

(1915) 11 MAD CK 0025
In the Madras High Court

T. Errikulappa Chetty

APPELLANT

Vs

The Official Assignee of Madras

RESPONDENT

Date of Decision : 15-11-1915

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5

Citation : (1916) ILR (Mad) 903 : 32 Ind. Cas. 190

Hon'ble Judges : John Wallis, C.J.; Seshagiri Ayyar, J

Bench : Division Bench

Judgement

John Wallis, C.J.—In this case the appellant took out a summons (Exhibit A) for attachment of certain properties before judgment under

Order XXXVIII, Rule 5, of the Code of Civil Procedure, and by the terms of the warrant to the sheriff (Exhibit B) the defendant was called upon

either to furnish security for Rs. 4,150-5-0 or such other sum as may be found sufficient to satisfy the decree which may be passed against him or

to show cause why he should not furnish security, and it was further ordered that the goods at his house should be attached until further notice. On

this the bailiff returned that the defendant had paid Rs. 4,150-5-0 and that amount had been paid to the Registrar. The defendant subsequently

became insolvent and Bakewell, J., has held that the appellant is not entitled to the rights of a secured creditor in respect of this sum as against the

Official Assignee in whom the defendant's estate has vested on insolvency. The order was applied for and made under Order XXXVIII, Rule 5,

of the Code of Civil Procedure, and the money paid by the defendant must be taken to have been ordered and levied as security to do what is

specified in the rule, viz., "to produce and place at the disposal of the Court, when required, the said property, or the value of the same, or such

portion thereof as may be sufficient to satisfy the decree," reproducing the language of Section 484 of the old Code. It is plain that under the terms

of the rule the defendant is only ordered to give security to produce and place at the disposal of the Court when required the "said property,

which, with reference to the earlier part of the rule, must mean his property within the jurisdiction of the Court, or its value, or such portion thereof

as may be sufficient to satisfy the decree. There is nothing in the language of the rule to give the plaintiff a charge on the money furnished as security

for this purpose, and, as in default of the security being given the property is ordered to be attached, and it is well settled that such attachment

before or after judgment does not confer title on the attaching creditor, it would, as pointed out by Mr. Chamier, be most anomalous that the

plaintiff should acquire a charge on money which is merely paid as security for the production of the said property and to render attachment

unnecessary. In my opinion this contention was rightly overruled. The defendant subsequently on 25th November 1912 obtained an order (Exhibit

C) permitting him to draw the money so paid into Court by him on giving security for that amount, but before the security was given, the case came

on for settlement of issues, when in view of the admission in paragraph 5 of the defendant's written statement it was ordered that Rs. 2,000 be

retained in Court pending the decision of the suit. If, as already held, the appellant had no charge on the money paid into Court, there is, in my

opinion, nothing in the order to give him one. I think, therefore, the learned Judge was right and the appeal must be dismissed with costs on the

original side scale.

Seshagiri Ayyar, J.

2. I entirely agree. The main contention of Mr. Venkatarama Sastriyar was that if the defendant furnished security by paying money into Court in

obedience to an order issued under Order XXXVIII, Rule 5, of the Code of Civil Procedure, that money must be regarded as having been paid to

the credit of the suit. The learned vakil conceded that if, on failure to furnish security, the defendant's properties were attached, the attachment will

not create a charge in favour of the plaintiff. I am unable to see any distinction in principle between the two classes of cases. As pointed out by Mr.

Chamier the acceptance of the contention of the appellant would involve the

position that a larger right was conferred by the legislature on a plaintiff who was fortunate enough to secure his object at the first stage, than was given to the person who was obliged to have recourse to the process of attaching the defendant's properties. There is no justification for this differentiation on principle. But it was argued that the language of the rule points to such a distinction.

3. The operative clause directs the defendant "to produce and place at the disposal of the Court when required the said property or the value of the same." The security mentioned in the earlier clause is to be given to ensure this production in Court. The adjectival clause "as may be sufficient to satisfy the decree," is intended to limit the quantum of the property to be produced the object being that the defendant should not be deprived of more of his property than is required to satisfy the final decree. The essence of the provision is to see that the defendant does not render the property unavailable to the creditor when and if a decree is obtained. The provision is penal in its nature. It is to be enforced against the defendant only to prevent him from screening the property from his creditors. No doubt the attaching plaintiff would benefit by such an order: but the object of the law is not to secure his rights alone. I am therefore of opinion that the aim of the rule is to give a control to the Court over the property and not to give a preferential right to the plaintiff who moves the Court over others who have claims against the debtor.

4. The learned vakil for the appellant drew attention to the language of Section 483 of the Act of 1882. I do not think that even under the old code, it was permissible for the attaching creditor to claim preference by virtue of his having obtained an order for security, Section 484 makes that clear. There are no decided cases on the old sections or on the corresponding Order in the new Code. *Sorabji Coovarji v. Kala Raghunath* ILR (1912) 36 Bom. 156 is the nearest approach to a decision in favour of the appellant. In that case the attachment was after decree and a sale was ordered. On that date the judgment-debtor satisfied the decree by paying money into Court. It was held that the applications for rateable distribution by the other decree-holders were infructuous, as the attachment ceased to exist by payment into Court. Speaking for myself, I am not sure whether the position taken by the learned Judges in the Bombay case is

correct. However that may be, I am not prepared to extend the ruling to cases where the law directs that the security shall be at the disposal of the Court. The decision in *Re Pollard* (1903) 2 K.B. 41 enunciates the true principle applicable to such cases. The sequestration under which the money was brought into Court in that case corresponds to attachment under our law. Lord Justice Romer says: ""In order that the creditor should obtain a special charge upon some specific part of the property seized under the writ, he must go further, and must obtain some order giving him a special right to or charge on a specific part of the property. To my mind these propositions are now free from doubt. Therefore, in an ordinary case like the present, the fact that the sequestrators had sequestered money owing to the debtor by a banker would not give the creditor any right to say that the money was his property or that he had any special charge thereon."" These observations apply *mutatis mutandis*[^] to the present case. The first contention must therefore be overruled.

5. It was next argued that the appellant obtained priority by reason of the order of the 29th January which directed ""that Rs. 2,000 be retained in Court pending the suit in view of the admission in paragraph 5 of the written statement."" This is not an order in favour of the appellant or for payment to the credit of his suit. It was intended to enable the debtor to take away a portion of the money on certain conditions. The reservation of the Lords Justices in the case already cited would not apply to such an order. I agree in the order proposed by the learned Chief Justice.