right to pre-empt, and failing to plead the custom, as has been noted by the Courts below.

I think that in the circumstances it is not necessary to send down an issue for a finding whether a custom imposing the rule of pre-emption on persons of defendant's persuasion exists in Ahmedabad or not.

I agree that the lower appellate Court's decree should be confirmed and that the appeal should be dismissed with costs.

Decree confirmed.

B. G. R.

APPELLATE CIVIL.

Before Mr. Justice Baker.

1928
December 7

SHRINIVAS VITHAL PAI AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS *v.* HARI SABAJI KAMAT (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), Order XXI, rule 57—Attachment before judgment—Decree—Execution—Application for rateable distribution—Application dismissed, whether attachment ceases.

One P filed suit No. 250 of 1903 against G. G.'s immoveable property was attached before judgment and in 1904 a decree for Rs. 4,000 was passed against him. In 1907 in execution of another decree in Suit No. 190 of 1905 some of the properties attached by P were sold and eventually purchased by K (plaintiff). In execution of his decree in Suit No. 250 of 1903, P filed two Darkhasts in 1909 and 1913. In these P asked for rateable distribution and for attachment of moveables. On the first an order for distribution was made while the second was dismissed for default. In 1916, P sought to bring to sale the property purchased by K. K thereupon filed a suit for a declaration that the property was not liable to be sold.

Held, that the property was liable to be sold as the attachment before judgment in Suit No. 250 of 1903 had not come to an end by reason of the Darkhasts in 1909 and 1913 as in neither of these darkhasts the judgment-creditor sought to bring the attached property to sale, nor was any such application dismissed.

The provisions of Order XXI, rule 57 of the Civil Procedure Code, 1908, will apply to the case of an attachment before judgment followed by an application after the decree for the purpose of bringing the property to sale.

In order that the attachment before judgment should come to an end, it is necessary that the decree-holder should apply for execution by sale of the attached property, and that his application should be dismissed for default.

*Second Appeal No 669 of 1926 (with Second Appeal No. 672 of 1926).

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The attachment will not cease on the dismissal of an application for sale of moveables.

Meyyappa Chettiar v. *Chidambaram Chettiar*,[1] discussed.

Bohra Akhey Ram v. *Basant Lal*[2] and *Ganpatibhatta* v. *Devappa*,[3] referred to.

A decree-holder's application that he should be allowed to share rateably in the proceeds of the sale of the property under attachment cannot be regarded as amounting to an application for sale of the property attached before judgment in his own suit.

SECOND appeal against the decision of E. H. P. Jolly, District Judge of Ratnagiri, confirming the decree passed by V. S. Nerurkar, Subordinate Judge at Malvan.

Suit for declaration.

In 1903, one Vithal Pai, father of defendants, filed Suit No. 250 of 1903 against one Govind Raghunath Pai. The immoveable property of the latter was attached before judgment and eventually on November 11, 1904, a decree for Rs. 4,000 was passed against him. This decree was confirmed on appeal on February 28, 1906.

In 1907, in execution of the decree in Suit No. 190 of 1905 another decree-holder attached and sold properties Nos. 1, 5, 6, 7, 8, 9 and 12 and they were purchased by one Kamat and sold to plaintiff on January 1, 1914. The remaining properties 2, 3, 4, 10 and 11 were sold to the plaintiff by the heir of Govind Pai, his daughter-in-law, in May 1914.

The defendants as decree-holders filed Darkhast No. 49 of 1909 by which they applied for rateable distribution of the assets that would be recovered by sale of some of the very properties attached under Darkhast No. 183 of 1907 filed to execute the decree in Suit No. 109 of 1905. The Darkhast No. 49 of 1909 was disposed of on April 12, 1913, the defendants having been granted some amount by way of rateable distribution. A second

(1) (1923) 47 Mad. 483.

(2) (1924) 46 All. 894.

(3) (1922) 46 Bom. 942.

Darkhast No. 240 of 1913 was filed by the defendants against the moveables of their judgment-debtors. This was dismissed on August 30, 1913, because the judgment-creditors did not pay the process fee required for issuing a notice to judgment-debtors.

In 1924 the defendants applied that sale proclamations be issued for sale of the properties purchased by the plaintiff contending that properties Nos. 8 and 9 had been attached in Darkhast No. 218 of 1916 and the rest of the properties were already attached in the year 1903 by attachment before judgment in Suit No. 250 of 1903 and therefore fresh attachment was not necessary.

