APPELLATE CIVIL.

Before Mr. Justice Duckworth, and Mr. Justice Godfrey.

1924
May 12.

K. O. M. SYED HOOSSEIN.
v.
S. R. M. M. C. T. CHETTIAR FIRM.*

Practice—Civil Procedure Code (V of 1908), section 104—Order XLIII—Order of arrest and attachment before judgment, whether appealable—Order XXI, Rule 21, and Order XXXVIII—Power of Court to order simultaneously both arrest and attachment before judgment—Attachment before judgment in a mortgage suit, whether permissible—What are requisite grounds for ordering arrest or attachment before judgment.

Held, that an appeal lies from an order of arrest or attachment before judgment.

Held, also, that the Court has power in its discretion, limited by the provisions of Order XXXVIII of the Civil Procedure Code, to order before judgment simultaneously the arrest of a defendant and the attachment of his property.

Held, further, that where it is proved that the defendants have avoided a conditional order of arrest before judgment, have considerably reduced their stock without attempting to replenish it, have failed to either furnish security or prove that the goods attached were sufficient in value to cover the plaintiff's claim, the Court has exercised a proper discretion in making absolute the conditional orders of arrest and attachment.

Semble :—Under special circumstances, even in a mortgage suit the property mortgaged may become liable to attachment before judgment.

Chena Pemaji v. *Ghelabhai Narandas*, (1883) 7 Bom., 301 ; *Jogemaya Dasee* v. *Baidyanath Premanick*, (1919) 46 Cal., 245—*referred to*.

N. M. Mukerjee—for the Appellant.
Lutter—for the Repondent.

DUCKWORTH AND GODFREY, JJ.—These appeals have been filed separately by three of the defendants in Suit No. 160 of 1923 of the District Court of Mandalay against an order of the District Judge of the 10th September 1923 making final a conditional order of attachment before judgment on certain goods (then in the defendants' possession) and a conditional order of arrest before judgment directed

* Civil Miscellaneous Appeal No. 69 of 1923 at Mandalay from the order of the District Court, Mandalay, passed in Civil Regular No. 160 of 1923.

against the two defendant-appellants in Civil Miscellaneous Appeals Nos. 69 and 71 of 1923, which he had previously issued.

The defendant-appellant in Civil Miscellaneous No. 70 of 1923 is only interested in the order of attachment; but all three appeals have been argued together and will be so dealt with. The attachment has been duly effected, but the warrants of arrest have been returned unexecuted.

The case is still pending and has only reached the stage of the settlement of the issues. The sale of the attached goods, which has been directed has been stayed pending the disposal of these appeals.

There can, we think, be no real doubt that an appeal does lie both from the order of arrest and from that of attachment. It is true that an order of arrest is not one of the appealable orders enumerated in Order XLIII, Rule 1, of the Schedule to the Civil Procedure Code; but the right is given specifically by section 104, Civil Procedure Code, and being a statutory right conferred by the body of the Code is not a matter of procedure and would not be taken away by rules contained in the Schedule. Moreover, its omission from Order XLIII does not necessarily mean that it does not exist—in fact its inclusion would be superfluous, the order not being exhaustive in it terms.

The contentions put forward on behalf of the appellant are in effect as follows:—

It is first contended that there are no grounds either for arrest or attachment before judgment. It is then contended that an attachment cannot issue as the suit is a mortgage suit and the property attached mortgaged property. It is next contended that arrest and attachment cannot issue simultaneously; and finally that the suit is not a *bonâ fide* one and therefore attachment should not issue.

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It is clear that the power of the Court to issue simultaneously execution for arrest and attachment is entirely discretionary under the Code [see Order XXI, Rule 21, Civil Procedure Code and *Chena Pemaji* v. *Ghelabhai Narandas*, (1883) 7 Bom., 301] and we have no doubt that it has the same power in matters before judgment, limited, however, by the provisions of Order XXXVIII of the Schedule.

The contention that attachment cannot issue because the suit is a mortgage suit and the property mortgaged property, proceeds upon an entire misapprehension as to the nature of the suit and is in fact without any substance whatever. It appears that in 1920 the defendants, who had been carrying on business under the name of Kavannah Ona Mohideen & Sons, were indebted to Haji Oomer Khatab Mohamed Esa & Co. in the sum of Rs. 83,000, and in order to pay off that debt, borrowed this sum from the plaintiff Chetty in terms of a registered bond of the 1st October 1920. By that bond the money so borrowed was repayable by certain instalments with interest and in the event of default in payment of any one instalment the whole amount of the balance unpaid was to become immediately due and payable and the plaintiff Chetty was to be at liberty to sell the goods mentioned in the schedule to the bond in part satisfaction of his claim, the defendants having by their bond created a charge on such goods for the payment of their debt.

The plaintiff's case is that the defendants have made default in paying the instalments and he now sues for a money decree against the defendants for the balance still payable and asks for a declaration of charge (lien he calls it) on the goods and for their sale.

This is not a mortgage suit but even if it were, we are far from saying that mortgaged property would

in no circumstances be liable to attachment [see *Jogemaya Daser* v. *Baidyanath Premanick*, (1919) 46 Cal., 245]. That question, however does not arise.

It is then said that it is apparent from the plaint and the bond, and a statement of account filed by the plaintiff Chetty, that the suit is not a *bonâ fide* one, because it seems that the defendants endorsed the cheque for the Rs. 83,000 given them by the plaintiff Chetty to their creditors, H. O. K. Mohamed Esa & Co., and the plaintiff Chetty has been paying such instalments to Mohamed Esa & Co. It does not necessarily follow from this that there is anything not *bonâ fide* in the Chetty's action. Without going into the merits of the case which we are not prepared to do at the present stage, it is impossible to say what arrangement Mohamed Esa & Co., may have made with the Chetty or that the Chetty has not a perfectly good and simple explanation.

It remains then to consider whether no sufficient grounds existed for the issue of the orders complained of as alleged. It can hardly be seriously contended that no grounds existed upon the affidavits filed for the issue of the conditional orders. From these affidavits there can be no sort of doubt that the defendants were removing large quantities of goods from their shop and also selling large quantities at less than cost price and very considerably reducing their stock. In order to show cause against the attachment and the order for their arrest, which latter they have so far managed to evade, the defendants have filed numerous affidavits, largely argumentative in character, the effect of which—apart from the charges made by many of the deponents against the Chetty of subornation of witnesses, etc., and against the police of improperly rendering

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assistance to the Court process-servers—would seem to show that there had been considerable sales of damaged and soiled goods only at reduced prices; but that in other respects sales were normal. The Judge of the District Court was not satisfied with these affidavits, and found that the defendants had failed to show cause, and accordingly maintained the orders of attachment and arrest. In view of the admitted facts that the defendants have at no time personally appeared in Court to show cause, but, on the contrary have been successfully evading arrest; that they are quite unable to furnish security for the amount of the claim against them, or even for the amount of the difference between the value of the goods attached and the amount of the claim; that they have considerably reduced their stock and do not suggest that they are replenishing it; and finally that they are in default in payment of the instalments provided for by their bond, and that the goods attached are not nearly sufficient in value to cover the plaintiff Chetty's claim, we think there is every reason for the plaintiff Chetty's apprehension and see no sufficient reason for differing from the District Court's finding or for interfering with the orders passed.

The three appeals are accordingly dismissed with costs.

Advocate's costs to be six gold mohurs for the three cases.