

ORIGINAL CIVIL.

Before Panckridge J.

RADHA KISSEN

v.

HIRA LAL BANJARA.*

1938

June 8, 13, 20.

Revision—Execution—Prohibitory order on Controller of Patents—Sale of patent rights by Small Cause Court—Jurisdiction—Indian Patents and Designs Act (II of 1911), ss. 63 (3), 65 to 70—Code of Civil Procedure (Act V of 1908), s. 51; O. XXI, r. 46.

In execution of a decree, the Small Cause Court sold the defendant's patent rights in patent No. 14245 after serving on the Controller of Patents an order directing him "to hold the defendant's patent right under patent No. 14245 and to bring the same into this Court to the credit" of the suit.

Held that under the Patents and Designs Act there is nothing to indicate that any of the rights of a patentee are regarded in law or in fact as in the possession of the Controller of Patents. Therefore, the service of a prohibitory order upon the Controller is not attachment within the meaning of s. 51, Civil Procedure Code, and, since the Small Cause Court has no power to sell in execution without previously attaching the property, the sale was made without jurisdiction and must be set aside.

Semle. The rights of a grantee under a grant of Letters Patent are covered by s. 60 of the Civil Procedure Code.

APPLICATION by the defendant, Hira Lal Banjara, under s. 115 of the Code of Civil Procedure.

The facts of the case appear fully from the judgment.

Bose, Standing Counsel, *Clough* and *Saroj K. Dutt* for the applicant. Under the Rules framed by the High Court for regulating the procedure of the Small Cause Court, the latter Court has no jurisdiction to sell any property in execution without an attachment. The service of a prohibitory order on the Controller of Patents does not amount to an attachment under s. 51 of the Code. The Controller is not a person in the possession of the patent rights of a patentee within the meaning of O. XXI, r. 46.

*Application in Suit No. 19803 of 1936 of the Calcutta Small Causes Court.

In England, patent rights are not capable of being attached and sold in execution proceedings. *British Mutoscope and Biograph Company, Limited v. Homer* (1) and *Edwards & Co. v. Picard* (2).

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Arun Sen for the respondents. Under s. 60 of the Civil Procedure Code patent rights are clearly liable to attachment. See ss. 12 and 63 of the Patents and Designs Act. A patent is a chose in action and is therefore attachable. Mulla's Transfer of Property Act, 2nd Ed., p. 688.

The prohibitory order on the Controller of Patents was under O. XXI, r. 46 and that amounted to an attachment. The subsequent sale of the patent right of the defendant was therefore in order.

Cur. adv. vult.

PANCKRIDGE J. This application to the Court to exercise its Revisional Jurisdiction under s. 115 of the Code of Civil Procedure raises a novel question.

The applicant is defendant in a suit in the Small Cause Court, in which the plaintiff has obtained a decree for Rs. 90-14-3 and costs. The applicant is also the patentee entitled to the benefit of patent No. 14245 granted under the Indian Patents and Designs Act, 1911.

On July 14, 1937, on the application of the plaintiff the following notice was served upon the Controller of Patents:—

SIR,

The plaintiff having applied, under O. XXI, r. 52 of the Civil Procedure Code, 1908, for an attachment of certain property now in your hands, *viz.*, defendant's patent right under patent No. 14245, I request that you will hold the said property subject to the further order of this Court, and that, if you have no notice of any claim to, or interest in, the said property other than that of the abovenamed you will bring the same into this Court to the credit of the above suit; or if you have any objection to so doing, that you will inform me of the grounds thereof.

(1) [1901] 1 Ch. 671.

(2) [1909] 2 K. B. 903.

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On September 6, 1937, the plaintiff applied for the sale by auction of the applicant's patent in execution of his decree.

On September 21, 1937, the applicant's patent was sold by public auction to Babu Ram Jaini, who is a party to the present application, for Rs. 405.

On December 18, 1937, the applicant applied to the Small Cause Court for an order setting aside the sale of September 21.

This application was dismissed on May 6, 1938, by the Small Cause Court, the learned Judge holding that the sale was effected in conformity with the provisions of the Code, and also that the application to set it aside was barred by limitation.

I am now asked to set aside the sale and the order of the Small Cause Court dismissing the application made to it.

