

ORIGINAL CIVIL.

Before Ameer Ali J.

HONGKONG & SHANGHAI BANKING CORPORATION

v.

PARESH LAL RAY.*

1938

May 9;
July 4.

Execution—Attachment of salary—Rateable distribution—Procedure—Code of Civil Procedure (Act V of 1908), O. XXI, r. 48—Original Side Rules, Ch. XVII, rr. 37, 38, 39.

Order XXI, r. 48, cannot override the substantive provision in s. 73 of the Civil Procedure Code and the rule of rateable distribution applies to attachment of salary.

Velchand Chhaganlal v. Musson (1) followed.

An application for payment out of money in Court, no less than one for rateable distribution, must have attached to it three certificates mentioned in Ch. XVII, r. 39 of the Rules of the Original Side. Unless the certificate of the Registrar shows blank no order for payment out *ex parte* can be made and the procedure laid down in the Rules must be strictly followed.

APPLICATION by the plaintiff for payment out of fund in the hands of the Accountant-General.

The plaintiffs, in execution of their decree dated June 4, 1935, had obtained an order for attachment of the salary of the defendant. On September 24, 1935, this order was returned by the defendants' employers on the ground that there was a prior subsisting attachment on the said salary. After the earlier decree had been satisfied, the plaintiffs herein applied again and successfully levied attachment as prayed.

This application was first made in March, 1938, when a certificate was signed by Mr. Collet in his capacity of the Accountant-General. The order for payment out was made on March 8, 1938, and came up again before the Court in circumstances mentioned in the judgment. Thereafter, the Court directed that the three certificates mentioned in r. 38 of

*Original Suit No. 1927 of 1934.

(1) (1912) 14 Bom. L. R. 633.

Ch. XVII should be annexed to the application. Then, it appeared from the Registrar's certificate that there were four other applications for attachments on the same salary.

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On May 9, 1938, the matter was heard again and Ameer Ali J. dictated the following note:—

AMEER ALI J. In this matter I appear to have made the order as I usually do in these payment-out matters subject to any representation by the Registrar. The Registrar has submitted such representation and Mr. Day has been good enough to argue the matter.

The main point involved in his argument is of considerable importance and it amounts to this, that, by reason of the particular nature of the attachment provided for in O. XXI, r. 48, such an execution is not subject to the ordinary rules as to rateable distribution. The result according to him is that the first person to attach under O. XXI, r. 48, is entitled to keep out other creditors until the whole of his claim has been satisfied out of the monthly sums attached and remitted to the Court: that no person during that period is entitled to make an effective application for execution: that it is only at the stage when the person whose attachment alone is effective has been fully repaid that a new effective application for attachment can be made.

To give an example:—*A*, debtor, no attachment: *B* obtains an order under O. XXI, r. 48 for a decree for Rs. 12,000: Salary Rs. 2,000: Until the 12 months have elapsed and 12 instalments of Rs. 1,000 have been collected and paid into Court, *C*, who has during the year applied for attachment, has no right: his application is a nullity: It is not until the end of the year, when *B*'s claim has been repaid in full that *D* can come in with a fresh application for attachment, in which case taking the same data *D* has a clear and exclusive field for another year. During that year *C* cannot come in. *C* in fact has applied during the close season and can do nothing. He must make a fresh application after *D*

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That view is based upon what Mr. Day contends as the implication of sub-r. (2) of O. XXI, r. 48. On this point Mr. Mulla has expressed no view. The commentary in Chitaley is against Mr. Day's contention. I have not considered the cases. On principle it seems to me that such a view would be contrary to ordinary accepted ideas of attachment in execution.

Mr. Day's next point is one not so much of principle but of practice. He contends that on this application no notice need be given to attaching creditor in the position of *C* in the illustration which I have given, the decree-holder who has attached during the close period of *B*'s attachment, not only on the ground of theory discussed but on the ground that in this case the certificate granted by the Registrar should have described these persons as persons whose applications for attachment are no longer subsisting.

P. K. Day for the applicants, further argued as follows:—

If no attachment can be made of salary already attached, application for attachment made by the other creditors is not in accordance with the law. *Munawar Husain v. Jani Bijai Shankar* (1); *Purna Chandra Mandal v. Radha Nath Dass* (2); *Durga Prasad Sahu v. Powdharo Kuer* (3). Hence the other attachments are invalid and there can be no question of rateable distribution.

In the judgment of the Bombay High Court in *Velchand Chhaganlal v. Musson* (4) no reasons were given for the decision and the Calcutta High Court is not bound by such decision.

Cur. adv. vult.

AMEER ALI J. This is an application for payment out by the Hongkong & Shanghai Banking Corporation made in chambers on March 8, 1938. I dealt with the matter in the usual, rather hurried

(1) (1905) I. L. R. 27 All. 619, 621. (3) (1930) I. L. R. 10 Pat. 183, 186.

