adjustment. The defendants were not consulted nor were they consenting parties to the giving of time to Sarda & Sons. It is clear that a surety would be absolved from liability as surety if time is given to the principal debtor without the surety's consent or acquiescence. The appellants, in my opinion, have succeeded in showing that they never consented to or acquiesced in the giving of time by the respondents to Sarda & Sons for payment of the debt for which the defendants could be said to be sureties.

I agree that this appeal should be allowed and the decree of the lower Court reversed.

I agree with the order proposed by the learned Chief Justice as to costs and the return of the lease to the defendants.

Attorneys for appellants: Messrs. *Crawford, Bayley & Co.*

Attorneys for respondents: Messrs. *Craigie, Blunt & Caroe.*

Appeal allowed.

B. K. D.

APPELLATE CIVIL.

Before Mr. Justice Madgavkar and Mr. Justice Murphy.

HARI SABAJI KAMAT (ORIGINAL PLAINTIFF), APPELLANT *v.* SHRINIVAS VITHAL PAI (ORIGINAL DEFENDANT), RESPONDENT.*

1931 *March* 12.

Civil Procedure Code (Act V of 1908), Order XXI, rule 57—Attachment before judgment—Attachment and sale of portion of property attached in execution of third party's decree—Application by decree-holder for rateable distribution and sale of judgment-debtor's moveable property—Dismissal of application for sale of moveable, whether puts an end to attachment before judgment.

A, the present defendant-respondent, in his suit begun in 1903, obtained an attachment before judgment of the judgment-debtor's properties comprised in 12 survey numbers. A's suit was decreed and the decree affirmed on appeal in 1906. In 1905 another plaintiff, B, filed a suit and obtained a decree, and in execution of that decree attached and brought to sale 7 out of the 12 survey numbers. In these execution proceedings A filed an application (*darkhast*) in

*Appeal No. 48 of 1929, under the Letters Patent with Appeal No. 44 of 1929 under the Letters Patent.

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1909 in which he prayed for two reliefs (1) rateable distribution under section 73 of the Code of Civil Procedure, and (2) attachment and sale of the moveable property of the judgment-debtor. His application was granted as to the first relief but rejected as to the second for want of process fees. In 1913 A again applied for the attachment and sale of the judgment-debtor's moveable properties but this application was also dismissed as no process fees had been paid. In 1916 A applied to the Court to sell the remaining 5 out of the 12 survey numbers of the judgment-debtor's properties whereupon the present plaintiff-appellant, who had acquired the properties by purchase, filed this suit for a declaration that as A's previous applications of 1909 and 1913 had been dismissed for default his attachment before judgment had ceased by reason of the provisions of Order XXI, rule 57, of the Code of Civil Procedure, 1908.

Held, that as there had been no application for sale of the attached properties in the previous *darkhasts* of 1909 and 1913 the attachment before judgment had not come to an end under Order XXI, rule 57, and the suit must be dismissed.

Order XXI, rule 57, of the Civil Procedure Code, necessarily presupposes first, an application for sale of the attached property; secondly, default on the part of the decree-holder in execution proceedings for such sale; and, thirdly, the attachment ceases only in respect of the properties in respect of which execution is sought and not other properties attached in respect of which execution has not been sought and in respect of which therefore necessarily there can be no default.

APPEAL No. 48 of 1929 under the Letters Patent against the decision of Baker J. in Second Appeal No. 669 of 1926 preferred against the decision of E. H. P. Jolly, District Judge, Ratnagiri, in Appeal No. 19 of 1925, heard with the Letters Patent Appeal No. 44 of 1929 decided by Baker J. in Second Appeal No. 672 of 1926.

Suit for declaration.

