APPELLATE CIVIL.

Before Mr. Justice Chitty and Mr. Justice Coxe.

1911
Feb. 14.

NAMUNA BIBI
v.
ROSHA MIAH.*

Execution of Decree—Attachment—Sale proclamation—Notice—Civil Procedure Code (Act V of 1908) o. XXI, rr. 57 66—"Default", meaning of.

On 20th February, 1909, an execution case, which could not proceed owing to the failure of the decree-holder to serve notice on the judgment-debtor as required by o. XXI, r. 66, of the Civil Procedure Code, 1908, was dismissed, the order concluding with these words:—"The execution case is accordingly dismissed, the properties will remain under attachment. Decree-holder will bear his own costs."

On 25th March, 1909, the decree-holder without issuing a fresh attachment again applied for sale of the property, and duly served the required notice. The judgment-debtor objected on the ground that there was no subsisting attachment.

Held, that this application must also be dismissed.

Held, *per* Chitty J., that the words of order XXI, rule 57, are imperative and the attachment on the property ceased by operation of law on the 20th February, 1909, and that the word "default" in that rule, cannot be given a restricted meaning so as to confine it to default in appearance, in the payment of process fees, or in production of documents, but must have its ordinary meaning, namely, failure to do what one is legally bound to do.

Held, *per* Coxe J., that under the Civil Procedure Code, 1882, the striking off of execution proceedings was capable of different interpretation in different circumstances, but order XXI, rule 57, was enacted to put a stop to the confusion. The application for execution having been dismissed the result specified in order XXI, rule 57, must necessarily follow.

Puddomonee Dossee v. *Roy Muthooranath Chowdhry* (1), *Biswa Sonan Chunder Gossyamy* v. *Binanda Chunder Dibingar Adhikar Gossyamy* (2), *Mohunt Bhagwan Ramanuj Das* v. *Khetter Moni Dassi* (3) referred to.

* Appeal from order, No. 55 of 1910, against the order of M. Yusuf, District Judge of Noakhali, dated Oct. 2, 1909, confirming the order of Kumud Kanta Sen, Munsif of Sudharam, dated Aug. 2, 1909.

(1) (1873) 20 W. R. 133. (2) (1884) I. L. R. 10 Calc. 416.
(3) (1896) 1 C. W. N 617.

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APPEAL by the judgment-debtor, Namuna Bibi.

The facts of the case are set out in the judgment of Chitty J.

Babu Hari Bhusan Mukerjee, for the appellants.

Babu Brajendranath Chatterjee, for the respondent.

Cur. adv. vult.

CHITTY J. This is an appeal by the judgment-debtor against an order of the lower Appellate Court affirming that of the Munsif in certain execution proceedings. The sole point for determination is whether at the date of the decree-holder's last application for sale, dated 25th March 1909, the property sought to be sold was under attachment.

The facts are as follows: In 1906, the decree-holder obtained a money decree against the judgment-debtor and, in execution attached and advertised for sale the taluk now in question. The judgment-debtor raised objections and proceedings took place which delayed matters for two years. It is unnecessary to particularise those proceedings as they have no bearing on the present case. On 4th April 1908, the decree-holder again applied for execution and asked for sale of the taluk (Execution Case, No. 464 of 1908). The judgment-debtor raised an objection that there was no subsisting attachment. This question was fought out in Miscellaneous Case, No. 190 of 1908, and both in the Court of first instance and the Appellate Court, the decision was against the judgment-debtor. The decree-holder then took further steps and a fresh sale proclamation was issued. The judgment-debtor again objected and his objection gave rise to Miscellaneous Case, No. 287 of 1908, which was eventually dismissed. On 2nd January 1909, we find this order in Execution Case, No. 464 of 1908 "Miscellaneous Case, No. 287 of 1908, has been dismissed for default. Issue sale proclamation on the property attached, fixing 15th February for sale. Decree-holder to file talabana and written process at once." On 15th February 1909, we find the order "Put up for sale after the sale (?

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work) of Judges and other Courts are over" and on 17th February 1909, "Decree-holder is permitted to bid at sale up to the decretal amount as prayed for."

Then on 20th February 1909 comes the order on the effect of which the determination of this appeal depends.

It runs as follows:—"The judgment-debtor and the incumbrancer have filed two petitions of objections. Several points have been urged, but the most important is that no notice was served on the judgment-debtor in accordance with the provisions of rule 66 of order XXI of the new Code before settling the terms of the sale proclamation. It appears that the sale proclamation was drawn up on the 6th January. The new Act came into force on the 1st idem. The sale must therefore be stayed as the sale cannot take place on the proclamation now issued. The pleader for the decree-holder consents he will file a fresh application for execution and this case which has been pending for a long time may be dismissed. The Execution Case is accordingly dismissed. The properties will remain under attachment. Decree-holder will bear his own costs."

Acting in compliance with that order and in pursuance of his intention expressed on 20th February 1909, the decree-holder again on 25th March 1909 applied for sale of the property after issue of the necessary sale proclamation. On this occasion notice under order XXI, rule 66, was duly served and the judgment-debtor came in and shewed cause, alleging that there was no subsisting attachment, it having ceased on 20th February 1909 by operation of law under the provisions of order XXI, rule 57, when the previous Execution Case was dismissed.

