

APPELLATE CIVIL:

Before Sir C. Kurrán, Kt., Chief Justice, and Mr. Justice Parsons.

TULAJI FATESING RAJE BHOSLE (ORIGINAL JUDGMENT-DEBTOR),
APPELLANT, v. BALABHAI LAKHMICHAND (ORIGINAL DECREE-HOLDER),
RESPONDENT.*

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March 10.

Execution—Attachment—Allowance payable through post office—Attachment of money in hands of public officer—Anticipatory attachment—Civil Procedure Code (Act XIV of 1882), Sec. 272, Sch. 4, Form 142.

Section 272 of the Civil Procedure Code (Act XIV of 1882) does not allow of an anticipatory attachment of money expected to reach the hands of a public officer, but applies only to moneys actually in his hands.

SECOND appeal from the decision of W. H. Crowe, District Judge of Poona, confirming the order of Rao Bahadur N. N. Nanavati, First Class Subordinate Judge, in an execution proceeding.

The appellant Tulaji Fatesing was in receipt of a monthly allowance of Rs. 500 from the Akalkot State. It was paid to him at Poona through the post office there. The respondent (plaintiff) obtained a decree against Tulaji in the Court of the First Class Subordinate Judge of Poona, and in execution attached, by a prohibitory order directed to the Post Master, Rs. 300 out of the allowance. The prohibitory order was issued on the 6th April, 1895, and was received by the Post Master on the 8th April. He received the money order on the 13th April.

Tulaji applied to the Court to remove the attachment. The Subordinate Judge rejected the application, holding that the allowance was liable to attachment and exempted from the operation of section 266 of the Civil Procedure Code (Act XIV of 1882), as it was neither a political pension nor a grant by the British Government.

On appeal by the judgment-debtor the Judge confirmed the order.

Tulaji thereupon preferred a second appeal to the High Court.

* Second Appeal, No. 902 of 1895.

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Branson with *Ghandasham N. Nalkarni* appeared for the appellant (Tulaji) :—The attachment purported to be made under section 272 of the Civil Procedure Code (Act XIV of 1882). Under that section the property to be attached must be in the hands of the public officer. But in the present case the Post Master had no money in his hands when he received the order of attachment. We contend that section 272 is not applicable. Arrears of maintenance can be attached under that section, but not the right to future maintenance.

Next we contend that an allowance of this kind cannot be attached under section 266 of the Civil Procedure Code (Act XIV of 1882). This allowance was granted to the appellant by the Akalkot State for his maintenance and, therefore, cannot be attached. It may be stopped at any time by the State. The test is, what would a purchaser get if the right to the allowance be put up to sale. It is merely a personal allowance and the purchaser would get nothing if the State stopped the allowance—*Ghamshamlal v. Bhansali*⁽¹⁾; *Diwali v. Apaji Ganesh*⁽²⁾; *Gulab Kuar v. Bansidhar*⁽³⁾; *Bhyrub Chunder Ghose v. Nubo Chunder Gooho*⁽⁴⁾.

Nagindas T. Marphatia appeared for the respondent (judgment-creditor) :—We do not ask for the attachment of the allowance that may become due in future. Here we have attached the sum of Rs. 300 which has become due. As soon as the money was paid to the forwarding post office at Akalkot for despatch to Poona it ceased to be an allowance, and it became money belonging to the appellant-debtor.

[PARSONS, J. :—Can you levy attachment in anticipation?]

We submit we can, because the money had already become the judgment-debtor's property at Akalkot. The prohibitory order was in force when the money reached Poona, and it came into full operation when the money was received by the Post Master at Poona—*Narasimhulu v. Adiappa*⁽⁵⁾; *Lallumal v. Mahmomed Sherdil Khan*⁽⁶⁾.

(1) I. L. R., 5 Bom., 249.

(2) I. L. R., 10 Bom., 342.

(3) I. L. R., 15 All., 371.

(4) 5 W. R., 111.

