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after the accounts were filed. On the present record nothing is shown to have been done with reference to the accounts said to have been filed by Balaji in January 1907. It is common ground that there is no order of discharge under section 41 (4).

Order confirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Crump.

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January 9.

VAIKUNT SHRIDHAR BHATTA (ORIGINAL PLAINTIFF), APPELLANT v. MANJUNATH MADHAV BHANDARI AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 4), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), Order XXI, Rule 60—Execution of decree—Attachment of property—Claim by a person in possession of maintenance charge on the property—Sale of the property in execution subject to the charge—Suit to recover possession of the property after the death of charge-holder—Parties to appeal—Practice and procedure.

Certain property in which a judgment-debtor was interested as a sharer was attached in execution of a decree against him. His mother applied to raise the attachment on the ground that she was in possession of the property, that she was entitled to retain it during her life-time and that it was subject to a charge for her funeral ceremonies. The property was sold subject to her charge and purchased by the plaintiff at the Court-sale. After the mother's death, the plaintiff sued to recover the judgment-debtor's share in the property by partition, when the judgment-debtor and a brother of his (defendants Nos. 2 and 1, respectively) contended that there was no attachment of the property at the time of sale and that the sale was, therefore, invalid. The trial Court decreed the claim on the ground that the sale was valid even though there was no attachment. Defendant No. 1 alone appealed; and the lower appellate Court held that absence of attachment vitiated the sale and dismissed the suit. The plaintiff having appealed,

Held, that the property was sufficiently attached, that all the subsequent proceedings including the sale of the right, title and interest of the judgment-debtor were in order, and that there was no real basis for the objection that the sale was void in consequence of the absence of attachment.

* Second Appeal No. 892 of 1918.

Held, also, that defendant No. 2 ought to have appealed from the decree of the trial Court; and that in his absence the decree could not be reversed by the lower appellate Court on the appeal of defendant No. 1 alone.

The Court, however, ordered defendant No. 2 to be joined as party to the appeal.

SECOND appeal from the decision of V. M. Ferrers, District Judge of Dharwar, reversing the decree passed by V. N. Navaratna, Subordinate Judge at Honawar.

Suit for partition.

At a partition arrived at between four brothers, defendants Nos. 1 and 2, father of defendant No. 3 and Venkatraman (transferor of defendant No. 4), certain properties were set apart for the maintenance of their mother Kaveri.

Subsequently, one Sheshgiri obtained a decree against defendant No. 2 and in execution of it, attached the properties (plaint serial Nos. 1 and 2) which were set apart for Kaveri's maintenance. Kaveri intervened in the proceedings and objected to the attachment on the ground that plaint serial No. 2 was in her possession, that she was entitled to retain it during her life-time, and that it was subject to a charge for her funeral ceremonies. She also objected that plaint serial No. 1 was subject to a charge for her maintenance. The Court granted the application. The properties were sold subject to Kaveri's charge and purchased by the plaintiff at the Court-sale.

After Kaveri's death, the plaintiff sued to recover from defendants Nos. 1 to 4 possession of the one-fourth share of the judgment-debtor in the property by partition.

The trial Court held that the Court-sale was valid in spite of absence of attachment and decreed the plaintiff's claim.

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Defendant No. 1 alone appealed from the decree, and made defendant No. 4 and the plaintiff as respondents. The lower appellate Court held, following I. L. R. 36 Bom. 163, that absence of attachment vitiated the sale, and dismissed the suit.

The plaintiff appealed to the High Court, impleading defendants Nos. 1 and 4 only.

G. P. Murdeshwar, for the appellant:—I raise three points to show that the decree of the lower Court is erroneous. Firstly, I submit that the view of both the Courts below that the property was not under attachment at the date of the sale is erroneous. The order on Kaveri's application, which is referable to Order XXI, Rule 60, was not, it is true, worded with precision. Kaveri did not claim a higher interest than a life-estate; neither did she deny the vested remainder of defendant No. 2. The attachment was, therefore, raised to a limited extent. The Court had the power to raise it "to such extent as it thinks fit." The same Judge who passed this order in Kaveri's application had occasion to interpret it in Sheshgiri's application and he held that defendant No. 2's interest was already under attachment. Secondly, assuming there was no subsisting attachment, the sale held was not void. Attachment has for its purpose the protection that it affords to judgment-debtors. The Code nowhere says that it is an essential preliminary to a sale. The omission to attach does not make the sale bad. It would at the most amount to an irregularity such as might entitle any interested person to apply to the Court to set aside the sale under Order XXI, rule 90: see *Naigar Timapa v. Bhaskar Parmaya*⁽¹⁾. The case of *Alahadeo Dubey v. Bholu Nath Dichit*⁽²⁾, on which the lower Court relies, was not followed even by the

⁽¹⁾ (1886) 10 Bom. 444 at p. 447.

