

APPELLATE CIVIL.

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

1922

February 7.

GANPATIBHATTA UMAMAHESHWARBHATTA AND ANOTHER (ORIGINAL OPPONENTS NOS. 2 AND 3), APPELLANTS v. DEVAPPA SHANKARNARAYAN HAVIK AND ANOTHER (ORIGINAL APPLICANT AND HEIR OF OPPONENT No. 1), RESPONDENTS*.

Civil Procedure Code (Act V of 1908), Order XXI, Rule 57—Decree—Execution—Attachment—Successive Darkhasts—Determination of attachment.

In 1908 the plaintiff obtained a money decree which was made payable by instalments and provided that on failure to pay two instalments the decree could be executed for the whole amount. The decree also directed that "the immoveable property of the defendant may be got attached and kept." Before any default in payment, the plaintiff took out a Darkhast on the 14th August 1908, under which the Court ordered the immoveable property to be attached, and dismissed the Darkhast. In 1910 the defendants granted a Mulgeni lease of the property in suit to the appellants. Prior to that, however, the plaintiff had purchased a considerable portion of the property from the defendants for a portion of the decretal debt. In 1910, 1912 and 1915 the plaintiff had applied for execution of the balance of the decretal debt by attachment and sale of the lands in dispute. In 1916, the plaintiff again applied for execution by sale of the lands free of the Mulgeni lease,

Held, dismissing the application, that the attachment had gone under the order of the Court or had ceased to exist under the provisions of Order XXI, Rule 57 of the Civil Procedure Code, 1908.

SECOND appeal against the decision of F. W. Allison, District Judge of Kanara, setting aside the decree passed by V. R. Guttikar, Subordinate Judge at Sirsi.

Proceedings in execution.

On the 18th July 1918 one Souda obtained a money decree against Annebhatta (defendant No. 1) for Rs. 1,290-6-0 payable in six equal annual instalments. The decree provided :

"In case of failure to pay to plaintiff any two successive instalments at the period fixed, the amount that remains payable in respect of principal and

* Second Appeal No. 337 of 1921.

interest together with interest at the above rate on the amount of costs should be paid without putting forward any excuse on the ground of subsequent instalments. And immovable property in respect of defendant may be got attached and kept".

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Before any of the instalments payable under the decree became due, the plaintiff presented on 14th August 1908, Darkhast application No. 313 of 1908, praying for attachment of the lands belonging to the judgment-debtor Annebhatta. The Court ordered the lands to be attached and directed the attachment to continue though the Darkhast was dismissed.

Subsequently Annebhatta privately sold to the judgment-creditor a considerable portion of the lands attached in 1908 for a part of the decretal debt, reserving to himself the lands in dispute, and agreed to pay the balance of the decree within a short time.

On the 21st June 1910, Annebhatta granted a Mulgeni lease of the lands in dispute to Ganapatibhatta and another (opponents Nos. 2 and 3).

On 25th July 1910, the decree-holder took out another Darkhast praying for recovery of the balance by attachment and sale of the lands in dispute. The property was put up for sale by the Collector, but, as there was no bid the Darkhast was dismissed.

The decree was thereafter transferred to Devappa who applied to execute it in 1912 praying for attachment and sale of the lands. An order for attachment was made, but as no Bhatta was paid the Darkhast was dismissed. Another Darkhast was filed in 1915 but it was dismissed for want of prosecution. In 1916 Devappa again applied to recover the balance of the decretal debt, by sale of the lands which were attached in 1908 and which were granted in Mulgeni lease to the opponents Nos. 2 and 3 in 1910.

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The executing Court was of opinion that the direction in the decree about the attachment of defendant's lands was valid and that the attachment levied in 1908 was not bad on account of prematurity ; but it held that the private sale in favour of plaintiff must be treated as a waiver on his part of the relief given to him by the attachment with the result that he and his assignee were estopped from questioning the lease in favour of opponents Nos. 2 and 3. The Darkhast was accordingly dismissed.

