

APPELLATE CIVIL.

Before Richardson and Beachcroft JJ.

ABDUL RAHMAN

v.

AMIN SHARIF.*

1918

Jan. 4

*Attachment before Judgment—Suit, dismissal of—Reversal on appeal—
Termination of attachment—Private sale—Sale in execution of decree—
Jurisdiction—Civil Procedure Code (Act V of 1908), s. 115; O.
XXXVIII, rr. 9 and 11*

The Court should when dismissing a suit at the same time make the order directing the attachment before judgment to be withdrawn. But even if the order is not made, on the dismissal of the suit the attachment before judgment falls to the ground, whether an appeal is filed or not.

Sasirama Kumari v. Meherban Khan (1) and *Ram Chand v. Pitam Mal* (2) referred to.

Where the District Judge has directed property not under attachment to be sold without being first attached, the question raised is one which falls within the scope of s. 115 of the Civil Procedure Code

APPEAL by Abdul Rahman and others, the objectors.

On the 19th September, 1911, in a suit for money brought by Amin Sharif and others against Anwar Ali Miya, the plaintiffs applied and obtained an order for attachment before judgment of certain property belonging to the defendant. On the 20th November, 1911, the plaintiffs' suit was dismissed without the attachment order being withdrawn. Thereafter, the plaintiffs preferred an appeal, and on the 28th January,

* Appeal from Order, No. 337 of 1916, against the order of J. C. Twidell, District Judge of Chittagong, dated Sep. 1, 1916, reversing the order of N. N. Chatterjee, Munsif of Cox's Bazar, dated March 7, 1916.

(1) (1911) 13 C. L. J. 243.

(2) (1888) I. L. R. 10 All. 506.

1913, the suit was decreed by the Appellate Court with costs. In 1915 the plaintiffs in view of the fact that their order for attachment before judgment was subsisting, applied for execution of their decree by sale of the property attached. In the meantime, after the suit had been dismissed and before the Appellate Court had decreed it on appeal, the defendant sold by private sale the property in question. The purchasers at the private sale objected to the property being subsequently sold by the plaintiffs in execution of their decree without a fresh order for attachment having been made. The Court of first instance held that the previous attachment before judgment did not subsist. On appeal, this order was reversed. The objectors, thereupon, appealed to the High Court and also obtained a Rule.

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Babu Chandra Sekhar Sen, for the respondent, took the preliminary objection that under s. 102 of the Civil Procedure Code no appeal lay.

Babu D. L. Kastagir, for the appellants, submitted that the attachment before judgment did not subsist. Under O. XXXVIII, r. 9, of the Code, the Court should have ordered the attachment to be withdrawn. The omission to make this order was a mistake of the Court, for which the appellants ought not to be made to suffer: see *Ram Chand v. Pitam Mal* (1) and *Sasirama Kumari v. Meherban Khan* (2). The provisions of O. XXXVIII, r. 11, of the Code, did not apply.

Babu Chandra Sekhar Sen, (*contra*). *Ram Chand v. Pitam Mal* (1) was distinguishable. It was under the old Code. The section of the new Code was comprehensive. The word "subsequently" in O. XXXVIII, r. 11, was not in the old Code, and meant finally. In the present case a decree was passed

(1) (1888) I. L. R. 10 All. 506.

(2) (1911) 13 C. L. J. 243.

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finally; the attachment, therefore, subsisted. If the Court of first instance had withdrawn the attachment order the respondents could have applied for fresh attachment before the Appellate Court. Furthermore, this was not a case in which the High Court should interfere under s. 115 of the new Code.

Appellants were not called upon.

RICHARDSON J. A preliminary point is taken in this appeal that no appeal lies under section 102 of the Civil Procedure Code. We are of opinion that this objection is good and that the appeal must be dismissed.

