APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Teunon.

1911
Feb. 7.

BASIRAM MALO
v.
KATTYAYANI DEBI.*

Attachment—Civil Procedure Code (Act XIV of 1882), ss. 256, 488 and 490—Attachment before judgment—Omission to take objection that the attached property was not saleable—The effect of such omission in subsequent execution proceedings.

An attachment before judgment does not for all purposes stand on the same footing as an attachment in execution proceedings.

An omission on the part of the defendant to take exception to the validity of the attachment on the ground that the property sought to be attached is not transferable, at the time when the application is made for attachment before judgment, does not operate as a bar to the investigation of the objection when an application has been made for execution of the decree made in the suit.

SECOND APPEAL by the petitioner, Basiram Malo.

One Kattyayani Debi obtained a decree for money against the petitioner Basiram Malo, and attached the dwelling-house and granary belonging to the judgment-debtor. The judgment-debtor put in an application before the Munsif of Narayanganj stating that the properties attached were not saleable and as such they should be exempted from attachment. It appeared that these properties were attached before judgment, and the defendant in the original suit, the aforesaid Basiram Malo, though notice was served on him and he contested that suit, did not raise any objection to this attachment. The decree-holder, opposite party, contended that the petitioner was precluded from raising this objection which he had waived when the property was attached before judgment.

*Appeal from order, No. 200 of 1910, against the order of B. B. Newhould, District Judge of Dacca, dated Feb. 5, 1910, affirming the order of Sarat Chandra Banerjee, Munsif of Naraingunge, dated Oct. 6, 1909.

The Court of first instance gave effect to the objection raised by the opposite party, and rejected the application. On appeal by the petitioner, the learned District Judge of Dacca affirmed the decision of the first Court.

Against that decision the petitioner preferred this second appeal to the High Court.

Babu Rajendra Chandra Guha, for the appellant.

Dr. Sarat Chandra Basak, for the respondent.

MOOKERJEE AND TEUNON JJ. This is an appeal against an order by which the Court below in concurrence with the Court of first instance has overruled, without any investigation, an objection by the judgment-debtors that the property sought to be sold in execution of a decree for money obtained against them is not transferable. The learned Judge has held that an investigation of this question is barred by the omission of the judgment-debtors to urge the objection when the property in question was attached before judgment. The question is one of some novelty; but upon an examination of the provisions of the Code we feel no doubt as to the manner in which it ought to be answered. The contention of the decree-holder is to the effect that when an application is made by a plaintiff for attachment of the property of the defendant before judgment, it is the duty of the defendant to take exception to the attachment, on the ground that the property is not saleable within the meaning of section 266 of the Code of 1882. It has been argued, on the other hand, on behalf of the judgment-debtors that the only question before the Court at this stage is whether circumstances have been established such as would justify the grant of attachment before judgment, and that the question of the true character of the property sought to be attached need not be investigated till a decree has been obtained by the plaintiff by virtue of which he becomes entitled to proceed with execution on the basis of the attachment before judgment. In our opinion, the scope

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of the investigation by the Court when an application is made for attachment before judgment, is defined by section 483 of the Code of 1882. The plaintiff before he can obtain an order for attachment before judgment must satisfy the Court that the defendant is about to dispose of the whole or any part of his property, or to remove the same from the jurisdiction of the Court in which the suit is pending, or has quitted the jurisdiction of the Court having therein property belonging to him. If the Court is satisfied that these elements exist, the defendant is to be called upon to furnish security, and upon his failure to furnish the security demanded, his properties are to be attached at the instance of the plaintiff. That attachment, however, is of no assistance to the plaintiff till he obtains his decree. If he is ultimately unsuccessful, under section 488 the attachment has to be withdrawn. If he is successful, section 490 provides that re-attachment is unnecessary in execution of the decree obtained by him. But there is no foundation for the contention of the respondent that an attachment before judgment and an attachment in execution stand precisely on the same footing for all purposes. The distinction between attachments of these two descriptions was lucidly explained by Mr. Justice Dwarka Nath Mitter in the case of *Sri Ram Manik* v. *Tincowry Rai* (1). The learned Judge pointed out that the objects for which the two kinds of attachment are made are entirely different: "An attachment prior to decree is not an attachment for the enforcement of the decree, but it is a step taken merely for the purpose of preventing the debtor from delaying or obstructing such enforcement when the decree subsequently passed shall be sought to be executed. An attachment after decree is, on the other hand, an attachment made for the immediate purpose of carrying the decree into execution, and it presupposes an application on the part of the decree-holder to have his decree executed." The learned vakil for the respondent has, however, contended on the authority of the decision of the Judicial Committee in the case of *Mungul Pershad* v.

(1) (1869) 4 B. L. R. F. B. 63.

