

(1955) 04 GUJ CK 0003
In the Gujarat High Court

Sheth Chhaganlal Madhavji

APPELLANT

Vs

Bai Memunabi Amadmiya and Another

RESPONDENT

Date of Decision : 19-04-1955

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 386(2), 386(2), 488, 488, 488(3)

Citation : (1955) CriLJ 1402

Hon'ble Judges : Shah, C.J.;Baxi, J

Bench : Division Bench

Judgement

Shah, C.J.—This reference from the Sessions fudge, Juna-gadh, arises from the following facts. The applicant Chhaganlal Madhvaji has obtained a decree against opponent 2 Khan Shri Fatehdinkhan, husband of opponent 1 Memunabi for Rs. 15,539 odd on 23-6-52 from the Court of the Civil Judge, Senior Division, Juuagadh, and by the said decree a charge was created on the cash annuity payable to the defendant Fatehdinkhan by the Government on the abolition of his Barkhali estate. The decree provided that the plaintiff was to receive the sum of the annuity directly from the office of the Vanthali Mahalkari and to credit it towards the decretal amount and further that in case the defendant paid off the decretal dues privately in one sum, the plaintiff was to have no right to the amount of the annuity payable by the Government to the defendant. In accordance with it, the sum of the annuity was recovered by the applicant-decree-holder in the years 1952 and 1953. Opponent 1 Memunabi then applied and obtained an order of maintenance at the rate of ate of Us. 75 per month against her husband, opponent 2 u/s 488, Cr.PC from the First Class Magistrate, Junagadh, and on her application for enforcing the said order, the sum of the annuity lying in the office of the Vanthali Mahalkari was attached and brought to the Magistrate's Court. The applicant objected to the attachment on the ground that he had a charge over the said amount by virtue of the decree, but the objection was overruled by the learned Magistrate, who held that the decree did not create the charge and he ordered that the sum be paid to the wile towards her maintenance. The applicant Chhaganlal having applied in revision to the

Sessions Judge, Luimgadh, against this order, the learned Sessions Judge took the view that the decree did create a charge on the amount of the annuity, that the sum attached by the Magistrate was move-able property and that u/s 386 (2), Cr.PC even if no rules were framed by the State Government, the procedure prescribed in Section 88 of the Code should have been followed by the Magistrate and an inquiry should have been made by him as required u/s 386 (2). The learned Judge also held that the annuity having been charged with the payment of the decretal dues, the sum could not be attached in enforcement of the order of maintenance in favour of the wife till the decree was duly satisfied, and he therefore made the present reference.

2. u/s 488 (3), Cr.PC on the failure to comply with the order of maintenance the Magistrate may issue a warrant for levying the amount in the manner provided for levying fines, which manner is prescribed in Section 388 of the Code. In the present case the Magistrate has issued a warrant u/s 386 (1) (a) by attaching the sum lying in the office of the Vanthali Mahalkari on the footing that the property to be attached is moveable property. It is not disputed before us that this sum is moveable property and the procedure adopted by the Magistrate for attaching it was therefore correct; but the question has arisen as to the procedure to be adopted for determining the claim made by the decree-holder that the amount of the annuity was subject to the charge created in his favour by the decree and till the decree was satisfied it could not be attached at the instance of the wife in enforcement of her claim to maintenance. The learned Magistrate has not considered this question at all evidently because in his view the decree did not create a charge and the amount was liable to be proceeded against for enforcing the order of maintenance; but his view that the decree did not create a charge is erroneous, and therefore the question whether it was the duty of the Magistrate to inquire into the claim preferred by the decree-holder u/s 386 (2) of the Code does arise. Now the State Government has not made any rules u/s 386 (2) of the Code, and the point for consideration therefore is whether in the absence of rules the summary determination of the claim as is provided for in Section 386(2) of the code should be carried out or not. In *Re: Pandurang Venkatesh Malgi*, it was held that the since rules u/s 380" (2) had not been made by the local Government, the Court had no option but to follow the law as laid down in reported cases bearing on the subject, and the most that the High Court could do was to direct the Magistrate to stay the sale of the property for such time as in his opinion would be sufficient to give the claimant time to establish his right thereto in a civil Court. In that case the property in dispute consisted of a type-writer, a cash sum of Rs. 54 and a looking glass which were attached as property belonging to the person against whom a warrant was issued for recovery of fine u/s 386, and the property was claimed by his brother as belonging to himself. Section 388, as it stood before the amendment in 1923, contained no provisions for an inquiry by the Magistrate into claims made by third parties and therefore in cases arising prior to the amendment, it was held that the criminal Courts had no jurisdiction to make

