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THE OFFICIAL ASSIGNEE *v.* MAUNG NYUN MAUNG.

PAGE, C.J.

the insolvent's salary, or income in the nature of a salary. [*Ex-parte Benwell* (1); *In re Shine* (2).] The income which the insolvent was entitled to receive out of the trust property clearly was not salary or income in the nature of a salary within section 60 (2).

For these reasons, in our opinion, the appeal must be allowed, and the order under appeal set aside. We desire to add that the order which we now pass is without prejudice to any application for an allowance that the insolvent may elect to prefer under section 75 (2) of the Insolvency Act. The costs of both parties will come out of the estate.

DAS, J.—I agree.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Sen.

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Jan. 28.

RAJA SIR S.R.M.M.A. FIRM

v.

THE BURMA OIL CO., LTD.*

Civil Procedure Code (Act V of 1908), *O.* 21, *R.* 53 (i) (*b*) *and* (6)—*Attachment order made by Judge—Order and notice signed by Head Clerk on behalf of Judge owing to his illness—Judgment-debtors' knowledge of order of attachment—Validity of attachment—Adjustment by judgment-debtor contrary to attachment order, whether valid—Irregularity as to signature whether material.*

A Court ordered the attachment of a decree under O. 21, Rule 53, of the Civil Procedure Code and directed that notices in Form 22 of Appendix E to the First Schedule of the Code should issue to the Court whose decree was sought to be attached under Rule 53 (1) (*b*), and to the judgment-debtor (respondents) under Rule 53 (6). The notices were issued under the seal of the Court and served, but owing to the serious illness of the Judge who was unable to attend Court, these notices were signed by the Head Clerk of the Court on behalf of the Judge. Respondents purported to adjust the decree with their

(1) 14 Q.B.D. 301. (2) (1892) 1 Q.B.D. 522.

* Civil First Appeal No. 124 of 1930 from the order of the District Court of Magwe in Civil Execution No. 14 of 1928.

decree-holder, with knowledge of the order of attachment and after service of the notice.

Held, that the Judge having validity ordered the attachment, in the circumstances of the case, the signing of the notices by the Head Clerk on behalf on the Judge was a mere irregularity and that there was a valid attachment of the decree, and according to Rule 53, Clause 6, as amended by this Court, the judgment-debtor having knowledge of the order of attachment, could not adjust the decree sought to be attached, in contravention of that order.

Bhavirisctti v. *Vetcha*, I.L.R. 50 Mad. 677 ; *Muthiah* v *Palaniappa*, 55 I.A. 256—*referred to.*

Ba Han for the appellants : The Head Clerk merely carried out the orders of the Judge. The signing of the said warrant and notice is a purely ministerial act. They were issued under the seal of the Court. If Order **21**, Rule 53 **(1)** (*b*) of the present Code is compared with Section 273 of the old Code it will be clear that the words : " the issue to such other Court of a notice by the Court" have taken the place of the words : " A notice in writing to such Court under the hand of the Judge of the Court." The present Code does not insist on the signature of the Presiding Judge : 32 Calcutta 1104 is an analogous case. Order XXI, Rule 90 and Section 99, Civil Procedure Code, lay down principles to meet cases where the defect or irregularity does not affect the merits or the Court's jurisdiction.

In 50 Madras 677 it has been held that an attachment under Order XXI, Rule 53, is complete so soon as the Court to which the notice prescribed by Clause (i) (*b*) of the Rule receives the notice.

Moreover Clause (6) of Rule 53 of Order XXI as amended by the Rangoon High Court's Notification No. 25 (Schedule), dated May 6, 1929, lays down that no payment or adjustment of the attached decree by the judgment-debtor in contravention of the attachment order or *with the knowledge thereof* shall be recognised so long as the attachment remains in force. In the present case the judgment-debtors

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received two notices from the Subdivisional Court regarding the attachment of the decree. It was only after the receipt of the notices that the judgment-debtor effected an adjustment of the decree. The judgment-debtor therefore knew of the order of attachment and effected the adjustment in defiance of the order. The adjustment should not therefore be recognised.

Clifton for the respondents. Attachment is effected by sending notice to the Court which passed the decree. See 50 Mad. 677. A notice signed by a clerk is no notice. See paragraph 117 of the Burma Courts Manual. Consequently there was no attachment. The notice sent to respondents being in the wrong form was invalid and in any case ineffective as the attachment was never in force.

HEALD, J.—In Suit No. 21 of 1926 of the District Court of Magwe one Po Gon and his daughter Ma Tin obtained a decree against the present respondents for over Rs. 25,000 and in Suit No. 25 of 1926 of the same Court respondents obtained a mortgage decree against the same Po Gon and Ma Tin for over Rs. 1,27,000. Respondents applied to be allowed to set off the amount of the money decree in favour of Po Gon and Ma Tin against the amount of their mortgage decree against the same persons and to have full satisfaction of the decree against them entered up, but their application was refused and the refusal was confirmed by this Court.

