

Sadek Ali Vs. Samed Ali

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Court : Kolkata

Decided On : Jul-11-1923

Reported in : 80Ind.Cas.300

Judge : Rankin and ;B.B. Ghose, JJ.

Appellant : Sadek Ali

Respondent : Samed Ali

Judgement :

Rankin, J.

1. This is an appeal by the Defendant in an ejectment suit. The Defendant's defence was a denial of the Plaintiff's title. The Plaintiff claimed title as purchaser at an execution sale against one Majammil Mea under a Small Cause Court decree for money obtained under the Provincial Small Cause Courts Act. It appears that in the Small Cause Court at Sealdah he obtained an attachment of the land now in suit before judgment, that there was an investigation of claim held under Order XXI, Rule 63, Civil Procedure Code, that the claimant succeeded and that the plaintiff then brought a suit to establish the right of his judgment-debtor, but that suit was withdrawn. Later, the decree was transferred to the ordinary Civil Court; the property was attached and sold to him ignoring the previous claim case.

2. The Munsif held that the Small Cause Court had power to attach immoveables before judgment and to decide the claim case. Accordingly he dismissed the plaintiff's suit holding that the plaintiff had no title. The learned District Judge held that the Small Cause Court had no such power and that the proceedings which purported to have been taken under Order XXI, Rule 63, Civil Procedure Code, were ultra vires. Accordingly, he remitted the suit for retrial to the first Court on the other issues. The only point made by the learned Vakil for the defendant-appellant is that, under the Code of 1908, a Provincial Small Cause Court has power to attach immoveable property before judgment and to decide a claim case thereon. This matter has been elaborately argued before us. It is quite clear that the proper method is first to examine this matter on the face of the Code and of the Provincial Small Cause Courts Act (IX of 1887). So far as the latter Act is concerned, it is only necessary to note that by the second schedule great care has been taken to exclude from the cognizance of the Small Cause Court all suits in respect of immoveable property whether for possession or declaration or partition or otherwise howsoever, with small exceptions as regards certain classes of rent suits. In effect, rights to, or interests in, immoveable property are elaborately excluded; but as questions of this character may arise incidentally in suits, for example, for money, a facultative provision is made by Section 23 enabling the Small Cause Courts to send the matter to the ordinary Civil Court but not obliging it to do so. Section 17 of this Act deals with procedure. It is the only section applying anything in the Code to Small Cause Courts. The provisions in the Code itself are directed entirely to excluding certain powers of the Court from application to Small Cause Courts. The provisions of the Code of 1882 specified in its second schedule 'so far as those chapters and sections are applicable' were made to obtain in the Small Cause Court by virtue of Section 17. They include Chaps. XIX and XXXIV 'Execution' and 'Arrest and Attachment before judgment.' In each case the words 'except as regards immoveable property' are inserted as a qualification in the second schedule itself. In form Section 17 is entirely inapposite now. Since 1908 it must be taken by virtue of Section 158 of the Code to refer to Section 7 and Order L of the Code of 1908. By Section 7 of the present Code so much of the body of the Code as relates to certain things is declared not to extend Small Cause Courts, namely, suits excepted from their cognizance, execution of decrees

in such suits and the execution of decrees against immoveable property. Also certain sections are made inapplicable, including Sections 94 and 95 so far as they relate to injunctions and interlocutory orders. This provision is badly drafted. Section 94 appears to refer entirely to interlocutory orders and even to call them so, but the parts of this section intended to be excluded are apparently Clauses (c) and (e). Clause (b) is not excluded by the words of Section 7 [Kumud Behary Pal v. Hari Charan Mandal 53 Ind. Cas. 814 : 46 C. 717 : 31 C.L.J. 179] and it can certainly take effect as regards moveables. The actual words of the clause, however, are 'order the attachment of any property.' Still Section 91 only confers powers of any sort 'if it is so prescribed' which means that unless the power is given by the orders in the first schedule, it is not in existence. It is fairly clear that we must, therefore, go to the schedule which by Order L declares that certain provisions of the schedule shall not extend to Provincial Small Cause Courts. This repeats the matters mentioned in the first half of Section 7 and adds two new matters. It then mentions certain rules and orders specifically and declares them also to be inapplicable to Small Cause Courts. It may be noticed that where as by Sections 7 and 94 a Provincial Small Cause Court cannot grant a temporary injunction, Order XXXIX, Rule 1 is not expressly mentioned in Order L. Order L. is not, it would appear, drafted either on the principle of repeating every exclusion made by Section 7 or of not repeating any such exclusion. Further in Order XVI, Rule 10 the power of compelling the attendance of a witness by attachment of his property is qualified by the proviso 'that no Court of Small Causes shall make an order for the attachment of immoveable property.' In these circumstances, the question seems to turn on the exact implication of the exclusion from the Small Cause Court powers of 'the execution of decrees against immoveable property' in Section 7 and Order L. There can be no doubt that in Order XXXVIII attachment before judgment is contrasted with and distinguished from 'attachment of property in execution of a decree.' Nor can it be doubted that there is an important difference between these two things [see Basiram Malo v. Kalyani Debi 10 Ind. Cas. 305 : 38 C. 448 : 15 C.W.N. 795] though it may be doubted whether the difference is really fundamental since attachment in execution is a step taken to crystallise the creditors' rights and prevent loss of the property prior to sale: attachment before judgment is also for the purposes of preservation so far as the

plaintiff is concerned.