It is not necessary to decide the broad questions that counsel for the applicant has sought to raise.

He has maintained that the rights of a patentee cannot be sold in execution, and he has referred to *Edwards & Co. v. Picard* (1), where it was held by the Court of Appeal (Fletcher Moulton L. J. dissenting) that an order for the appointment of a receiver by way of execution of the rents, profits, and moneys receivable in respect of a judgment-debtor's interest in certain patents could not be made.

On the other hand, Mr. Sen opposing the application on behalf of the auction purchaser points out that the provisions of s. 60, Civil Procedure Code, which deals with property liable to attachment and sale in execution of a decree, are very wide, and he relies on the words "all other saleable property moveable or "immoveable."

In this connection it must be noticed that ss. 12 and 63 of the Patents and Designs Act specifically

(1) [1909] 2 K. B. 903.

recognize the assignability of patents, and the language of the proviso to the latter section is in these terms:—

Provided that any equities in respect of the patent or designs may be enforced in like manner as in respect of any other moveable property.

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Moreover, the late Sir Dinshaw Mulla, commenting on s. 130 of the Transfer of Property Act, states that under English law a patent although an incorporeal right is a chose in action. Mulla on the Transfer of Property Act, 2nd Ed., p. 688.

It is not necessary for me to decide the general question, but, as a matter of construction, I should certainly be inclined to hold that the rights of a grantee under a grant of Letters Patent were covered by s. 60, Civil Procedure Code.

I am, however, forced reluctantly to the conclusion that the sale with which this application is concerned is a nullity and must be set aside.

Although under s. 51, Civil Procedure Code, the Court has power to order execution of a decree by attachment and sale, or by sale without attachment, of any property subject to such conditions and limitations as may be prescribed, the Calcutta Small Cause Court has only power to order execution by sale preceded by attachment and not by sale without attachment.

Has there been attachment in this case? If there has not, the sale has been without jurisdiction.

The auction purchaser argues that the notice served on the Controller is attachment within the meaning of the Code.

It is clear that what has been done is to attempt to apply O. XXI, r. 46. The rule provides that in the case of moveable property (other than a debt or a share in the capital of a corporation) not in the possession of the judgment-debtor the attachment

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shall be made by a written order prohibiting the person in possession of the same from giving it over to the judgment-debtor.

It is difficult to see how in this case the patent rights, if such rights can properly be said to be in the possession of any one, are not in the possession of the patentee judgment-debtor.

Be that as it may, it is impossible to hold that the Controller of Patents is a "person in possession of the "same" within the meaning of the rule.

The position of the Patent Office and of the Controller form the subject-matter of Part III of the Act, and the powers and duties of the Controller are dealt with in ss. 65 to 70. Nowhere, however, in these sections or elsewhere in the Act is there anything to indicate that any of the rights of a patentee are regarded in law or in fact as in the possession of the Controller.

Indeed it may be noted that under s. 63(3) the registered proprietor of a patent has power absolutely to assign, grant license as to, or otherwise deal with, the patent. The Controller has no power to interfere with an assignment, although under s. 20, unless copies of documents affecting the proprietorship of a patent have been supplied to the Controller in the prescribed manner for filing in the Patent Office, such documents shall not be received as evidence of any transaction affecting a patent.

I am compelled to hold, therefore, that service of the so-called prohibitory order upon the Controller of Patents was not attachment within the meaning of s. 51, Civil Procedure Code, and that since the Small Cause Court has no power to sell in execution without previously attaching the property, the sale of September 21, 1937, was made in excess of jurisdiction and must be set aside.

[His lordship then dealt with the question of limitation, holding that the powers of the High Court under s. 115, Civil Procedure Code, were not

affected by the dismissal of the plaintiff's application to the Small Cause Court to set aside the sale and further that the learned Judge erred in holding that the application was time-barred.]

I confess that I regret this result, because, if, as seems to be the fact, the patent rights have a pecuniary value there is every reason why they should be utilised to satisfy the decree.

With regard to costs the applicant is entitled to his costs against the decree-holder who has not appeared. Against these costs the decree-holder may set-off what is due under the decree. There will be no order as to the costs of the auction purchaser.

Attorney for applicant : *Birendra Kumar Bose.*

Attorney for respondents : *S. M. Chowdhury.*

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