In Suit No. 13 of 1928 of the Subdivisional Court of Magwe the present appellant obtained a simple money decree for Rs. 1,663 against the same Po Gon and Ma Tin and in execution of that decree on the 26th of March 1929 he applied for an attachment of the moneys payable by respondents to his judgment-debtors

Po Gon and Ma Tin, under the decree in Suit No. 21 of 1926. On that application the Judge of the Subdivisional Court issued a notice to the Judge of the District Court attaching a sum of Rs. 1,666, as being proceeds of the execution of the decree in Suit No. 21 of 1926 in Execution Case No. 14 of 1928 in the District Court standing to the credit of Po Gon and Ma Tin.

On the following day appellant asked for notice of the attachment of the decree to be sent to respondents under the provisions of Order 21, Rule 53 (6), on grounds that there was a likelihood of an adjustment between his judgment-debtors and respondents in satisfaction of the decree. No action was taken by the Court on that application, probably because appellant's earlier application was not in form of an application for attachment of the decree but was an application for the attachment of money alleged to be in the custody of the District Court.

The warrant of attachment was returned by the Judge of the District Court with a report that there was no deposit in that Court to the credit of Po Gon and Ma Tin.

Appellant then applied for the attachment of the decree by the issue of notices to the District Court and to the respondents under the provisions of Order 21, Rule 53 (6), and on the 10th of April 1929 the Judge ordered that a notice in Form 22 of Appendix E to the First Schedule of the Code of Civil Procedure should issue to the District Court, Magwe, under Order 21, Rule 53 (1) (*b*), and that a notice of the attachment of the decree should issue to the respondents under Order 21, Rule 53 (6).

On the 3rd May 1929 a notice in the form specified by the Judge was issued to the District Court and was received in that Court on the 4th of May. It was sealed with the seal of the Subdivisional Court

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which issued it, and was signed by the Head Clerk of that Court, who purported to sign not in his own right but on behalf of the Judge. It appears that at that time the Judge was so seriously ill that he was unable to attend Court and had to be relieved of his duties, so that there was a virtual interregnum in the Court between his being taken ill and his being relieved by his successor. The Head Clerk of the Court was however not empowered to sign such notices in ordinary circumstances and for that reason the notice was returned by the District Court for the signature of the Judge to be obtained. It was never obtained, and so far as the notice to the District Court was concerned the matter rested there.

When the provision for giving, to the judgment-debtor bound by the decree attached, notice of the order of attachment was inserted in Order 21, Rule 53, no form for such notice was added to the Schedule of notices in Appendix E of the Code, so that the form of that notice was left to the discretion of the Court, and in the present case a notice was issued to respondents in exactly the same form as the notice to the Court except that it was addressed to respondents and not to the Judge. It was headed as a notice of attachment of a decree to the Court which passed it, and it referred to the decree in Suit No. 21 of 1926, and gave the names of the parties to that decree, namely Po Gon and one as the decree-holders and respondents as the judgment-debtors and like the notice to the Court it was issued on the 3rd of May 1929, was sealed with the seal of the Court from which it issued, and was signed by the Head Clerk of that Court purporting to act on behalf of the Judge. Respondents admit receipt of that notice and in fact

produce it themselves together with the cover in which it was received, and from the post-mark on the cover it appears that they received it on or about the 8th of May 1929.

On the 23rd of May 1929 respondents and Po Gon and Ma Tin filed a joint application in the District Court in Execution Case No. 14 of 1928, asking that satisfaction of the decree in Suit No. 21 of 1926 should be entered as the suit had been compromised, and on the 28th of May the Court ordered the execution case to be closed.

On the 12th of October 1929 appellant applied in Execution Case No. 14 of 1928 in the District Court for execution of the decree in Suit No. 21 of 1926 under the provisions of Order 21, Rule 53 (2). Notice of that application was issued to respondents and to Po Gon and Ma Tin. Po Gon and Ma Tin did not contest the application.

Respondents contended that there was no valid attachment, that notice of the attachment was not duly sent either to the District Court or to them, and that since satisfaction of the decree had been entered no further proceedings in execution were possible. As I have already said they produced the notice received by them and the cover in which it was received.

The District Court found that because the Head Clerk of the Subdivisional Court who signed the notices of the attachment of the decree, which were sent to the District Court and to the respondents, was not empowered to sign such notices, there was no attachment, and on that ground dismissed appellant's application for execution.

