

APPELLATE CIVIL.

Before Addison and Din Mohammad JJ.

1938
March 16.

TIKHA RAM-CHUNI LAL AND ANOTHER (DECREE-
HOLDERS) Appellants,
versus
FAKHIR AHMED AND OTHERS (JUDGMENT-DEBTORS)
Respondents.

Execution Second Appeal No. 1266 of 1937.

*Civil Procedure Code (Act V of 1908), O. XXI, r. 90 —
Execution of decree — Sale of immoveable property without
previous attachment — whether vitiates the sale.*

Held, that the absence of attachment prior to the sale
of immoveable property in the execution of a decree amounts
to no more than an irregularity and is not sufficient to vitiate
the sale unless substantial loss has been caused thereby.

Case law reviewed.

*Second appeal from the order of Mr. Kartar
Singh, District Judge, Karnal, dated 30th April, 1937,
reversing that of Mr. Bhagat Singh, Subordinate
Judge, 1st Class, Rohtak, dated 18th November, 1935,
and ordering the lower Court to attach the property
first and then to proceed according to law.*

QABUL CHAND MITTAL, for Appellant.

PARKASH CHAND, for Respondents.

The Judgment of the Court was delivered by—

ADDISON J.—In execution of a decree, the decree-
holder attached on the 29th November, 1933, certain
shares of the judgment-debtors in *Khewat* No. 571 in
Mauza Sonapat. The proceedings dragged on and on
the 11th March, 1935, the executing Court directed
the decree-holder's counsel to substantiate his allega-
tion that the land in question had ceased to be agricul-
tural. It was held on the 10th April, 1935, that the
land had ceased to be agricultural except two *Khasra*
numbers.

1938

On the 4th June, 1935, the Court passed an order that the application for execution, which had been pending for two years, was dismissed at the request of the decree-holder but the attachment of the property was maintained. On the same day a fresh application for execution was put in. It is obvious that this was merely a dodge to get a delayed execution case off the pending file of the Subordinate Judge. On the 5th July 1935 the judgment-debtors applied for review of the order dated the 10th April 1935. In the meantime a new Subordinate Judge had arrived and he reopened the matter. Two issues were framed by him: (1) Has the land in dispute ceased to be agricultural; and (2) Is any portion of the land a graveyard, and, if so, how does this affect the execution. The executing Court came to the conclusion that the land was no longer agricultural. There also seems to be a finding that some part was being used as a graveyard but it was held that the sale could not be refused on that ground and it was stated that mention would be made in the proclamation of sale that a portion was being so used.

Thereafter in January 1936 the land was sold. In the meantime the judgment-debtors appealed against the order, passed in review on the 18th November, 1935. The appeal was not decided till the 30th April 1937, there being no explanation for this extraordinary delay. On appeal all that the District Judge said was that, as the land had not been attached, (a point which had not been taken in the executing court) it could not be sold and in this respect he followed *Daim Shah v. Vir Bhan* (1), a judgment of a Single Judge. He did not go into the other matters. Against this decision this second appeal has been instituted.

TIRKHA RAM-
CHUNI LAL
v.
FAKHIR AHMED.

(1) 1934 A. I. R. (Lah.) 395.

1938

TIRKHA RAM-
CHUNI LAL
v.
FAKHIR AHMED.

The learned Judge of this Court, who decided the case referred to, purported to follow *Mahadeo Dubey v. Bhola Nath Dichit* (1). His attention, however, was not drawn to the fact that a Division Bench of the Allahabad High Court in *Sheodhyan v. Bhola-nath* (2) did not follow their own Full Bench decision, pointing out that it could no longer be held to be correct, in face of the judgment of their Lordships of the Privy Council in *Tasadduk Rasul Khan v. Ahmad Husain* (3).

Further, this question came before one of us who held in *Muhammad Abdulla v. Jamait Rai* (4) that "the absence of attachment prior to the sale of immoveable property in execution of a decree amounts to no more than an irregularity and is not sufficient to vitiate the sale in the absence of any substantial loss resulting from such want of attachment." Most of the authorities are discussed there and it will only be necessary briefly to refer to them.

It appears that it was held in *Sarabji Coovarji v. Kala Raghunath* (5), that there could be no order for sale when there was no attachment; but in view of numerous other authorities, a Single Judge of that Court in *Sakharlal Jamnadas v. Jerbai Sorabji* (6) did not follow the earlier Bombay decision and held that the absence of attachment prior to sale amounted to no more than a material irregularity and was not, unless substantial injury was caused thereby, sufficient to vitiate the sale.

Again, there is a decision of a Division Bench of the Calcutta High Court in *Panchanan Das v. Kunja Behari* (7) to the effect that attachment is necessary

(1) I. L. R. (1883) 5 All. 86 (F. B.). (4) 1930 A. I. R. (Lah.) 685.
(2) I. L. R. (1899) 21 All. 311. (5) I. L. R. (1912) 36 Bom. 156.
(3) I. L. R. (1894) 21 Cal. 66 (P. C.). (6) I. L. R. (1934) 53 Bom. 564.
(7) (1917) 42 I. C. 259.

1938

before a sale can take place, but the opposite view has been taken by the same Court in *Sasirama Kumari v. Meherban Khan* (1), *Kishory Mohan Roy v. Mahomed Muzaffar Hossain* (2), *Hari Charan Singh v. Chandra Kumar Dey* (3) and *Rajani Kanto Pal v. Mohan Chandra Roy* (4).

TIKHA RAM-
CHUNI LAL
v.
FAKHIR AHMED.

It has also been held by the Patna High Court in *Raja Wazir Narain Singh v. Bhikhari Ram* (5), by the Rangoon High Court in *Ma Pwa v. Mahomed Tambi* (6), and by the Court of Judicial Commissioners of the Central Provinces in *Shanker Rao v. Manik Rao* (7), that want of attachment is only an irregularity and the sale cannot be set aside merely on that ground.

Similarly, the Madras High Court has held in *Ramasami Naik v. Ramasami Chetti* (8), *Sivakolundu Pillai v. Ganapattiy* (9), *Subramania Aiyar v. Krishna Aiyar* (10) and *Velayutha Muppan v. Subramanian Chetti* (11), that absence of attachment does not invalidate an execution sale unless substantial loss has been caused thereby.

There is thus no doubt as to the weight of authority and we hold that the absence of attachment is not sufficient to invalidate an execution sale unless substantial loss has been caused thereby. We accordingly accept the appeal, set aside the order of the District Judge, and remand the appeal to him for decision on the merits. The appellant will get his costs of this Court. Costs of the District Court will be in the discretion of that court.

A. N. K.

Appeal accepted.

(1) (1911) 9 I. C. 918.

(6) I. L. R. (1923) 1 Rang. 539.

(2) I. L. R. (1891) 18 Cal. 188.

(7) 1923 A. I. R. (Nag.) 18.

(3) I. L. R. (1907) 34 Cal. 787.

(8) I. L. R. (1907) 30 Mad. 255.

(4) 1927 A. I. R. (Cal.) 847.

(9) (1917) Mad. W. N. 88.

(5) I. L. R. (1923) 2 Pat. 207.

(10) 1926 A. I. R. (Mad.) 211.

(11) (1913) 24 Mad. L. J. 70.