should not prevent the court from proceeding further with the sale of the properties in question, because the law does not require that an Immoveable property cannot be sold in execution of a decree without first taking it into attachment.

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18. Appeal dismissed.