APPELLATE CIVIL.

Before Mr. Justice Baguley.

1939

Mar. 16.

K.S.R.M. CHETTYAR *v.* P. S. LAKHANI.*

Damages for wrongful attachment, suit for—Reasonable grounds for belief that goods were judgment-debtor's—Reasonable and probable cause—Absence of malice—Pleas not available to attaching creditor—No declaratory suit by attaching creditor—Plea not available that goods belonged to judgment-debtor—Civil Procedure Code, O. 21, r. 63.

A judgment-creditor in execution of his decree attached shop goods as belonging to his judgment-debtor, but the attachment was removed at the instance of a claimant. The judgment-creditor did not file a declaratory suit under O. 21, r. 63 of the Civil Procedure Code. In a suit by the claimant for damages for wrongful attachment it is no defence for the creditor to aver that he had reasonable grounds for believing that the goods attached belonged to his judgment-debtor and that no damages could be recovered against him unless the claimant proved absence of reasonable and probable cause and/or malice.

K. A. Assan Mahomed v. *S. M. Rowther*, I.L.R. 2 Ran. 181 ; *Kissorimohun Roy* v. *Harsukh Das*, I.L.R. 17 Cal. 436, referred to.

Ramanathan Chetty v. *Marikar*, A.I.R. (1931) P.C. 28, distinguished.

Nor is it open to the judgment-creditor to raise the plea that his judgment-debtor was the owner of the goods. In the absence of a declaratory suit resulting in his favour the order of the executing Court is conclusive.

Neamaganda v. *Paresha*, I.L.R. 22 Bom. 640, referred to.

P. B. Sen for the appellant.

K. C. Sanyal for the respondent.

BAGULEY, J.—The appellant obtained a decree against one Prem Singh. In execution of that decree he attached the contents of a certain shop. Pretem Singh Lakhani applied for removal of the attachment and was successful on September 8, 1937. No immediate suit for a declaration under Order 21, Rule 63 was filed by the appellant and, on November 30, 1937, Pretem Singh Lakhani filed a suit against the appellant for wrongful attachment. He claimed damages to the extent of

* Special Civil 2nd Appeal No. 377 of 1938 from the judgment of the District Court of Mandalay in Civil Appeal No. 36 of 1938.

Rs. 600. The lower Court gave him a decree for Rs. 509. On appeal the learned District Judge, Mandalay reduced the amount of damages to Rs. 472, so the present appellant files this second appeal under section 11 of the Burma Courts Act.

The first ground argued was that the appellant had reasonable grounds for believing that the shop attached in execution of his decree belonged to his judgment-debtor and damages could not be given unless and until the respondent proved absence of reasonable and probable cause and/or malice. In support of this, reliance is placed on *Ramanathan Chetty* v. *Mira Saibo Marikar* (1). This case is not a safe guide on which to rely. It is a case from Ceylon and is really a case in which the Roman-Dutch Law had to be applied, reference being made to two other cases, one from the Supreme Court of Ceylon and the other a decision of the Supreme Court of the Cape of Good Hope. The law on this point varies in different countries as is shown in another Privy Council case, *Kissorimohun Roy* v. *Harsukh Das* (2) where it is pointed out that the procedure of attachment is not the same in India as in England, and it was held in India that the plaintiff was not bound to allege and prove that the defendants had resisted his previous application under section 278 maliciously or without probable cause. This case is relied upon in *K. A. Assan Mahomed* v. *S. M. Kadersa Rowther* (3). So the appellant's first point fails.

The next point is that it was open to the appellant to raise the plea that his judgment-debtor, Prem Singh was the owner of the shop. This contention is also bad. There is an order as between these parties that the goods were the property of Pretem Singh Lakhani and this order is conclusive, subject to the result of any

(1) A.I.R. (1931) P.C. 28. (2) (1889) I.L.R. 17 Cal. 436.
(3) (1924) I.L.R. 2 Ran. 181.

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suit filed by the party against whom the order is made. No such suit has been filed. Of the cases quoted, *Nilo Pamdurang* v. *Patloji* (1), *Bailur Krishna Rau* v. *Lakshmana Shanbhogue* (2) and *Surnamovi Dasi* v. *Ashutosh Goswami* (3) are different from the present case because in all these cases more than a year had elapsed from the order passed in the removal of the attachment proceedings to the date of final suit, so the order passed under Order 21 Rule 63 had become absolutely conclusive. The case of *Neamaganda* v. *Paresha* (4) however, is the same as the present case. The suit in which that order was passed was filed within one year of the passing of the order in the removal of attachment proceedings. Nevertheless it was held that the order was still conclusive until and unless the person against whom the order was passed had filed a regular suit to get it set aside. It was argued before me that if as soon as this suit for damages was filed the appellant had filed a suit under Order 21, Rule 63, it could not have been tried by reason of section 10 of the Civil Procedure Code; the same matter arising in the two cases, the suit first instituted would have to proceed, and that is the present case. The argument however overlooks the fact that the matter in issue must be pending in Courts having jurisdiction to grant the relief claimed. The setting aside of the order in the removal of attachment proceedings could only be agitated in a separate suit filed under Order 21 Rule 63. In the present case the Court had no jurisdiction to deal with it, so the appellant should have filed a suit under Order 21, Rule 63, and then applied to have the present case stayed pending its disposal. But evidently he did not adopt this course. There was no need for finding that Pretem Singh Lakhani was the owner of the shop,

(1) (1884) I.L.R. 9 Bom. 35.
(2) (1879) I.L.R. 4 Mad. 302.
(3) (1900) I.L.R. 27 Cal. 714.
(4) (1897) I.L.R. 22 Bom. 640.

because that was concluded by the order passed in the removal of attachment proceedings.

The next point is that the Court should have taken into consideration the facts that the judgment-debtor was the uncle of Pretem Singh Lakhani and was the Manager in charge of the shop and that these facts should be considered in mitigation of damages. There can be no question of mitigation of damages in a suit for trespass. The damages have to be measured by the loss suffered by the plaintiff. There is no question of punitive or vindictive damages.

[His Lordship confirmed the decree of the lower Court but lessened the amount of damages awarded to Rs. 338.]