The plaintiff therefore filed Suit No. 54 of 1924 for a declaration that the plaint property was not liable to sale in execution of Darkhast No. 218 of 1916. There was another Suit No. 50 of 1924 filed by another plaintiff Pandurang Kabre for the same relief in respect of other properties purchased from Govind Pai's son.

The Subordinate Judge relying on *Banuddin Sahib* v. *Arunachala Mudali*[1] and *Ganpatibhatta* v. *Devappa*[2] held that the attachment before judgment made in the year 1903 did not subsist after Darkhast No. 49 of 1909 in Suit No. 250 of 1903 was disposed of. He therefore decreed that the plaintiffs in both the suits were entitled to the declaration that the properties purchased by them were not liable to be sold under Darkhast No. 218 of 1916.

On appeal, by the defendants, the District Judge also held that the application for execution in 1909 included a prayer that the decree-holders should be allowed rateable distribution in the proceeds of the sale of property already under attachment and this may legitimately be considered as an application to proceed against such property and in this view the case was covered by the

(1) (1914) 26 Mad. L. J. 215. (2) (1922) 46 Bom. 942 at p. 946.

Full Bench decision in *Meyyappa Chettiar* v. *Chidambaram Chettiar.*[1] Both the appeals were, therefore, dismissed. The defendants presented second appeals to High Court.

Rege, with *A. A. Adarkar*, for the appellants.

G. N. Thakor, with *S. R. Parulekar,* for the respondent.

BAKER, J. :—These are companion appeals arising out of two suits in which the point is the same and may be disposed of in one judgment. The plaintiff sued for a declaration that the property in suit was not liable to be sold in execution of the decree in Suit No. 250 of 1903 obtained by defendants against the heirs of one Govind Raghunath Pai. The facts are as follows. Suit No. 250 of 1903 was filed by the father of the present defendants against Govind Raghunath Pai. His immoveable property was attached before judgment, and on November 11, 1904, a decree for Rs. 4,000 was passed against him, which was confirmed on appeal on February 28, 1906. In 1907, in execution of the decree in Suit No. 190 of 1905 another decree-holder attached and sold properties Nos. 1, 5, 6, 7, 8, 9 and 12, and they were purchased by one Kamat and sold to plaintiff on January 1, 1914. No objection is raised to this in appeal. The remaining properties, Nos. 2, 3, 4, 10 and 11, were sold to plaintiff by the heir of Govind Pai, his daughter-in-law, in May 1914. The present defendants had filed two darkhasts in 1909 and 1913. In the first darkhast they asked for rateable distribution, and for attachment of moveables. Both the darkhasts were disposed of, the second one being dismissed. In 1916 defendants again sought to bring the property to sale, and this resulted in plaintiff's suit for a declaration that the property is not liable for sale. The first Court, the Subordinate

[1] (1923) 47 Mad. 483.

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Judge of Malvan, granted the plaintiff the declaration sought, and the decree was confirmed in appeal. Defendants make this second appeal.

The only point in appeal is whether the property purchased by plaintiff from the heir of the judgment-debtor is liable to sale in execution of the defendants' decree against Govind Raghunath Pai. The defendants' contention is that the alienation in favour of the plaintiff is invalid because the properties were still under attachment in Suit No. 250 of 1903. The point is one of importance. The question for decision is whether the attachment before judgment in Suit No. 250 of 1903 had come to an end by reason of the disposal of the darkhasts in 1909 and 1913, that is, whether the provisions of Order XXI, rule 57, are, or are not, applicable to the case. Order XXI, rule 57, states that :—

> "Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease."

The question is whether this rule applies to attachments before judgment. The plaintiff contends that the defendants having allowed their first darkhast, No. 49 of 1909, to be disposed of, and having done nothing further, the property was freed from attachment under Order XXI, rule 57, and that by the defendants' own conduct and negligence they had shown their intention not to proceed against the property, and hence the attachment came to an end in April 1913, when the darkhast was dismissed.

The reasoning of the learned District Judge is as follows.

The facts of the present case are nearly on all fours with those in *Banuddin Sahib* v. *Arunachala Mudali*,[1]

[1] (1914) 26 Mad. L. J. 215.

