THE

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MADRAS SERIES.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Kumaraswami Sastri.

VENKATASUBBIAH (PLAINTIFF), APPELLANT,

v.

VENKATA SESHAIYA AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

1918, April 25 and July 10.

Civil Procedure Code (Act V of 1908), Order XXXVIII—Order to attach before judgment—Attachment effected after decree—Alienation after attachment, validity of—Order XXI, rule 57, applicability of to attachment before judgment.

An attachment ordered before judgment invalidates an alienation made after the property is actually attached in pursuance of the order even though the actual attachment was made after the passing of the decree.

Order XXI, rule 57, Civil Procedure Code, has no application to attachments *before* judgment. Hence an attachment before judgment does not cease to have effect because of the dismissal of subsequent application for execution for default of prosecution.

Bavuddin Sahib v. *Arunachala Mudali* (1914) 26 M.L.J., 215 and *Kosuri Suraparaju* v. *Mandapaka Narasimham* (1914) 26 I.C., 81, followed.

A private purchaser from the judgment-debtor pending an attachment has no right of suit for damages on the ground that the decree was satisfied and became unexecutable until he is damnified by any execution of the decree.

SECOND APPEAL against the decree of J. W. HUGHES, District Judge of Cuddapah, in Appeal No. 33 of 1915, preferred against the decree of T. M. VENKATARAGHAVA ACHARIYAR, District Munsif of Cuddapah, in Original Suit No. 208 of 1913.

* Second Appeal No. 1549 of 1917.

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The facts are stated in the first paragraph of the judgment of KUMARASWAMI SASTRI, J.

N. R. K. Tatachariyar for appellant.

K. P. Ramakrishna Ayyar and *B. Somayya* for first respondent.

B. Ramaswamayya for second respondent.

PHILLIPS, J. PHILLIPS, J.—In this case the first defendant attached the plaint property before judgment in connexion with a suit filed against the third defendant, viz., Original Suit No. 137 of 1910. The plaintiff subsequently purchased the property. The question is whether at the time of the plaintiff's purchase the property was subject to the attachment by the first defendant. Two points are raised now: (1) that the original attachment was invalid as having been completed after the decree in the suit was passed; and (2) that even if the attachment was valid it became an attachment in execution when the decree was sought to be executed and ceased to exist under the provisions of Order XXI, rule 57, Civil Procedure Code. So far as the second contention is concerned, the matter is practically concluded by authority. Vide *Bavuddin Sahib* v. *Arunachala Mudali*(1), *Ganesh Chandra Adak* v. *Banwari Lal Roy*(2) and *Kosuri Suraparaju* v. *Mandapaka Narasimham*(3). No doubt in *Sewdut Roy* v. *Sree Canto Maity*(4), there is an observation by WOODROFFE, J., that the attachment before judgment on application to execute the decree becomes attachment in execution. Except for that one observation, I can find no other authority in support of the proposition that the nature of the attachment is altered by the filing of an execution application. I am not at all inclined to adopt this view in opposition to the authority of the cases above cited.

In support of the first proposition, reliance is placed on the language of Order XXXVIII, rule 11 of the Civil Procedure Code, which is as follows:—

> "Where property is under attachment by virtue of the provision of this order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property."

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(1) (1914) 26 M.L.J., 215. (2) (1912) 14 I.C., 345.
(3) (1914) 26 I.C., 81. (4) (1906) I.L.R., 33 Calc., 639.

