

(1932) 03 MAD CK 0021

In the Madras High Court

Marina Narasanna and Others

Date of Decision : 09-03-1932

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 386

Citation : (1933) ILR (Mad) 1041 : (1932) 36 LW 402 : (1932) 63 MLJ 142

Hon'ble Judges : Pakenham Walsh, J

Bench : Division Bench

Judgement

Pakenham Walsh, J.—This is a revision petition against the order of the Joint Magistrate of Rajahmundry in the matter of a claim put

forward to certain properties seized u/s 386, Criminal Procedure Code. The accused's family originally consisted of seven brothers, one of whom

is dead leaving children. One out of the six surviving brothers, the accused, was convicted and sentenced to a fine of Rs. 1,000. The Police seized

and carried away certain movable properties. The brothers put in a claim. They alleged that the properties in C and D Schedules were the separate

properties of two of the brothers, that those in E Schedule were the separate properties of the mother and that those in B Schedule were joint

family properties. As regards the E Schedule properties the Lower Court found that the mother was no party to the proceedings and as none of

the petitioners held a power-of-attorney for her they had no locus standi to complain of the proceedings as regards the said properties. As regards

the properties in Schedules C and D which were claimed to be the separate properties of the petitioners, the Lower Court observed that no

evidence in support of this allegation was produced and that the family being admittedly a joint one, the presumption is that these properties also

were joint family properties. On this point an affidavit has been put in wherein it is stated:

Then the learned Magistrate posted the case for arguments on the question whether assuming the property is joint family property the seizure is or is not valid. Arguments were heard on this question on 12th February, 1932, on the distinct understanding that the evidence would be received on the question that the properties were the separate properties of the other members of the joint family after the decision on the preliminary point and the Lower Court posted the case to 17th February, 1932, for orders. On 17th February, 1932, orders were pronounced giving decision on all the points thereby depriving the petitioners of an opportunity to produce evidence to show that the properties were the separate property of the married brothers whose wives were given these properties by their parents.

2. It is quite natural that arguments should have been heard on the preliminary point assuming that the properties were joint family properties, so that, if it were held that the Court had no power to proceed against joint family properties evidence as to the properties being the separate properties of the claimants would become unnecessary. But it is difficult to believe that the Lower Court, having found that the Court could attach the right, title and interest of the convicted person in the joint properties, would have failed to receive evidence tendered that certain of the properties were not joint but separate properties of the claimants. However, in the view I am going to take on the matter, this will not assume much importance. There is no doubt, and it is not-disputed on the other side, that since the decision in *Secretary of State for India v. Rangaswami Aiyangar* (1916) ILR 39 M.831 : 31 M.L.J. 84 (F.B.) the right, title and interest of a convicted person in the joint family properties can be attached. That decision no doubt was u/s 88, Criminal Procedure Code, but it has not been argued that the principle does not apply to Section 386 also. The real question in issue is whether such joint property can be attached by way of seizure. On this point the learned Joint Magistrate correctly observes that there is no direct authority. But he does not appear to me in his subsequent arguments to distinguish clearly between the method of attachment by seizure and attachment by prohibitory order or appointment of a receiver or whether attachment by seizure is permissible in cases of this sort. Section 386 of the old Code of 1882 ran: Whenever an offender is sentenced to pay a fine the Court passing the sentence

may, in its discretion, issue a warrant for the levy of the amount by distress and sale of any movable property belonging to the offender, although the sentence directs, that in default of payment of the fine, the offender shall be imprisoned.

3. In the new Code the section has been amended. The word ""distress"" has disappeared. It provides two ways for the Court to take action - either

way may be employed against movable property but against immovable property only the second way. Vide Section 386(1)(a) and (b). We are

not concerned with Section 386(1)(b) because it is not under that section that action was taken. Section 386(1) says that the Court can issue a

warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender. It is pointed out for the petitioner that

while in the old Code the warrant u/s 386 runs

This is to authorise and require you to make distress by seizure of any movable property....

the warrant in the amended Code runs

This is to authorise and require you to attach any movable property....

and it is argued that the word ""seizure"" has been deliberately omitted. The definition of ""distress"" in Stroud's Judicial Dictionary has been quoted:

A distress is one of the most ancient and effectual remedies for the recovery of rent. It is the taking, without legal process, cattle or goods as a

pledge to compel the satisfaction of a demand, the performance of a duty, or the redress of an injury. The act of taking, the thing taken, and the

remedy generally having been called a "distress"; an inaccuracy which the older text-writers usually avoided.

4. I do not think this definition is particularly useful here, for admittedly even under the old Code this distress was by a process of law. In the

Concise Oxford Dictionary ""distress warrant"" is described as warrant authorising distraint. The learned Joint Magistrate has relied on Section 88

and it has also been relied on before me. It is clearly, I think, permissible to look to Section 88 which lays down in some ways a more express

procedure. We find in the amended Code Sub-section (3) which runs:

If the property ordered to be attached is a debt or other movable property, the attachment under this section shall be made-

- (a) by seizure; or
- (b) by the appointment of a receiver; or
- (c) by an order in writing prohibiting the delivery of such property to the proclaimed person or to any one on his behalf; or
- (d) by all or any two of such methods, as the Court thinks fit.