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where it was held that the provisions of Order XXI, rule 57, have no application in the case of an attachment before judgment, even though in execution of the subsequent decree application may have been made for rateable distribution of the assets that might be realised by the sale of the properties attached. This was followed in *Venkatasubbiah* v. *Venkata Seshaiya.*[1] The scope of the rule, however, has been materially narrowed by the decision of the majority of the Full Bench in *Meyyappa Chettiar* v. *Chidambaram Chettiar*,[2] where it was held that the provisions of Order XXI, rule 57, would apply to the case of an attachment before judgment followed by an application after the decree for the purpose of bringing the property to sale. In the present case, although the defendants had filed two applications for execution in 1909 and 1913 respectively, in neither of those applications had they specifically sought to bring to sale the immoveable property which had been attached before judgment. Both these applications were against the moveable property of the judgment-debtor, though the application of 1909 went so far as to request rateable distribution of the assets of the immoveable property which was being proceeded against in execution by other judgment-creditors. In *Meyyappa Chettiar* v. *Chidambaram Chettiar*[2] it was held that when after the decree application is made with a view to bringing to sale property attached before judgment, such attachment may be treated for the purpose of Order XXI, rule 57, as attachment in execution. It is true that in the present case there has been no application in execution to bring the attached property to sale which application has been dismissed, but the District Judge is of the opinion that there is no reason why a decree-holder, once he has applied for execution, should be placed in

[1] (1918) 42 Mad. 1.

[2] (1923) 47 Mad. 483.

a more advantageous position merely by reason of the fact that he has obtained attachment before judgment than a decree-holder who has obtained attachment after judgment. If the provisions of Order XXI, rule 57, are in no case to have effect in respect of an attachment before judgment, it becomes open to a decree-holder who has obtained attachment before judgment to maintain the attachment indefinitely or at any rate so long as the decree remains executable. He can save limitation by filing successive applications for execution and by abstaining from proceeding against the specific property attached and thus prevent the judgment-debtor from dealing with it. There is no reason why a higher degree of diligence should be required from a decree-holder who has obtained attachment after judgment than from one who has obtained attachment before judgment. By their application in 1909 the appellants requested that they should be allowed to share rateably in the proceeds of the sale of the property already under attachment and in process of being brought to sale by the other decree-holders. This amounts to acquiescence in the sale of the property which was already attached before judgment on their own application, and so *Meyyappa Chettiar* v. *Chidambaram Chettiar*[1] applies.

The learned counsel for the appellants contends that the attachment before judgment subsisted, and that the case in *Banuddin Sahib* v. *Arunachala Mudali*[2] covers the case. It is not overruled by *Meyyappa Chettiar* v. *Chidambaram Chettiar*,[1] and this latter case does not apply because in the present case there has not been an application in execution to bring the attached property to sale, nor has such application been dismissed. He further relies on

[1] (1923) 47 Mad. 483. [2] (1914) 26 Mad. L. J. 215.

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Bohra Akhey Ram v. *Basant Lal.*[1] For the respondents it is contended that after Govind's death the attachment did not continue, and that the appellants' own conduct in allowing the same property to be attached by others and asking for rateable distribution of the proceeds of the sale shows that they did not regard the attachment as subsisting. Order XXI, rule 57, was rightly applied, following *Meyyappa Chettiar* v. *Chidambaram Chettiar.*[2] The original view was that Order XXI, rule 57, only applies to attachments in execution as laid down in *Venkatasubbiah* v. *Venkata Seshaiya.*[3] Reference is made to Order XXXVIII, rule 7, *Arunachalam Chetty* v. *Periasami Servai,*[4] and the remarks at p. 505 in *Meyyappa Chettiar* v. *Chidambaram Chettiar.*[2] Order XXXVIII, rule 9, only refers to what takes place while the suit is pending. Order XXXVIII, rule 11, provides for what is to happen when the suit is disposed of. After the decree is passed, the attachment becomes one in execution, and ceases to be one before judgment, although *Bohra Akhey Ram* v. *Basant Lal*[1] is against this view. The facts in *Banuddin Sahib* v. *Arunachala Mudali*[5] are obscure. The respondents' counsel further refers to *Ganpatibhatta* v. *Devappa*[6] which, however, does not refer to the case of an attachment before judgment. I am of opinion that Order XXXVIII, rule 9, applies only to what happens before decree. What happens after the decree is dealt with by Order XXXVIII, rule 11. Up to the date of the Full Bench decision in *Meyyappa Chettiar* v. *Chidambaram Chettiar*[2] it was held that Order XXI, rule 57, did not apply to attachments before judgment: cf. *Banuddin Sahib* v. *Arunachala Mudali,*[5] *Bohra Akhey Ram* v. *Basant Lal*[1] and *Venkatasubbiah* v. *Venkata Seshaiya.*[3] Under the ruling in *Meyyappa*

