

MISCELLANEOUS CIVIL

Before Mr. Justice Niamat-ullah and Mr. Justice
Rachhpal Singh

1933
April, 10

HUSAIN BAKHSH (DECREE-HOLDER) v. BRIGGEN SHAW
(JUDGMENT-DEBTOR)*

Civil Procedure Code, section 60(1), proviso, clauses (i) and (j)—Attachment of salary of a soldier-officer—Army Act (44 and 45 Vic., cap. 58), section 136—"Public officer".

The salary of a soldier to whom the Army Act, 44 and 45 Victoria, chapter 58, applies is attachable in execution of a decree in accordance with the provisions of section 60(1) of the Civil Procedure Code; if he is a public officer as defined in section 2(17) (c) of the Civil Procedure Code, his salary is exempt from attachment to the extent mentioned in clause (i) of the proviso to section 60(1), and if he is not such a public officer, it is not exempt from attachment at all.

Section 136 of the Army Act, 44 and 45 Victoria, chapter 58, as amended in 1895, makes itself subject to Acts passed by the Governor-General of India in Council; it is, therefore, subject to the provisions of the Civil Procedure Code, section 60.

The proviso to section 60(1) only exempts certain properties, including part of the salary and allowances of public officers, from attachment. If a property, salary or otherwise, does not fall within any of the clauses of the proviso, the general provisions contained in section 60(1) shall prevail and the property shall be attachable.

Parties were not represented.

NIAMAT-ULLAH and RACHHPAL SINGH, JJ. :—This is a reference by the learned Judge of the small cause court, Jhansi, under order XLVI, rule 1 of the Code of Civil Procedure. The learned Judge has not formulated the question on which the opinion of this Court is desired. Order XLVI, rule 1, requires the court making the reference to "draw up a statement of the facts of the case and the point on which doubt is entertained". We gathered from the order of reference that one Husain

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Bakhsh obtained on the 9th of June, 1932, a decree for Rs.33-8-0 against Mr. Briggen Shaw, No. 14A Transport Cavalry C. P. Mule, Quetta, Baluchistan. The decree-holder applied on the 24th of June, 1932, for execution of his decree by attachment of the judgment-debtor's salary, which was mentioned to be Rs.300 a month approximately. The learned Judge of the small cause court at Jhansi, who had passed the decree and to whom the application for execution was made, issued a notice to the judgment-debtor to "show cause on or before the 5th of August, 1932, why the amount of Rs.39-4-0 (which included the original sum claimed and costs and interest) should not be realized by attaching your pay". It should be noted that the law did not require a notice of this kind to be issued in the circumstances of this case. It is only where a case falls within the purview of order XXI, rule 22 of the Code of Civil Procedure that a notice is necessary before any process of execution can issue. Execution was applied for only two weeks after the passing of the decree and against the judgment-debtor himself, but the learned Judge issued a notice by way of courtesy. The judgment-debtor should have acknowledged receipt of the notice and, if so advised, should have objected to his salary being attached by the ordinary process recognized by law. He adopted the extraordinary and, we are bound to say, disrespectful procedure of making the following note on the back of the notice received by him :

"It is pointed out that my pay cannot be attached for debits and that traders allowing credit to serving soldiers do so at their own risk.

"2. It was pointed out to this man and he was told that if he wrote to the person that incurred the debt with him he would receive payment."

It should be observed that no reference is made to any law under which the judgment-debtor claimed protection against the attachment of his pay. At the hearing a

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reference was made by the decree-holder's pleader to the case of *Hay v. Ram Chandar* (1) in which it was definitely held that the pay of an officer of the Indian Army may be attached in execution of a decree against him to the extent of one-half. The learned Judge had also before him General Letter No. 5/44-9(1) of 1930, dated the 10th of February, 1930, from the Registrar of this Court to all District Judges subordinate to the High Court of Judicature at Allahabad, which he thought was somewhat in conflict with the case above referred to. This letter was circulated to all judicial officers to invite their attention to the provisions of section 120 of the Indian Army Act No. VIII of 1911, under which the pay and allowances of persons subject to that Act are exempt from attachment. The learned Judge was apparently under a misapprehension as to whether the Indian Army Act and the General Letter to which reference has been made by him have any relevancy in the present case. The judgment-debtor does not claim to be a person subject to the provisions of the Indian Army Act, VIII of 1911. Persons who are so subject are described in section 2 of that Act; and in view of what the judgment-debtor subsequently noted on the back of a notice issued by this Court we do not wish to consider the provisions of section 120 of Act VIII of 1911 in any detail.

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On receipt of the reference a notice was issued by the High Court office under the signature of the Deputy Registrar to the judgment-debtor informing him that a certain date had been fixed for the disposal of the reference and that he should "appear in person or by an advocate duly prepared to inform the Hon'ble Court on the aforesaid date whether the judgment-debtor is or is not a person to whom the Indian Articles of War apply, that you should also supply the materials on which the information is based, and that the case will be laid before

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the Court for disposal on such date or as soon thereafter as the same may be heard". The notice was served through the Commanding Officer on the 5th of December, 1932. The endorsement of receipt of notice has been made in the following words :

"1. Certified that I have been served with the duplicate of this Form.

"2. I have no knowledge of the case under reference

"3. Certified that I am a soldier serving under a normal period of engagement and subject to the Army Act."

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The information conveyed to us by the "certificate" noted on the back of the notice is that the judgment-debtor is "a soldier serving under a normal period of engagement and subject to the Army Act". We may note at once that the Act referred to by him is not the Indian Army Act VIII of 1911 to which reference has been made by the learned Judge of the court below. The Act which is relied on by the judgment-debtor is the Army Act of 1881, 44 and 45 Vic., cap. 58. The question which calls for an answer, therefore, is whether a soldier to whom the Army Act applies is protected so far as the attachment of his pay and allowances is concerned.

