APPELLATE CIVIL—FULL BENCH.

Before Sir Abdur Rahim, Kt., Officiating Chief Justice, Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

1919, April 29 and 30, August 26.

SINNAPPAN ALIAS METHARMAMANA ROWTHER (PLAINTIFF), APPELLANT,

v.

ARUNACHALAM PILLAI AND TWO OTHERS (DEFENDANTS' LEGAL REPRESENTATIVES), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 64, and O. XXI, r. 54—Attachment of immoveable property—Order for attachment made—Alienation by judgment-debtor, subsequent to order but before proclamation of attachment, validity of—Prohibition against alienation, effective from what date.

An attachment operates as a valid prohibition against alienation of the attached property only from the date on which the necessary proclamation is made and copy of the order affixed as contemplated in Order XXI, rule 54, Civil Procedure Code

Ramanayakudu v. *Boya Pedda Basappa*, (1919) I.L.R., 42 Mad., 565, approved; *Venkatasubbiah* v. *Venkata Seshiah*, (1919) I.L.R., 42 Mad., 1, distinguished; *Venkatachelapati Rao* v. *Kameswaramma*, (1918) I.L.R., 41 Mad., 151 (F.B.), and *Kanai Lal* v. *Ahed Bux*, (1917) 39 I.C., 562, referred to.

SECOND APPEAL against the decree of K. V. KARUNAKARA MENON, the Temporary Subordinate Judge of Madura, in Appeal Suit No. 34 of 1917, preferred against the decree of R. RANGASWAMI AYYANGAR, the Additional District Munsif of Dindigul, in Original Suit No. 67 of 1915.

The plaintiff instituted this suit to recover the suit lands as a purchaser deriving title from an auction-purchaser who had bought the same on the 11th December 1909 in a court-auction held in execution of the decree in Original Suit No. 219 of 1903 on the file of the District Munsif's Court of Dindigul. The Court ordered the attachment of the suit lands by an order, dated 12th July 1909, and the warrant was issued on the 16th July 1909, but the actual attachment, by means of the proclamation and affixture of notice of the attachment, was made only on the 22nd July 1909. In the meantime, the judgment debtor sold

* Second Appeal No. 1098 of 1918.

the lands to the defendant by a sale-deed executed on the 19th July 1909 which was registered on the 14th August 1909. The plaintiff contended inter alia in the lower Courts that the sale-deed to the defendant was really executed subsequent to the date of the actual attachment and was antedated, and that it was therefore inoperative against him under section 64 of the Civil Procedure Code. Both the lower Courts found against this contention and dismissed the suit. The plaintiff preferred this Second Appeal and contended inter alia that the sale to the defendant was void and inoperative as against the auction-purchaser under the provisions of section 64 of the Civil Procedure Code, as the attachment was effective from the date of the order for attachment and not merely from the date of the actual attachment, and that in any event the subsequent attachment would take effect retrospectively from the date of the order.

This Second Appeal came on for hearing in the first instance before OLDFIELD and SADASIVA AYYAR, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

OLDFIELD, J.—The question raised is in general terms whether an attachment operates as a valid prohibition against alienation of the attached property from the date on which it is ordered or from that on which the necessary proclamation is made and copy of the order affixed. OLDFIELD, J.

I should be content to treat the matter as concluded by the decision of PHILLIPS and KRISHNAN, JJ, in *Yuna Ramanayakadu* v. *Boy Pedda Basappa*(1). There is, however, it seems to me great difficulty in reconciling that decision with some expressions in the judgments of the former learned Judge and of KUMARASWAMI SASTRI, J., in an earlier case which is included in the authorized reports, *Venkatasubbiah* v. *Venkata Seshaiya*(2). In that case PHILLIPS, J., said

"The attachment, when effected, is an attachment made, in pursuance of an order to attach before judgment and must be treated as an attachment before judgment and not as a nullity merely because as a matter of fact the attachment is not completed until after judgment. To adopt the opposite view would be to allow a formal judicial order to be upset by the negligence or default of a subordinate ministerial officer"

(1) (1919) I.L.R., 42 Mad., 565. (2) (1919) I.L.R., 42 Mad., 1.

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"Attachment of the property in the manner prescribed by Order XXI, rule 54, is a purely ministerial act. Any delay of the officers of Court in effecting the attachment should not prejudice the decree-holder and the validity of the order of attachment under rule 5, Order XXXVIII, should not depend on the date when it is actually effected."

