

SPECIAL BENCH (CIVIL).

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, Mr. Justice Mya Bu
and Mr. Justice Mosely.

1939

Feb. 2.

S.T.R.M. CHETTYAR FIRM

v.

ANDATHAL AND OTHERS.*

Execution—Attachment of immovable property—Personal service of notice on judgment-debtor—Mode of attachment—Prohibitory order—No personal service required—Court issuing notice of its own motion—Rules particularizing notice to judgment-debtor—Civil Procedure Code, O. 21, r. 22; O. 21, rr. 43, 44, 46 (2), 47, 48, 51 to 53; O. 21, r. 54.

Except in the cases covered by O. 21, r. 22 of the Civil Procedure Code, and except where the Court issues of grace of its own motion notice to the judgment-debtor to show cause against attachment of his property, the judgment-debtor is not entitled to be served personally with a notice before a prohibitory order is issued for the attachment of his immovable property under O. 21, r. 54 of the Code.

A perusal of the rules of O. 21 which deal with the attachment of other descriptions of property, rr. 43, 44, 46, 47, 48 and 51 to 53, of which r. 46 (2) and r. 47 are the only ones which particularize notice to the judgment-debtor as the requisite method of informing him of the attachment, is sufficient to show that the omission to require service of a notice on the judgment-debtor in person in r. 54 was intentional.

Nayasha Kursoon Bee Bee v. S.P.S.T.R.M. Firm, A.I.R. (1936) Ran. 403; *Ramanayakudu v. Basappa*, I.L.R. 42 Mad. 565; *Sher Khan v. Misri Lal*, A.I.R. (1926) Oudh 45, referred to.

P. B. Sen for the appellant. A person who is to be prohibited from dealing with his property by reason of some attachment must have notice of the prohibition. Where property is sought to be attached under O. 21, r. 54 of the Civil Procedure Code notice of such attachment must be served on the judgment-debtor. Mere constructive notice is not sufficient. The form of the notice prescribed in Appendix E, No. 24, shows that personal service is necessary.

* Civil First Appeal No. 55 of 1938 from the order of the Assistant District Court of Hanthawaddy in Civil Execution No. 7 of 1936.

The decision of this Court to the contrary in *Nayasha Kursoon Bee Bee v. S.P.S.T.R.M. Chettyar Firm* (1) requires re-consideration. See *Sinnappan v. Arunachalam* (2); *Abdul Ghafur Khan v. Akram Hasan* (3); *Ganga Din v. Khushali* (4); *Ma Pwa v. Mohamed Tambi* (5).

1939
S.T.R.M.
CHETTYAR
FIRM
v.
ANDATHAL.

Aiyar and Wan Hock for the 1st and 4th respondents contended that no such personal service was necessary, and referred to *Nagar Mull v. Benares Bank, Ltd.* (6); *Das v. Ray* (7); *Mule Ram v. Jiwanda Ram* (8); *Galabhai v. Kika Jivan* (9); *Sher Khan v. Misri Lal* (10). All that is necessary is that an order of attachment should issue, and the other things prescribed in rule 54 should be done.

MOSELY, J.—This is an appeal by the S.T.R.M. Chettyar Firm of Pyawbwe, Hanthawaddy District, whose property was sold in execution by its partner Somasundaram Chettyar against the decree-holder respondent 1 and respondents 2, 3 and 4, the auction purchasers.

In Civil Regular No. 30 of 1933 of the Assistant District Court of Hanthawaddy the plaintiff sued the firm in question carrying on business by its partner Somasundaram Chettyar, and also sued the four partners in their personal capacity, namely the above Somasundaram Chettyar whose address is given as Mogul Street, Rangoon, Thenappa Chettyar deceased by his legal representative Subbiah Chettyar of Ramnad, Madras, Visvanathan Chettyar, and Meenatchi Achi of Madras. The suit was decreed against the firm and partners.

(1) A.I.R. (1936) Ran. 403.

