

Dhan Bibi Vs. Mrinalini Ghosh and ors.

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Court : Kolkata

Decided On : Jul-21-1944

Reported in : AIR1945Cal449

Appellant : Dhan Bibi

Respondent : Mrinalini Ghosh and ors.

Judgement :

1. In 1939 the respondent brought a suit to recover a sum of money from Khalil Ostagar and his son. She applied for attachment before judgment of the property in suit and the property was attached in September 1939. Khalil died in February 1940 and his widow, the present appellant, was substituted as one of his legal representatives. Thereafter, she preferred a claim under Order 38, Rule 8, Civil P.C., to the property, that had been attached but that claim was summarily rejected on 15th July 1910. Subsequently a decree was passed in July 1940 against her as the legal representative of Khalil and against the other defendant. In January 1942 the respondent applied for execution of the decree. She prayed for the sale of the said property which had been attached before judgment.

2. As the decree could be executed only against the assets of Khalil in her possession the appellant objected to the sale of the said property on the ground that it was not Khalil's property but was hers. Both the Courts below have come to the conclusion that the property belongs to the appellant. The Court of first instance allowed her objection and released the property from attachment but the lower appellate Court has reversed that order on the ground that she should have

brought a suit to set aside the adverse order passed in the claim case within one year of that order. As the finding of fact on the question of title is binding on us the principal question therefore in the appeal before us is whether Article 11 or Article 13, Limitation Act, is applicable to a case where a claim to a property attached before judgment is made and rejected before the decree is passed. If either of these articles be not applicable, the residuary article, namely Article 120, would be, and in that case the un-successful claimant would have six years' time from the date of the adverse order passed on her claim to sue for establishing her right to that property. A subsidiary question has been raised before us which involves a question of procedure, which is, whether the question relating to the title to the property can be raised on an objection by the appellant under Section 47, Civil P.C., or whether a suit is necessary. The last mentioned point is not material except for the purpose of court-fees, as her objection under Section 47 has been filed in a Court which would have had jurisdiction to entertain a suit by her for establishment of her title to the property attached. We are, however, of opinion that a suit would be the proper remedy. This Court has all along held that Order 21, Rule 63 of the Code applies when a claim to a property attached before judgment is either allowed or rejected: *Raj Kishore Gope v. Bhabatosh Chakravarty* . That is also the view of other High Courts: *Mallikarjuna Ptasada Nayadu v. Virayya* ('18) 5 A.I.R. 1918 Mad. 26 *Bisheshwar Das v. Ambica Prasad* ('15) 2 A.I.R. 1915 All. 275 Mt. *Babbal Kumari v. Mulchand Marwari* ('34) 21 A.I.R. 1934 Pat. 580 *M.S.M.M. Chettiar Firm v. Naung Sein* ('31) 18 A.I.R. 1931 Rang. 279. The appellant therefore should have instituted a suit for establishment of her right to the property, as her claim to the property which had been' attached before judgment had been rejected. This aspect of the case distinguishes it from the case in *Punchanon Bandopadhyay v. Rabia Bibi* ('90) 17 Cal. 711 (F.B.), though she is a legal representative of Khalil Ostagar and is resisting execution on the ground that the property in question did not form part of the assets of the latter. The question of substance, however, is within what time she is to bring the suit. If the time had not run out on the date when she filed her objection under Section 47 of the Code she would be able to raise the question that the property was hers and not the property of her husband, Khalil Ostagar, for, in the circumstances of the case, her application could have been converted by the execution Court to a plaint

on payment of proper court fees.

3. Article 13, Limitation Act, would not in our judgment, apply. That article does not apply where the order sought to be set aside by a Suit had been made in a suit. *Shankar Sarup v. Mejo Mal* ('01) 23 All. 313 at p. 209; *Official Receiver, South Malabar v. Veeraraghavan Pattar* ('22) 9 A.I.R. 1922 Mad. 189. The order rejecting the claim of the appellant was made in the suit which the respondent had filed against Khalil Ostagar. The competition, therefore, is between Arts. 11 and 120, Limitation Act. The fact that the appellant's claim had been dismissed without investigation would not make Article 11 inapplicable, if it is otherwise applicable: 23 C.W.N. *Nogendra Lal v. Fani Bhusan Das* ('19) 6 A.I.R. 1919 Cal. 835: 45 Cal. 785: 44 I.C. 265. The material portion of that article is as follows:

(Suit) 'By a person against whom the following order has been made to establish the right which he claims to the property comprised in the order:

Order under the Code of Civil Procedure, 1908, on a claim preferred to, or an objection made to the attachment of, property attached in execution of a decree;.... one year (from) the date of the order.