On appeal, the District Judge, was of opinion that the property was still under attachment when the Mulgeni lease was passed ; that the lease was not binding on the decree-holder and that the decree-holder was not estopped from contending that the lease was not binding on him. The Darkhast was sent back for disposal according to law.

Opponents Nos. 1 and 2 appealed to the High Court.

R. A. Jahagirdar, for the appellants.

G. P. Murdeshwar, and *D. R. Ugrankar*, for respondent No. 1.

MACLEOD, C. J. :—The plaintiff in this suit got a decree so far back as 1908 for a certain sum of money which was directed to be payable by instalments. If two instalments were in arrears the decree could be executed for the whole amount. But the decree also directed that “the immoveable property of the defendant may be got attached and kept.” We do not know what meaning could be attached to those words. Clearly it was *ultra vires* of the Court if it was intended that the defendant's property should be attached before default had been made in the payment of the instalments. It seems that the plaintiff immediately after the decree was passed took out a Darkhast on 14th August 1908 under which the Court ordered the lands

to be attached, but struck off the Darkhast. On the 21st June 1910 the defendant granted a Mulgeni lease to the present opponents Nos. 2 and 3. Prior to that the decree holder had bought from the judgment-debtor a considerable portion of the property which he purported to have attached in 1908, and the terms of the sale provided that in addition to the lands sold the defendant was to pay a small balance to the decree-holder at his convenience within a short time.

On the 25th July 1910, the decree-holder took out another Darkhast praying for the recovery of the balance by attachment and sale of the lands in dispute, the prayer being to attach and sell by auction the lands in dispute which were already attached. The property was put up for sale by the Collector, but, as there was no bid the Darkhast was dismissed on the 30th March 1912.

Then the decree-holder transferred the decree to the present applicant who presented a Darkhast against the judgment-debtor, and that application prayed for the attachment and sale of the lands in dispute. An order for attachment was made, but as no Bhatta was paid the Darkhast was dismissed with costs. Another Darkhast was filed in 1915 praying for the attachment of the moveable property of the judgment-debtor. That was dismissed for want of prosecution. Then the present Darkhast of 1916 was filed praying that the properties now in dispute should be sold for the balance of the decree.

It is not an easy matter to decide whether property remains under attachment when the Darkhast is struck off. Strictly speaking if the Darkhast is struck off the attachment would go with it. It seems contrary to the ordinary meaning of words that when a Darkhast, which is issued to attach property, is dismissed, still the attachment should continue. But

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in this case we have to consider the conduct of the judgment-creditor, and his transferee, the present applicant. We are satisfied in this case that the attachment either went under the order of the Court or ceased to exist under the provisions of Order XXI, Rule 57. It does not seem to make very much difference. It certainly seems extraordinary that in 1922 we should have to decide whether a Mulgeni lease granted in 1910 is void or not. Certainly the present applicant has only himself to thank for his own delay in not prosecuting the execution of his decree with due diligence. The appeal must be allowed and the Darkhast dismissed with all costs on the applicant.

Decree reversed.

J. G. R.

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CHIMABAI KOM MALGOUDA PATIL (ORIGINAL PLAINTIFF), APPELLANT v. MALLAPPA PAYAPPA, STYLES HIMSELF AS KALGAUDA MALGAUDA, MINOR; BY HIS GUARDIAN GODAVA KOM KALGAUDA PATIL AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS^o.

Hindu law—Adoption—Adoption made by husband—Widow cannot dispute the adoption.

Under Hindu law as administered in this Presidency it is not competent to a widow to dispute the validity of the adoption made by her husband.

FIRST appeal against the decision of E. F. Rego, First Class Subordinate Judge of Belgaum.

Suit to recover possession.

The property in suit belonged to one Malgauda Kalgauda Patil of Dhamane in Belgaum District. Malgauda was a Jain by religion.

On Monday the 29th November 1915, Malgauda adopted Malappa (defendant No. 1) who was a son of

^oFirst Appeal No. 249 of 1920.