

Queen-Empress v. Maganlal⁽¹⁾—when the fear is of instant death. In less serious cases, this circumstance can only be pleaded in mitigation of the punishment. The Sessions Judge would certainly not have sentenced the accused No. 2 to two years' rigorous imprisonment but for his conviction that No. 2 accused actively supported No. 1 accused, and that he took part himself in the torture. Even though I hold that the evidence does not support this view, yet as he was a police officer on duty at the time, and as he joined with No. 1 accused in the illegal search at night without the usual precautions of a panch to watch the proceedings, the accused No. 2 by his silent acquiescence was an accessory to the offence of his principal. In the view I have taken of the facts I think a sentence of one year's imprisonment would be sufficiently deterrent punishment under the peculiar circumstances of the case.

(1) I. L. R., 14 Bom., 115.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

CHARLES AGNEW TURNER, OFFICIAL ASSIGNEE AND ASSIGNEE OF THE ESTATE AND EFFECTS OF A. G. ALMOND, AN INSOLVENT (APPLICANT), v. PESTONJI FARDUNJI AND OTHERS (ORIGINAL PLAINTIFFS), OPONENTS.*

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March 12.

Insolvency—Attachment before judgment—Insolvency of defendant whose property has been attached before judgment—Right of Official Assignee to attached property—Practice—Procedure—Civil Procedure Code (Act XIV of 1882), Secs. 278, 281, 487, 351—Indian Insolvent Act (Stat. 11 and 12 Vic., C. 21).

Plaintiffs filed a suit in a Subordinate Court and attached before judgment some moveable property of the defendant. Before the hearing of the suit, the defendant filed a petition in Bombay under the Insolvency Act, and a vesting order was made.

Held, that the Official Assignee was entitled by an application to the Court, in which the suit was filed, to have the attachment raised before the defendant was declared an insolvent.

Where a vesting order is made after attachment, and before decree, the title of the Official Assignee takes effect, and prevents the attaching creditor from obtaining satisfaction of his decree by a sale. In such a case the Official Assignee can move by an ordinary motion instead of a regular suit.

* Application No. 235 of 1894 under extraordinary jurisdiction.

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Jiva v. Jádowji⁽¹⁾ referred to.

Shib Kristo v. Miller⁽²⁾ and *Sadayappa v. Ponnáma*⁽³⁾ referred to and followed.

APPLICATION under section 622 of the Civil Procedure Code (Act XIV of 1882) to the High Court in its extraordinary jurisdiction.

In a suit brought against one Almond in the Court of the First Class Subordinate Judge of Surat, certain property belonging to him was attached before judgment by the plaintiffs (Dinshaw Fardunji and Co.)

On the 26th June, 1894, before the suit came on for hearing, Almond filed his petition in insolvency in the High Court of Bombay, and by the vesting order made on that day all his estate became vested in the Official Assignee under section 7 of the Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21).

On the 30th June, the Official Assignee applied in the Surat Court under sections 278 and 487 of the Civil Procedure Code (Act XIV of 1882) to have the attachment before judgment removed, and the attached property handed over to him for the benefit of the insolvent's creditors.

The Subordinate Judge, Khán Bahádur M. N. Nánávati, rejected the application as being premature, because Almond had not yet been declared an insolvent under section 351 of the Civil Procedure Code (Act XIV of 1882), and he observed: "If the attachment be raised now, and if Almond's application be dismissed, or he be not declared an insolvent, the attaching creditors would lose all the benefit of the attachment before judgment to the defeat of the principle *vigilantibus non dormientibus leges et æquitas subveniunt.*"

The Official Assignee then applied to the High Court under section 622 of the Code of Civil Procedure (Act XIV of 1882) and obtained a rule *nisi* calling upon the plaintiff in the suit (Dinshaw Fardunji and Co.) to show cause why the decision of the Subordinate Judge of Surat should not be set aside.

Macpherson (with *A. F. Sakhardande*) for the applicant (the Official Assignee) in support of the rule:—An attachment before

(1) 1 Bom. H. C. Rep., 224.

(2) I. L. R., 10 Calc. 150.

(3) I. L. R., 8 Mad., 551.

judgment is void as against a vesting order. See *Gamble v. Bholágir*⁽¹⁾, *Shil Kristo v. Miller*⁽²⁾ and *Sadayáppa v. Ponnáma*⁽³⁾.

The application was not premature.

The case of *Jára v. Jádowji*⁽⁴⁾ relied upon by the Subordinate Judge was decided under section 246 of the former Civil Procedure Code (Act VIII of 1859). That section 246 has been split up into sections 278, 280, 281 and 282 of the present Civil Procedure Code (Act XIV of 1882), and those sections only apply to property attached in execution of decrees, the words "Or under any order for attachment passed before judgment" in section 246 of the old Code having been omitted in the new Code. The Official Assignee can, therefore, apply under section 487 of the new Code. Section 278 merely shows the manner in which the investigation of his claim is to be made. The later sections, *viz.*, 279, 280 and 281, do not apply to attachments before judgment at all.