4. As an attachment before judgment is not an attachment in execution of a decree, for the reasons that at the time when it is made there is no decree in existence, that article would not on a plain reading apply where a suit is brought (and we have held that a suit will have to be instituted in the case before us) either by the plaintiff in the money suit or the claimant, where the claim to the property attached before judgment had either been allowed or disallowed, as the case may be, and as there is no other specific article, Article 120 would apply to such a suit. 'We do not consider the decisions under the repealed Codes of Civil Procedure or under the repealed Limitation Acts of 1871 or 1877 to be material, for the language employed in Article 11 as it stands in the Limitation Act of 1908 is materially different from the language employed in the earlier statutes. Section 81, Civil P.C. of 1859 (Act 13 of 1859) provided for attachment before judgment and section 86 provided that claims to property attached before judgment shall be investigated in the manner prescribed for investigation of claims to property attached in execution of a decree for money. Section 246 provided that if a claim is preferred to, or an

objection offered against, the sale of property which may have been attached in execution of the decree or under an attachment before judgment, the claim or objection is to be investigated in a certain manner. The section itself provided that the order passed would not be appealable, but the party affected by the order would be at liberty to institute a suit to establish his right within a year of the order. The construction placed on Section 86 was that the whole of Section 246 was attracted to orders passed on claims preferred to attachments before judgment. These cases decided when Section 246, Civil P.C. of 1859 stood in that form would not be material as the provision relating to limitation is not contained in Order 21, Rule 63 which, as we have already held, is attracted to attachments before judgment by reason of the provisions of Order 38, Rule 8, which in terms correspond to Section 86, Civil P.C. of 1859. By the Limitation Act of 1871, the last twelve words of Section 246, Civil P.C. of 1859, which provided for limitation were repealed, and Article 15 was introduced. In 1877 both the Code of the Civil Procedure of 1859 and the Limitation Act of 1871 were repealed and new enactments were made in their places. The Civil Procedure Code (10 of 1877) re-enacted in Sections 485 and 487 the provisions of Sections 81 and 86 of the repealed Civil Procedure Code of 1859 and Sections 278 and 283 comprised in substance the provisions of Section 246 of that Code as it stood after the amendment by the Limitation Act of 1871. In the Civil Procedure Code of 1882 (14 of 1882) these sections were re-enacted under the same numbers. Section 283 was as follows:

The party against whom an order under Sections 280, 281 or 282 is passed may institute a suit to establish the right he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive.

5. Article 13, Limitation Act, took the place of Article 15, Limitation Act of 1871, and was couched in the same language, but another article--Art. 11--was added. The material portion of Article 11 as then framed was as follows:

By a person against whom an order is passed under Sections. 280, 281, 282 or 283 .. . of the Code of Civil Procedure to establish his right to... the property comprised in the order.

