
(1914) 03 BOM CK 0013
In the Bombay High Court
Case No : Second Appeal No. 509 of 1913

Tayabali Gulam Husein

APPELLANT

Vs

Atmaram Sakharam Vani

RESPONDENT

Date of Decision : 24-03-1914

Acts Referred:

Civil Procedure Code, 1882 — Section 268

Citation : AIR 1914 Bom 299 : (1914) 16 BOMLR 520 : 25 Ind. Cas. 375

Hon'ble Judges : Batchelor, J; Basil Scott, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Basil Scott, Kt., C.J.—In execution of a decree in Suit 689 of 1904 against Baba Ismail, a debt of Rs. 1,023, alleged to be due to the judgment-debtor by the firm of Tyaballi Gulam Hussein, the present defendants, was attached by the judgment-creditor, the present plaintiff, u/s 268 of the Code of 1882. The garnishees received notice to bring into Court the amount of the alleged debt, but as they disputed their liability they objected to the attachment and the judgment-creditor having put in an answer they gave evidence -before the executing Court to prove that they in fact owed nothing to the judgment-debtor as, although Rs. 594 were due by them to the judgment-debtor's Chalisgaon shop, Rs. 676 was due to them by the judgment-debtor's Pachora shop. This evidence was given on the 4th of September 1905 and thereafter on the same day the plaintiff applied for sale of the debt of Rs. 594. The executing Court then ordered that this debt should be - sold. On the sale it was purchased by the plaintiff who now brings this suit to recover the Rs. 594 from the garnishees.

2. The garnishees set up the same facts in defence as they set up when they unsuccessfully objected to the attachment. The learned Judge in the lower appellate Court was of opinion that the Chalisgaon and the Pachora accounts being separate the defendant could not claim that the Pachora debt should be taken into account, for the judgment-creditor had not made " himself responsible

for the judgment-debtor's debts having only purchased one of his assets. If this were the only question in the case we should reverse the decree of the Assistant Judge, for, as decided in *Tapp v. Jones* (1875) L.R. 10 Q.B. 591, if a cross debt were due to the garnishee at the date of the attachment it is obviously just that there should be a right of set-off in his favour: this principle is recognised by the Indian Legislature in the Transfer of Property Act, Section 132 (see ill. (i)). We also do not agree with the Subordinate Judge in the trial Court that the equity arising from the cross debt could not be set up by the defendants except on payment of a Court fee as on a counter-claim.

3. The more serious question for the defendants is, we think whether the defence of set off is open to them after their failure to raise the attachment as no suit has been filed by them within a year from the 4th of September 1905 to establish the right alleged by them and not allowed by the executing Court.

4. The point was not taken by the plaintiff in the lower Court and was just suggested from the Bench in this appeal. We have now heard arguments upon the point.

5. The defendants' Counsel relies upon the decision in *Mussamut Rambutty Kooer v. Kamessur Pershad* (1874) 22 W.R. 36. which upon the facts found was a similar case to the present. We are, however, unable to accept it as an authority for two reasons. First, because Section 246 of the Code of 1859 provided that the party against whom an order might be given on investigation might bring a suit to establish his right within one year from the date of the order : a provision which the Court held would not necessarily prevent the garnishee from setting up the same defence upon an action brought against him by the purchaser of the debt. This ruling is no longer applicable, for Section 283 of the Code of 1882 (Order xxi, Rule 63, of the present Code) provides that the order on the investigation shall, subject to the result of such suit, if any, be conclusive. It is, therefore, no longer open to a garnishee to plead a defence which has already in an execution inquiry been unsuccessful except in a suit instituted within one year from the date of the adverse order. Secondly, we are unable to follow the argument of the Calcutta Judges based upon other sections of the Act of 1859, for it seems to ignore the finding arrived at that the property attached was not money but a debt, and the provisions of Section 265 which provided for the delivery of debts sold in execution.

6. The other case relied on by the appellants was *Harilal Amthabhai v. Abhesang Meru* ILR (1880) 4 Bom. 323 in which on an unargued reference for opinion from a Subordinate Court the Judges expressed the opinion that Section 278 of the Code did not apply to objections to the attachment of debt but that the Court should satisfy itself that a debt was existent before selling it. This decision does not appear to us wholly consistent with that in *Mansuhab Umed v. Bhagwandas Jamnadas* mentioned in the Subordinate Judge's reference in *Harilal Amthabhai v. Abhesang Meru* ILR (1880) 4 Bom. 323 cannot accept an expression of opinion on an unargued reference as a binding authority. A different view of Section 278

has been taken by a Full Bench of the Madras High Court after argument, in *Chidambara Patter v. Ramasamy Patter* ILR (1903) Mad. 67. overruling *Basavayya v. Syed Abbas Saheb* ILR (1900) Mad. 20, a decision based upon *Mussamut Rambutty Kooer v. Kamessur Pershad* (1874) 22 W.R. 36. We agree with the Full Bench of the Madras High Court. It is of importance that garnishees' claims and objections should be decided at least as promptly as other objections to attachment.

7. Order xxi, Rule 58, applies in terms to any property attached in execution and thus relates to debts so attached. The sum of Rs. 594 appearing due, in one set of the garnishees' books, to the judgment-debtor was not liable to attachment if it was in fact cancelled by another debt due by the judgment-debtor to the garnishee in another set of books. If it was not so cancelled it was attachable property constructively in the possession of the judgment-debtor. In another view also the question raised by the garnishee called for investigation u/s 278 and the following sections, for the debt attached could be regarded as property in the possession of the garnishee in trust for the judgment-debtor : see *Vinall v. De Pass* [1892] A.C. 90., We dismiss the appeal without costs.