In the case of insolvents under the Indian Insolvent Act (Statute 11 and 12 Vic., c. 21), the title of the Official Assignee is finally completed by the vesting order. The words "*declared insolvent*" in section 351 of the Civil Procedure Code (Act XIV of 1882) are not to be found in the statute. The lower Court's order, therefore, is erroneous.

CANDY, J. :—Dinshaw Fardunji and Co. having filed a suit against A. G. Almond in the Subordinate Court, Surat, attached before judgment certain moveable property of the defendant. Before the hearing of the suit, Almond filed his petition in Bombay under the Insolvency Act, and the usual vesting order was at once made. The Official Assignee then applied to the Subordinate Judge, Surat, under sections 487, 278, Civil Procedure Code (Act XIV of 1882) to raise the attachment; but the Subordinate Judge dismissed the application on the grounds that (a) Almond had not been declared an insolvent; (b) in the case of *Jára v. Jádowji*⁽⁴⁾, the application, under section 246, Act VIII of 1859, (answering to section 278, present Code) had been dismissed. He, therefore, rejected the application as premature, the Official Assignee being at liberty to make it on Almond being declared an insolvent.

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(1) Bom. H. C. Rep., 146.

(2) I. L. R., 10 Cal., 150.

(3) I. L. R., 8 Mad., 554.

(4) 1 Bom. H. C. Rep., 224.

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On the Official Assignee applying to this Court under section 622, a rule *nisi* was granted, and notices were issued. Dinshaw Fardunji and Co. have intimated that they have no objection to the attached property being handed over to the Official Assignee. But it is expedient to intimate our views on both the points taken by the Subordinate Judge.

(a) Almond having himself made a petition in insolvency, it was impossible to hold that the Official Assignee's application was premature till Almond had been declared an insolvent. This was not a case in which a creditor had asked the debtor to be declared an insolvent, or where a declaration of insolvency could be made under section 351, Civil Procedure Code.

(b) In the case of *Jáva v. Jádlowji*⁽¹⁾, the facts were as stated by the Subordinate Judge. But it is clear that in the opinion of the Chief Justice, Sir M. Sausse, it was the duty of the Court, on the fact of the vesting order being brought to its notice, to remove the attachment. So here the Subordinate Judge should have adjudicated on the question, and not declined to deal with the facts brought to his notice, on the ground that the application was premature.

We agree with the majority of the Judges of the Calcutta High Court in *Shib Kristo v. Miller*⁽²⁾ and with the Madras High Court in *Sadayappa v. Ponnáma*⁽³⁾ that where a vesting order has been made after attachment and before decree, the title of the Official Assignee takes effect and prevents the attaching creditor from obtaining satisfaction of his decree by a sale. But the right of the Official Assignee to have the attachment before judgment removed, and his right to resist the claim of the attaching creditor to have the decree satisfied by the sale of the attached property, would seem to stand or fall together. We can see no reason, on principle, why the Official Assignee should be forced to assert his right by a regular suit instead of bringing the facts to the notice of the Court by ordinary motion. The latter procedure is apparently followed by the Calcutta High Court (see *Bank of Bengal v. Newton*⁽⁴⁾). It has, as

(1) 1 Bom. H. C. Rep., 224.

(2) I. L. R., 10 Calc., 150.

(3) I. L. R., 8 Mad., 554.

(4) 12 Bom. L. R., App. 1.

shown above, been followed on the Original Side of this Court; and we see no reason why it should not be followed in the Subordinate Courts of the Presidency.

This conclusion seems consistent with the provisions of the Civil Procedure Code. By the terms of section 487, any claim to property attached before judgment shall be investigated in the manner before provided for the investigation of claims to property attached in execution of a decree for money. The section dealing with the manner of investigating such claims is section 278, which directs that the Court shall proceed to investigate the claim with the like power as regards the examination of the claimant and in all other respects as if he were a party to the suit, and the provisions of this section must be applied to the investigation of claims to property attached before judgment. But section 281, which in certain cases prevents the release from attachment of property attached in execution of a decree, has not been applied to claims to property attached before judgment, for section 487, which prescribes the manner of investigation, is silent as to the result. If, then, it be found that by operation of law, the defendant has ceased to have any interest in the property, and that there is nothing left to justify the maintenance of the attachment, it is clear that the attachment ought to be raised, for when the law directs the claim to be investigated, it manifestly implies that if the claim is made good, the attachment, which was intended merely to preserve the defendant's interest from the effect of private alienations, shall come to an end.

Having regard to these considerations, we must make the rule absolute, and discharge the order of the Subordinate Judge, and direct the attachment to be removed. The Official Assignee does not ask for costs.

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