such an inquiry ; but under the law as it stood after the amendment, the Magistrate is empowered to determine summarily the claims of third parties. The learned judges in "In re Pandurang's case" (A), felt the difficulty because the local Government had not made rules for the summary determination of the claims and they therefore felt that in the absence of rules the only thing that could be done was to stay the sale and refer the claimant to a civil Court. "Queen-Empress v. Kandappa Goundan" 20 Mad 83 (B) was referred to in that case. In the said Madras case certain cattle, grain and other property, which were attached u/s 88, Cr.PC were claimed by the petitioner as belonging to him and the Magistrate dismissed the objection without examining the witnesses cited in support of the allegation, and on the petitioner complaining of the order the Sessions Judge made a reference to the High Court. It was held by the High Court that the Magistrate had given good reasons for his order, and secondly in their Lordships' opinion in the case of the order made u/s 88, Cr.PC the aggrieved party's remedy was a civil suit and that what may be said with regard to Section 88 would equally apply to Section 386, and the reference was therefore not accepted. Even after referring to this decision, the learned Judges in the Bombay case "in re Fanduraug" (A) proceeded on the narrow ground that since the local Government had not framed rules, a summary determination u/s 386(2) could not be insisted upon and that the claimant should be referred to a civil Court.

3. The question whether in the absence of rules the procedure prescribed in Section 88 could be resorted to for the purpose of holding the inquiry u/s 386 (2) was considered in "Narasauua v. Emperor" AIR 1932 Mad 538 (C). Part of the judgment is directed towards the question whether joint moveable property can be attached by way of seizure. On the question of making the attachment the learned Judge observed : "It is difficult to understand why any different principle should be applied when making an attachment u/s 386, Cr.PC when in the analogous Section 88, the procedure for claims is practically in terms of the Civil P. C."

In the matter of determining the claim made by a third party u/s 386 (2), the learned Judge held that in the absence of rules framed by Government under the said sub-section, the procedure contained in Section 88 must be followed. That procedure is contained in sub-ss. (6A) to (61)) of Section 88 and it is analogous to the procedure adopted in Order 21, Rules 58 to 61, Civil P.C Reference may be made in this connection to Harimal Vs. Emperor, , where no doubt rules were made by the local Government. However that case is relevant for showing that the inquiry is usually to be on the lines of that prescribed under Order 21, Rules 58 to 61. In "Narasanna's case" (C), the property in respect of which the dispute was taken to the High Court was claimed to be the joint property of the family and not the exclusive property of the person against whom a warrant for recovery of fine was issued. The Magistrate was directed to allow the claimant: to adduce evidence and in doing so it was made clear that the onus in such a case should be regarded as lying in the same way as it does upon the claimants to

attached property under the Civil P. C. In our judgment, the view taken by the Madras High Court in "*Narasamma v. Emperor*" (C), is the better view, and the fact that the State Government has not made rules for the summary determination of claims u/s 386 (2) should not deprive the claimant-of the remedy open to him under the said provisions, because to deny that remedy on the ground that rules have not been made would amount to rendering the sub-section a dead letter till the rules are framed. If a strict view were to be taken, then it becomes difficult to see how the warrant itself can be executed in the absence of rules. Agreeing with the Madras decision, therefore, we hold that in the absence of rules made by the State Government, the Magistrate should follow the procedure prescribed in Section 88, Cr.PC and determine the applicant Chhagan-"al"'s claim u/s 386(2).

4. On the question whether the decree created a charge or not, the clause in the decree, which has been reproduced by the learned Sessions Judge in the order of reference, clearly empowers the plaintiff to receive directly from the office of the Vanthali Mahalcari the cash annuity, payable by the Government to the defendant in lieu of his Barkhali estates, and to credit it towards the decree. It further provides that in case the defendant paid off the decretal amount in one sum, the plaintiff was not to have any right against the said amount of the annuity. Thus the decree clearly points to a specific fund from which the decretal sum is to be satisfied. Now a charge can be validly created on moveable property, but in that case the property or the fund must be specifically indicated : and since in the present case, the decree refers to a specified amount viz., the cash annuity payable by the Government to the defendant and provides that it is made available for the obligation arising under the decree, it must be held that it creates a charge on the said amount. It was urged by Mr. Tanna that the specific words such as "charge" are not used in the relevant clause of the decree, but it is not necessary that, any particular form or words should be used in order to create a charge. All that is required is that there must be a clear intention to make the sum a security for the satisfaction of the decretal amount. See *Bhola Nath Banerji and Others Vs. Sarbamangala Debi Roy*, , and *Nathan Lal and Others Vs. Durga Das*, .

5. In this view the question is whether we should remand the case to the Magistrate to inquire into the claim of the applicant Chhaganlal u/s 386 (2), Cr.PC or, having regard to the facts of this case, we should ourselves proceed to pass orders. The dispute does not admit of any oral or other evidence, and the plain position is that the statement is liable to be removed because the amount could not be attached so long as the applicant's decree remains unsatisfied. We do not, therefore, consider it necessary to send back the case to the Magistrate for holding a formal inquiry. Accordingly we accept the reference and order that the attachment levied at the instance of opponent 1 should be removed, and the sum brought into the Court of the First Class Magistrate should be returned to to the Mahalkari of Vanthali for payment to the applicant Chhaganlal Madhavji. Order accordingly,

Baxi, J.

6. I agree.