
(1950) 02 OHC CK 0001
In the Orissa High Court
Case No : M.A. No. 31 of 1947

Province of Orissa

APPELLANT

Vs

G. Venkata Rangamma and Another

RESPONDENT

Date of Decision : 14-02-1950

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 33 Rule 10, Order 40 Rule 1, 51 , 60(1)
Transfer of Property Act, 1882 — Section 6

Citation : AIR 1950 Ori 220 : (1950) 16 CLT 92

Hon'ble Judges : Narasimham, J; Jagannadhadas, J

Bench : Division Bench

Advocate : Advocate General, for the Appellant; P.V.B. Rao, for the Respondent

Final Decision : Partly Allowed

Judgement

Jagannadhadas, J.—The Province of Orissa is the appellant in this appeal. It arises out of an application for execution filed by the Government to recover the costs of a suit in forma pauperis decreed in favour of the plaintiff therein. In T. S. No. 9/45, one G. Venkata Rangamma, filed a suit for enhancement of her maintenance against one G. Gunnamma the former being the mother-in-law of the latter, who was in possession and enjoyment of her deceased husband's ancestral property. The suit was in forma pauperis. The Court decreed enhanced maintenance at the rate of Ra. 480 per year payable by 15th September of every year commencing from the year 1944-45, the first payment falling due on 18th September 1945, with a charge on the plaint schedule properties for the same. The plaintiff's claim for arrears of maintenance was disallowed. In view of the fact that the plaintiff made an exaggerated claim of Rs. 1200 per year and also for arrears at that rate and since the major portion of the plaintiff's claim was disallowed, the learned Subordinate Judge ordered that the parties shall bear their own costs and also that the court-fees payable to the Government in respect of the pauper-plaint should be recoverable from the plaintiff herself. By execution application No. e. P. 252/46 filed on 21st October 1946 against both

the plaintiff and the defendant in the pauper suit, the Government applied for recovery of the amount due to it towards the stamp duty on the plaint namely, Rs. 696-4-0, plus the execution costs. The relief that was asked for in the execution application was in the following terms :

"The decree-holder prays that the amounts claimed in cols. 7 and 8 may be realised with subsequent costs by issuing notice under Order 21, Rule 22, Civil P. C., and thereafter by attaching the arrears due to the plaintiff-decree-holder under the decree, by appointing a receiver to collect the future maintenance due to the plaintiff under the above decree under Order 21, Rule 53 and Order 21, Rule 11, Civil P. C. and the said amount after realisation, may be paid over to the decree-holder Government. The executing decree-holder Government submits that an ad interim order of attachment prohibiting the second judgment debtor from making any payment to the plaintiff first judgment-debtor in the above case or to anybody on her behalf may be passed simultaneously with the issue of notice to the judgment-debtor as otherwise the interest of the executing decree-holder may be seriously prejudiced."

2. This execution was contested by the first judgment-debtor (the plaintiff in the pauper-suit) on the ground that the right to maintenance obtained by her under the decree was not attachable. The learned Subordinate Judge by his order dated 16th April 1947 upheld this contention. He held that by virtue of the provisions of Section 60(1)(n), Civil P. C., under which a right to future maintenance is not attachable, the decree obtained by the first judgment-debtor against the second was not attachable. As regards the prayer for appointment of a receiver he held relying on *Secy. of State v. Bai Some A. I. R. 1933 Bom. 350 : 57 Bom. 507* that the appointment of a receiver in execution virtually amounts to an attachment of the decree which in his view was prohibited by Section 60 and that therefore the relief by way appointment of a receiver could not be granted. As regards the prayer for attachment of arrears of maintenance, he refused the same on the ground that there was no arrears of maintenance granted under the decree. It is against this order of the Subordinate Judge that the Government have come up in appeal to this Court.