No doubt under this rule it would appear at first sight that the attachment must have been completed before the decree was passed in order to give a party the benefit of the rule, that is to say, the benefit of not being obliged to apply for re-attachment of the property, when he wishes to execute his decree. In the present case it is not necessary to consider whether re-attachment was necessary, and we need only consider whether the property was validly attached under Order XXXVIII. Attachment was applied for and an order of attachment was passed before judgment was actually pronounced. But the attachment was not effected until a few days after the date of the decree. This being so, can it be said that there was any attachment before judgment? No doubt the order was passed under rule 6 (1) before the decree, and if the order had been carried out at once, there could have been no doubt in the matter. Can it be said that the fact that there was delay in carrying out the order of the Court has deprived the Court of its powers to make such order effectual? The scope of Order XXXVIII is unquestionably limited to attachment before judgment, and all its provisions are set forth with a view to securing the plaintiff in the suit up to the time that he obtains a decree. It would be only by applying this limited scope of the order to the present case that we would be justified in ruling that the attachment actually effected after the decree was ineffectual and void. It has been held in *Sivakolundu Pillai* v. *Ganapathi Ayyar*(1), that when an application for renewing attachment under section 46, Civil Procedure Code, has been put in before the expiry of the two months prescribed in the proviso to that section and an order of the Court has not been passed until after the two months expired, the date of the application should be deemed to be the date of the order extending time. On the other hand, the appellant's vakil relies on *Venkatachalapati Rao* v. *Kameswaramma*(2), deciding that the written order of the Appellate Court staying execution does not take effect from its date but only from the date of its communication to the executing Court. Neither of these cases is really directly in point, and the question has to be decided on general principles. It seems to me that when a Court makes an order under Order XXXVIII,

(1) (1916) 3 L.W., 336. (2) (1918) I.L.R., 41 Mad., 151 (F.B.).

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rule 6 of the Civil Procedure Code that order cannot be deprived of all force by the mere failure of the executive officers of the Court to carry it out before the decree is passed. 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. The language of Order XXXVIII, rule 11, is also in favour of my view, for it does not refer to 'an attachment made before judgment' but to an attachment 'by virtue of the provisions of this order', and an attachment made in pursuance of an order under rule 6 could be such an attachment in spite of its being completed after decree. I find therefore that the attachment in the present case was a valid attachment. The claim for damages is certainly premature.

The Second Appeal is accordingly dismissed with costs.

KUMARASWAMI SASTRI, J.

KUMARASWAMI SASTRI, J.—The plaintiff is the appellant. The first defendant instituted a suit (Original Suit No. 137 of 1910) against the third defendant and on the same date applied for attachment before judgment. Notice was directed to the defendant and interim attachment was ordered under Order XXXVIII, rule 5 of the Civil Procedure Code, on the 17th February 1910. The attachment was actually effected on the property on the 26th February 1910. Meantime a decree was passed in the suit on the 21st February 1910. After decree the decree-holder applied for execution on the 3rd January 1912 and the 10th July 1912, but both the applications were dismissed for default of prosecution. The plaintiff herein purchased the property on the 27th April 1911 and sued for a declaration that the decree in Original Suit No. 137 of 1910 was satisfied and was unexecutable and, in the alternative, for damages. The lower Courts dismissed the plaintiff's suit on the grounds *inter alia* that the purchase of the plaintiff being subsequent to the attachment was invalid against the decree-holder and that the suit for damages was premature.

As regards the first point, it is contended by the appellant that the attachment having been actually effected after passing

of the decree, it is invalid and that, even if valid, the dismissal of the execution application for default put an end to the attachment under Order XXI, rule 57 of the Code of Civil Procedure. I am unable to agree with either of the contentions. There is nothing in Order XXXVIII, rules 5 to 12 (which deal with attachments before judgment), requiring that the actual attachment in pursuance of the order directing conditional attachment should be made before passing of the decree. Rule 5 empowers the Court to direct conditional attachment of the property specified in the application when at any stage of the suit it is satisfied that the defendant is about to dispose of the whole or any part of his property or is about to remove it from the local limits of the Court's jurisdiction. An order duly passed under rule 5 cannot be *ipso facto* vacated by reason of the decree supervening before actual attachment is effected in manner specified by Order XXI, rule 54, unless there is something in rules 5 to 12 to that effect. It is contended that rule 11 of Order XXXVIII refers to an attachment and subsequent decree and that by implication it negatives the validity of an attachment made subsequent to decree in pursuance of a previous order under rule 5. All that rule 11 states is that it shall not be necessary to re-attach if before decree has been passed property has been attached in pursuance of an order under rule 5. The section is only an enabling one and relieves the decree-holder from going over the same process again after decree if he has attached the property while the suit is pending. It is unnecessary to consider whether, if the attachment ordered before was made after decree, the section would apply so as to dispense with attachment after the filing of the execution application. The invalidity of the attachment order under rule 5 effected after decree is one thing and the necessity for re-attachment owing to the terms of rule 11 not having been complied with is another. The case is one of first impression and I think there is neither reason nor authority for holding that the mischief, to prevent which rule 5 was enacted, is none the less because of the passing of a decree subsequent to the order. It is argued that the party could re-attach, but a re-attachment would take some time (especially if the property is situate at some distance from the Court) and should the order under rule 5 cease to have any effect immediately on the passing

