

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Shah.

SUBRAO MANGESH CHANDAVARKAR (ORIGINAL PLAINTIFF), APPELLANT,
v. MAHADEVI KOM MANJIBHATTA AND OTHERS (ORIGINAL DEFENDANTS),
RESPONDENTS.*

1913.

July 25.

Civil Procedure Code (Act V of 1908), Order XXXVIII, rule 5—Attachment before judgment—Money decree—Death of judgment-debtor—Property passing by survivorship to his coparcener—Subsequent execution of decree—Right of survivorship not defeated by execution.

In 1906 the plaintiff obtained a money decree against B, having first obtained attachment before judgment of certain property which was joint family property. In 1907 B died while joint with defendant 2. The plaintiff applied to execute the decree in 1909 and again in 1911. The lower Courts dismissed the application on the ground that the title of defendant 2 to the property by survivorship was not defeated by the attachment before judgment. The plaintiff having appealed :—

Held, that the attachment before judgment did not defeat the right of defendant 2 by survivorship ; and that the plaintiff had taken no measure to which could be attributed the effect of defeating that right.

SECOND appeal from the decision of C. V. Vernon, District Judge of Kanara, confirming the decree passed by V. V. Bapat, Second Class Subordinate Judge at Honavar.

Execution proceedings.

The plaintiff obtained on the 1st November 1906 a money decree against Bellabhattera, having first obtained on the 28th October 1906, an attachment before judgment of property belonging to the joint family of which Bellabhattera was a member. In 1907 Bellabhattera died. The plaintiff applied to execute the decree by sale of the property in 1909 and again in 1911. Subraya (defendant 2), a coparcener of Bellabhattera, opposed the application contending that the property had passed to him by survivorship on Bellabhattera's death.

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Both lower Courts dismissed the application on the ground that the attachment before judgment was of no avail against the passing of the property by survivorship.

The plaintiff appealed to the High Court.

S. S. Patkar, Government Pleader, for the appellant.

K. H. Kelkar, for respondent 2 (defendant 2).

BATCHELOR, J.:—This is an appeal in execution proceedings, and it arises upon these facts.

The appellant on 1st November 1906 obtained a money decree against one Bellabhatta. Prior to the decree, *i. e.*, on 23rd October 1906, the appellant had obtained attachment before judgment of the property in suit, as being the property of Bellabhatta. Some time in 1907 Bellabhatta died. Admittedly he was in union with the respondent 2, and the property was joint family property, which on Bellabhatta's death would ordinarily have passed to respondent 2 by survivorship. Nothing further was done under the decree till 1909 and 1911, when the appellant made applications for execution.

The question is whether, in these circumstances, the respondent's title by survivorship was defeated by the appellant's attachment before judgment. Both the lower Courts have answered this question in the negative. In our opinion that is the correct answer.

It would seem that there is no reported decision which precisely covers the present facts, but the nearest discoverable authority is the judgment of the Privy Council in *Suraj Bunsî Koer v. Sheo Persad Singh*⁽¹⁾. Both sides have accordingly relied upon this case, and the determination of the present appeal turns mainly on the correct construction of the Privy Council's judgment. Now in *Suraj Bunsî Koer's case* there had been

⁽¹⁾ (1879) 5 Cal. 148.

not a mere attachment before judgment, but an attachment in execution and an order for sale; indeed the sale itself would have taken place but for the judgment-debtor's applications for postponement. It was upon these facts that the judgment proceeded, their Lordships saying that "the execution proceedings, under which the mouza had been attached and ordered to be sold, had gone so far as to constitute, in favour of the judgment-creditor, a valid charge upon the land" which could not be defeated by the debtor's death before the actual sale. It would appear, therefore, that the ground of the judgment was that in that case the judgment-creditor had carried execution proceedings so far as to give himself a valid charge upon the property; and this interpretation has the authority of Sir John Edge, C. J., in *Jagannath Prasad v. Sita Ram*⁽¹⁾. If this view is right, then we think that the Privy Council's judgment is authority against the present appellant. For, prior to Bellabhata's death, the appellant had not only not carried execution proceedings to a point where a charge might be held to have been created, but had in fact instituted no execution proceedings at all. All that he had done was to obtain an attachment before judgment, a mere precautionary measure which admittedly creates no charge. Indeed in *Moti Lal v. Karrabuldin*⁽²⁾, Lord Hobhouse, in speaking even of an attachment in execution, says that it "only prevents alienation, it does not confer title."

It follows from the above considerations that the appellant has taken no measure to which could be attributed the effect of defeating the respondent's right by survivorship. And on principle we cannot see any ground upon which the appellant could succeed, for when the right by survivorship accrued to the respondent, there was not in existence any competing right or

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⁽¹⁾ (1888) 11 All. 302.⁽²⁾ (1897) 25 Cal. 179.