The father of the defendants obtained a decree for Rs. 4,000 and odd against the heirs of one Govind Raghunath Pai in Suit No. 250 of 1903 which decree was confirmed on appeal in 1906. He had attached before judgment 12 survey numbers belonging to the judgment-debtor. In 1907 in execution of the decree in Suit No. 190 of 1905 another decree-holder attached and sold 7 of these survey numbers which were purchased by one Kamat who sold them to the plaintiff on January 1, 1914. The remaining five survey numbers were sold to the plaintiff by the heir of Govind Raghunath Pai. In the meanwhile the defendants had filed two darkhasts

the first in 1909, and the second in 1913, as stated in the head note. In 1916 the defendants sought to bring the properties to sale which resulted in plaintiff's suit for a declaration that the properties in dispute were not liable to sale. Both the Courts decreed the plaintiff's claim on the ground that the attachment before judgment of the properties in suit had come to an end under Order XXI, rule 57, of the Civil Procedure Code, owing to the dismissal of the defendants' darkhasts in 1909 and 1913. The defendants filed a second appeal in the High Court which reversed the decree passed by the lower Courts and dismissed the plaintiff's suit. Plaintiff thereupon obtained leave to file an appeal under the Letters Patent.

M. R. Jayakar, with *S. R. Parulekar*, for the appellant.

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

The arguments of counsel sufficiently appear from the judgment of the Court which was delivered by

MADGAVKAR, J.:—This is an appeal under the Letters Patent against the judgment of Mr. Justice Baker, reversing the decree of the two Courts below and dismissing the plaintiff's suit with costs. The question in both the appeals is whether the attachment of the defendants-respondents was subsisting on the date of the purchase by the plaintiff-appellant from the judgment-debtor. The property in all comprised twelve survey numbers. Out of these, a third party had obtained a decree and attachment in respect of seven. The defendants-respondents had obtained attachment before judgment in respect of twelve survey numbers in a suit, which ended in a decree in their favour in 1906. In 1909 the other decree-holder Dattatraya had applied to attach and sell seven out of the survey numbers, and by Darkhast No. 49 of 1909

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by the defendants in execution of this decree the respondents applied for two reliefs, firstly, for rateable distribution under section 73, Civil Procedure Code, in respect of the seven properties attached which formed the subject-matter of the application by Dattatraya, and, secondly, for attachment and sale of the moveable properties of the judgment-debtor. The former relief he obtained but not the latter as process was not paid. By Darkhast No. 240 of 1913 on April 12, 1913, he again applied for attachment and sale of the moveable properties. No process was paid and that Darkhast was dismissed for default. Subsequently the plaintiff purchased the remaining five properties. In 1916 the respondents sought to bring the remaining five attached properties to sale, and the present suit by the plaintiff was for a declaration that these properties were not liable to be sold in execution of the decree in favour of the respondents on the ground that the respondents' attachment before judgment ceased under Order XXI, rule 57, Civil Procedure Code, on the dismissal of their two Darkhasts of 1909 and 1913. The plaintiff-appellant's contention was upheld by the two lower Courts, which held that the defendants-respondents' attachment before judgment was not subsisting on the date of the plaintiff-appellant's purchase but had ended under Order XXI, rule 57, Civil Procedure Code. Baker J. in appeal came to a different conclusion on the ground that there had been no application by the respondents for sale of the five out of the twelve properties attached, and Order XXI, rule 57, Civil Procedure Code, therefore, had no application and the attachment therefore subsisted.

It is argued for the appellant that as held by me sitting singly in *Ardeshir* v. *Usman Gani*,[1] Order XXI,

[1] (1929) 31 Bom. L. R. 1101.

rule 57, applies to property attached before judgment no less than to property attached in execution after judgment, and that the sentence is not limited to an application for execution by sale of the attached properties but that an application for execution in any of the modes allowed by the Code suffices, and if any such application is dismissed by reason of the decree-holders' default, the attachment, that is to say, the entire attachment of all the properties attached even before judgment ceases. Reliance is placed for this contention on the decision of the majority of the Full Bench of the Madras High Court in *Meyyappa Chettiar* v. *Chidambaram Chettiar*,[1] followed by this Court in *Ardeshir* v. *Usman Gani*.[2]

