

(1927) 01 BOM CK 0015
In the Bombay High Court
Case No : O.C.J. Suit No. 1310 of 1924

The Japan Cotton Trading Co., Ltd.

APPELLANT

Vs

The Universal Fire and c. Insurance Co.

RESPONDENT

Date of Decision : 11-01-1927

Acts Referred:

Citation : AIR 1927 Bom 420 : (1927) 29 BOMLR 686 : 103 Ind. Cas. 452

Hon'ble Judges : Mirza, J

Bench : Single Bench

Judgement

Mirza, J.—This is an informal application made on behalf of the Sheriff for his poundage in respect of certain execution proceedings. The defendants against whom the order is sought have appeared and contested it. A practice has grown up in this Court for the Deputy Sheriff to consult the Chamber Judge and obtain his directions in matters relating to his office. I am not in favour of this informal manner of obtaining orders and directions from the Chamber Judge where there is a serious contest and substantial rights are involved. Where as the result of a levy of execution certain property or moneys have come into the hands of the Sheriff the party aggrieved by it may on a summons ask for a relief against the Sheriff in respect of such levy, but where the property or moneys have not reached the hands of the Sheriff, and the Sheriff claims his poundage in respect of the attachment from the parties personally I am of opinion it is a matter fit for a suit rather than for informal directions by the Chamber Judge.

2. The facts which have given rise to the application are stated on behalf of the Sheriff in the affidavit of his bailiff affirmed on December 4, 1926, and on the affidavit of Kanchanlal Vrajdas on behalf of the defendants affirmed on December 17, 1926. From those affidavits, it appears that on August 4, 1926, at 4-30 P.M. the Sheriff's bailiff accompanied the Superintendent of the Japan Cotton Trading Co. Ltd. to the defendants' office to execute a warrant of attachment under Order XXI, Rule 43. The bailiff showed the warrant to the defendants' Manager and asked him whether he would pay up the amount therein. He further told him

that if the amount was not paid he would levy attachment. The Manager gave no reply. He showed certain receipts to the Superintendent, who had accompanied the bailiff and told him that the moneys due had already been paid into the Rangoon High Court. The defendants' attorneys then appeared on the scene and stated that they would obtain an order from the Court to stay execution. Thereupon the Superintendent asked the Sheriff's bailiff not to levy the attachment and the Sheriff's bailiff accompanied the Superintendent to the Office of Messrs. Little & Co., the attorneys of the attaching creditor. At that office the defendants' attorney handed over certain security to Mr. Eastley, a partner in Messrs. Little & Co., and Mr. Eastley thereupon asked the Sheriff's bailiff not to levy the attachment. At the request of the bailiff Mr. Eastley thus endorsed the warrant: "Mr. C.N. Eastley requested that the warrant was not to be executed (signed) "Little & Co." "Thereupon the Sheriff's bailiff returned to his office and nothing more happened. It appears that the defendants' attorneys handed over to Messrs. Little & Co. five per cent Government Loan Notes of the face value of Rs. 56,000 as security pending enquiries to be made at Rangoon as to whether what the defendants had here stated regarding the satisfaction of the decree was correct. As the result of those enquiries Messrs. Little & Co. returned the script to the defendants. The Sheriff claims poundage on the amount of this script. Rule 385 of the High Court Rules provides that "in the case of warrants of attachment of property after judgment the judgment creditor either obtaining satisfaction or compromise or settling his claim direct and the attachment thereupon being raised by order of the Court or at the request of the judgment-creditor, the Sheriff shall be paid his poundage [at the rate of two per cent.] upon the amount of such satisfaction, compromise or settlement." On the facts before me it does not appear that there was any levy or seizure of the judgment-debtor's property, or there was any attachment which was raised at the request of the judgment-creditor. All that happened was that at the request of the judgment-creditor no attachment was levied. Under these circumstances I fail to see how the Sheriff is entitled to poundage.

3. In *Mortimore v. Cragg* (1878) 3 C.P.D. 216 Bramwell L.J. interpreted the term "levy" at p. 219 meaning "shall seize, and thereby get the money," Brett L.J. remarked (p. 219):-

Where an execution issues the transaction may be divided into four parts : 1. The delivery of the writ to the sheriff : 2. Seizure: 3. The possible payment of money after seizure : 4. If no payment, sale. The first step does not entitle the sheriff to poundage; and if he does not seize, *Nash v. Dickenson* (1867) L.R. 2 C.P. 252 is an authority that he is not entitled to poundage. Although he seizes, nothing may be realised, because the seizure may be wrongful; it may be withdrawn by direction of law, then the sheriff would receive no poundage. Then comes the case after seizure. The money may be paid by the execution debtor either directly or indirectly; directly by virtue of the seizure to the sheriff: indirectly where payment is made by means of a compromise which is the consequence of the seizure; in either of those cases the sheriff is entitled to

poundage. If a sale takes place, again the sheriff is entitled to poundage.

4. In *Bissicks v. Bath Colliery Co.* (1877) 2 Ex. D. 459 Cockburn C.J. remarked (p. 461):-

The question is whether the writ of fi. fa. was executed. If it was the sheriff is entitled to the poundage and fees; if it was not executed he is not entitled....In my opinion it is enough if the sheriff's officer goes down to the premises with the warrant and gets payment. He can only receive payment by virtue of the warrant, which is his authority, and the debtor can make a valid payment only under the warrant; and if the debtor in order to avoid the inconvenience of a levy and sale prefers to pay the money, I think the sheriff's officer is not only authorized but bound to accept it.

5. The same case went up to the Court of Appeal and is reported in L.R. 3 Ex. D. 174, where Bramwell L.J. remarks (p. 175):-

I also feel some hesitation, but upon the whole I think there was a seizure, for the officer did threaten to leave a man in possession.

6. Brett L.J. remarks (p. 175):-

The sheriff's officer went to the plaintiff's house with a man, he obtained entry into the house, and whilst he was there the plaintiff's goods were under his control; he spoke as if he had made a seizure, and he treated what he was doing as if it was a seizure; and the plaintiff also treated it as a seizure;...

7. Cotton L.J. remarks (p. 175):-

I have felt some doubt, but on the whole I think there was a seizure; for if the money had not been paid, the officer would have left the man in possession of the plaintiff's goods.

8. On the facts of the case before me I hold that there was no seizure or levy on the goods and the Sheriff therefore is not entitled to his poundage.

9. On the question of costs, as it has been the practice in the past for the Deputy Sheriff to obtain these informal directions I do not think it will be fair to mulct him in costs, particularly as the position of the Sheriff as an honorary officer of Government is not well defined, and if he is to pay the costs personally, it may work as a hardship upon him, unless Government paid the amount on his behalf.