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to the landlord and is not a payment in fulfilment of an obligation to pay rent. If then, before the date on which the rent falls due, the landlord makes an assignment, the receipt of rent in advance cannot be treated as a discharge by him, because by assignment before the rent falls due he has parted with the power of giving such a discharge, and payment of rent before it falls due cannot free the tenant from further liability."

Similarly in the case of *Tilok Chand* v. *Beatlie* (1), which was also a Bench case, the present Chief Justice of the High Court of Calcutta said :—

"In order to get the benefit of the protection of section 50 the tenant must pay rent as rent and must not pay rent in advance, which in these circumstances is a mere loan."

It appears therefore that the judgment of the Small Cause Court, which held that the supposed payment in advance to the previous owners relieved the respondents from liability to applicant for the rents was not according to law, and I set it aside.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

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June 16

PINDI

v.

U THAW MA AND ANOTHER. *

Attachment before judgment—Dismissal of suit for default—Effect on attachment—Restoration of suit—Revival of Attachment—Civil Procedure Code (Act V of 1908), O. 38, R. 9.

When a suit is dismissed for default all interim and ancillary orders in the proceedings must fall with it. An attachment before judgment comes to an end when the suit abates and is dismissed, and the attachment does not revive if the suit is restored. The last words of Order 38, rule 9, of the Code of Civil Procedure are directory only and not imperative, and are not intended to effect the survival of interlocutory proceedings after the suit has come to an end.

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(1) (1925) 25 Cal. W.N. 953.

* Letters Patent Appeal No. 7 of 1931 from the judgment of this Court in Special Civil Second Appeal No. 276 of 1930.

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Abdul Raman v. *Amin Sharif*, I.L.R. 45 Cal. 780; *Jyotish Chandra* v. *Har Chandra*, 47 Cal. L.J. 282; *Ram Chand* v. *Pitam Mal*, I.L.R. 10 All. 506; *Sasirama* v. *Meherban Khan*, 13 Cal. L.J. 243—*referred to.*

Namagiri v. *Muthu Velappa*, 56 Mad. L.J. 70—*dissented from.*

Anklesaria for the appellant.

No appearance for the respondent.

PAGE, C.J.—The facts to which it is necessary to refer for the purpose of disposing of this appeal lie within a narrow compass.

The appellant filed suit No. 68 of 1926 against U Hpa and his wife, and in October 1926, obtained an order in the suit attaching before judgment certain property. On the 2nd September 1927, the appellant's suit was dismissed for default. On the 10th February 1928, an order was made for the restoration of the suit. On the 7th April 1928, U Hpa and his wife transferred the property in suit to the respondent U Thaw Ma, who straightway mortgaged the said property to a Chettyar firm. On the 25th March 1929, the appellant obtained a decree against U Hpa and his wife.

The question that falls to be determined is whether the conveyance by U Hpa and his wife to U Thaw Ma of the 7th April 1928, is void as against the appellant having regard to the attachment of the property at the instance of the appellant in October 1926.

On behalf of the appellant it is urged that the effect of the order for the restoration of the suit on the 10th February 1928 was to put the parties in *loco quo ante*, and to cause a revival not only of the suit, but also of all interlocutory orders that had been passed therein, including the order for attachment of the property of the 16th October 1926. In support of his contention the learned advocate for

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the appellant presented a twofold argument: (*i*) that the dismissal of a suit for default is not a final decree dismissing the suit, because there are provisions in the Code which entitle the appellant within the time prescribed to apply for an order restoring the suit to the file; and (*ii*) that the terms of Order 38, rule 9, are to be read strictly, and that, notwithstanding the dismissal of a suit, an order for attachment before judgment remains in force until an order has been passed by the Court that the attachment should be withdrawn. In my opinion, there is no substance in either of these contentions. In support of the first argument that has been presented to the Court the learned advocate for the appellant relied upon the decision of the High Court of Madras in *Namagiri Ammal* v. *Muthu Velappa Goundan and another* (1). In that case Devadoss, J., at page 75, observed :—

"In my view the dismissal of a suit does not amount to the withdrawal of the attachment before judgment, and, if the order of dismissal is set aside on appeal and a decree is passed in favour of the plaintiff, the attachment before judgment would enure for his benefit. Here, in this case, the suit was dismissed for default of plaintiff's appearance and was restored by the Court. The restoration of a suit under Order 9, rule 9, Civil Procedure Code, stands on a slightly different footing from the order of the Appellate Court reversing the dismissal of the suit. A Court may dismiss a suit for default and may restore it to the file on proper cause being shown in the course of the same day. It would work great hardship if it be held that in such a case the attachment before judgment ceased to have force because the suit was off the file for a few hours."

And Phillips, J., added :—

"That order of dismissal having been set aside the suit remains as it was on the day that it was dismissed, and all proceedings taken up to that date must be deemed to be in force when the

(1) 56 Mad. L.J. 70.

dismissal is set aside, and in my opinion all interlocutory orders would be revived on the setting aside of the dismissal. Similarly, an order for attachment of property would also be revived. It would certainly be unreasonable to expect a plaintiff who had already obtained an order for attachment before judgment to comply with the whole procedure laid down in Order 38, and to have a fresh attachment made."

With all due respect to the learned Judges who decided *Namagiri Ammal's* case it is no answer to a legal right that it may, in certain circumstances, if enforced, work hardship. Hard cases make bad law. Further, it appears to me that, if the attachment came to an end when the suit was dismissed, it matters not whether the suit was restored to the file on the same day or at a later date. In my opinion if the suit on being dismissed for default came to an end all interim and ancillary orders in the proceedings must fall with it. This view, I apprehend, is in consonance alike with principle and authority.

