

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1911

August 3.

KASSUM GOOLAM HOOSEIN VAZIR (ORIGINAL OPPONENT-DEFENDANT),
APPELLANT, v. DAYABHAI AMARSI, ASSIGNEE OF BHANJI RAVJI KHOJA
(ORIGINAL APPLICANT-PLAINTIFF), RESPONDENT.*

*Civil Procedure Code (Act V of 1908), Order XXI, Rule 16—Decree—Assignment—
Application for execution—Attachment before hearing judgment-debtor's objec-
tions—Notice to assignor and judgment-debtor—Attachment proceedings not merely
irregular but illegal.*

The transferee of a decree having preferred a *darkhast* for execution, the judgment-debtor's property was attached in his shop by seizure before hearing his objections. The next day an order was made on the application of the judgment-debtor that the property should not be removed until his objections had been heard. Subsequently the Court heard the judgment-debtor's objections and held that the transferee was entitled to execution of the decree against the judgment-debtor, the omission to hear the judgment-debtor's objections was a mere irregularity and proceedings in attachment should not be set aside.

Held, reversing the order and dismissing the *darkhast*, that legislature having provided that the decree should not be executed until the objections had been heard, the proceedings were unlawful and not merely irregular as the objections of the judgment-debtor had not been heard.

SECOND appeal against the decree of C. E. Palmer, District Judge of Thana, confirming the order passed by S. S. Wagle, First Class Subordinate Judge of Thana, in an execution proceeding, *darkhast* No. 91 of 1910.

One Bhanji Ravji Khoja obtained a decree, No. 117 of 1905, against the defendant Kassum Goolam Hoosein Vazir for the recovery of Rs. 800. The decree was dated the 11th August 1905 and it was subsequently assigned by the decree-holder to Dayabhai Amarsi. On the 11th June 1910 the assignee preferred a *darkhast*, No. 91 of 1910, in the Court of the First Class Subordinate Judge of Thana, praying for the recovery of Rs. 1,167-8 due under the decree from the defendant personally and by the attachment and sale of his moveable property. On the 18th June 1910 the assignee put in an affidavit stating that the defendant was about to close his shop and run away from Bandora, where he lived, and applied that the order for

* Second Appeal No. 184 of 1911.

attachment should be issued along with the notices under Order XXI, Rule 16 of the Civil Procedure Code (Act V of 1908). The property was consequently attached in the defendants' shop on the 29th June 1910. On the next day, that is, on the 21st June 1910, the defendant made an application stating that the attachment was illegal and should be set aside. The Court, thereupon, made an order that further proceedings should be stopped and set down the defendants' application for hearing on the 26th June 1910. On that day certain affidavits were put in to show that the defendant was a respectable man and had no intention of absconding. Witnesses were examined at intervals and on the 6th August 1910 the Subordinate Judge found that there were not sufficient grounds for an immediate attachment. He, therefore, disallowed the costs of the attachment but directed that the attached property be sold.

On appeal by the defendant the District Judge confirmed the order observing :—

As the notices required by Order XXI, Rule 16, and Order XXI, Rule 22, were issued and after the attachment had been made no further steps were ordered to be taken till appellant had been heard, I am not prepared to hold that the order eventually passed was wrong or must be set aside because of the initial irregularity, if there was one, in making an attachment after judgment.

The defendant preferred a second appeal.

Manubhai Nanabhai for the appellant (opponent-defendant) :—The Court should not have issued the attachment before hearing our objections. The terms of Order XXI, Rule 16 of the Civil Procedure Code are clear. Its provisions are obligatory. Non-compliance with them is not a mere irregularity which can be cured by section 99 of the Code, nor can section 151 of the Code enable the Court to go against the express provisions of Order XXI, Rule 16 : *Gulzari Lal v. Daya Ram*⁽¹⁾. The rulings under section 248 of the old Code of 1882 where similar language had been used show that proceedings in violation of the provisions of that section were held to be illegal.

Coyaji with *V. G. Deshpande* for the respondent (applicant-plaintiff) :—Notices had been issued and objections on the

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merits were heard and over-ruled. The defendant has not, therefore, been prejudiced. The matter was urgent and the Court must have some power to attach the judgment-debtor's property if he is about to abscond. If the Court has power to grant attachment before judgment, it has the same power after decree: section 151 of the Civil Procedure Code. Merely attaching the property does not amount to execution of the decree as contemplated by Order XXI, Rule 16, Rule 24.

SCOTT, C. J.:—In this case a *darkhast* for execution was applied for by the assignee of the decree.

Rule 16 of Order XXI provides that where a decree is transferred by assignment, the transferee may apply for execution of the decree and the decree may be executed as if the application had been made by the decree-holder subject to this proviso, that where the decree has been transferred by assignment, notice of the application for execution shall be given to the transferer and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections, if any, to its execution.

Being aware of the provisions of that rule the transferee applied on the 18th of June 1910 for notices to the transferer and the judgment-debtor. He applied at the same time for attachment by seizure of the goods of the judgment-debtor in his shop. On the same day notices were issued by the Court and also a warrant of attachment. Before any objection had been heard on the part of the judgment-debtor the property was attached in his shop by seizure by the Sheriff's officer on the 20th of June 1910.

Then on the 21st of June an application was made by the judgment-debtor to the Court and an order was made that the bailiff should not remove the property until after the objections had been heard.

The hearing of the objections commenced on the 26th of June and the hearing was concluded on the 6th of August. The Court then held that the plaintiff was entitled to execution of the decree against the judgment-debtor. Thus, it appears that the property of the judgment-debtor had been attached

in execution for a month and a half before his objections had been finally heard. The attachment was effected in the manner most prejudicial to the reputation of the defendant by the open seizure of the goods in his shop. It has been held, however, by the lower Courts that although the provisions of the Code have been violated to the great prejudice of the defendant, it is a mere irregularity and the proceedings in attachment should not be set aside. We cannot agree in this view. The legislature has provided in express terms that the decree shall not be executed until the objections have been heard. One of the modes provided by the Code for execution of decrees is by attachment and sale of the property. The execution of the decree had commenced by the attachment. We think that this was unlawful and not merely irregular as the objections of the judgment-debtor had not been heard.

We, therefore, set aside the order of the lower appellate Court and dismiss the *darkhast* with costs throughout upon the decree-holder.

Order set aside.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

THE AHMEDABAD MUNICIPALITY (ORIGINAL DEFENDANT), APPELLANT, v.
RAMJI KUBER (ORIGINAL PLAINTIFF), RESPONDENT.*

District Municipal Act (Bom. Act III of 1901), section 96, sub-sections (2), (3) (a), (4) (a) (ii) and (5)⁽¹⁾—Application to Municipality to reconstruct a house, building balconies—"Permission note" to rebuild the house—Permission to build balconies indefinitely delayed—Building of balconies—Indefinite delay inconsistent with the District Municipal Act (Bom. Act III of 1901).

On the 3rd July 1903 the plaintiff applied to the Ahmedabad Municipality for permission to reconstruct his house, building balconies on its two sides. On the

* Second Appeal No. 909 of 1909.

(1) Section 96, sub-sections (2), (3) (a), (4) (a) (ii) and (5) of the District Municipal Act (Bom. Act III of 1901) :—

96. (1) Before beginning to erect any building, or to alter externally or add to any existing building, or to reconstruct any projecting portions of a building in

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