⁽²⁾ (1882) 5 All. 86.

same High Court in *Sheodhyan v. Bholanath*⁽¹⁾ on the ground that it was impliedly overruled by the Privy Council decision in *Tasadduk Rasul Khan v. Ahmad Husain*⁽²⁾. The case of *Kishory Mohun Roy v. Mahomed Mujaffar Hossein*⁽³⁾ supports the view that a sale in the absence of attachment is not void. Despite any material irregularity, a judicial sale is operative until set aside: *Malkarjun v. Narhari*⁽⁴⁾. The sale ought to have been set aside within the period of limitation prescribed in Article 12. Moreover, defendant No. 2, inasmuch as he did not object to the sale, is estopped by his conduct from contending now that the sale was irregular: *Naigar Timapa v. Bhaskar Parmaya*⁽⁵⁾; *Malkarjun v. Narhari*⁽⁴⁾ and *Shaligram bin Motiram v. Hanmantram Jamnaldas*⁽⁶⁾. Thirdly, defendant No. 2 having accepted the decree of the trial Court, plaintiff became entitled to his share. Defendants being tenants-in-common, defendant No. 1 had no ground to appeal. The lower Court, therefore, was incompetent to vary the decree in appeal to which defendant No. 2 was not a party at all.

Nilkanth Atmaram, for the respondent:—It is not open to the appellant to contend that there had been an attachment before the property was put up to sale. The first Court which decided in his favour found as a fact that there was no attachment and this finding was not challenged in the appeal Court. In second appeal it is not now open to him to question a finding on a point which was conceded in the lower Court.

Assuming that that finding is correct, my point is that the Court had no jurisdiction to sell the property; the sale is consequently void, and the Court-purchaser gets no title. It is on this ground that the case of *Malkarjun v. Narhari*⁽⁴⁾ can be distinguished,

(1) (1899) 21 All. 311 at p. 313.

(2) (1893) 21 Cal. 66.

(3) (1890) 18 Cal. 188.

(4) (1900) 25 Bom. 337 at p. 349.

(5) (1886) 10 Bom. 444 at p. 447.

(6) (1882) P. J. 149.

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e.g., a notice under the old section 248 of the Civil Procedure Code is necessary in order that the Court should obtain jurisdiction to sell property by way of execution if more than one year has elapsed between the date of the decree and the application for its execution or if the enforcement of the decree be applied for against the legal representatives of the judgment-debtor. If such notice be not issued, the subsequent proceedings are void for want of jurisdiction. This has been held by the Privy Council. But in *Malkarjun's case*⁽¹⁾, the Court had done what was required of that Court to give it jurisdiction, though its decision as to the personality of the legal representative was erroneous, and the Privy Council said that that fact did not make the sale a nullity. *Malkarjun's case*⁽¹⁾ has no application here.

Mahadeo Dubey v. Bhola Nath Dichit⁽²⁾ decides that where there has been no attachment any sale which may take place is void. This was followed in *Ram Chand v. Pitam Mal*⁽³⁾. *Naigar Timapa v. Bhaskar Parmaya*⁽⁴⁾ is not against this view. In this case there was an attachment, but what was contended for was, that the attachment was not in a particular manner provided for by the Code. That contention was obviously wrong.

It is wrong to say that the Full Bench decision in *Mahadeo Dubey v. Bhola Nath Dichit*⁽²⁾ was not accepted by the same Court in a later case, viz., *Sheodhyan v. Bholanath*⁽⁵⁾. For in this latter case, the property had been under attachment before judgment, and the fact that it was not attached a second time after judgment, did not make the sale a nullity for second attachment is not necessary.

⁽¹⁾ (1900) 25 Bom. 337.

⁽³⁾ (1888) 10 All. 506.

⁽²⁾ (1882) 5 All. 86.

⁽⁴⁾ (1886) 10 Bom. 444.

⁽⁵⁾ (1899) 21 All. 311.

[At this stage the Court intimated that they were disposed to hold that there was an attachment subsisting on the property before it was sold, and that the pleader should therefore address the Court on that point.]

The order passed by the Court on Kaveri's application taken with the prayer made by her leaves no doubt that the whole attachment was raised. Though she admitted that defendant No. 2 and his brothers had a vested interest in the property still her prayer was that the attachment should be raised, and Court passed the order "granted". That can only mean that the whole attachment was raised. That is the plain meaning of the order.