(5) I. L. R., 13 Mad., 242.

(6) 12 Punjab Record, p. 233.

The money is not payable by the British Government and, therefore, it is not a pension under section 266 of the Civil Procedure Code (Act XIV of 1882).

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FARRAN, C. J. :—It is not disputed by Mr. Nagindas for the respondent that the allowance payable to the defendant in this case was not attachable until the sums payable in respect of it were received by the post office for his benefit and on his behalf. The attachment order cannot, therefore, be supported on the ground of its being an attachment of the defendant's right to receive the sum in question. The attachment can only be supported as an attachment of moneys in the hands of a public officer within the meaning of section 272 of the Civil Procedure Code.

It is admitted, however, that at the date of the attachment (6th April, 1895) there was no money in the hands of the Post Master at Poona. The money sought to be attached did not reach his hands until the 13th April, and so could not be attached on the 6th. Section 272 does not, in my opinion, allow of an anticipatory attachment of money expected to reach the hands of a public officer, but applies only to moneys actually in his hands.

The Court reverses the order of attachment with costs throughout on respondent.

PARSONS, J. :—I concur. Section 272 of the Code of Civil Procedure provides for the attachment of property which is deposited in or is in the custody of a Court or public officer. The form (No. 142, Schedule 4) recites an application for the "attachment of certain money now in your hands (*here state how the money is supposed to be in the hands of the person addressed*).". Thus it is clear both from the words of the section and the form that the property sought to be attached must be actually in the possession of the Court or officer to enable it to be attached under section 272. It cannot be attached in anticipation of receipt. The District Judge thinks that such a construction of the section would operate to prevent the attachment of salaries; but there is a special provision for them made in section 268 which he has apparently overlooked.

Order reversed.

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Before Mr. Justice Jardine and Mr. Justice Ranade.

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VARAJLAL MULCHAND AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, v. KASTUR DHARAMCHAND (ORIGINAL DEFENDANT), RESPONDENT.*

Decree—Execution—Attachment in execution—Suit to declare property attached not liable in execution—Injunction against sale of property pending decision of suit on plaintiff giving security for interest on the sum representing value of attached property—Subsequent dismissal of suit with costs—Application by defendant in execution of decree for the interest for which security ordered by injunction—Application disallowed—Remedy under section 497, Civil Procedure Code—Civil Procedure Code (Act XIV of 1882), Secs. 278, 283, 492, 497.

Kastur having obtained a decree against one Vanmali attached a house in execution. Varajlal intervened under section 278 of the Civil Procedure Code (Act XIV of 1882), and applied that the house, if sold, should be sold subject to his mortgage. His application was dismissed and he thereupon brought a suit (No. 648 of 1887) for a declaration that the house was not liable in execution of Kastur's decree. That suit was dismissed by the lower Court, and Varajlal appealed. Pending the hearing of the appeal he applied for and obtained under section 492 of the Civil Procedure Code an injunction restraining the sale until the result of the appeal on his giving security for interest at six per cent. on Rs. 2,000, the acknowledged value of the house. The appeal was heard in due course and was dismissed with costs, and thereupon Kastur in execution of the decree in this last mentioned suit (No. 648 of 1887) applied to recover the interest for which security was ordered to be given by the District Court.

Held, that he was not entitled to recover it. A Court of execution cannot award interest when the decree is silent. The respondent (Kastur) had his remedy under section 497 of the Civil Procedure Code, and that remedy was obtainable on application, not to the Court of execution, but to the Court which issued the injunction.

SECOND appeal from the decision of Gilmour McCorkell, District Judge of Ahmedabad.

One Kastur Dharamchand having obtained a decree against Vanmali and others attached a house in execution.

Thereupon Varajlal Mulchand intervened under section 278 of the Civil Procedure Code (Act XIV of 1882) claiming a mortgage lien on the attached house. His application was dismissed

* Second Appeal, No. 831 of 1895.