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title at all ; in other words, there was nothing to arrest the accrual of the respondent's right. This conclusion is supported by the decision of the Madras High Court in *Ramanayya v. Rangappayya*⁽¹⁾, where the right of the survivor was held to prevail despite an attachment before judgment. It is true that in that case the defendant had died before the decree was passed, but that circumstance does not, we think, make any difference of substance ; for in this case owing to the absence of execution proceedings, as in that case owing to the death of the judgment-debtor before decree, the attachment before judgment did not become effective to render the property available for sale until after the right of survivorship had accrued. For the attachment before judgment, though it enured for the benefit of the creditor, did not avail to render the property saleable until the first application for execution was made in 1909, that is, long after Bellabhata's death : see *Pallonji Shapurji Mistry v. Edward Vaughan Jordan*⁽²⁾.

This view as to the rights of the present parties has also the support of the high authority of Westropp, C.J., in *Udaram Sitaram v. Ranu Panduji and Venku Panduji*⁽³⁾, where the Chief Justice noticed the case of *Goor Pershad v. Sheodeen*⁽⁴⁾. With the observations as to the alienability of a coparcener's share in this Presidency we have no concern, but the judgment shows that the Chief Justice and West, J., "fully concurred" in the decision in *Goor Pershad's case* so far as that decision held that where the coparcener's share had been attached, and attached in execution proceedings, and the coparcener had died before the actual sale, the judgment-debtor at his death had left no right at all in the property, and there was consequently nothing in

(1) (1893) 17 Mad. 144.

(2) (1888) 12 Bom. 400.

(3) (1875) 11 Bom. H. C. R. 76.

(4) (1872) 4 N.-W.-P. H. C. R. 137.

connexion with it which was liable to be sold. It is true that though the execution proceedings in *Goor Pershad's case* were not carried so far as in *Suraj Bansi Koer's case*, yet the former decision must be taken to have been overruled by the Judicial Committee at least to this extent that it can no longer be held that the right by survivorship is to be defeated only by an actual sale during the judgment-debtor's life-time. That, however, leaves matters only at this point, that the right by survivorship is defeated in a case where, a parcener's interest having been attached in his life-time under a decree obtained against him for his separate bond debt, and a sale having subsequently been held under the attachment, the judgment-debtor dies between the date of the attachment in execution and the sale. Here the facts are much stronger in favour of the surviving coparcener, since, as we have noticed, no proceedings in execution had been taken by the creditor at the time of the coparcener's death, nor was any sale ever held, but the solitary circumstance on which the creditor can rely is the attachment before judgment. We are brought back, therefore, to the question whether such an attachment can be held to be operative to defeat the survivor's right for, in *Suraj Bansi Koer's case*⁽¹⁾ their Lordships say "It seems to be clear upon the authorities that if the debt had been a mere bond-debt, not binding on the sons by virtue of their liability to pay their father's debts, and no sufficient proceedings had been taken to enforce it in the father's life-time, his interest in the property would have survived on his death to his sons, so that it could not afterwards be reached by the creditor in their hands". On the facts of this suit we are of opinion, for the reasons stated, that this is such a case, and that no sufficient proceedings have been taken by

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⁽¹⁾ (1879) 5 Cal. 148 at p. 173.

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the creditor to enforce his claim during the debtor's life-time.

Mr. Patkar has contended, on the authority respectively of *Ganu Singh v. Jangi Lal*⁽¹⁾, and of *B. Krishna Rau v. Lakshmana Shanbhogue*⁽²⁾, first, that an attachment before judgment stands for all purposes on the same footing as an attachment in execution, and, secondly, that an attachment in execution creates a valid charge and is sufficient to defeat the right by survivorship. This latter proposition, however, which is otherwise doubtful, no longer has the support of the Madras High Court: see *Sankaralinga Reddi v. Kandasami Tevan*⁽³⁾, and *Zamindar of Karvetnagar v. Trustee of Tirimalai, Tirupati, &c., Devasthanams*⁽⁴⁾. And the former proposition is equally devoid of authority; for all that the learned Judges decided in *Ganu Singh's case* was that an attachment before judgment and an attachment after judgment had the same effect for one particular purpose, namely binding the property so as to prevent private alienations. Here there is no question of any private alienation, and the appellant's contention must consequently be disallowed.

For these reasons we are of opinion that the lower Court's decree is right, and we dismiss this appeal with costs.

Appeal dismissed.

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(1) (1899) 26 Cal. 531 at p. 534.

(3) (1907) 30 Mad. 413.

(2) (1881) 4 Mad. 302.

(4) (1909) 32 Mad. 429.