(2) I.L.R. 42 Mad. 844.

(3) I.L.R. 46 All. 741.

(4) I.L.R. 7 All. 702, 707

(5) I.L.R. 1 Ran. 533.

(6) I.L.R. 9 Pat. 860.

(7) I.L.R. 59 Cal. 1176.

(8) I.L.R. 4 Lah. 211.

(9) I.L.R. 53 Bom. 851.

(10) A.I.R. (1926) Oudh. 45

1939
 S.T.R.M.
 CHETTYAR
 FIRM
 v.
 ANDATHAL.
 MOSELY, J.

In the execution case in question, No. 7 of 1936, the judgment-debtors were—

- (1) the firm ;
- (2) Somasundaram Chettyar ;
- (3) Subbiah Chettyar as legal representative ;
- (4) Nachiappa Chettyar, minor son of Visvanathan by his guardian *ad litem*, the Bailiff, Hanthawaddy and
- (5) Meenatchi Achi.

It appears that the last two judgment-debtors had been adjudged insolvent in Madras.

One of the grounds of objection in the present case is that notice to the Official Receiver as their legal representative was not issued under Order 21, rule 22. I note that the trial Court went astray in quoting *Maung Ohn Tin v. P.R.M.P.S.R.M. Chettyar Firm* (1) as authority for the proposition that notice was unnecessary to the Official Receiver. That case was a case where the Official Receiver was impleaded in his capacity as an ordinary Receiver in administration and not as Official Receiver.

However, in the present case these notices under Order 21, rule 22 are altogether immaterial, as execution was applied for against the property of the partnership firm and not against the personal property of the partners, *vide* Order 21, rule 50 (a).

The next objection is that the prohibitory order (Order 21, rule 54) was not served on Somasundaram Chettyar, the managing partner. It is objected by Mr. Aiyar for the first respondent that such notice is unnecessary. That has been laid down in *Nayasha Kursoon Bee Bee v. S.P.S.T.R.M. Chettyar Firm* (First Appeal No. 22 of 1936) which I note has been reported in an unauthorized report (2). We have been invited by Mr. P. B. Sen for the appellant to have this ruling

(1) (1929, I.L.R. 7 Ran. 425.

(2) A.I.R. (1936) Ran. 403.

re-considered. It has been given effect to in Burma Courts Manual, Circular No. 30, Item 18, and it is, therefore, desirable to re-consider it if there are grounds for doing so, though that may not be essential for the decision of this case.

Order 21, rule 54, sub-sections (1) and (2), read as follows :

“(1) Where the property is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate.”

Sub-section (3) need not be considered. It was added by this Court to deal with the date from which the order is effective.

Nayasha Kursoon Bee Bee's case quotes four decisions : *Sinnappan alias Metharmamana Rowther v. Arunachalam Pillai and two others* (1), *Ramanayakudu and three others v. Boya Pedda Basappa and two others* (2), *Abdul Ghafur Khan v. Akram Hasan and another* (3), *Ganga Din and others v. Khushali* (4) and says that these are no authority for the contention that personal service of the prohibitory order on the judgment-debtor is necessary. These cases are directed to the point, it is said, that an attachment is effective not from the date of ordering it but from the date of publishing it. No doubt, it is said, there are, in these cases, *dicta* to the effect that the judgment-debtor must receive notice of the attachment, but he does receive such notice, either

(1) (1919) I.L.R. 42 Mad. 844.

(3) (1924) I.L.R. 46 All. 741.

(2) (1919) I.L.R. 42 Mad. 565.

(4) (1885) I.L.R. 7 All. 702.

1939
 S.T.R.M.
 CHETTYAR
 FIRM.
 v.
 ANDATHAL.
 MOSELY, J.

actual or constructive, because before the order for attachment is made he is called upon to show cause against it, and therefore he must either be present before the Court at the time when the order is made, or he must have had an opportunity of being present.