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and he then filed a suit (No. 648 of 1887) praying for a declaration that Kastur was not entitled to sell the said house in execution except subject to his mortgage. This suit was dismissed with costs by the lower Court.

He thereupon filed an appeal in the District Court and at the same time applied for an *interim* injunction against Kastur restraining him from selling the house pending the disposal of the appeal. This application was made under section 492 of the Civil Procedure Code (Act XIV of 1882), and not under section 545. The District Court on this application granted the injunction if Varajlal gave a security for interest at 6 per cent. on the value of the property. The order of injunction was in the following terms:—

“If the applicant gives security for interest at 6 per cent. on Rs. 2,000 which is acknowledged to be the value of the property by both parties should he fail to establish his mortgage claim and for fulfilling the orders of the Appellate Court, I make the order absolute.”

The appeal to the District Court in Suit No. 648 of 1887 failed, and the decree of the lower Court dismissing the suit was confirmed, and subsequently a second appeal to the High Court was also dismissed with costs.

Thereupon Kastur applied in execution of the decree in this latter suit (No. 648 of 1887) to recover from Varajlal Rs. 236, the interest at 6 per cent. on Rs. 2,000 for which security was ordered to be given by the District Court.

Varajlal contended that the order as to the giving of security did not entitle Kastur to recover interest in execution, and that no interest could be recovered in execution of the decree in Suit No. 648 of 1887, as that decree contained no order to pay interest.

The Subordinate Judge refused execution of the decree in respect of the interest claimed.

In appeal the District Judge allowed the interest. In giving his decision he said:—

“The principal reason why the Subordinate Judge refused execution is that the decree sought to be executed does not direct any interest to be paid to the defendant by plaintiff.

When an appellant obtains a stay of execution pending an appeal and gives a security bond to meet the decree of the Appellate Court, the usual

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way of enforcing such security bond when necessary is by ordinary execution proceedings: *vide Venkapa Naik v. Bassalijgappa bin Kotrabasappa*(1). Nor is it usual in the decretal orders of the Appellate Court to make any reference to the security bond or its conditions. It is quite true, as stated by the Subordinate Judge, that the suit was one for a declaratory decree, and no interest could be awarded. It was, however, competent to the Court to have granted compensation to the defendant under section 497 of the Civil Procedure Code, and the probability is that no demand was made for compensation, because the defendant felt that under the security bond he could recover his full compensation. There does not, therefore, appear to me any objection to grant execution in respect of the interest. The Subordinate Judge also remarks that the appellant in his original decree has obtained an order awarding him interest on the decretal amount, and that he cannot recover double interest on it. As, however, the appellant does not seek to recover double interest from the same person, this does not appear an insurmountable difficulty. What the appellant really seeks to recover is the consideration which respondents undertook to pay on account of the grant of the temporary injunction. I do not see that it was necessary to make any reference to this security bond in the decree of the first Appellate Court. Looking to all the equitable circumstances of the case, the respondents are clearly liable to pay the interest promised in the security bond. That bond was not merely to make good the value of the property should any accident occur by which it became injured or ceased to exist, *e.g.* a fire. A regular suit is not the proper procedure to enforce a security bond given in proceedings for a stay of execution, and unless the appellant is to completely lose his equitable rights, he must be able to recover them in execution."

The District Judge, therefore, directed execution to issue for the interest claimed. Varajlal filed a second appeal in the High Court.

Ganpat Sadashiv Rao for the appellant Varajlal:—The injunction granted by the District Court staying the sale if security was given was not made under section 545 of the Civil Procedure Code. It was an injunction made under section 492. That being so, Kastur should have claimed compensation as provided in section 497, but he has not done so. The District Judge has not distinguished between sections 545 and 492. No interest can be awarded in execution of the decree in this case, because the decree itself does not award it—*Sadasiva v. Ramalinga*(2); *Hurro Doorga v. Maharani Surut Soondari*(3); *Forester v. The Secretary of State for India*(4).

(1) I. L. R., 12 Bom., 411.