These observations were not, so far as appears, brought to the notice of the learned Judges in *Yuna Ramanayakadu* v. *Boya Pedda Basappa*(1). There may, it must be respectfully suggested, be some difficulty in following their connexion with the context in which they occur, and in particular with the reference in it to completion of an attachment by the proclamation, etc. But in view of Order XXXVIII, rule 7, I do not think that their application can be restricted to cases, such as that actually then before the Court, of attachment before judgment. In these circumstances there is a conflict which in my opinion must be resolved by a Full Bench and I therefore refer the question stated at the beginning of this order.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—It must be admitted that there are observations in the judgments of both the learned Judges who took part in the decision in *Venkatasubbiah* v. *Venkata Seshaiya* (2), which lend support to the contention of the appellant's learned vakil, Mr. Jayarama Ayyar, that an attachment, which prevents a valid alienation after it is made, is effected or made as soon as the order directing the attachment is passed by the Court and even before the order is proclaimed in the manner directed by clause (2) of Order XXI, rule 54. But the real basis of that decision seems to me to have been (as stated in the judgment of PHILLIPS, J.) that it is not necessary at all that there should be an attachment fully effected before judgment to attract the provisions of Order XXXVIII, rule 11 (which dispenses with re-attachment after decree), and as a consequence the provisions of section 64; but it is only necessary that the property should have become attached and "under attachment" (whether before or after judgment) "by virtue of the provisions of this order" (that is, of Order XXXVIII).

There is also the observation of KUMARASWAMI SASTRI, J., in the course of his judgment that

(1) (1919) I.L.R., 42 Mad., 565. (2) (1919) I.L.R., 42 Mad., 1.

"under section 64, the attachment invalidates an alienation only when the alienation is after the actual compliance with the provision of rule 54,"

that is, I take it, after proclamation is also made under clause 2 of rule 54. This opinion of KUMARASWAMI SASTRI, J., is supported by the decision in *Yuna Ramanayakadu* v. *Boy Pedda Basappa*(1), to which PHILLIPS, J., was a party, though the decision in *Venkatasubbiah* v. *Venkata Seshaiya*(2) is not referred to in *Yuna Ramanayakadu* v. *Boya Pedda Basappa* (1). This latter case is directly against the contention of the appellant.

As regards the omission from section 64 of the words "by actual seizure or by written order duly intimated and made known in manner *aforesaid*" (that is, in the manner mentioned in old section 274) found in the old section 276 (which corresponded to the present section 64) it might first be remarked that old section 276 followed in order the old section 274, but section 64 in the body of the new Code precedes all orders including Order XXI, rule 54. The legislature could not therefore reproduce the words "in manner *aforesaid*" but should have substituted the words "in manner provided by Order XXI, rule 54 infra," if it wanted to reproduce as many of the words as is possible to be found in the language of the old Act. But the legislature knew (what Mr. Jayarama Ayyar conceded) that all the decisions under the old Code, section 276, had held that an alienation is not invalidated merely by an order for attachment having been passed before its date, but such order should have been also proclaimed in the manner provided by Order XXI, rule 54, clause (2). (I might add that the language of Order XXI, rule 54, can be modified by the High Court so that even further conditions might be imposed to completely 'make' an attachment.) It seems, therefore, to have been thought by the legislature unnecessary to retain the omitted words, though it might be considered (if I may say so with respect) injudicious on the part of the legislature to have so omitted them. As stated in Maxwell

"Language is rarely so free from ambiguity as to be incapable of being used in more than one sense."

(1) (1919) I.L.R., 42 Mad., 565. (2) (1919) I.L.R., 42 Mad., 1.

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"There is enough in the vagueness and elasticity inherent in language to account for the difficulty so frequently found in ascertaining the meaning of an enactment."

But I think that the intention of the legislature not to interfere with the settled law which made an alienation invalid only if notice of attachment had been given to the judgment-debtor and the public by a proclamation as provided for in Order XXI, rule 54, clause (2), seems to me to be reasonably clear notwithstanding the omission of certain words in old section 276 when re-enacting it as section 64.

I am prepared therefore to follow *Yuna Ramanayakadu* v. *Boya Pedda Basappa*(1), but as my learned brother considers that it is advisable to have the question referred to a Full Bench I agree.

ON THIS REFERENCE

K. S. Jayarama Ayyar for appellant.—The making of the order for attachment is sufficient. Order XXI, rule 54, relates only to the mode of attachment. Section 276 of the Code of 1882, which corresponded to section 64 of the New Code of 1908, contained express words that the attachment should not only be ordered, but also duly published, etc. These words have been omitted in section 64 of the New Code of 1908. Order XXI, rule 43, shows that, in the case of moveables, the attachment is by actual seizure subsequent to the order to seize the goods, while in the case of lands only an order is necessary. Under rule 46 of Order XXI attachment is by prohibitory order only. Section 64 is applicable to both moveables and immoveables. In *Venkatasubbiah* v. *Venkatasesha Ayyar*(2) it was held that the actual attachment is only a ministerial act and not a judicial act under Order XXXVIII, rules 7 and 11, of the Code.

