

PETITIONER:  
NANCY JOHN LYNDON

Vs.

RESPONDENT:  
PRABHATI LAL CHOWDHURY & ORS.

DATE OF JUDGMENT 19/08/1987

BENCH:  
KANIA, M.H.  
BENCH:  
KANIA, M.H.  
REDDY, O. CHINNAPPA (J)  
SHETTY, K.J. (J)

CITATION:  
1987 AIR 2061                      1987 SCR (3) 1038  
1987 SCC (4) 78                      JT 1987 (3) 366  
1987 SCALE (2) 413

ACT:

Civil Procedure Code. 1908: Section 64 and Order 21 Rule 57 Attachment order--Execution petition or suit in which attachment ordered dismissed--Restoration of such proceedings--Whether attachment revived--Alienation of attached property--Whether affected.

HEADNOTE:

The appellant filed a petition for execution of the money decree obtained by her in High Court against the judgment-debtor and attachment was levied in execution on open land and a portion of the premises in question belonging to the judgment-debtor. Subsequently, the judgment-debtor sold a portion of the attached property. The purchaser in turn, sold a portion thereof to the respondents. The aforesaid execution petition was dismissed for default but later on an application by the appellant, the said Execution Case was restored, and the said property was again attached, and a proclamation for sale of the said property was issued under Order 21 Rule 66 of the Code of Civil Procedure. The respondents' petition under Order 21, Rule 58 of C.P.C. for releasing the property purchased by the respondents from attachment was dismissed. The High Court allowed the appeal.

In appeal to this Court, it was urged on behalf of the appellant that in view of the provisions of Section 64 of the Code of Civil procedure, the sale of the property by the judgment debtor to the purchaser and the sale thereafter by him to the respondents, which were both effected during the subsistence of the attachment, were void as against the appellant decree-holder, and although the attachment ceased on the dismissal of the Title Execution Case, on May 9, 1972, it was revived by restoration of the case.

Allowing the appeal, this Court,

HELD: An order of restoration of a suit dismissed for default would certainly restore or revive the attachment for the period during which it was in subsistence, namely, prior to the dismissal of the suit or execution application. [1043D]

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In the present case both transactions, sale by the

judgment-debtor and subsequent sale by the purchaser to the respondents, were effected during the subsistence of the attachment and before the Title Execution Case was dismissed for default. [1043C]

The Division Bench of the High Court was in error in taking the view that by reason of the dismissal of the said Title Execution Case, the attachment came to an end and the order of restoration of the said case would not affect any alienations made before the restoration, although such alienations might have been made during the subsistence of the attachment. [1044C]

Sushila Bala Dasi v. Guest Keen Williams Ltd., I.L.R. 1949 Vol. 1 Calcutta, p. 177 Annapurna Patrani & Ors. v. Lakshmana Kara & Anr., A.I.R. 1950, Madras, p. 740; Pradyut Natwarlal Shah v. Suryakant H. Sangani & Ors., A.I.R. 1979 Bombay, p. 166; Tavvala Veeraswami v. Pulim Ramanna & Ors., A.I.R. 1935 Madras, p. 365 and Patringa koer v. Madhavanand Ram & Ors., Calcutta Law Journal, 1911, Vol. 14 p. 476, referred to.

#### JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3535 of 1982.

From the Judgment and Order dated 16.3. 1982 of the Calcutta High Court in F.M.A No. 282 of 1981 & C.R. No. 3842 (m) of 1980.

T.S. Krishnamurthy Iyer, G.L. Sanghi, G.S. Chatterjee and D.P. Mukherjee for the Appellant.

L.N. Sinha, M.P. Jha, K.C. Mittal and A.K. Chopra for the Respondents.

The Judgment of the Court was delivered by

KANIA, J. This is an appeal directed against the judgment of a Division Bench of the High Court of Calcutta in Appeal from Original Order No. 282 of 1981 with C.R. No. 3842 (m) of 1980. The relevant facts for the purpose of this appeal can be shortly stated. In August 1969, the appellant before us obtained a money decree in the High Court at Calcutta against the judgment debtor Maharaj Kumar Maley Chand Mahatab. On 31st July 1970 the appellant filed a petition for execution of the decree, numbered as Title Execution Case No. 19 of 1970. On 3rd August 1970 attachment was levied in execution on open land 1040