As long ago as 1888, Mahmood, J., in *Ram Chand* v. *Pitam Mal* (1), observed that if he were to hold that if an attachment before judgment did not come to an end when the suit was dismissed he would be "laying down the untenable rule that an *ad interim* order survived the pendency of the main litigation itself" and "that such interim order of attachment subsists for ever, whether there is or is not an appeal, unless and until such order is expressly withdrawn." See also *Sasirama Kumari* v. *Meherban Khan* (2); *Abdul Rahman* v. *Amin Sharif* (3); and *Jyotish Chandra Sen* v. *Har Chandra Saha and others* (4). The principles enunciated in *Jyotish Chandra Sen's* case, in my opinion, conclude the present appeal

(1) (1888) I.L.R. All. 506, at p. 513.
(2) (1911) 13 Cal. L.J. 243.
(3) (1918) I.L.R. 45 Cal. 780.
(4) (1928) 47 Cal. L.J. 282.

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against the appellant. In that case a money suit was brought against one Uma Charan, and an order was obtained for attachment before judgment of Uma Charan's property on the 31st August 1915. On the 11th November 1915, the plaintiff obtained an *ex-parte* decree against Uma Charan. It was common ground, however, that between the date of attachment and the date of the decree Uma Charan died, the result being that as against him the decree was a nullity. As an application was not made for substituting the heirs within the time limited by law the suit abated and died. In August 1916, after the suit had come to an end, Uma Charan's heirs sold the property in dispute. Subsequently, on the 5th January 1918, an application was made on behalf of the plaintiff to set aside the abatement and to restore the case, and for leave to substitute his heirs in place of Uma Charan That application was granted, and on the 5th April 1918, the plaintiff obtained a second *ex-parte* decree against the heirs of Uma Charan. Thereafter he issued execution, and on the 1st November 1919, purchased the property in dispute at the execution sale. The question to be determined in the suit was whether the effect of setting aside the abatement revived not only the suit but also the order for attachment before judgment, thereby invalidating as against the plaintiff the sale of the property to defendent No. 1 by Uma Charan's heirs. The appeal was heard by Duval, J. and myself, and I find that in the course of the judgment I observed that—

"but for the fact that the two Courts have passed a decree in favour of the plaintiff I should have thought that the plaintiff's case was unarguable. It depended upon the attachment before judgment being in existence actually or constructively until after the second *ex-parte* decree was obtained.

But when the suit abated and came to an end on the death of Uma Charan the attachment died with it. In my opinion the appeal is concluded against the respondent both upon principle and by *Sasirama Kumari* v. *Meherban* (1), and *Abdul Rahman* v. *Amin Sharif* (2). The learned Vakil on behalf of the respondent sought to distinguish these cases upon the ground that in these two cases the suit came to an end because it was dismissed and a suit which is dismissed differs from a suit which abates. True, the cause of its death is different, but in either case, it is equally dead, and if it is dead the attachment before judgment dies with it. The second point which is taken is that the effect of the order setting aside the abatement and restoring the case was to revive also the attachment before judgment. These two cases to which reference has been made are authorities to the contrary."

I adhere to the view that I expressed in *Jyotish Chandra Sen's* case, and, in my opinion, the first argument presented on behalf of the appellant fails.

As regards the second argument, it is necessary to consider the meaning and effect of Order 38, rule 9, which runs as follows :

"When an order is made for attachment before judgment the Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed."

On behalf of the appellant it is urged that, notwithstanding the dismissal of the suit, the order for attachment before judgment subsists until an order is passed for its withdrawal. So to hold, I venture to think, would be neither good sense nor good law. In my opinion, as pointed out by Mahmood, J., in *Ram Chand* v. *Pitam Mal* (3), the last words of Order 38, rule 9, were not "intended to be more than directory, or, in other words, so imperative as to render an attachment before judgment a perpetual attachment in the absence of an order removing the

(1) (1911) 13 Cal. L.J. 243. (2) (1918) I.L.R. 45 Cal. 780.
(3) (1888) I.L.R. 10 All. 506, at p. 513.

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same." The object of the rule is to provide that when a suit is dismissed the Court *suo motu* or on application should at the same time pass an order that the attachment be withdrawn, but, in my opinion, it was never intended by the rule to provide or effect, that when a suit dies, interlocutory proceedings that are ancillary to the main purpose of the suit should not die with it. The object of an order for the attachment of property before judgment is to prevent the defendant from disposing of the property *pendente lite*, and in that way depriving the plaintiff of the opportunity of satisfying his decree by selling the property (Rule 6). If and when the suit is dismissed the object for which the order for attachment before judgment was made ceases to exist. In my opinion, both upon principle and upon authority the appeal fails and must be dismissed.

MYA BU, J.—I agree.

APPELLATE CIVIL.

1931

June 17.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

C. JORDEN

v.

MAUNG BA CHIT.*

Letters Patent, Clause 13—*Suit continued by receiver of an insolvent's estate—Order dispensing with security—Order whether a 'judgment'—Appeal.*

An order directing that the receiver of an insolvent's estate should not be required to give security for the costs of a suit filed by the debtor before his insolvency, and continued by the receiver, is not a 'judgment' within clause 13 of the Letters Patent, and is not appealable.

Doctor for the appellant.

K. C. Bose for the respondent.

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* Civil Miscellaneous Appeal No. 52 of 1931 from the order of this Court in the Original Side in Civil Regular No. 551 of 1928.