Grija Kant (1) and upon the decision of this Court in the cases of *Durga Charan* v. *Kali Prasanna* (2), *Sheikh Murullah* v. *Sheik Burullah* (3), *Coventry* v. *Tulshi Pershad Narayan* (4), and *Dwarkanath Pal* v. *Tarini Sankar Ray* (5), that the omission of the defendant to take exception to the validity of the attachment on the ground that the property sought to be attached is not transferable at the time when the application is made for attachment before judgment, operates as a bar to the investigation of the objection when an application has been made for execution of the decree made in the suit. The cases relied upon are clearly distinguishable. They are cases in which applications have been made for execution of subsisting and enforceable decrees, and it has been held that when in proceedings in execution of such a decree an order for attachment has been made without any objection, its validity cannot subsequently be questioned by the judgment-debtor. In this class of cases, it is obvious that if exception is not taken to the attachment, the next step in execution must necessarily follow; that is, an order for sale of the property attached must be made. Consequently, if the judgment-debtor contends that the property is incapable of attachment, because it is not transferable, the proper stage at which the objection can be urged is when the application for attachment is made. In the case before us, however, no steps could possibly be taken on the basis of the attachment before judgment till a decree had been made in favour of the plaintiff. In our opinion, it would be a needless hardship on the judgment-debtor if he was obliged, at the stage when an application was made for attachment before judgment, to take exception to the validity of the attachment on the ground that the property was not transferable. It has not been disputed that if this contention prevailed and an investigation was made as to the character of the property attached at this stage, the order would be final, because the Code does not provide

(1) (1881) I. L. R. 8 Calc. 51.
(2) (1899) I. L. R. 26 Calc. 727.
(3) (1905) 9 C. W. N. 972.
(4) (1904) 8 C. W. N. 672.
(5) (1907) I. L. R. 34 Calc. 199.

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for any appeal against such an order. On the other hand, if it is held that such an objection may be taken as soon as an application for execution has been made after the decree, the investigation would be one under section 244 of the Code of 1882, and the propriety of the order could consequently be tested by appeal upon questions of fact as well as law. Much reliance was placed by the learned vakil for the appellant upon the provisions of section 487 of the Code of 1882, which lays down that if any claim be preferred to the property attached before judgment, such claim shall be investigated in the manner provided for the investigation of claims to property attached in execution of a decree for money. This provision, in our opinion, shows that the contention of the respondent cannot be supported, because, if an attachment before judgment stands for all purposes on precisely the same footing as an attachment in an execution proceeding, section 487 would be entirely superfluous. The Legislature intended that investigations of claims to property attached before judgment should be determined at that stage, when such claims are preferred by persons who are strangers to the suit. If the Legislature had also intended that an objection of the description taken before us should be investigated at this stage, an appropriate provision in that behalf would have been made in the Code. It follows, therefore, that an attachment before judgment does not for all purposes stand on the same footing as an attachment in execution proceedings. This, indeed, is obvious from first principles. The attachment does not of necessity ensure the property to the person who attaches it. He becomes entitled to proceed against it only if he eventually gets a decree. The plaintiff must not only wait until he has obtained a decree; it is not competent to him to proceed against the property attached until he has also taken the preliminary steps which the law requires for its enforcement; in other words, he must apply for execution, just like any other creditor: *Aga Mahomed Ali Shiraji* v. *S. E. Judah* (1), *Pallonji Shapurji* v. *Edward Vaughan Jor-*

(1) (1871) 7 B. L. R. 50, 53.

dan (1), *Sowdut Roy* v. *Sreecanto Maity* (2), and *Bhugwan Kritiratna* v. *Chundra Mala Gupta* (3).

The result, therefore, is that this appeal must be allowed and the order of the Court below discharged. The case will be remitted to the Court of first instance, in order that the objection taken by the judgment-debtors may be investigated upon evidence to be adduced by the parties. The appellants are entitled to their costs both here and in the Court of Appeal below. The costs in the Court of first instance will abide the result.

Appeal allowed; case remanded.

S. C. G.

(1) (1888) I. L. R. 12 Bom. 400.
(2) (1906) I. L. R. 33 Calc. 639.
(3) (1902) I. L. R. 29 Calc. 773; 1 C. L. J. 97.

CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

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Feb. 7.

KALI DAS CHUCKERBUTTY

v.

EMPEROR.*

Misjoinder—Commission of criminal breach of trust in the same transaction as abetment of cheating and attempt to cheat and as part of a common design—Joint trial of one accused under ss. 408 and $\frac{420}{109}$ with another under ss. $\frac{420}{511}$ of the Penal Code—Legality of separate sentences—Concurrent sentences—Criminal Procedure Code (Act V of 1898) s. 239.

Where A, a railway ticket collector, made over two used tickets, which he had collected from passengers, to B, and instructed him to apply for a refund of the fares covered by the same, as unused tickets, at the place of issue, and the latter proceeded there and made such an application but was discovered in the act:—

Held, that the joint trial of A on charges under ss. 408 and $\frac{420}{109}$ and of B, under ss. $\frac{420}{511}$ of the Penal Code, was legal under the provisions of s. 239 of the Criminal Procedure Code.

* Criminal Revision, No. 69 of 1911, against the order of T. S. Macpherson, Additional Sessions Judge of Hooghly, dated Dec. 20, 1910.