belonging to the judgment debtor admeasuring about 19 Kathas at 10A, Diamond Harbour Road, and portion of premises No. 2 Judges Court Road, now, numbered as 6/1D, Diamond Harbour Road and 2/A, Judges Court Road, 24-Paraganas respectively. On 14th September 1970, the judgment debtor sold a portion of the attached property admeasuring a little over to 11 Kathas to one Bharat Shamshere Jung Bahadur Rana. On 29th March, 1972 Bharat Shamshere Jung Bahadur Rana sold a portion of the said land admeasuring a little over 9 Kathas (referred to hereinafter as "the said property") to Prabhatilal Chowdhary and others who are the respondents in the present appeal. On 9th May, 1972 the aforesaid Execution Petition, namely, Title Execution Case No. 19 of 1970 was dismissed for default. On 16th September, 1975, on an application by the appellant, the said Title Execution Case No. 19 of 1970 was restored. On a petition dated 26th September, 1975 the said property was again attached. Thereafter, a proclamation for sale of the said property was issued under Order 21 Rule 66 of the Code of Civil Procedure. The respondents Prabhatilal Chowdhary & Others filed a petition

under Order 21 Rule 58 of C.P.C. for releasing the said property from attachment. This application was registered as Misc. Case No. 8 of 1978. On 11th August, 1980 the said Misc. Case No. 8 filed by Prabhatilal and Others was dismissed. On 16th March, 1982 the aforesaid appeal from Order No. 282 of 1981 and C.R. NO. 2843(m) of 1980 was allowed by the Calcutta High Court. It is this decision allowing the said appeal which is assailed before us.

Mr. Sanghi, learned counsel for the appellant urged that the sale of the said property by the judgment debtor to Bharat Shamshere Jung Bahadur Rana and the sale of the said property by the said Bharat Shamshere Jung Bahadur Rana to the respondent were both effected during the subsistence of the attachment. Although the attachment ceased on the dismissal of the said Title Execution Case on 9th May, 1972, the said attachment was revived by reason of restoration of the said case on 16th September, 1975. It was submitted by him that, in view of the provisions of Section 64 of the Code of Civil Procedure, the sale of the said property by the judgment debtor to Bharat Shamshere Jung Bahadur Rana and the sale of the same by the Bharat Shamshere Jung Bahadur Rana to the respondent are both void as against the appellant decree holder.

Section 64 of the Code of Civil Procedure runs as follows:-

"Where an attachment has been made, any private transfer

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or delivery of the property attached or of any interest therein and any payment to the judgment debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment."

There is an Explanation to this Section, but it is not material for our purposes.

Order 21 Rule 57 as it stood prior to its amendment in 1976 and as amended by the Calcutta High Court as follows:-

"Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease unless the Court shall make an order to the contrary."

The words "unless the Court shall make an order to the contrary" have been added by way of amendment to the said Rule made by the Calcutta High Court.

In view of the plain wording of the aforesaid Rule, it is clear that when the aforesaid Title Execution Suit was dismissed for default, the attachment levied ceased as no order to continue that attachment was made by the Court. The question as to what is the effect of the restoration of the said Title Execution Suit, that is, whether the said restoration would restore the original attachment and, if so, to what extent. In this connection, it has been held by the Calcutta High Court that where an order for releasing property from attachment is set aside on appeal, the effect is to make the property still subject to the attachment and to restore the state of things which had been disturbed by the order of release. It makes no difference whether the order for releasing the attachment under Order 21 Rule 63 of the Code of Civil Procedure is passed in appeal or revision. (See Sushila Bala Dasi v. Guest Keen Williams, Ltd., I.L.R. 1949 Vol. 1 Calcutta, p. 177.

A Division Bench of the Madras High Court in Annapurna Patrani & Ors. v. Lakshmana Kara & Anr., A.I.R. 1950, Madras, p. 740 has held that where in execution of decree property is attached

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but the petition for execution is dismissed for default and on appeal the order of dismissal for default is set aside, the effect of the appellate order is to restore the order attaching property and the trial Court would have to proceed with the execution application from the stage at which it had interrupted it by dismissing it for default. The appellate order restoring attachment would relate back to the date when the attachment was first made and would render invalid any alienation in the interim period. A similar view has been taken by a learned Single Judge of the Bombay High Court in Pradyut Natwarlal Shah v. Suryakant N. Sangani & Ors., A.I.R. 1979 Bombay, p. 166.