3. The order of the learned Subordinate Judge is clearly wrong so far as the prayer in respect of the arrears of maintenance is concerned. It is true that under the decree, arrears prior to the date of the suit have been disallowed, but the decree itself as already stated, directs payments of maintenance from the year 1944-45, the first payment falling due on 15th September 1945. The execution application was filed on 21st October 1946. By that date two payments under the decree were due to be made on 15th September 1945 and 15th September 1946. If they remained unpaid, there was no reason why the attachment could not have been allowed in respect of such arrears. It is not disputed that the] prohibition against attachment in respect of maintenance applies only to future maintenance and not to arrears of maintenance. There is ample authority for the same and it is enough to refer to the case in *Asid Ali v.*

Haidar Ali 88 Cal. 13 : 6 I. C. 826 in support of it. What the exact effect of this view would be with reference to what has so far transpired in this case, will be indicated towards the close of the judgment.

4. The substantial question, however, that arises for decision in this appeal is whether the learned Subordinate Judge is right in his view that the Government is not entitled to relief by way of attachment or appointment of a receiver in respect of future maintenance. Under Order 33, Rule 10, Civil P. C., the amount payable as court-fee in respect of a pauper-plaint shall be recoverable by the Government from any party ordered to pay the same and shall be a first charge on the subject-matter of the suit. By virtue of Rules 12 and 13 of the same order, the Government can recover the said amount by an application, which is to be treated as one in execution. The subject-matter of the suit in the present case is the right to recover maintenance, with a charge on specified properties. There can be no doubt that the Government have a first charge on this right to maintenance as decreed with the benefit of the charge in favour of the first judgment-debtor: see *Gadadhar Mandal v. Manaka Dassi* A.I. R. 1996 Cal. 859 at page 860: 94 I. O. 391. The only question is how that charge in favour of the Government is to be realised or whether the Government have no remedy at all on account of the prohibition against attachment of the right of maintenance u/s 60(1)(n), Civil P. C., and the prohibition against the transfer of the right to future maintenance by virtue of Section 6(dd), T. P. Act.

5. There has been considerable difference of opinion in the High Courts with reference to this question. That a mere right to future maintenance as such can neither be attached, nor sold cannot be very well disputed and has been established by a long course of judicial decisions. There has been difference of view, however, as to whether where the right to future maintenance has merged into a decree, that decree right can be attached or assigned. The difference of view on these matters can be gathered from the two cases in *Asad Ali v. Haider Ali* 12 C. L. J. 130; 6 I. C. 826 and *Tara Sundari v. Saroda Charan* 12 C. L. J. 146 : 7 I. C. 80 in which there is very learned and exhaustive discussion of the subject by Mukherjee J. The view has been maintained in *Asad Ali v. Haider Ali* 12 C. L. J. 130 : 6 I. C. 826 that where the right to maintenance has merged into a decree, it is both attachable and assignable, particularly where the right has been charged on specific property. It may be doubted, however, in view of the specific amendment of Section 6, T. P. Act of 1929, whereby Sub-clause (dd) to Section 6 has been inserted stating "A right to future maintenance in whatsoever manner arising secured or determined, cannot be transferred, whether the distinction that has been laid down in the case in *Asad Ali v. Haider Ali* 12 C. L. J. 130 : 6 I. C. 826 between the right secured by a decree and the mere right to maintenance can any longer be maintained in respect of a right to maintenance which is merely personal and not hereditary. It would also be reasonable to construe the prohibition of the attachment in Section 60(1)(n), Civil P.C. of a future right to maintenance as equally applicable to decrees for maintenance, since the attachment is only preliminary to a sale through Court. It is no doubt

true that the Transfer of Property Act applies only to transfers by the parties; but Section 6 (dd) has the effect of declaring that a decree for the right of future maintenance is not saleable property. This would, therefore, lead to the consequence that a decree for future maintenance is not attachable and saleable through Court, I would, therefore, assume without deciding that the decree for future maintenance obtained by the first judgment-debtor in this case against the second judgment-debtor is not attachable and that the Government cannot obtain any relief by way of attaching or selling the decree, in so far as any instalment has not, by the date of the application become an arrear. The question then is whether the remedy by way of appointment of a receiver is also not available. On this question AIR 1925 176 (Privy Council) Secy. of State v. Venkata Lakshmanayya A. I. R. 1926 Mad. 665 : 49 Mad. 667; Sain Das v. Tikka Sant Singh A. I. R. 1936 Lah. 830: 165 I. C. 519; Keshabati Koeri v. Mohan Chandra 39 Cal. 1010 : 14 I. C. 227 and AIR 1942 410 (Oudh) are in favour of the appellant's view; while Palikandi Mammad v. Valia Appa 40 Mad. 302 : A. I. R. 1917 Mad. 79 ; Secy. of State v. Bai Some A. I. R. 1933 Bom. 360 : 57 Bom. 507 and Vishnibai v. Bulchand Tikamdas 154 I. C. 580: A. I. R. 1935 Sind. 21 are in support of the opposite view.