Secondly, even if proclamation of attachment is necessary before completion of the attachment, for purposes of protection under section 64 of the Code, if the attachment is as a fact subsequently made, it takes retrospective effect from the date of the order directing the attachment. The delay of the Court or its ministerial officer cannot prejudice the parties who obtained the order for prohibition. Reference was made to *Murgatroy* v.

(1) (1919) I.L.R., 42 Mad., 565. (2) (1919) I.L.R., 42 Mad., 1.

Wright(1) and *Sivakolundu Pillai* v. *Ganapathi Ayyar*(2).

K. S. Ganapati Ayyar for respondent.—The question under reference is covered by authority of two cases under the New Code, namely, *Kanai Lal* v. *Ahed Bux*(3) and *Simrik Lal Bhakat* v. *Radharaman*(4). The above cases show that the attachment cannot have retrospective effect from the date of the order directing attachment, and that the omission of the words found in the Old Code from section 64 of the New Code was on the ground that such words were surplusage.

OPINION.

ABDUR RAHIM, OFFG. C.J.—The question referred to the Full Bench is

"whether an attachment operates as a valid prohibition against alienation of the attached property from the date on which it is ordered or from that on which the necessary proclamation is made and copy of the order affixed."

This depends upon the proper construction of section 64 and Order XXI, rule 54, of the Code of Civil Procedure. Section 64 lays down that

"where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment."

Rule 54 lays down how an attachment is made. It is in these words:

"(1) Where the property is immoveable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way and all persons from taking any benefit from such transfer or charge.

"(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate."

(1) (1907) 23 K.B., 333. (2) (1916) 3 L.W., 336.
(3) (1917) 39 I.C., 562. (4) (1917) 39 I.C., 857.

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It is contended before us by Mr. Jayaram Ayyar that the attachment is made when the order prohibiting the judgment-debtor from transferring the property is passed and that from that date the alienation of the property is prohibited. His argument is that, although the order has to be proclaimed as required by the second paragraph of the rule, the attachment must be taken to have been made when the Court passed the order of prohibition. He is unable to cite any authority in support of his contention, but he says that the language of section 64 and rule 54 supports it. Section 64 does not say "where an order for attachment has been made," but "where an attachment has been made." No doubt rule 54 says that an attachment shall be made by an order, but that does not necessarily mean that the order completes the attachment. In fact Mr. Jayaram Ayyar seemed in one part of his argument to concede that the attachment is not completed until the order is proclaimed and a copy of the order affixed in the way described in paragraph 2 of rule 54. That seems to be obvious. The object of section 64 is to prohibit alienation after attachment, and, if the mere passing of an order in Court would have that effect, one can easily imagine that the judgment-debtor would be in a position to make alienations to innocent purchasers to their prejudice. The essence of an order for attachment is to prohibit the judgment-debtor from transferring the property and until such a prohibition is proclaimed and made known in the way provided by the rule it cannot be said to have come into operation.

Our attention has been drawn to a somewhat different wording of rule 43 and rule 46 of Order XXI. The first rule provides that in case of moveable property the attachment shall be made by actual seizure, and it does not contain reference to any order. Rule 46 provides that the attachment shall be made by a written order prohibiting the debtor from paying the debt to his creditor. But so far as rule 43 is concerned there can be no doubt that there must be an order preceding the actual seizure; and when the debtor receives notice under rule 46, that is when the order is served on the debtor, there can be no question of his paying the debt to his creditor without notice of any prohibitory order. In a recent Full Bench ruling of this Court, *Venkatachalapati Rao* v. *Kameswaramma* (1), it was laid

(1) (1918) I.L.R., 41 Mad., 151 (F.B.).

down that where, subsequent to an interim order for stay of execution made by an Appellate Court without notice to the decree-holder but before its communication to the Court of First Instance an order of attachment is made by the latter Court, the order of attachment is not void and ineffectual as having been made without jurisdiction, but is legally valid. The reason given is that the order staying execution is in the nature of a prohibitory order to the lower Court and until it is communicated the steps taken by the lower Court must be treated as legally valid. It cannot be denied that so far as prohibitory orders, properly so called, are concerned they do not come into operation until notice of the order is given to the prohibited person. Applying the same principle to the case now under consideration it would not be right to hold that the mere passing of the order by a Court without anything being done to effectuate the attachment would operate as an attachment of the property.

