

APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Parker.*

SRINIVASA SASTRIAL (DEFENDANT), APPELLANT,

v.

SAMI RAU (PLAINTIFF), RESPONDENT.*

*Declaratory decree—Code of Civil Procedure—Act XIV of 1882, ss. 278 and 283—
Termination of attachment by abandonment.*

The plaintiff had an attachment against certain property. Owing to his not filing a necessary affidavit, the execution petition was struck off. Subsequently he applied for the sale of the property, and the Court directed a fresh attachment to issue. It was held that these facts did not amount to an abandonment of the first attachment by the plaintiff.

SECOND APPEAL against the decree of J. A. Davies, District Judge of Tanjore, in appeal suit No. 454 of 1891, modifying the decree of S. Ramasamy Iyengar, District Munsif of Tiruvadi, in original suit No. 63 of 1888.

The lands in dispute in this case originally belonged to one Krishnasami Moitay, against whom the plaintiff in this suit obtained a decree in 1887 and the lands were attached in execution thereof, but the execution petition was subsequently struck off the file owing to the plaintiff's default in filing a necessary affidavit. In 1889 the plaintiff applied for the sale of the property attached in 1887, and the Court directed a fresh attachment to issue. The defendant then came forward and alleged that he had purchased the property prior to the second attachment and obtained an order in his favour. The plaintiff alleged that the defendant's sale having been subsequent to the first attachment, was not valid against the plaintiff, and that the defendant was bound by the terms of his sale to pay the plaintiff the debt decreed in 1887, and that the said debt was therefore a charge on the said property in the defendant's hands. Hence this suit.

The District Munsif decreed in favour of the plaintiff, declaring the subsistence of the attachment of 1887 of the plaintiff's properties and his rights to realize his money by a sale of those properties.

* Second Appeal No. 541 of 1892.

On appeal against the District Munsif's decree by the defendant, the District Judge delivered the following judgment :—

“The test question in these cases is has there been an abandonment of the first attachment either in fact or constructively. Now in this case there was no actual withdrawal from the first attachment, and there was no order for releasing that attachment, so there was no abandonment in fact. The delay in following up the attachment is satisfactorily explained by the plaintiff's taking of other legal proceedings, so on the score of delay on abandonment cannot be presumed. Nor can such presumption arise from the Munsif's order directing a second attachment which plaintiff accordingly made, for that was the act of the Court and not of the party. I therefore agree with the Munsif for the further voluminous reasons given by him that plaintiff's attachment of 1887 never ceased to exist and consequently defendant's sale was subject to it under section 376 of the Code of Civil Procedure.

“It is further urged in appeal that plaintiff being able upon the terms of that sale to sue defendant for the recovery of his money had no right to seek for a mere declaration that his attachment was in force, but should also have sued for the recovery of the money due to him under the sale-deed to defendant. But this is a vain contention, because plaintiff was not a party to the contract of sale, and could not, therefore, have enforced its provisions.

“The appeal, therefore, fails and is dismissed with costs.”

The defendants preferred this appeal, alleging that the plaintiff's suit was not maintainable under either section 283 of the Civil Procedure Code, nor under section 42 of the Specific Relief Act; that an appeal should have been preferred against the order of the District Munsif directing a second attachment; and that the first attachment did not continue to subsist at the time of the defendant's sale-deed.

Sivaswami Ayyar for appellants.

Pattabhirama Ayyar for respondents.

JUDGMENT.—We have no doubt that a suit for a declaratory decree is maintainable. The plaintiff's petition was put in under section 278 of the Code of Civil Procedure and a suit under section 283 is his only possible remedy.

SRINIVASA
SASTRIAL
v.
SAMI RAU.

The next point urged is that an appeal should have been preferred against the order of the District Munsif directing a second attachment. But that order was a mere direction of the Court without notice to either party and in no case could defendant have been made a party to the appeal if there had been one.

The decision quoted in *Puddomonee Dossee v. Roy Muthooranath Chowdhry* (1) lays down no general rule, but the effect of it is that it is a matter of inference in the particular case whether the striking off of an execution petition terminates an attachment. We agree with the District Judge that in this case there was no intention to abandon or to terminate the attachment. This may be inferred not only from plaintiff's subsequent conduct, but from the very terms of the sale-deed under which the defendant purchased, provision being therein made that defendant should pay off the balance of the decree debt in the suit in which the attachment had been made. No mention in terms is made of the attachment, but it is a legitimate inference that it was then regarded as subsisting.

We dismiss the second appeal with costs.

APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Davies.*

RAMAPPA UDAYAN (DEPENDANT No. 1), APPELLANT,

v.

ARUMUGATH UDAYAN (PLAINTIFF), RESPONDENT. *

Hindu law—Succession of a daughter's daughter to her grandfather's estate.

On the principle laid down in *Nallamma v. Ponnal* (2), a daughter's daughter is, in the absence of preferential male heirs, entitled to succeed to her grandfather as a *bhandu*.

SECOND APPEAL against the decree of V. Srinivasa Charlu, Subordinate Judge of Kumbakonam, in appeal suit No. 7 of 1892,

* Second Appeal No. 23 of 1893.

(1) 12 B.L.R., 411.

(2) I.L.R., 14 Mad., 149.