6. It may be seen from a perusal of the above cases that the majority of the decisions are in favour of the view that a relief in execution by way of appointment of a receiver can be granted in a case where reliefs by way of attachment and sale are not available. The opposite view is fully brought out in the cases in Secy. of State v. Bai Some A. I. R. 1933 Bom. 350 : 57 Bom. 507 and Palikandi Mammad v. Valia Appa 40 Mad. 802 : A. I. R. 1917 Mad. 79. In Secy. of State v. Bai Some A. I. R. 1933 Bom. 350: 57 Bom. 507 it was said that the order appointing a receiver to collect future maintenance and to pay the amount or part thereof to the judgment-debtor is, virtually an order for attachment and that the prohibition would equally apply to both. It was said that the exemption from attachment u/s 60 of such future maintenance is based on considerations of public policy and that if these exempted payments can be reached in execution by appointment of a receiver by way of equitable execution, the protection afforded by the section is to a great extent lost. It was also said that the Courts in England have refused to sanction any form of equitable execution over property not liable to attachment in law. In Palikandi Mammad v. Valia Appa 40 Mad. 303 : A. I. R. 1917 Mad 79 the relief by way of appointment of a receiver was refused on the ground that the Court has power to appoint a receiver in execution only of property which has been attached. A passage from Woodroffe on Receiver at p. 166 to the effect that the Court can appoint a receiver in execution only of property already under attachment has also been cited by the learned counsel for the respondent. This assumption, however, made in Palikandi Mammad v. Valia Appa 40 Mad. 302 : A. I. R. 1917 Mad. 79 and in Woodroffe on Receiver, is based on the old CPC of 1882 and is no longer correct with reference to the CPC of 1908. It is to be noticed that u/s 503 of the old Code, the power of a Court to appoint receivers was in the following terms:

"Whenever it appears to the Court to be necessary for the realisation, preservation, better custody or management of any property, movable or immovable, the subject of a suit, or under attachment, the Court may, by an order appoint a receiver of such property."

Under this section a receiver in execution can be appointed only of property already in attachment and for the purpose of preservation or management of the property. In the Code of 1903, the corresponding provision, viz., Order 40, Rule 1 is much wider in terms and is as follows:

"Whenever it appears to the Court to be just and convenient, the Court may by an order, appoint a receiver of any property whether before or after the decree."

The power to appoint a receiver in execution is not limited therefore to cases where the property is already under attachment, nor is it limited to the purpose of realisation, preservation, better custody or management of the property. There is, therefore, no foundation under the present Code for the assumption that attachment is the basis for the relief by way of appointment of a receiver in execution. Further, in the old Civil Procedure Code, appointment of a receiver in execution is not in terms provided for, while in the present CPC Section 51 which is new, provides for it specifically. I am also inclined to think that the view taken in *Secy. of State v. Bai* Some AIR 1933 Bom. 850 : 57 Bom. 507 that the relief by way of appointment of a receiver is, in substance, the same as that by way of attachment and that therefore where attachment is prohibited, A receiver cannot be appointed, cannot be sustained under the present Code, As already pointed out, the power to grant relief by way of appointment of a receiver has been specifically recognised by the new Section 61, Civil P. C. of 1908 and it is clear from that section that it is not a mere substitute for the relief by way of attachment, but is in terms, an alternative and independent relief. When, therefore, the Civil P. C. u/s 60 prohibits attachments of certain classes of properties, it does not necessarily follow that relief by way of appointment of a receiver is also prohibited. As pointed out in *Keshabati Koeri v. Mohan Chandra* 39 Cal. 1010: 14 I. C. 227 and *Lahanu Bai v. Harakh Chand* A. I. R. 1915 Nag. 98; 11 N. L. R. 113 there is clear distinction between attaching future payments and appointing a receiver to collect them as they fall due from time to time.