However, in the present case the restoration of the Title Execution Case was not made on an appeal or revision, whereby order of dismissing the said suit for default was set aside, but the said suit has been restored on an application made for restoration. Such an order for restoration cannot be equated with an order passed on appeal or in revision setting aside the dismissal. In this case we are not called upon to consider what is the effect of an order of dismissing the Execution Application for default being set aside on appeal or revision, and we do not propose to express any opinion in that connection. In a case which is more relevant for determination of the question before us, namely, Tavvala Veeraswami v. Pulim Ramanna & Ors., A.I.R. 1935 Madras, p. 365 which was decided by a full Bench of the Madras High Court an order dismissing a suit for default was set aside on an application for that purpose. It was held that where an order dismissing a suit for default is set aside on an application for that purpose, the suit remains as it was on the day when it was dismissed and all proceedings taken up upto that date must be deemed to be in force when the dismissal is set aside and all interlocutory orders will be revived on the setting aside of the dismissal. Similarly, an order for attachment of property will also be revived. In that case an attachment before judgment was raised on security being furnished. The suit in which the attachment was levied was dismissed for default, but was restored on an application made for that purpose and decreed and the decreeholder sought to enforce the security bond. It was held that on the restoration of the suit, all ancillary orders were restored without any further order, and that therefore, the security bond given for the raising of attachment before judgment was also restored and the decreeholder was entitled to enforce the security bond. It was observed by Beasley C.J., who delivered the judgment with which other learned Judges concurred, as follows:-

"It does not seem to be reasonable that the plaintiff in a

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suit who has got an attachment before judgment should have again, after the restoration of the suit after its dismissal for default, to apply to the Court for a fresh attachment and that having done so, the defendant should have to apply to raise the attachment by producing a surety or sureties. The commonsense view of the matter is that all ancillary orders should be restored on the suit's restoration without any further orders."

In the present case both, the sale by the judgment debtor to Bharat Shamshere Jung Bahadur Rana and the sale by Bharat Shamshere Jung Bahadur Rana to the respondent, were effected during the subsistence of the attachment and before the Title Execution Case was dismissed for default. In our view, even if a doubt were to be entertained as to whether an order for restoration of the suit or execution application would have the effect of restoring the attachment retrospectively so as to affect alienations made during the period between dismissal of the suit or execution application and the order directing restoration, it is clear that an order of restoration would certainly restore or revive the attachment for the period during which it was in subsistence, namely, prior to the dismissal of the suit or execution application.

The learned counsel for the respondent drew our attention to the decision of the Division Bench of the Calcutta High Court in the case of Patringa Koer v. Madhavanand Ram & Ors., Calcutta Law Journal, 1911, Vol. 14 p. 476 where it was held that a revival of execution proceedings does not operate as revival of the attachment so as to prejudice the rights of strangers who have in the interval acquired a title to the property. The reversal of judicial orders leaves unaffected the rights of strangers, bona fide purchasers, whether under execution sale or under private sale, who have acquired title on the assumption that such orders were valid in law. A careful reading of this decision shows it is of no assistance to the case of the respondent because the judgment makes it clear that what was really held was that in the absence of statutory provisions to the contrary, the court cannot cancel the order of dismissal for default of an execution application with retrospective effect so as to prejudice the title that might have been acquired in the interval by a stranger, when the property was admittedly not in the custody of the Court. This decision might have helped the respondents if the alienations in question had been effected during the interval between the dismissal of the Title Execution Case and its restoration. But, in the present case, the alienations were effected

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when the attachment was subsisting as we have already pointed out and hence this decision is of no assistance to the respondents. We are not called upon to consider as to whether the aforesaid decision lays down good law or as to what would have been the effect of the restoration of the Title Execution Case had the alienations been effected during the aforesaid interval and we do not propose to say anything in this regard.

In our view, the Division Bench of the Calcutta High Court was in error in taking the view, in the judgment appealed against, that by reason of the dismissal of the said Title Execution Case, the attachment came to an end and the order of restoration of the said case would not affect any alienation made before the restoration although such alienations might have been made during the subsistence of the attachment.

We may mention that our attention was drawn to the amendment of Rule 57 of Order 21 made by the Calcutta High Court, but in our view that amendment merely provides that although under Rule 57 of Order 21 the attachment would cease on an order dismissing the application for execution it is open to the Court to make an order to the contrary, which would mean that the Court could make an order to continue the attachment for some time. The amendment, however, is of no relevance in the case before us.

In the result, the appeal is allowed, the impugned judgment set aside and the order of First Subordinate Judge at Alipore in Misc. Case No. 8 of 1978 which was set aside by the Calcutta High Court restored. The respondents must pay to the appellant the cost of the appeal.

N.P.V.  
allowed.  
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Appeal

JUDIS