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of the decree, there is nothing to prevent alienation between the date of the decree and the date when the attachment is actually effected in manner specified by Order XXI, rule 54, as under section 64 the attachment invalidates an alienation only when the alienation is after the actual compliance with the provision of rule 54. 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. I am of opinion that an attachment ordered before judgment invalidates an alienation made after the property is actually attached in pursuance of the order even though the actual attachment was made after the passing of the decree.

It is argued that the dismissal of the execution application puts an end to the attachment before judgment and reliance is placed on an observation of WOODROFFE, J., in *Sewdut Roy* v. *Sree Canto Maity*(1) to the effect that on an application for execution being filed

> "the attachment before judgment enures and becomes upon and by virtue of the application an attachment in execution."

The question whether rule 57 of Order XXI which expressly refers to cases where property is attached in execution of a decree, can be extended to cases of attachment before judgment merely by reason of the provision of rule 11 of Order XXXVIII dispensing with the necessity for re-attachment was considered by SADASIVA AYYAR and SPENCER, JJ., in *Bavuddin Sahib* v. *Arunachala Mudali*(2) and I agree with them in holding that rule 57 of Order XXI has no application to attachments effected under rule 5 of Order XXXVIII. A similar view was taken in *Kosuri Suraparaju* v. *Mandapaka Narasimham*(3).

As regards the claim to damages, it is premature as the decree has not been executed and plaintiff did not at the date of the suit suffer any damages. The decree may never be executed by sale of the property purchased by plaintiff and there

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(1) (1906) I.L.R., 33 Calc., 639 at p. 643. (2) (1914) 26 M.L.J., 215.
(3) (1914) 26 I.C. 81.

is no reason why he should get the consideration paid by him, by way of damages and also keep the property. It is open to him to pay the amount due on the decree in respect of which the property is attached and recover it by proper proceedings but his case is that the decree has been satisfied.

The second appeal fails and is dismissed with costs.

N.R.

APPELLATE CRIMINAL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

THE CORPORATION OF MADRAS (COMPLAINANT), APPELLANTS,

1918. July 18.

v.

S. VARADACHARIAR ... ... ACCUSED.*

Madras City Municipal Act III of 1904, secs. 262 and 420—Reconstruction of pandal, whether within the section.

The reconstruction of an old pandal with inflammable materials without the written permission of the President of the Corporation is prohibited by section 262 and is an offence punishable under section 420 of the Madras City Municipal Act (III of 1904).

Section 262 of the Madras City Municipal Act (III of 1904) was intended to reproduce section 264 of the Madras City Municipal Act (I of 1884).

APPEAL against the acquittal of E. H. M. BOWER, the Fourth Presidency Magistrate, Egmore, Madras, in Calendar Case No. 17776 of 1917, under section 417 of the Code of Criminal Procedure (Act V of 1898).

The accused was the owner and occupier of a house, within the municipal limits of Madras, to which was attached a pandal constructed of inflammable materials, originally erected thirty years ago and renewed from time to time. On the 19th of July 1917 he pulled down the pandal, leaving the teak posts planted in the masonry structure of the house standing, and on the 21st of July he rebuilt the pandal partly with the old materials and partly with new of the same kind, without obtaining a licence from the President of the municipality.

* Criminal Appeal No. 285 of 1918.