(1) (1924) 46 All. 894.
(2) (1923) 47 Mad. 483.
(3) (1918) 42 Mad. 1.
(4) (1921) 44 Mad. 902.
(5) (1914) 26 Mad. L. J. 215.
(6) (1922) 46 Bom. 942 at p. 946.

Chettiar v. *Chidambaram Chettiar*[1] the attachment before judgment is converted after decree into an attachment in execution, and the provisions of Order XXI, rule 57, will apply. But, although Order XXI, rule 57, will apply, *Meyyappa Chettiar* v. *Chidambaram Chettiar*[1] only goes so far as to show that, upon the dismissal of an application for execution by bringing the attached property to sale on account of the decree-holder's default, the attachment will cease. Therefore, even applying the provisions of Order XXI, rule 57, in order that the attachment before judgment should come to an end, it is necessary that the decree-holder should apply for execution by sale of the attached property, and that his application should be dismissed for default. This condition has not been fulfilled in the present case. The decree-holder endeavoured to execute the decree by sale of moveable property only and not of the immoveable property attached, and though he asked for a share in the proceeds of the sale of the immoveable property in execution of the decree got by another decree-holder, he has not himself asked for sale of the immoveable property attached. The effect of the judgments of the lower Courts, therefore, is to still further extend the principle laid down in *Meyyappa Chettiar* v. *Chidambaram Chettiar*,[1] and to hold that an attachment made before execution of immoveable property ceases to exist on the dismissal of an application by the decree-holder for execution by sale not of the immoveable property attached before decree, but of moveables. None of the reported cases has gone so far as this, and I am not prepared to accept this position as correct. The facts of the present case do not satisfy the conditions laid down by Order XXI, rule 57. There has been no default on the part of the decree-holder so far as the

(1) (1923) 47 Mad. 483.

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execution in regard to the immoveable property is concerned. I cannot regard the decree-holder's request that he should share rateably in the proceeds of the sale of the property already under attachment as amounting to an application for sale of the property attached before judgment in his own suit.

In these circumstances I disagree with the view of the Courts below. I reverse the decree, so far as the properties purchased from the judgment-debtor's heir are concerned, and direct that the plaintiff's suit should be dismissed. As the appeal has not been pressed with regard to the properties sold at the auction sale each party will bear its own costs.

The order in the other appeal will be that the plaintiff's suit is dismissed with costs.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Patkar and Mr. Justice Baker.

1929
January 25

LALLUBHAI PRAGJI AND OTHERS (ORIGINAL PLAINTIFFS Nos. 1 to 4), APPLICANTS *v.* BHIMBHAI DAJIBHAI (ORIGINAL DEFENDANT), OPPONENT.*

Civil Procedure Code (Act V of 1908), section 110—Privy Council, leave to appeal to—Suit for easement of light and air—Value of subject matter—Second Class Subordinate Judge—Jurisdiction.

In a suit for an easement of light and air claimed by the owner of property A against the owner of property B, it is the value of the easement and not the value of property A, that determines the appealable value for leave to appeal to the Privy Council under section 110 of the Civil Procedure Code, 1908.

De Silva v. *De Silva*[1] and *Manilal* v. *Banubai*,[2] followed.

Appaya v. *Lakhamgowda*,[3] distinguished.

In a suit for easement of light and air, the relief claimed by the plaintiff was valued at Rs. 5 and the suit was brought in the Court of a Subordinate Judge of Second Class. The plaintiff having lost in appeal and in Second Appeal to the High Court, applied for leave to appeal to the Privy

*Civil Application No. 727 of 1928.

[1] (1904) 6 Bom. L. R. 403. [2] (1920) 23 Bom. L. R. 374.
[3] (1922) 25 Bom. L. R. 77.