Appellant appeals on grounds that the decree was in fact attached by the warrant issued on their application of the 26th March 1929, that by reason

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of the Judge's order of attachment of the 10th of April 1929, the Head Clerk of the Court was empowered to sign the notices which that order directed to be issued, such signature being a purely ministerial act, that the attachment ordered by the Judge on the 10th of April 1929 was actually effected by the issue of the notice to the District Court on the 3rd of May 1929, and that because respondents effected the adjustment of the decree against them with knowledge of the order for attachment and in contravention of that order, the adjustment could not be recognised by the District Court.

There is no force in the first of these grounds of appeal because, although appellant doubtless intended to apply for attachment of the decree, he did not in fact do so, and the attachment which actually issued as a result of his application was not an attachment of the decree.

With reference to the second ground of appeal it is quite clear in view of the orders contained in paragraph 117 of the Burma Courts Manual that the Head Clerk of the Court was not empowered to sign such notices by himself and it was doubtless for this reason that he signed them "for" the Judge.

With reference to the third ground of appeal it is settled law by reason of the judgment of their Lordships of the Privy Council in the case of *Muthiah* v. *Palaniappa* (1) that "no property can be declared to be attached unless first the order for attachment has been issued, and secondly in execution of that order the other things prescribed by the rules in the Code have been done." Further in view of the Full Bench decision of the High Court of Madras in the case of *Bhavirisetti* v. *Vetcha* (2) and of the provisions of the Rule 53 itself it may be taken as

(1) (1927) 55 I.A. 256. (2) (1927) I.L.R. 50 Mad. 677.

settled law that an attachment under that rule is completed by the receipt of the notice prescribed by Clause (1) (*b*) of that Rule in the Court to which that notice was sent.

But as the learned Judges said in the latter case Clause (6) of Rule 53 has nothing to do with the completion or non-completion of the attachment or its coming into force. The clause itself, as amended in this Province, says that no payment or adjustment of the attached decree made by the judgment-debtor in contravention of the order for attachment and with the knowledge of that order, whether that knowledge was acquired through the Court or otherwise (*vide* the remarks on this point in the Madras case), shall be recognised by any Court so long as the attachment remains in force.

The position therefore is that so long as there was a valid order for attachment and a valid attachment it is immaterial whether the adjustment mentioned in Rule 53 (6) was effected before or after the actual attachment.

There is no question in this case of the validity of the order for attachment. What is disputed is the validity of the actual attachment.

The question to be decided at this stage is therefore whether or not there was a valid attachment. No cases on this point except the Madras case mentioned above have been cited before us.

Questions of irregularity in the procedure in respect of attachment commonly arise in cases under Order 21, Rule 90, and that rule allows an objection on the ground of irregularity only if the irregularity is material and if substantial injury has been caused by it. Similarly section 99 of the Code says that no decree shall be reversed or substantially varied in appeal on account of any defect or

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irregularity in any proceedings in the suit not affecting the merits of the case or the jurisdiction of the Court. On the analogy of these provisions I would hold that in a case like the present, where the Judge himself had ordered the attachment and had specified the particular form of notice to be used but had fallen so seriously ill as to be unable to do the work of the Court before the notice was issued, where the notice had issued in the form ordered by the Judge and had been sealed with the seal of the Court, and had been signed by the Head Clerk of the Court, purporting to sign it not in exercise of any power of his own but on behalf of the Judge, the irregularity, which consisted merely in the Clerk's signing the notice on behalf of the Judge, did not prevent the attachment from being effective.

I would therefore hold that in this case there was a valid attachment of the decree.

The sole question which remains is whether or not respondents had knowledge of the order for attachment at the time when they effected the adjustment of the decree on or about the 23rd of May 1929. They admittedly received the notice on or about the 8th of May. That notice was in form an intimation to the District Court that the decree against them had been attached. It was headed as a notice of attachment of a decree to the Court which passed it, and, as I have said, it referred to the decree in Suit No. 21 of 1926 giving the names of the parties, namely Po Gon and one on the one side and respondents on the other. It said expressly that that decree was attached. It is true that the notice was not in the form in which it should have been as a notice to respondents, but it was clearly sufficient to inform them that the decree had been attached. In these circumstances I have no hesitation

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in holding that at the time when respondents effected the adjustment which purported to satisfy that decree they had knowledge of the order for attachment and that therefore they effected that adjustment in contravention of that order and with knowledge of it. It follows that the adjustment could not be recognised by the District Court, and that appellant was still entitled to execute the decree against respondents under the provisions of Order 21, Rule 53 (2).

I would therefore set aside the order of the District Court, which is under appeal, and I would direct that Court to proceed with the execution of the decree on appellant's application under Order 21, Rule 53 (2).

Respondents should pay appellant's costs in this appeal, Advocate's fee to be five gold mohurs.

SEN, J.—I agree.