7. It is no doubt true that even before the CPC of 1908 equitable execution by way of appointment of receiver was being allowed in appropriate cases and that the principles recognised in English cases for such equitable execution were being followed. It may still be that such principles would continue to be of considerable assistance in exercising the discretion for granting relief by way of appointment of receiver in execution. It has accordingly been argued that under the English law, it is well settled that where the right to a future personal allowance is by statute not transferable equitable execution by way of appointment of receiver to collect the same cannot be granted. The cases in *Lucas v. Harris* (1886) 18 Q. B. D. 127 : 56 L. J. Q. B. 15 *Crowe v. Price* (1889) 22 Q. B. D. 499 : 68 L. J. Q. B. 215 and *Robertson v. Johnson* 1893 1 Q. B. 129 :

62 L. J. M. C. 1 have been cited in support. The first two cases have also been referred to in *Secy. of State v. Bai Some A. I. R. 1933 Bom. 350 : 57 Bom. 507*. It would also appear that a Full Bench in *Surendra Prosad Singh and Another Vs. Tekait Singh and Others*, acted on the view that where the raiyati holdings of agriculturists in Santhal Parganas were inalienable by Statute, to allow equitable execution by way of appointment of a receiver would be an evasion and invasion of the Statute.

8. Learned counsel for the respondent relies on the observations in those cases. He says that since a right to future maintenance is not merely not attachable under the procedural law, but is not transferable as a matter of substantive law by virtue of Section 6 (dd), T. P. Act, the principles recognised in those cases will apply.

9. There does not appear, however, to be any scope for this distinction as a general rule in the law as administered in India. In AIR 1925 176 (Privy Council) maintenance was payable by way of the rents and profits of certain property allotted for the purpose which in specific terms was made inalienable. Their Lordships recognised that not only was the property inalienable by the settlement, but the rents and profits which constitute maintenance was unattachable by virtue of Section 60, Civil P. C. All the same, they held that the remedy by way of appointment of a receiver could be granted of such future rents and profits. It is submitted with respect that the weight of this decision cannot be whittled down in the way in which *Secy. of State v. Bai Some A. I. R. 1933 Bom. 350 : 57 Bom. 507* does. In AIR 1931 160 (Privy Council) [which confirmed on appeal the decision of the High Court in *Karnani Industrial Bank Ltd. Vs. Nawab Bahadur of Murshidabad*, a similar question arose with reference to property which was inalienable under a statute, viz., the Murshidabad Act (Act IV [4] of 1891). It was pointed out by their Lordships that though the property as such was inalienable by the Statute, the owner had the disposing power over the rents and profits thereof and that, therefore, a receiver of the same could be appointed though the property itself could not be attached. Similarly, in *Manohar Singh and Others Vs. Hakim Riazuddin* it was pointed out that a statutory prohibition of the sale of any property is not a prohibition of the assignment of the proceeds thereof or of the receipt of its income by a receiver on behalf of the owner of the property to be applied in discharge of his decree debt. Besides, instances of appointment of receiver by way of execution in respect of properties which are inalienable are numerous, the most familiar being cases of Muth properties: See AIR 1927 131 (Privy Council) and *Niladri Sahu v. Chaturbhuj Das A. I. R. 1926 P. C. 112 : 53 I. A. 253*. It appears to me on the authority of the above cases that it cannot be maintained as a general proposition that when a property is not alienable as a matter of substantive law, either because of the character of the property or because of the terms on which it is held, or on account of statutory provisions relating thereto, a receiver in respect of that property cannot be appointed in execution. This must depend on the nature and amplitude of the prohibition to be gathered from the context and the three

English cases and the Patna Full Bench case above referred to may be distinguished as relating to the construction of the nature of the prohibition in those cases.

