

CIVIL REFERENCE.*Before Newbould and Panton JJ.*

KUMUD BEHARY PAL

v

HARI CHARAN SARDAR.*

1918

Nov. 20.

Attachment before Judgment—Moveables—Power of the Provincial Small Cause Court—Civil Procedure Code (Act V of 1908), ss. 7 (b), 94.

For the purpose of interpreting cl. (b) of section 7 of the Civil Procedure Code, an attachment before judgment is not one of the interlocutory orders there referred to.

The only orders excluded are those specifically mentioned in s. 94 as injunctions or interlocutory orders, that is to say, orders under cl. (c) or cl. (e) of section 94.

A Provincial Small Cause Court has the power to attach moveables before judgment.

S. 7, cl. (b) and s. 94 of the Civil Procedure Code interpreted.

THIS was a reference under rule 1, O. XLVI, of the Code of Civil Procedure, by the Munsif of the 2nd Court at Alipore. The point referred to was whether a Provincial Small Cause Court had power to attach moveables before judgment. The learned Munsif was inclined to think that attachment before judgment was an interlocutory order within the meaning of the Code and the Provincial Small Cause Court had no power to attach any moveable or immoveable property before judgment. Hence the reference to this Court. The letter of reference was as follows:—

“The plaintiff in the Small Cause Court suit noted in the margin seeks to attach before judgment money belonging to the defendant in the hand of

* Civil Reference No. 3 of 1918, by Kshetranath Banerjee, Munsif, 2nd Court, Alipore, dated June 10, 1918.

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a third person. I entertain grave doubts as to whether a Provincial Small Cause Court under the present Civil Procedure Code can attach, before judgment, any property belonging to a defendant. The question is of great importance. I therefore think it fit to refer the point to the Hon'ble Court for an expression of its opinion. Ss. 7, 94, 95 and Orders XXXVIII and L of the Code require our consideration in this connection. S. 7 lays down that ss. 94 and 95 so far as they relate to injunctions and interlocutory orders shall not extend to Small Cause Court suits. S. 94 lays down that a Court in order to prevent the ends of justice from being defeated may, if it is so prescribed, issue warrant to arrest the defendant, call upon the defendant to furnish sufficient security or to produce any property before the Court *or order the attachment of property*, grant temporary injunction, appoint a receiver and make such *other* interlocutory orders as appear to the Court to be just and convenient. S. 95 simply invests the Court with powers to award damages in case of wrongful attachment, arrest or temporary injunction. Order XXXVIII deals in detail with arrest and attachment before judgment. Order XXXIX deals with injunctions and certain interlocutory orders. Under the heading "Interlocutory orders" we find rules that empower Courts to sell articles attached before judgment which are subject to speedy and natural decay. Order L lays down the orders and rules that shall not extend to Small Cause Court suits. Orders XXXVIII and XXXIX are not in the list. Courts derive their authority to attach property before judgment under the last portion of cl. (b), s. 94 of the Code. If an attachment before judgment is an interlocutory order, then Provincial Small Cause Court have no power to do this in virtue of cl. (b), s. 7 of the Code. An attachment before judgment cannot but be an interlocutory order. 'Something which is done between the commencement and the end of a suit or action which decides some point of matter which, however, is not a final decision of the matter in issue, is known as interlocutory order.' An interlocutory order determines questions that arise during the progress of an action. Orders for attachment before judgment are interlocutory orders according to the general acceptance of the expression. The Code does not define what orders are interlocutory orders and what are not. That an attachment before judgment is an interlocutory order within the meaning of the Code will appear from clause (e) of s. 94. Clauses (a) to (d) of the section relate to interlocutory orders and cl. (e) treats them as such by using the expression 'make such other interlocutory orders.' If all the clauses of s. 94 and of s. 95 relate to interlocutory orders then what is meant by the expression *ss. 94 and 95 so far as they relate to injunctions and interlocutory orders*. If the Code precludes Small Cause Courts from attaching property before judgment then how is it that Order XXXVIII does not find a place in Order L? As Orders XXXVIII and XXXIX are not within the