For the respondents reliance is placed on a decision not referred to in *Ardeshir* v. *Usman Gani*,[2] *Shibnath Singh Ray* v. *Sheikh Saberuddin Ahmed*,[3] which follows the view of the minority of the Full Bench Madras decision in *Meyyappa Chettiar* v. *Chidambaram Chettiar*.[4] It is argued that even on the decision of the majority in the Madras Full Bench case referred to above, Order XXI, rule 57, necessarily pre-supposes, firstly, an application for sale of the attached property, secondly, default on the part of the decree-holder in execution proceedings for such sale, and thirdly, the attachment ceases only in respect of the properties in respect of which execution is sought, and not other properties attached in respect of which execution has not been sought and in respect of which, therefore, necessarily there can be no default. In this case the respondents have never applied themselves for sale of any of the attached property even in respect of the seven survey numbers brought to sale by Dattatraya but merely applied for rateable distribution under section 73, Civil

(1) (1923) 47 Mad. 483 at pp. 498, 501, 511.
(2) (1929) 31 Bom. L. R. 1101.
(3) (1928) 56 Cal. 416.
(4) (1923) 47 Mad. 483.

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Procedure Code. There was no default on their part in the first Darkhast of 1909, and the second Darkhast of 1913 was only for sale of the moveable property and Order XXI, rule 57, Civil Procedure Code, has therefore no application.

In regard to the construction of Order XXI, rule 57, the argument for the respondents is in our opinion correct. The words of that section "where any property has been attached in execution of a decree" necessarily pre-suppose an application for execution for attachment and sale of the property, and this is made still more clear by the subsequent words in the opening sentence. Similarly, the subsequent word "application" for execution must be taken to imply the same application for execution, viz. by attachment and sale of the property. Where, therefore, as here, there has been no such application for attachment and sale of the property Order XXI, rule 57, has no application. In this view, strictly speaking, it is not necessary for us to consider the further aspect of the case.

At the same time we adhere to the view one of us expressed in *Ardeshir* v. *Usman Gani*,[1] based on the decision of the majority in *Meyyappa Chettiar* v. *Chidambaram Chettiar*.[2] We are of opinion that by the words "has been attached" the legislature did not intend to exclude property which originally might have been attached before judgment but in respect of which, although no second application to re-attach was necessary by reason of Order XXXVIII, rule 11, Civil Procedure Code, application to sell had been made in execution subsequent to the decree. The reasoning in the Calcutta case, if we may say so with all respect, is not convincing. The reasons of the legislature for the addition of this new rule to the Code of 1908 hold equally good in the

[1] (1929) 31 Bom. L. R. 1101. [2] (1923) 47 Mad. 483.

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case of property attached before judgment. Speaking for myself, I still prefer the reasoning and the conclusion of Couts Trotter J. and Ramesan J. in the Full Bench Madras case referred to above to that of Rankins C. J. in *Shibnath Singh Ray* v. *Sheikh Saberuddin Ahmed*[1] and of *Bohra Akhey Ram* v. *Basant Lal.*[2]

In the present case we are of opinion that the words "attachment shall cease" in the concluding sentence of rule 57 do not mean necessarily attachment of all the properties attached even though they do not form the subject-matter of the application for execution. Attachment merely results in the property remaining in *custodia legis*. But cases repeatedly occur where one or more out of such properties may be taken away from such *custodia legis* by order of the Court or by consequence of law; the others so remain under attachment. In the present case, we are of opinion that in the properties with which the present appeal is concerned, the attachment did not cease but subsisted on the date of the plaintiff-appellant's purchase, and his suit therefore fails.

We agree, therefore, with the decision of Mr. Justice Baker and dismiss the appeals with costs.

Appeals dismissed.

B. G. R.

[1] (1928) 56 Cal. 416.

[2] (1924) 46 All. 894.

APPELLATE CIVIL.

Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Murphy.

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April 7.

SANGANGOUDA FAKIRGAUDA AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS *v.* HANMANTGOUDA SANGANGOUDA (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Adoption—Adoption made by father's widow—Consent of son's widow—Adoption invalid.

It is settled law that where a Hindu dies leaving a widow and a son and the son dies leaving a widow the power of the father's widow to adopt is extinguished

*Appeal under the Letters Patent No. 25 of 1929.