Both the Courts below have decided against the judgment-debtor. The Munsif holds that the rule has no application, (*i*) because default means only default in appearance, or in payment of fees or in putting in documents, and that there was no such default in this case; (*ii*) there is nothing to prevent a Court from keeping an attachment in force, except in a case dismissed for default; (*iii*) the Court did not intend

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to "kill" this application; and (*iv*) that an attachment not expressly abandoned or withdrawn subsists.

The Subordinate Judge as I read his judgment held that there was no default on the part of the decree-holder. He says that the Munsif evidently suggested the order of dismissal, which was accepted by the decree-holder, and that it would be unfair to make the decree-holder "responsible for the Court's suggestion, to which he bowed down simply out of respect." Now there can be no doubt whatever that the only obstacle to the Court's proceeding further with the application for execution in January and February 1909 was that the requisite notice under order XXI, rule 66, had not been issued or served on the judgment-debtor. It appears equally clear that it was the duty of the decree-holder to apply for such notice and take the necessary steps to have it served upon the judgment-debtor. Not having done so, the decree-holder was in default, and it was this default that prevented the Court from proceeding with the execution on 20th February 1909. I can see no reason for giving a restricted meaning to the word 'default' in order XXI, rule 57, that is, to confine it to default in appearance, in the payment of process fees, or in production of documents. It must, I think, have its ordinary meaning, namely, failure to do what one is legally bound to do.

If this be the view taken, the matter admits of no doubt. The words of order XXI, rule 57, are explicit and imperative; "Upon the dismissal of such application the attachment shall cease." It is not open to the Courts to consider what the Judge or the parties intended. The Judge, no doubt, intended to continue the attachment for he said so in so many words. No intention, however, of the Judge or the parties, nor any such order of the Judge can override the express provision of the law that upon the dismissal the attachment shall cease. The Judge might, if he had thought fit, have adjourned the application. He was, however, unwilling to do so, as the case had been long pending. The decree-holder appears to have admitted his default, for he not only acquiesced in the dismis-

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sal but consented to pay all the costs. It is no excuse to say, as has been contended here, that the new Code of Civil Procedure had only just come into force and the Court and the parties were therefore not well acquainted with its provisions. The ignorance of a law whether new or old is no excuse. I am of opinion that the attachment had ceased by operation of law on 20th February 1909 and that the decree-holder could not proceed further in execution without again placing the property under attachment. Some attempt was made to argue that no second appeal lay in this case, but the learned pleader confessed that he did so with diffidence. It is clear that it is a question between the parties in execution under section 47, Civil Procedure Code, and that an appeal lies. I would accordingly set aside the orders of the lower Appellate Court and the Court of first instance, and allow the petitioner's objections to execution with costs in all the Courts.

It has been stated at the Bar that the property in question in this matter has actually been sold by the Courts and, possession given to the purchaser. With that we have nothing to do. We can only correct the orders which are before us on appeal and leave the parties to take such further action as they may be advised.

COXE J. I need not recapitulate the facts, which are set out in the judgment of my learned Colleague. On those facts I feel compelled to agree that order XXI, rule 57, is fatal to the decree-holder respondent's case. Under the former Code the striking off of execution proceedings was capable of different interpretations in different circumstances [*Puddomonee Dossee* v. *Roy Muthooranath Chowdhry* (1)] and led to much uncertainty and confusion. In *Biswa Sonan Chunder Gossyamy* v. *Binanda Chunder Dibingar Adhikar Gossyamy* (2), Field J. commented on the evils of the practice and remarked that it would be very desirable if Courts in the moffusil were to abandon it. And the confusion caused by the

(1) (1873) 20 W. R. 133.

(2) (1884) I. L. R. 10 Calc. 416.

practice arose as well in cases dismissed as in those that were merely struck off: *Mohunt Bhagwan Ramanuj Das* v. *Khetter Moni Dassi* (1). It was doubtless to put a stop to this confusion that the Legislature enacted rule 57, and I think it is impossible for us in the first case that arises under the rule to weaken its effect and limit its operation. It may be that in this particular case hardship and injustice may be caused. It is clear that the Court as well as the parties, on the 20th February 1909, agreed that the attachment should continue and that the decree-holder should have further time to file the sale proclamation. The Court, which should always be vigilant not to allow its own act to do wrong to a suitor [*Syud Tuffuzzool Hossein Khan* v. *Rughoonath Pershad* (2)], seems to have lulled the decree-holder into a false security and to have let him understand that in despite of rule 57 and in despite of the dismissal of his application his attachment would still subsist and he would still have further time allowed him. I appreciate fully the arguments of the lower Courts and their reluctance to let the oversight of the Court work injustice. But the words of the rule are quite clear and the present case certainly comes under them. The Munsif was unable to proceed with the execution on the 20th February because no notice had been served on the judgment-debtor, and no notice had been served because the decree-holder had made no application for the issue of such a notice. That omission of his certainly seems to me to have been a default on his part. The Munsif could have adjourned the case but he did not do so. He dismissed it, and the results specified in rule 57 must necessarily follow. That may involve injustice in this particular case, but the law must be observed and it is perhaps better that hardship should be caused in one case than that a door should be opened to the return of all the uncertainty that rule 57 was intended to do away with.

S. A. A. A. *Appeal allowed.*

(1) (1896) 1 C. W. N. 617. (2) (1871) 14 Moo. I. A. 40.