6. From the fact that Sections 280 to 283, Civil P.C., had been expressly mentioned in that article two types of decisions were given: (1) that that article was applicable only when the claim was investigated on the merits: *Uma Charan v. Hiran Moyee Debi* ('15) 2 A.I.R. 1915 Cal. 121 and, (2) that that article was applicable to claims preferred to property attached before judgment. The decisions of the second type proceeded on the ground that orders made on such claims would be under Section 283 of the Code. The last mentioned proposition had been laid down by Sir Barnes Peacock C.J. as early as 1868 in *Kartick Chander Mookerjee v. Mookta Ram* ('68) 10 W.R. 21 as a result of the construction of Section 86, Civil P.C. of 1859 which corresponded to Section 487 of the Codes of 1877 and 1882. The language of Article 11, Limitation Act of 1908 is different. The reference to the corresponding provisions of the Code of Civil Procedure of 1908, namely to Order 21, Rules 58 to 63, has been omitted and the words 'attached in execution of a decree' have been added. That omission is not immaterial, for that omission has been given as one of the reasons for holding that Article 11, Limitation Act, 1908, would apply to a suit even where the claim had been dismissed without investigation on the merits but for default: *Nogendra Lal v. Fani Bhusan Das* ('19) 6 A.I.R. 1919 Cal. 835. As the omission has a material effect it cannot be said that the addition has none, and that article should not, in our opinion, be held to be applicable to cases of attachments before judgment unless an attachment before judgment is by some provision of law or by some process of reasoning be held to amount to an attachment in execution. In the referring order in *Arunachalam Chetty v. Periasami Servai* ('21) 8 A.I.R. 1921 Mad. 163: 44 Mad. 902, Napier J. was inclined to the view that Order 38, Rule 11 operated to make an attachment before judgment an attachment in execution of the decree. We cannot agree with that view for all that Order 88, Rule 11 enacts is that it would not be necessary to attach the property again after a decree is passed and that decree is put into execution. Krishnan J. in the referring order relied upon Rule 8 of Order 38. He relied upon the Full Bench decision in *Mallikarjuna Ptasada Nayadu v. Virayya* ('18) 5 A.I.R. 1918 Mad. 26 which held that not only Order 21, Rules 58 and 59 but also Order 21, Rules 60 to 63 are made applicable to claims to property attached before judgment. No objection can be taken to his observation that

the effect of Order 38, Rule 8 is to bring property attached before judgment within the purview of Rules 58 to 63 of Order 21 for that is the consistent view of this Court, but the further inference that he draws from that proposition and which is expressed in the next sentence--'and thus within the expression property attached in execution of a decree' does not necessarily follow. Even if Order 21, Rule 63 had been mentioned in Article 11 it would not have made any difference in view of the words 'attached in execution of a decree'.

7. No doubt the object of an attachment before judgment and an attachment in execution, of decree is the same--namely to preserve the fund to which the decree-holder may look for satisfaction by taking away, so far as the decree-holder is concerned, from the defendant or judgment-debtor the power to deal with the property. It is also no doubt desirable that the course of executions should be as speedy as possible and that the claims of third parties or of the decree-holder to the property attached either before judgment or after decree should be settled by a suit as quickly as possible, but we have to construe the statute as it stands. If there is a defect it would be for the Legislature to remove it. If Article 11 is not applicable to the case of a claim to property attached before judgment, then Article 120 would apply with the result that a suit by the unsuccessful claimant or plaintiff would be in time if instituted within six years of the order, whereas if the claim be to property attached in execution the period of limitation would be one year only. There is that anomaly but that anomaly has to be removed by the Legislature. As the claim to the property attached before judgment in the case before us was made and disposed of before the decree had been passed it is not necessary to consider the further point considered by the Full Bench of the Madras High Court in *Kartick Chander Mookerjee v. Mookta Ram* ('68) 10 W.R. 21 especially as this Court in *Shibnath Singh v. Saberuddin Ahmad* did not fully concur with the view expressed therein. We agree with the observation of that Full Bench which, whilst not expressed in specific terms, amounts to an expression of the view that Article 120 and not Article 11, Limitation Act, applies to a suit brought by an unsuccessful claimant, whose claim to property attached before judgment had been preferred and rejected before the decree had been passed. This view is supported by the decision of the Patna High Court in *Mt. Babbal Kumari v. Mulchand Marwari* ('34) 21 A.I.R. 1934 Pat. 580:. We decide the question accordingly.

8. As we have held that the appellant's remedy lay in a suit the appellant must pay the deficit court-fees on her objection petition filed in the Court of first instance under Section 47 of the Code and on the memorandum of appeal filed in this Court. The court-fee would be calculated in terms of Schedule 2, Article 17, clause (i), Court fees Act. We give her time till 30th August 1944, to put in, in this Court the deficit court-fees. If she pays the deficit court-fees within the said time, the appeal will be allowed with costs throughout in her favour hearing-fee in this Court being assessed at two gold mohurs, and the execution against the property in question dismissed. In default the memorandum of appeal to this Court and her objection petition in the Court of first instance will be rejected.

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