The main argument of Mr. Jayaram Ayyar is based on the omission from section 64, Civil Procedure Code, of the words "by actual seizure" or "by written order duly intimated and made known in the manner aforesaid" after the words "where an attachment has been made." The reason for the omission seems to be obvious. The mode of attachment is laid down in the Code, that it is to be effected by actual seizure or by written order duly intimated and made known in the manner referred to, and the legislature apparently thought that it was superfluous to repeat those words. This is what was pointed out by WOODROFFE and MOOKERJEE, JJ., in *Simrik Lal Bhakat* v. *Radharaman* (1).

It is also argued by Mr. Jayaram Ayyar that although an attachment is not completed until the proclamation is made, still once the proclamation is made the attachment takes effect from the date of the order of the Court. It is difficult to appreciate the force of this argument. The attachment can be said to be made only on the date on which it is completed and becomes operative.

There is only one ruling of this Court in point and that is the ruling in *Ramanayakudu* v. *Boya Pedda Basappa* (2), to which PHILLIPS and KRISHNAN, JJ., were parties. That is directly

(1) (1917) 39 I.C., 857. (2) (1919) I.L.R., 42 Mad., 565

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in support of the view just indicated. There is another decision by PHILLIPS and KUMARASWAMI SASTRI, JJ., in *Venkatasubbiah* v. *Venkata Seshiah*(1). That was a case of attachment before judgment and the question for consideration was whether, where an order for attachment was made before judgment and the attachment was not actually made until after the decree, that was a valid attachment. They hold that it was a valid attachment and in so holding certain general expressions were used in the course of the judgment which have been seized upon by Mr. Jayaram Ayyar in support of his argument. The general observations ought to be read in connexion with the point which the learned Judges had before them and if so read they cannot be said in any way to countenance the construction contended for on behalf of the appellant.

There is only one other case that has been brought to our notice and that is a Calcutta decision in *Kanai Lal* v. *Ahed Bux*(2). That also is in support of the view which has been indicated. The answer will therefore be that an attachment operates as a valid prohibition against alienation of the attached property only from the date on which the necessary proclamation is made and copy of the order affixed as contemplated in Order XXI, rule 54.

OLDFIELD, J.

OLDFIELD, J.—I agree.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—I entirely agree. I think the principle enunciated in *Venkatachalapati Rao* v. *Kameswaramma*(3) is applicable to this case.

As regards the contention that the omission of the words commented upon by the learned Chief Justice makes for the position that the order was intended to be efficacious from the moment of its promulgation and not from its publication, I agree with the view taken by the Calcutta High Court that the legislature must have thought that these words were mere surplusage. If the legislature had intended to introduce such a fundamental change as is suggested by Mr Jayaram Ayyar, it could have very easily stated in section 64 "where an order for an attachment has been made, any private transfer," etc. That is not what the legislature has said and it would not be in consonance with any

(1) (1919) I.L.R., 42 Mad., 1. (2) (1917) 39 I.C., 562.
(3) (1918) I.L.R., 41 Mad., 151 (F.B.).

canon of construction to impute to the legislature such a violent change in the law because of the omission of certain unnecessary words. In my view the decision in *Ramanayakudu* v. *Boya Pedda Basappa*(1) is correct. As regards *Venkatasubbiah* v. *Venkata Seshaiya*(2), as I understand the learned Judges, the question before them was whether an order for attachment which was made before the decree was passed had spent itself out as it had not been effectuated by doing the acts enjoined before the passing of the decree. The learned Judges in construing Order XXXVIII, rule 11, were of opinion that although nothing might have been done between the passing of the order and the passing of the decree the order still remained in force and could be effectuated by publication and proclamation after the date of the decree. That is not the point we are concerned with. Apart from that point, the learned Judges have expressed themselves in no uncertain terms on the question we have to decide; they say that until the order has been proclaimed there can be no attachment, and to that extent are therefore in agreement with the view taken in *Ramanayakudu* v. *Boya Pedda Basappa*(1).

The second argument which Mr. Jayaram Ayyar advanced before us is that, although the order might have been proclaimed only at a later date, it dates back to the date of its being made. The answer to that is this: section 64 attempts at preventing a party from exercising his undoubted right of alienation. Therefore, unless we find in section 64 any provision which says that the order of publication was to date back to the date of its promulgation, the Courts are not justified in saying that this should be read into the language of the section. The right was intended to be affected only from the date which is actually mentioned in the section and not from an anterior date. This is the view taken by the Calcutta High Court in *Kanai Lal* v. *Ahed Bux* (3), and in my opinion that view is right.

For both these reasons the answer must be the one suggested by the learned Chief Justice.

K.R.

(1) (1919) I.L.R., 42 Mad., 565. (2) (1919) I.L.R., 42 Mad., 1.
(3) (1917) 39 I.C., 562.