Section 136 of the Army Act as it originally stood provided that "the pay of an officer or soldier of Her Majesty's regular forces shall be paid without any deductions other than the deductions authorised by this or any other Act or by any royal warrant for the time being." This section was amended by the Army Amendment Act of 1895, section 4 of which added the words "or by any law passed by the Governor-General of India in Council". Accordingly, if any Act of the Governor-General of India in Council made it permissible that part of the salary of an officer or soldier to whom the Army Act applied be deducted, the amended section 136 cannot come in conflict with it.

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Section 60 of the Code of Civil Procedure, as it originally stood, provided in clause (b) to sub-section (2) that nothing in that section affected the provisions of the Army Act. In view of this provision the pay of an officer or soldier to whom the Army Act applied and who served in India could not be attached. An important amendment was, however, made by Act X of 1914, by which clause (b) to sub-section (2), referred to above, was deleted, with the result that section 60(1) of the Code of Civil Procedure became applicable to officers and soldiers to whom the Army Act is applicable, unless there be something in the latter Act which excludes its application. As already noticed, section 136 of the Army Act, as amended in 1895, makes itself subject to Acts passed by the Governor-General in Council. The Code of Civil Procedure is an Act of the Governor-General in Council. It follows that a deduction from the salary of an officer or soldier, to whom the Army Act applies, can be made if the Code of Civil Procedure permits the same being done.

Section 60(1) of the Code of Civil Procedure provides, *inter alia*, that "save as hereinafter mentioned, all other saleable property, movable or immovable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit . . ." may be attached in execution of a decree. There can be no doubt that the salary of an officer or soldier, to whom the Army Act applies, as and when it becomes payable to him, is "property over which he has a disposing power" and that, except so far that it is protected by the proviso to that section, it is declared attachable by the opening part of section 60(1). The proviso to this section exempts certain property from attachment. One of the exemptions is contained in clause (i), which declares a portion of the salary and allowances of "public officers" drawing less than a minimum amount to be not attachable.

An officer or soldier to whom the Army Act applies is a public officer within the meaning of the aforesaid section. The term "public officer" is defined in section 2(17), Code of Civil Procedure. The question in each case will arise whether an officer or soldier, to whom the Army Act applies, is a public officer within the meaning of the proviso to section 60(1). We are unable to say whether the judgment-debtor in this case falls within any of the clauses of section 2(17) of the Code of Civil Procedure. Assuming he is one, his salary to the extent of half can be attached, as his salary is said to be Rs.300 a month. We may note in this connection that clause (j) of the proviso to section 60(1), which refers to Act VIII of 1911 (Indian Army Act), does not apply to the judgment-debtor, who claims to be subject to the Army Act.

Our view is supported by *Prins v. Murray and Co.* (1), decided by a Bench of the late Court of the Judicial Commissioner of Oudh, which has been followed by a Bench of this Court in *Hay v. Ram Chandar* (2). The last mentioned case does not, however, decide the point which has arisen before us. It has reference to a case to which the Indian Army Act was applicable. Our view finds further support from *Kering Rupchand and Co. v. Murray* (3) decided by the Bombay High Court.

We have considered the case of *Brown v. Pearce* (4) decided by a Division Bench of this Court, in which it was held that as the judgment-debtor, who was a Military Assistant Surgeon, was not a "public officer" within the meaning of section 60(1) (h) and (i) of the Code of Civil Procedure, therefore no portion of his salary was attachable. With great respect we would point out that the decision in that case proceeds on a misapprehension of the effect of the proviso to section 60(1) of the Code of Civil Procedure, as the following passage taken from the judgment in that case will clearly show: "*Attachment*

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(1) (1914) 23 Indian Cases, 935.

(2) (1917) I.L.R., 39 All., 308.

(3) (1913) 59 Indian Cases, 683.

(4) (1925) I.L.R., 48 All., 73.

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is dealt with in section 60 of the Code of Civil Procedure, and in the proviso to that section certain salaries of certain public officers or servants are attachable to a certain extent. Section 2(17) describes who are the public officers who fall under the description of persons whose salaries are attachable." The learned Judges proceeded on the assumption that the proviso to section 60(1) permits attachment of property in the cases therein specified. It will be observed that the proviso merely exempts certain property from attachment, including part of the salary and allowances of public officers. If a property, salary or otherwise, does not fall within any of the clauses of the proviso, the general provisions contained in section 60(1) shall prevail, and the same shall be attachable.

In the circumstances discussed above, our answer to the reference is that if the judgment-debtor is a public officer, as defined in section 2(17) of the Code of Civil Procedure, his salary is exempt from attachment to the extent mentioned in clause (i) of the proviso to section 60(1) of the Code of Civil Procedure, and that if he is not such a public officer, it is not exempt from attachment to any extent.

APPELLATE CRIMINAL

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Before Mr. Justice King and Mr. Justice Kisch
EMPEROR v. CHAUBE DINKAR RAO AND OTHERS*

Indian Penal Code, section 161 with 116—Abetment of taking illegal gratification by public officer—Public officer suggesting willingness to take a bribe—Intention not dishonest but merely to set a trap—Whether payment of the bribe in such circumstances is punishable—Indian Penal Code, sections 107, 108—Abetment, where the person abetted has no guilty intention but simulates it.

While a suit was pending before a Subordinate Judge, he was approached by one J who told him that the plaintiff

*Criminal Appeal No. 696 of 1932, by the Local Government, from an order of J. Allsop, Sessions Judge of Cawnpore, dated the 14th of Junc, 1932.