The form of the notice is addressed to the judgment-debtor personally as well as to the public. I agree that the section of the Code does not require personal service of the notice on the judgment-debtor. A perusal of the rules of Order XXI which deal with the attachment of other descriptions of property, rules 43, 44, 46, 47, 48 and 51 to 53, of which rule 46 (2) and rule 47 are the only ones which particularize notice to the judgment-debtor as the requisite method of informing him of the attachment, is sufficient to show that the omission to require service of a notice on the judgment-debtor in person in rule 54 was intentional. As was said in a case quoted to us, *Sher Khan v. Misri Lal* (1) which is only available in an unauthorized report, no notice other than the publication of the prohibitory order (wrongly styled there "sale notice") is necessary. *Ramanayakudu and three others v. Boya Pedda Basappa and two others* (2) says, at page 566, that Order 21, rule 54, sub-section (2), contemplates that the person prohibited must have the opportunity afforded by the application (affixing?) mentioned in clause (2) of rule 54 of knowing that he is so prohibited.

Except in the cases covered by Order 21, rule 22, and except where the Court issues of grace of its own motion notice to the judgment-debtor to show cause against attachment, the judgment-debtor has no notice actual or constructive of attachment before a prohibitory order is issued under Order 21, rule 54, as that is the first stage in execution by attachment of immovable property.

(1) A.I.R. (1926) Oudh. 45.

(2) (1919) I.L.R. 42 Mad 565.

It may be in some cases that notice to the judgment-debtor, though not obligatory under rule 54, is desirable. A case of this kind might be where the property is attached in the non-cultivating season, and lies so far from any village that the judgment-debtor may not know of the attachment.

In any case the evidence and the materials on record show that notice in this execution case was served on Vyraavan who was living in the firm's house at Pyawbwe and was working and collecting rents on behalf of the firm. In my opinion until the contrary is proved he must be held to have an ostensible authority to accept notice on behalf of the managing partner (Order 5 rule 12). It is unnecessary to consider the evidence, that of Chidambaram, and the affidavit of service of the prohibitory order itself that a prohibitory order was issued to Somasundaram Chettyar in another execution case, No. 15 of 1936 of the same Court, by another decree-holder attaching the same land in question, which was sold in execution at the same sale, that decree-holder being allowed rateable distribution,—for that attachment would not fix *this* debt on the property.

[His Lordship then held that there was no substance in the objection that notice to verify the sale proclamation issued under Order 21, rule 66 by substituted service was obtained under false pretences : His Lordship continued :]

The last objection is one under Order 21, rule 90, that there is a material irregularity in publishing or conducting the sale in that the property was misdescribed in the proclamation. We have heard Mr. P. B. Sen at length on the point and it appears to me that the schedule gave all the particulars of the property sold that could be reasonably required. It was not necessary to give the amount for which the houses in

1939
S.T.R.M.
CHETTYAR
FIRM
v.
ANDATHAL.
MOSELY, J.

1939

S.T.R.M.
CHETTYAR
FIRM
v.
ANDATHAL.
MOSELY, J.

question were rented, nor was it necessary to describe one plot of land as suitable for a mill site when there is no evidence that it was peculiarly suitable therefor and all that is said is that a proposal for its use as such had once been abandoned.

The evidence on the record that the granary was sold for a wholly insufficient price is, in my opinion, quite unreliable.

There is evidence that the first judgment-debtor throughout knew of the sale, and it was not shown that he suffered any substantial injury by reason of any irregularity. What is more, the grounds put forward by him could have been put forward before the sale was conducted [Order 21 rule 90 sub-section (a) as amended by Schedule Notification No. 44 of 27th January 1937].

No irregularities were disclosed which went to the root of the proceedings, or affected the auction purchasers.

I would therefore dismiss this appeal with separate costs against the decree-holder and the auction-purchasers, advocate's fee in each case five gold mohurs.

ROBERTS, C.J.—I agree.

MYA BU, J.—I concur.