The appellants, however, succeeded in obtaining a Rule from this Court which raises the same question as is raised in the appeal. The question turns on the provision contained in rule 9 of Order XXXVIII of the Civil Procedure Code. The rule runs as follows:—
“Where an order is made for attachment before judgment, the Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed.” It appears that on the 19th September, 1911, certain property belonging to the defendant in the suit out of which these proceedings arise was attached before judgment. The suit was dismissed by the trial Court on the 20th November, 1911. On appeal the suit was decreed on the 28th January, 1913. In the interval the property attached before judgment, had been purchased at a private sale by the appellants or rather the petitioners. In 1915, the decree-holders applied for execution of their decree by the sale of the property on the footing that the attachment before judgment subsisted and that it was unnecessary for them to apply for re-attachment of the property. It is obvious that they were bound to frame their application for execution in that way.

because, if the attachment before judgment did not subsist, the property having been purchased by the petitioners could not be attached or sold in execution. The point made on behalf of the decree-holders is that when the first Court dismissed the suit it omitted to carry out the direction in rule 9 of Order XXXVIII of the Code that the Court should at the same time order the attachment to be withdrawn. If that order had been made, there can be no doubt that the attachment would not have subsisted and would not have been revived by the fact that on appeal the decree of dismissal was set aside and the suit was decided in the plaintiffs' favour. As authority for that, if authority is needed, we may refer to the case of *Sasirama Kumari v. Meherban Khan* (1) decided by Mookerjee and Coxe JJ. The argument is that the Court having omitted to make an order withdrawing the attachment, the attachment continued. This point was decided by the learned Munsif against the decree-holders and by the learned District Judge in their favour. With great respect to the latter I agree with the Munsif. The observations made by Mr. Justice Mahmood in the case of *Ram Chand v. Pitam Mal* (2), are as applicable to the present Code as to the previous Code and in my opinion they correctly state the law. In principle as pointed out by Mr. Justice Mookerjee in the first case cited, the attachment before judgment should come to an end when the suit is dismissed. And I agree with Mr. Justice Mahmood when he says, speaking of the Code of 1882, that the part of the rule requiring the Court to remove the attachment was never intended to be more than directory. There is no doubt that in order to avoid all possible doubt and difficulty the Court should, when dismissing a suit, at the same time make the order directing the attachment to be withdrawn.

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But even if the order is not made, in my opinion, on the dismissal of the suit the attachment before judgment falls to the ground.

Some attempt was made to argue that rule 11 of Order XXXVIII has made some change in the law by reason of the word "subsequently" which appears in that rule. The rule is as follows: "Where property is under attachment by virtue of the provisions of this Order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property." But that rule cannot be read in the way in which the learned pleader for the respondent seeks to read it. It applies only where the property is under attachment and a decree is passed subsequently. It is begging the question to say that the property remains under attachment after the suit has been dismissed or that the attachment revives when an appeal is lodged. If the property is not under attachment at the date of the appeal, this rule can have no application, even though a decree be subsequently made in favour of the plaintiff. It is obvious that if the suit is dismissed and no appeal is preferred the attachment, whether an order withdrawing it is made or not, must cease and I cannot see that the filing of an appeal makes any difference.

For the reasons indicated, the judgment of the District Judge is, in my opinion, erroneous and must be set aside. The Rule is accordingly made absolute.

It has been suggested that no question of jurisdiction arises which justifies us in interfering with the District Judge's order under section 115 of the Civil Procedure Code. But clearly, if the property is not under attachment, the District Judge had no jurisdiction to direct it to be sold without being first attached.

The question raised is, therefore, one which falls within the scope of section 115.

The result is that the Rule must be made absolute and the order of the Court below set aside. The petitioners are entitled to their costs.

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BEACHCROFT J. I agree.

O. M.

Appeal dismissed.

Rule absolute.

APPELLATE CIVIL.

Before Richardson and Beachcroft JJ.

NAGENDRA LAL CHOWDHURY

v.

FANI BHUSAN DAS.*

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Jan. 15.

Limitation—Attachment in execution—Claim proceeding—Claim rejected for default and without investigation—Subsequent title suit—Limitation Act (IX of 1908), Sch. I, Art. 11—Civil Procedure Code (Act V of 1908) O.XXI, rr. 58 and 63.

Where a claim is preferred under O.XXI, r. 58 of the Civil Procedure Code and an order is passed either allowing or rejecting, the party against whom the order is made, may, irrespective of whether any investigation took place or not, bring a suit in the language of O.XXI, r. 63 "to establish the right which he claims to the property in dispute," or in the language of Art. 11 of Sch. I of the Limitation Act, 1908, "to establish the right which he claims to the property comprised in the order," and the suit must be brought within the year allowed by Art. 11.

* Appeal from Appellate Decree, No. 2988 of 1914, against the decree of Ramesh Chandra Bose, officiating Subordinate Judge of Chittagong, dated May, 28, 1914, affirming the decree of Kumud Kanta Sen, Munsif of South Raozan, dated June, 30, 1913.