10. On the distinction pointed out in *Karnani Industrial Bank Ltd. Vs. Nawab Bahadur of Murshidabad*, and *Wasif Ali Mirza v. Karnani Industrial Bank Ltd.* A.I.R. 1931 P. C. 160: 59 Cal. 1 and on the authority of AIR 1925 176 (Privy Council) it would seem to follow that while the future right to maintenance is not assignable, as property and hence not attachable, there can be appointed a receiver in respect of the proceeds thereof, which are at the disposal of the judgment-debtor. Apart, however, from the larger question whether any judgment-debtor can get a receiver appointed under the decree for future maintenance of his judgment-creditor, in execution of his own decree, the question in the present case so far as Government's position under Order 33, Rule 10, Civil P. C. is clear and simple. Any prohibition against attachment u/s 60, Civil P. C., or against assignability u/s 6 (dd), T. P. Act, must be read in the light of the provisions of Order 33, Rule 10 and must be reconciled with it. A general declaration of unattachability and/or non-transferability by statute in respect of a future right to maintenance, cannot be construed as nullifying a charge expressly created by statute for a specific and limited purpose. It has been held in *Dalar Kaur v. Ram Rattan* 1 Lah. 192 : A. I. R. 1920 Lah. 456 that a statutory prohibition against alienation of property does not necessarily imply prohibition of a temporary alienation. The charge created by statute under Order 33, Rule 10 is limited and for a specific purpose. It is absolute and makes no exception in respect of a maintenance suit by a pauper. To hold that the Government have no right to realise the amount due to it by way of appointment of a receiver in a case like the present one, would be to defeat the express statutory right of the Government, though protected by a charge. It is also well settled that in an appropriate case, a mortgage or a charge can be realised in execution by the appointment of a receiver in respect of the property charged. (See *Rameshwar Singh v. Chuni Lal* 47 Cal. 418 : A. I. R. 1920 Cal. 545 and *Paramasivan Pillai v. Ramasami Chettiar* 56 Mad 915 : A. I. R. 1933 Mad 670 (F. B.))

11. I have therefore come to the conclusion that the view taken by the Court below on this question relying on *Secy. of State v. Bai Some* A. I. R. 1933 Bom. 350 : 57 Bom. 507 is erroneous. I hold that a receiver can be appointed at the instance of the Government in respect of the decree for future maintenance with the benefit of the charge thereby created) in order to realise the court-fee payable to them under the decree. But it is subject to the safeguards as to leaving adequate provision for plaintiff judgment debtor as pointed out in AIR 1925 176 (Privy Council) .

12. In the present case, a maintenance allowance of Rs. 480 per year has been fixed under the decree. The previous maintenance was at Rs. 175 per year and the same has been raised to a sum of Rs. 480 per year on the ground of rise in

prices and inadequacy of the previous amount in the altered circumstances. If a receiver be appointed for collection, there will be hardly enough left after meeting the receiver's expenses, to provide for the adequate sustenance of the first judgment-debtor. While therefore the Government have the right to get a receiver appointed, it is not expedient to appoint a receiver at the present juncture. We understand that there is an appeal pending on behalf of the plaintiff-maintenance holder against the judgment of the Subordinate Judge in the suit and that the plaintiff is seeking in the appeal to get higher maintenance allowed. If and when the plaintiff happens to succeed in getting a decree for a larger amount of maintenance, the Government may make an appropriate application for the appointment of a receiver, if so required.

13. So far as the arrears that may have remained unpaid by the date of the present execution application, namely, the amounts payable on 15th September 1945 and 15th September 1946, are concerned the Government as already held, have a clear case. It would appear from the record that as soon as the Government filed the execution application, they asked for and obtained an ex parte interim attachment and that while that attachment was pending, the first judgment-debtor realised in execution some portion of the maintenance amount due to her under the decree. A sum of Rs. 439-2-6 is said to be in Court deposit towards the maintenance due to her by virtue of that execution. To the extent that any portion of that amount or any further amount realised in execution pending the attachment relates to the year 1945 and 1946 the Government would be entitled to the same. The Government would also be entitled to attachment of any further amount that may be payable under the decree for years 1946 and 1946. In so far as any arrears that may have accrued since the present execution application was filed, the Government would clearly not be entitled to treat them as arrear, since the same must have been brought about by virtue of the ex parte interim attachment made, which we have held the Government not to be entitled to in the present circumstances (see *Lucas v. Harris*, (1886) 18 Q. B. D. 127 at p. 135 bottom : 56 L J. Q. B. 15).

14. The order of the Court below is modified as specified in this judgment and the appeal is partly allowed accordingly. Since the appellant has succeeded in respect of the main point raised by him, he is entitled to his costs in both the Courts.

Narasimham, J.

15. I agree.