5. Here there are three distinct methods of attachment of which seizure is only one. The provisos which follow, 6-a and so forth, are modelled on

the provisions for deciding claims to attached property made by third parties under the Civil Procedure Code. It is, therefore, I think quite proper

to look to the CPC for assistance in this matter. Section 60, Civil Procedure Code, defines:

Property liable to attachment and sale"" and among such property is ""movable property belonging to the judgment-debtor over which he has a

disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in

trust for him or on his behalf.

6. Of course there is no question that a share in movable property belonging to a joint family is property liable to be attached under this section.

Order 21, Rule 47 states:

Where the property to be attached consists of the share or interest of the judgment-debtor in movable property belonging to him and another as

co-owners, the attachment shall be made by a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in

any way.

7. On this Mulla remarks in his commentary:

This rule is new. It provides for the attachment of a share or interest in movable property belonging to the judgment-debtor and others in co-

ownership. Such a share or interest is obviously incapable of actual seizure, and provision has, therefore, been made for the issue to the judgment-

debtor of a notice prohibiting him from transferring his share or interest in any way.

8. It is, therefore, clear that the proper mode of attachment under the CPC of the judgment-debtor's share in joint property is by way of

prohibitory notice; and it is difficult to understand why any different principle

should be applied when making an attachment u/s 386, Criminal Procedure Code, when in the analogous Section 88 the procedure for claims is practically in terms of the Civil Procedure Code. There is an interesting discussion in *Alagammal v. Sadasiva Padayachi* (1930) 60 M.L.J. 72 as to the difference between attachment by a Civil Court and that by a Criminal Court; but what was in issue in that case was whether, when the property of an absconder had been attached u/s 88, the Government held it merely as his agent or had itself an interest in it. The learned Judges remark:

We are clearly of opinion that the possession of the Government is not merely that of attaching decree-holder which was the view taken by the learned District Munsif. We are also clear that the possession of the Government is not that of an agent of the absconder.

9. What was held in that case was that the effect of Section 88 is to create an interest in the property and to entitle the Government to be in

possession of the property and that the Government was a necessary party to the prior suit. This possession by Government only means, I think,

the possession which the absconder would have had in the property. In *Juggomohun Bukshee v. Roy Mothooranath Chowdry* (1867) 11 M.I.A.

223 at 238, which was a case under the Bengal Regulation corresponding to Section 88, Criminal Procedure Code, it was held that there could be

no confiscation of property other than that of the delinquent. That was no doubt a case of confiscation, but it would seem to follow on the same

principle that there can be no seizure of an interest in the property other than that of the delinquent. It has been pointed out also that Section

514(3), Criminal Procedure Code, which deals with warrants for attachment to realise a security, states that the warrant ""shall authorise the

attachment and sale of any movable property"". But, on the other hand, it is pointed out for the Crown that the form prescribed for this warrant,

No. 52 runs:

This is to authorise and require you to attach by seizure movable property belonging to the said....

10. While I do not think it is safe to rely too much on forms in the Appendix which are merely in the nature of general directions, I think there is

considerable force in the argument that the form u/s 386 has been deliberately

altered apparently to correspond with the change in the wording of the section. On general principles also I consider that the Crown has no right to anything more in joint movable property than the delinquent himself had, and it cannot deprive the co-owners, by seizing property, of their right of possession in it. The correct course is, I take it, that laid down in Order 21, Rule 47, Civil Procedure Code. If necessary, either a receiver can be appointed for the delinquent's share", or a prohibitory order can be issued against him. His interest in the property can then be brought to sale. I would, therefore, hold that the attachment of the property in this case by way of seizure is wrong and that it should be proceeded against as laid down in the Civil Procedure Code, Order 21, Rule 47. The properties seized including E Schedule properties should be meanwhile returned to the petitioners with a prohibitory order on the convicted accused.

11. As regards the onus of proof, the Lower Court has fallen into a natural error in making the presumption that the property is joint. After the ruling of the Privy Council in *Annamalai Chetti v. Subramanian Chetty* (1928) 56 M.L.J. 435 at 440 (P.C.) it is clear that the burden of proving in an action for partition of joint family property that any particular item of property is joint primarily rests upon the plaintiff. However, I should hold in the present case, that, as the procedure which has been laid down in Section 88 must be followed in the absence of any special rules framed by Government u/s 386(2), the onus in such a case should be regarded as lying in the same way as it does upon claimants to attached property under the Civil Procedure Code. That is to say, the mere fact of attachment throws the onus upon the claimants so that in the result the Lower Court was correct in throwing the onus of proof on the claimants. They should, however, be allowed to adduce evidence as to the separate possession of Schedules C and D property and on that evidence the Court will pass final orders. The order as regards Schedule E properties is upheld in so far as the decision that they are joint family properties is concerned.