SHAH, J. :—The facts which have given rise to this appeal are these :—

Certain properties including the property in suit formed the subject-matter of a partition among four brothers, defendants Nos. 1 and 2, father of defendant No. 3 and one Venkatraman. At that partition the property in suit was given to their mother during her life-time for her maintenance. One Sheshgiri obtained a decree against defendant No. 2 and in execution of that decree he attached two lands, plaint serial Nos. 1 and 2. Kaveri, the mother of defendant No. 2, objected to the attachment and made an application for having the attachment raised on the ground that plaint serial No. 2 was in her possession, that she was entitled to retain it, during her life-time and that there was a charge thereon for a certain sum to be paid by the brothers for her funeral ceremonies after her death. The allegation as to the other land was that it was subject to a charge for her maintenance at a certain monthly rate. This application was granted on the 16th of August 1901. Thereafter in the Darkhast of Sheshgiri an order was made on

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the 30th of October 1901 directing the sale of both the properties including the property, plaint serial No. 2, subject to certain charges which were claimed by Kaveri in her application. The right, title and interest of defendant No. 2 in the property were put up for sale subject to the charges mentioned in the order of the 30th of October, and the plaintiff purchased the same. The sale was duly confirmed and apparently no objection was taken to the sale thereafter either by the decree-holder or the judgment-debtor. Kaveri died in 1915, and the auction-purchaser filed the present suit in 1917 for the partition of the property described as plaint serial No. 2 and claimed his one-fourth share which represented the interest of defendant No. 2 in the property. Defendants Nos. 1 and 2 contended that in fact there was no attachment of the property in question and that the sale in the absence of any previous attachment was void according to law. The defendant No. 3 did not appear; and defendant No. 4, who was a purchaser of the share of Venkatraman, claimed that on partition his one-fourth share might be assigned to him.

The trial Court found that the plaintiff property was released from attachment at the date of the sale, but that Court came to the conclusion that the sale was valid in spite of the absence of a formal attachment at the date of the sale. Accordingly a decree was passed in favour of the plaintiff allowing him his one-fourth share in the plaint serial No. 2 by partition. There was also a decree for past mesne profits and future mesne profits against defendant No. 2. The defendant No. 4 also was allowed under the decree to recover his one-fourth share by partition in the property.

The defendant No. 1 appealed to the District Court from this decree against the plaintiff and defendant No. 4. He did not join defendants Nos. 2 and 3 as

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respondents to his appeal. The appellate Court came to the conclusion that the property had been sold by the Court when it was not under attachment and that the sale was void in consequence of the absence of attachment at the time. The learned District Judge accordingly reversed the decision and allowed the appeal with costs.

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In support of the appeal, which has been preferred from the decree of the District Court, it has been urged that the property was under attachment in fact when the execution proceedings relating to the sale of the right, title and interest of the present defendant No. 2 went on in the executing Court on the Darkhast filed by Sheshgiri, that even if there was no attachment, the sale was not void, and that under the circumstances of this case it was not open to the lower appellate Court to reverse the decree on the appeal of defendant No. 1 as defendant No. 2 had not joined him in the appeal.

We have heard the pleader for the respondent on the first and the last points, and in the view which we take of those points we have not considered it necessary to hear him fully on the question as to whether the sale effected by the Court in the absence of any prior attachment would be valid or not.

It may be noted that in the appeal preferred to this Court by the plaintiff defendants Nos. 2 and 3 have not been joined as parties.

The first point to be considered is whether the lower Courts are right in their view that there was no attachment of the property which was put up for sale. The facts relating to this point are that the property was in fact attached in the first instance on the application of Sheshgiri, that there was subsequently an order on Kaveri's application and that later on in the darkhast proceedings there was an order stating the effect of the order on Kaveri's application. If the effect of the order

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is correctly stated by the executing Court in its order of the 30th of October 1901 it seems to me that the property was duly attached at the time. To start with in this case there was an attachment of the property on the Darkhast of Sheshgiri. It is urged on behalf of the respondent that that attachment was raised by an order on Kaveri's application under Rule 60 of Order XXI. If the order stood by itself, there would be much to be said in favour of the view that the attachment was wholly raised so far as the property in question was concerned. But the order is very brief and it is quite clear that in its entirety it is difficult to apply it with reference to the other property which formed the subject matter of that application and of the attachment. As regards the other property the claim of Kaveri was that it was subject to a certain charge. As regards the property now in question her claim was that she was in possession and that she was entitled to enjoy the property during her life-time. No doubt in the application she proceeded to say that the defendant No. 2 had no right to the property. But it is clear that her meaning was that during her life-time he had no right to the property, and that it was subject to a certain charge for her funeral expenses. In October 1901, when in executing the decree in favour of Sheshgiri, the Court read this order as meaning that the right, title and interest of defendant No. 2 in the property was liable to be sold subject to the interest of Kaveri, which was stated in the order, it seems to me that the executing Court which had passed the order on Kaveri's application interpreted it in a manner in which it was reasonably capable of being interpreted. If the order had been in that form in terms, it seems to me that it would have been a valid order under Rule 60 which enables the Court to make an order releasing the property wholly or to such extent as it thinks fit from

attachment. The order having been so interpreted by the executing Court and the prior attachment having been treated as being still in force, the property was put up for sale. In due course the plaintiff purchased the right, title and interest of the present defendant No. 2 in the property. I do not see how it could be said that there was absolutely no attachment of the property in question. It is clear on the allegation of Kaveri in that application that the judgment-debtor had some saleable interest at the time; and though the order was in a general form, it was rightly understood by the executing Court to mean that the property was liable to be sold, subject to Kaveri's interest therein. I am clearly of opinion that the property was sufficiently attached and that all the subsequent proceedings including the sale of the right, title and interest of the judgment-debtor were in order, and that there is no real basis for the objection that the sale is void in consequence of the absence of any attachment.