(2) (1906) I. L. R. 33 Cal. 867, (4) (1912) 14 Bom. L. R. 633.

way, and asked the office to check. The certificate annexed (Annexure B to the petition) states that there is no attachment affecting the sum in the hands of the Registrar. It is signed by Mr. Collet as Registrar. The office quite rightly sent the matter back to me. The certificate (Ex. B) is not the Registrar's certificate. It happens to be signed by Mr. Collet as "Registrar" because, owing to our system of doubling, Mr. Collet looked at with one eye is the "Accountant-General"; looked at with the other he is the "Registrar". This certificate, technically, is the "Accountant-General's" certificate. It happens to be signed by Mr. Collet as "Registrar" for a technical reason, the funds still being apparently in the "Registrar's" account. This matter will become more plain when I deal with the matter of procedure.

When the matter came back to me on May 9th and I had the benefit of Mr. Day's very complete and ingenious argument, the two other certificates were available. I refer to what is really the Registrar's certificate, and the Sheriff's certificate. The Registrar's certificate showed five applications for attachment including the one by the Hongkong & Shanghai Banking Corporation.

The gist of Mr. Day's argument will appear from the note dictated by me at the time, which I annex. Shortly put, his point of principle was that O. XXI, r. 48 makes salary unattachable if it is already under attachment by reason of an order under O. XXI, r. 48. Therefore, other applications pending the attachment are void and of no effect. As a matter of practice he contended that the attachments of persons whose applications appear in the Registrar's certificate must not be deemed to have valid and subsisting attachments, apart from the question of principle, because for the most part their decrees have been transferred to other Courts for execution.

I expressed a view on both points, and I was of opinion that the case decided in *Bombay, Velchand*

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Chhaganlal v. Musson (1), was correct. It was out of respect for Mr. Day's argument, and from a desire to enquire from the office as to what had previously taken place that I reserved orders. I made such enquiry, and Mr. Day was correct in stating to me that the view put forward by him had, at any rate in a number of instances, been accepted by the office.

I discussed the matter of principle and practice with the Master, who agrees with the view which I now express. First, with regard to the question of principle, I have now still less doubt that the view accepted in Bombay is correct, shortly for the following reason: first, that O. XXI, r. 48 cannot override the substantive provision in the earlier portion of the Code, *viz.*, s. 73. Secondly: I draw no inference from O. XXI, r. 48, to the effect that the intention was to make an exception from the rule relating to rateable distribution. Thirdly: I think it quite clear from our rules that rateable distribution is recognised as applying to attachments of salary (*see* r. 41, Ch. 17).

I now come to the question of procedure, equally important, and must make it clear what I consider to be the correct procedure. It is complicated, but so long as the principle of rateable distribution applies it is necessary, and this case and others with which I have had to deal, convince me that it is unsafe to depart from it.

I am not suggesting in this case that the application was not perfectly *bona fide*. I have no doubt that it was, but an application for payment out may be made under Ch. XVII, r. 37 and *ex parte* only where the Registrar's certificate properly so called showed no prior applications for attachment.

From r. 39, it is quite clear that such an application must, no less than an application for rateable distribution, have attached to it the three certificates mentioned in r. 39, namely, the "Accountant-General's" certificate (which was attached to the petition in this case), secondly, the Registrar's

Certificate subsequently attached, and, thirdly, the Sheriff's certificate which in this case is unimportant. Unless the certificate of the Registrar is blank, no application for payment out *ex parte* can be made under r. 37. Where it is not blank, the applicant must apply for rateable distribution under r. 38. In such case notice, unless dispensed with by the Court, must be given to all persons whose names appear in the Registrar's certificate. It is only when this is done that the application for attachment made by those other persons can be challenged. The Registrar's certificate is intended, according to our practice, to show subsisting attachments. If the claim had been satisfied the Registrar's certificate should not show the attachment. On the other hand the fact that there has been a particular decree which has been transferred to another Court does not affect the matter for the purpose of the certificate, and for purpose of rateable distribution it remains a subsisting application for attachment. When the application is heard on notice to the applicants for attachment, these questions can be gone into. The object of returning the application for attachment under O. XXI, r. 48, is so that these matters can be gone into.

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My view, therefore, on both points is as follows: rateable distribution applies to attachments of salary, notwithstanding what has been done by this Court and the contentions that have been put forward on this application. Secondly, the procedure laid down in the Rules must be followed. I agree that it is complicated. So long as the principle of rateable distribution is recognised, the machinery is necessary.

I direct, therefore, that the application is renewed on notice to the persons mentioned in the Registrar's Certificate other than Pulin Krishna Ray.

The application will be treated as an application under r. 38 of Ch. XVII.

Attorneys for applicant: *Sandersons & Morgans.*