exceptions mentioned in Order L it is now being contended before us by the plaintiffs in Small Cause Court suits that not only has Small Cause Court power to attach moveable property before judgment but it has also the power to attach immoveable property. This interpretation cannot be accepted without ignoring s. 7 of the Code. Orders XXXVIII, XXXIX and L are in the 1st schedule of the Code. The body of the Code governs and is not governed by the schedule. The plaintiff urges before me that by injunction and interlocutory orders in s. 7 are meant only those things that are to be found mentioned in Order XXXIX. His contention is principally based on the head lines of the Order. It is difficult to hold that orders passed in connection with attachment before judgment are interlocutory orders but not the attachment itself. We cannot construe an Act by referring solely to its head lines and marginal notes if they be not consistent with its plain provisions. It is difficult to make out why Order XXXIX is described as temporary injunctions and interlocutory orders if Order XXVIII also relates to interlocutory orders. But as the language used in the head line is the same as used in restrictive clause of s. 7 of the Code, doubts have arisen in my mind as to what is meant by 'so far as they relate to injunctions and interlocutory orders' in the section. I need hardly add that Small Cause Courts had the power under the old Code to attach moveable property before judgment and that the old practice still continues apparently in the belief that there is no difference between the old law and the new law on the point. S. 5 of Act XIV of 1882 extended Chapter XXXIV (the chapter that deals with arrest and attachment before judgment) of the Act to Small Cause Courts with the reservation that such Courts would have no jurisdiction over moveable property (see 2nd schedule). The language of s. 7 of the present Code is not the same as that of s. 5 of the old Code. The former restricted by express mention. The latter extended by express mention. S. 17 of the Provincial Small Cause Courts Act does not help us in any way. The new Code has taken the place of the old and we are bound to follow its provisions. In spite of the head line and in spite of the fact that Orders XXXVIII and XXXIX do not find a place in Order L one may be inclined to think that attachment before judgment is an interlocutory order within the meaning of the Code and that Provincial Small Cause Courts have no power to attachment of any property moveable or immoveable before judgment. But as the point is not free from doubt I refer it to the High Court for its decision."

The Senior Government Pleader (Babu Ram Charan Mitra), for the Government.

No one for the opposite party

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NEWBOULD AND PANTON JJ. This is a reference under rule 1, Order XLVI of the Civil Procedure Code by the Munsif of the 2nd Court at Alipore vested with Small Cause Court powers. The point referred is whether a Provincial Small Cause Court has the power to attach moveables before judgment.

The provision of the Code relating to attachment before judgment is rule 5, Order XXXVIII. Order L of the first schedule of the Code provides that certain portions of that schedule shall not extend to Courts constituted under the Provincial Small Cause Courts Act, 1887, or to Courts exercising the jurisdiction of a Small Cause Court under that Act. It is quite clear that there is nothing in Order L to prevent Small Cause Courts exercising powers of attachment before judgment.

The only other provision in the Code that requires to be considered is section 7 of the body of the Code. Under that section, sections 94 and 95, so far as they relate to injunctions and interlocutory orders, do not extend to Provincial Small Cause Courts or Courts exercising the jurisdiction of a Court of Small Causes.

The referring Munsif seems to have thought that all orders under section 94 including those under clause (b) of that section must be held to be interlocutory orders. In dealing with this reference it is not necessary to consider whether orders for attachment before judgment can under any circumstances be regarded as interlocutory orders; but we are certainly of the opinion that for the purpose of interpreting clause (b) of section 7 of the Code, an attachment before judgment is not one of the interlocutory orders there referred to. If it was intended to exclude from the jurisdiction of Small Cause Courts the powers to make any order of the nature described in section 94, the words "so far as they relate to injunctions and

interlocutory orders" would be superfluous. In our opinion the only orders excluded are those specifically mentioned in section 94 as injunctions or interlocutory orders, that is to say, orders under clause (c) or clause (e) of section 94. We do not think that the new Code of Civil Procedure has made any change in the former law, and we answer the point referred by saying that a Provincial Small Cause Court has the power to attach moveables before judgment.

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APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C. J. and Woodroffe J.

SOVA CHAND BHUTORIA

v.

HURRY BUX DEORA.*

1918
 Nov. 26.

Arbitration—Award, filing of—Time requisite for obtaining copy of a decree—“Submission to the Court” and “Filing in Court”—Exclusion of time between submission and filing—Limitation Act (IX of 1908) Sch. I, Art. 153—Civil Procedure Code (Act V of 1908) Sch. II, s. 10.—Rules and Orders of the High Court, Chapter XXIII, Rule 1.

The arbitrator in a certain suit made his award on the 23rd August, 1917, and on the 3rd September, 1917, the plaintiff through his attorneys applied for a copy of the award. On the 10th October, 1917, the award was received by the Registrar. Owing to the Long Vacation, the Court was closed on that date and remained so till the 17th November, 1917. On the 22nd November, 1917, the defendants filed the award in Court. In pursuance of the abovementioned application, dated the 3rd September, 1917, a copy of the award was supplied to the plaintiff on the 27th November, 1917. On the 6th December, 1917, the plaintiff applied to the Court for an order to set aside the award and the award was subsequently set aside. On appeal:—

Held, that it was not shown that it was the duty of the respondent to file the award and that he could and should have done so between the 17th and 22nd November.

*Appeal from Original Civil, No. 33 of 1918, in Suit No. 186 of 1916.