

1912
May, 7.

APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

AZIZ BAKHSH (OBJECTOR) V. KANIZ FATIMA BIBI AND ANOTHER
(DECREE-HOLDERS).*

Civil Procedure Code (1908), order XXI, rule 57—Execution of decree—Attachment—Application for execution dismissed but subsequently restored on review.

By a mistake of the Court an application for execution against property which was under attachment was dismissed, but the decree-holder obtained a review of that order and the executing court was directed to proceed. There was no order removing the attachment. *Held* on application by the decree-holder to sell the attached property that the attachment still subsisted and was valid as against a sale made by the judgement-debtor previous to the review.

In this case the assignee of a simple money decree applied for attachment of two classes of property, (1) property burdened with a mortgage in favour of the assignor, and (2) property not so mortgaged. The first court disallowed the judgement-debtor's objection, but upon appeal it was allowed by the High Court and the application was dismissed *in toto*. The decree-holder, however, made an application for review, and a modified decree was passed dismissing the application for execution in respect of the mortgaged property alone. During the pendency of the application for review, the judgement-debtor had transferred the property to a third person, and the lower court after receipt of the first order had sent the record to the record room. After review the decree-holder applied to the executing court to go on with the execution as to the non-mortgaged property. The judgement-debtor objected; but his objections were disallowed. The judgement-debtor thereupon appealed to the High Court.

Mr. *Nihal Chand*, for the appellant.

Mr. *B. E. O'Connor* and *Maulvi Ghulam Mujtaba*, for the respondents.

KARAMAT HUSAIN and TUDBALL, JJ.—This is an appeal by a judgement-debtor from an order passed in execution proceedings.

The person seeking to execute the decree is the assignee of a simple money decree which was transferred to the court of the Subordinate Judge of Meerut.

* First Appeal No. 54 of 1912 from a decree of *Soti Raghubans Lal*, Subordinate Judge of Meerut, dated the 25th of November, 1911.

The assignee of the decree attached two lots of property, (1) property which was burdened with a mortgage in favour of her assignor; (2) property which was not so mortgaged. Both sets of property were attached. The judgement-debtor objected that the mortgaged property could not be sold in execution without a suit being brought on the mortgage.

The first court disallowed the objection. An appeal was preferred by the judgement-debtor to this Court, a Bench of which, on the 2nd of June, 1909, upheld the objection and passed a decree dismissing the application for execution *in toto*. In this order there was clearly an error, as some of the property attached was not mortgaged property.

Accordingly, on the 10th of August, 1909, the decree-holder applied for review of the judgement of the 2nd of June, 1909. The application was granted, and this Court, on the 13th of June, 1910, passed a modified order dismissing the application for execution only in respect to the mortgaged property and remitting the record to the lower court with orders to continue with the execution of the decree according to law in regard to the rest of the property. In the meantime, the lower court on receipt of the decree of the 2nd of June, 1909, had on the 18th of August, 1909, sent the record into the record-room.

While the application for review was pending, *i.e.* between the 10th of August, 1909, and the 13th of June, 1910, the judgement-debtor sold the non-mortgaged property to a third party.

After the decision of the 13th of June, 1910, the decree-holder applied to the lower court on the basis of this Court's order of that date to go on with the execution proceedings and to sell the attached (non-mortgaged) property. The judgement-debtor (not his transferee) objected, pleading that under order XXI, rule 57, the previous attachment had ceased to exist, and that a fresh attachment was necessary and the property could not be sold as he had already sold it to another person.

The lower court rejected the objection, and hence this appeal by the judgement-debtor.

Stress is laid on order XXI, rule 57. The rule clearly does not apply. It relates to the case of a default by the decree-holder which prevents the court from continuing the execution proceed-

1912

 AZIZ
 BAKHSH
 v.
 KANIZ
 FATIMA BIBI.

1912

AZIZ
BAKHSH
v.
KANIZ
FATIMA BIBI.

ings and results in a dismissal of the application for execution by reason of that default. In such a case the rule lays down that the attachment ceases to exist directly the order of dismissal is passed. The rule allows the court on the occurrence of such default to either dismiss the application or adjourn the proceedings, and adds that if the application be dismissed the attachment ceases at once.

In the present case there was no default, nor after such a dismissal would the revival of the execution proceedings cause a revival of the attachment, at least so as to prejudice the rights of strangers who have in the meantime acquired a title to the property (*vide* 14 C. L. J., 476). This latter case does not help the appellant who is himself the judgement-debtor; nor is the case reported in 13 C. L. J., 243, of any assistance, for in that case there was a clear specific order releasing the property from attachment. Prior to the Code of Civil Procedure now in force there was often considerable doubt whether an attachment came to an end on the passing of an order dismissing an application for execution by reason of the decree-holder's default (*vide* I. L. R., 33 Calc., 666). This has now been set at rest by order XXI, rule 57. But in the present case there was no such order of dismissal for default. The first order of dismissal passed by this Court on appeal on the 2nd of June, 1909, was set aside on review, and the order finally passed on the appeal only disallowed the application for execution in so far as it related to the mortgaged property, and upholding the application in regard to the property now in question and ordering the lower court to go on with the execution of the decree in respect thereto.

In regard to this property there has, therefore, been no dismissal of the application for execution. The lower court's order of the 18th of August, 1909, consigning the record to the record-room does not and cannot help the appellant. He made the transfer while the application for review was pending. We would point out that his transferee has not come into court.

We hold that in the circumstances of this case the attachment of the property in question at no time came to an end, and we, therefore, dismiss the appeal with costs.

Appeal dismissed.