(3) L. R., 9 I. A., 1.

(2) I. L. R., 2 I. A., 219, 228.

(4) I. L. R., 3 Calc., 169.

Goverdhanram M. Tripatti for respondent:—The order of injunction was no doubt made under section 492. The respondent (*Kastur*) might have applied for compensation under section 497, but he is not precluded from enforcing in execution the security ordered by the District Judge. See section 253, Civil Procedure Code. The injunction refers to the then pending litigation. Although the decree is silent as to the interest, the Court can enforce the injunction order.

JARDINE, J.:—The present respondent in 1886 attached a house in execution of a decree against some one who is not a party in the present litigation. The present appellants intervened under section 278 for a declaration of their mortgage lien, and were unsuccessful. Then they sued for the same reliefs, but were unsuccessful in the suit and both appeals. That suit was No. 648 of 1887. In the appeal therein to the District Court, that Court granted an injunction to restrain the present respondent from selling the house. Both the learned pleaders before us say the injunction was under section 492. The injunction imposed on the present appellants an obligation to pay interest at 6 per cent. on the occurrence of certain future contingencies, on the value of the property settled to be Rs. 2,000.

The present respondent claimed in the Court of the Subordinate Judge to recover this interest by way of execution of the decree in Suit No. 648. That decree is silent on the subject. No order was made upon the injunction by the Court that granted it. The Subordinate Judge held that as the decree was silent regarding this interest he could not award it as a Court of execution. The District Judge has reversed the part of the order which rejects the interest claimed in the darkhast. He conceded, as has been conceded in the full argument here, that the respondents had a procedure provided under section 497 of the Civil Procedure Code before the District Court. This raises the question whether the law allows by implication that the respondent may also present a darkhast like this to the Subordinate Judge. The case cited by the District Judge—*Venkapa v. Baslingappa*⁽¹⁾—relates to a surety and is an interpretation of sections 253 and 583; and arose out of a matter under section 545 of the Code. We do not think it relevant to the present question.

(1) I. L. R., 12 Bom., 411.

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The settled doctrine is that a Court of execution cannot award interest where the decree is silent—*Sadasiva Pillai v. Ramalinga Pillai*⁽¹⁾, *Huro Doorga Chowdhroni v. Maharani Surat Soondari Devi*⁽²⁾, and *Forester v. The Secretary of State for India in Council*⁽³⁾. *A fortiori* this doctrine must apply where, as under section 497, a special procedure is provided in a different forum. We think section 497 applies, and that the relief which the District Judge might award upon the application would be pursuant to an adjudication under the section. To hold that the executing Court can adjudicate would be contrary to section 407, which assigns the duty to the Court which issued the injunction. To hold that no adjudication is necessary would also be contrary to section 497, which further provides for the result being embodied in the decree. If, then, the respondents had wished to get relief in the matter of interest from the Court of execution, they should have first applied under section 497, and got provision made in the decree of the District Court.

For these reasons we reverse the order of the District Judge and restore that of the Subordinate Judge: the respondent to pay the costs of both appeals.

Decree reversed.

(1) L. R., 2 I. A., 219, 228.

(2) L. R., 9 I. A., 1.

(3) I. L. R., 3 Cal., 169.

APPELLATE CIVIL.

Before Sir G. Farran, Kt., Chief Justice, and Mr. Justice Parsons.

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March 11.

RAMCHANDRA GANESH PURANDHARE (ORIGINAL PLAINTIFF), APPELLANT, v. RAMCHANDRA KONDAJI KATE AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Vendor and purchaser—Specific performance—Suit by purchaser against vendor for specific performance of contract of sale—Covenant by purchaser to build a temple—Specific performance refused—Specific Relief Act (I of 1877), Sec. 21.

On the 16th November, 1893, the first defendant agreed to sell a house to the plaintiff. The contract contained a covenant on the part of the plaintiff to build a temple and to secure an annuity to the vendor and his wife. On the

Appeal, No. 123 of 1895.