3. Two views have been taken. The District Judge has adopted the view stated in Woodroffe on the Civil Procedure Code. That is, in effect, the principle applied in Madras to the Code of 1859 under Act XI of 1865 that 'a Court which cannot attach primarily in execution of its decree cannot attach in anticipation of it' [Marthamma v. Kittu Sheregara 6 M.H.C.R. 91].

4. The other view was adopted in Kanchedi v Kanchedi 43 Ind. Cas. 123 : 14 N.L.R. 1 by the Judicial Commissioner at Nagpur. He regarded the express exception in Order XVI, Rule 10 as in favour of this construction and he did not think that Rule 7 of Order XXXVIII was against it. He pointed out that the exclusion of this power was express and clear in the Code of 1882 and that it is not repeated in the present Code.

5. Order XXXVIII, Rule 7 lays down: 'The attachment shall be made in the manner provided for the attachment of property in execution of a decree.' Rule 8 applies in like manner to the provisions as to the method of investigation of claims.

6. This not only refers inter alia to Order XXI, Rule 54 but also to the provisions for investigation of claims (Rules 58 to 62) and further to Rule 63 which makes the order in a claim case conclusive subject only to a suit. If there is power to attach before judgment, then whether it be limited to moveables or not, Rule 63 must be intended to apply [Sri Malikharjuna Prasada Naidu v. Matiapalli Virayya 47 Ind. Cas. 1000 : 41 M. 849 : 24 M.L.T. 134 : 35 M.L.J. 231 : 8 L.W. 197 : (1918) M.W.N. 699 (F.B.)]. However the matter be regarded, Rule 63 is not in reality a mere question of 'manner.'

7. Again by Section 36 of the Code 'the provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders.' It cannot be contended that 'the execution of decrees against immoveable property' is not meant to cover the Execution of orders for the purposes of Section 7 or Order L; yet they are only excluded by implication.

8. The argument from previous Codes is apt to exceed the limits laid down in *Bank of England v. Vagliano* (1891) A.C. 107 : 60 L.J.Q.B. 145 : 61 L.T. 353 : 89 W.R. 657 : 55 J.P. 676 but no doubt in so far as a revised Code takes the form of an amendment as regards a particular provision something may legitimately be gathered by a comparison. Compare, for instance, Section 73 of the present Code and Section 295 of 1882. But the whole manner and scheme of declaring the powers of Small Cause Courts were recast in 1908, though Section 17 of Act IX of 1887 lives on. Section 5 of the Code of 1882 declares everything expressly mentioned in the second schedule to extend to Small Cause Courts to the extent provided. Section 7 and Order L of the present Code mention certain things as not to extend. Formerly every chapter was specifically dealt with, i.e., inserted with or without qualification or omitted. Thus 'Chap. XXXIV of Arrest, Attachment before judgment,' except as regards 'immoveable property.' The Code of 1877 as amended in 1879 was exactly the same. The position which arose under Act XLII of 1860 (which first created the Provincial Small Cause Court) and the amending Act XI of 1865 was that these had to be read with the Code of 1859 which knew nothing of Small Cause Courts. Section 21 of the Act of 1860 provided that 'except as hereinbefore provided' the Code of 1859 should be applicable 'in so far as the same may be applicable and necessary.' Section 47 of the Act of 1865 was equally general 'so far as the same are or may be applicable.' In this respect I think the comment of the learned Vakil for the appellant upon the Madras decision [*Marthamma v. Kittu Sheregara* 6 M.H.C.R. 91] has force. In 1871 there was a wide general direction left to be applied by common sense. From 1877 to 1908 there was dear and specific provision. The Code of 1908 did not revert to wide or general direction.

9. It is by no means absurd to suppose that the Code of 1903 may have meant, subject to the right of High Courts to amend the Rules...to extend the power of attachment before judgment to immoveable property in the case of Provincial Small Cause Courts, while refusing to such Courts the right to attach such property in execution of decrees. As the language of Section 17 of the Provincial Small Cause Courts Act (IX of 1887) is now inapposite, I am inclined to think that the onus is on the person denying the existence of the power to show that it is excluded by the Code. I agree that the principle of *Marthamma v. Kittu Sheregara*

6 M.H.C.R. 91 is not so forceful as it was under the old Acts. On the other hand, I think the difference between attachment before and after judgment is not so great as has been sometimes thought and I do not think the comparison of the present Code with the clear language of the Code of 1882 affords ground for a safe inference to the effect that the power was not meant to be excluded.

10. It is very difficult to think that a Court which so far as is possible is prohibited from entertaining questions of rights in immoveables and which may not levy thereon, nor attach such property to compel a witness to appear, should have been given without plain language the extreme right of attachment before judgment and of adjudicating on all claims which such an attachment may produce. That the debt must be small in all cases makes the difficulty greater. It is quite true that on the language of Rule 54 of Order XXI the attachment is made an order; but the peon or the officer who affixes on the premises the order of the Court and proclaims it by beat of drum could hardly deny that he was executing an order upon immovable property any more than the Sheriff when seizing moveables could deny that he was executing an order. If Section 7(a)(iii) is read with Section 36 as meaning to exclude 'the execution of decrees or orders against immovable property'...as I think it must--then, apart from Order L, I think that the power to attach immoveables before judgment is sufficiently, if not too dearly, negatived. [Of. Order XXXVIII, Rule 11.].

11. In the end, therefore, the appeal fails and must be dismissed with costs, hearing-fee, two gold mohurs.

Ghose, J.

12. I agree.