In this view of the matter it is not necessary to consider the interesting question as to whether in the absence of an attachment a sale effected by the Court would be valid or not. In favour of its validity reliance was placed in the course of the argument upon the decision in *Kishory Mohun Roy v. Mahomed Mujaffar Hossein*⁽¹⁾ and *Malkarjun v. Narhari*⁽²⁾. On the other hand in favour of the view that in the absence of any prior attachment the sale would be void reliance was placed upon the case of *Mahadeo Dubey v. Bhola Nath Dichit*⁽³⁾. It is not necessary, as I have said, to express any opinion on this question as in my opinion the property was under attachment subject to Kaveri's interest at the material time.

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(1) (1890) 18 Cal. 188.

(2) (1900) 25 Bom. 337.

(3) (1882) 5 All. 86.

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The only other question which requires consideration is whether on the appeal of defendant No. 1 alone the lower appellate Court could have passed the decree now under appeal. It becomes necessary to consider that question as defendants Nos. 2 and 3 have not been joined as parties to this appeal. It would have been far more satisfactory if they had been joined as parties to this appeal quite apart from the consideration as to whether they were parties to the appeal in the lower appellate Court. In the trial Court the defendant No. 2 joined defendant No. 1 in raising the question as to the validity of the Court sale. But that Court decided the question against them, and defendant No. 2 did not appeal from the decree for partition, which was passed on the basis that his right, title and interest had been validly conveyed to the plaintiff. It seems to me under the circumstances that the defendant No. 2 not having appealed, it was not open to defendant No. 1 to object to partition on that ground. Admittedly the defendants were tenants-in-common and there could be no doubt that either defendant No. 2 or the person claiming to be the owner of his right, title and interest would be entitled to his share. Defendant No. 1 never contended that defendant No. 2 had no share in the property. Though it might appear that the point which he raised in the appeal was one which was raised in the trial Court, in view of the fact that defendant No. 2 did not appeal from that decree it cannot be said that defendant No. 1 could raise a point which it was open to defendant No. 2 primarily to raise and which by his omission to appeal he must be taken to have given up. It seems to me, therefore, that on the appeal of defendant No. 1 the decree of the trial Court could not have been properly reversed. In that view of the matter in spite of the absence of defendants Nos. 2 and 3 on the record of this appeal I have come to the

conclusion that this appeal may be disposed of without further delaying the proceedings by directing defendants Nos. 2 and 3 to be joined as parties to the appeal.

On these grounds I would allow this appeal, set aside the decree of the lower appellate Court and restore the decree of the trial Court with costs of this appeal and in the lower appellate Court on defendant No. 1.

CRUMP, J. :—I concur.

Appeal allowed.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

SHIVAJIRAO NARAYANRAO THORAT (ORIGINAL DEFENDANT No. 1),
APPELLANT *v.* HARI NARAYAN TAGARE AND ANOTHER (ORIGINAL
PLAINTIFF), RESPONDENTS^o.

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January 13.

Indian Limitation Act (IX of 1908), section 19—Acknowledgment—Court of Wards Act (Bom. Act I of 1905), section 16, proviso—Offer made by Collector in settlement of claim—Whether the offer can be used as an acknowledgment of debt.

In 1886, the defendant's family passed in favour of the plaintiff a simple mortgage bond for Rs. 9,500 for a period of ten years. The defendant was a minor and a ward of the Collector under the Court of Wards Act (Bom. Act I of 1905). In 1916, the plaintiff sued to recover the amount due on the bond of 1886. Interest on the bond was paid regularly till 1903. On the 24th May 1913, the Collector wrote a letter to the plaintiff by which the Collector offered to pay Rs. 17,000 in instalments in satisfaction of the "whole of the amount due" to the plaintiff. The plaintiff relied upon this letter as an acknowledgment of debt to save the bar of limitation. On behalf of defendant it was contended that under the proviso to section 16 of the Court of Wards Act, the letter could not be proved,

Held, that the proviso did not prevent the plaintiff from using the letter as an acknowledgment so as to start a fresh period of limitation under section 19 of the Limitation Act, 1908.

^o First Appeal No. 251 of 1917.