A RAJENDER SINGH

v.

RAMDHAR SINGH AND ORS.

MAY 11, 2001

B [UMESH C. BANERJEE AND K.G. BALAKRISHNAN, JJ.]

Civil Procedure Code, 1908

Section 136—Attachment order—Property falling outside the jurisdiction
C *of the issuing authority—Procedure for execution—Non-compliance with—Attachment challenged as invalid—Held, the non-compliance will not invalidate the attachment order as such since defect in the procedure could be cured—Order 38 Rules 5 and 7.*

D *Order 38 Rule 5(1) (as amended by Amending Act, 1976) and Section 136—Difference between.*

Auction sale—Execution proceedings—Challenge on ground of insufficiency of consideration—Held, mere inadequacy of consideration is not a ground for setting aside Court sale.

E

In a money suit filed by the appellant-plaintiff certain property of the defendant falling in another district was attached. The order was sent directly to Subordinate Judge, and not through District Judge of the concerned district. After *ex-parte* decree of the suit in execution proceedings, the property was auction-sold and was purchased by the appellant-decree holder.
F **Respondents filed a case for release of the land from attachment as they had purchased the property from the judgment debtor. The case of the respondents was rejected by the execution Court.**

Respondents filed Revision Petition before High Court contending that the attachment of property by the appellant-decree holder was not in accordance
G **with Section 136 of Civil Procedure Code, 1908, and that since the agreements for sale of the property were prior to the attachment, the subsequent attachment would not prevail over the sale deeds executed pursuant to the agreements of sale; and that the price, at which the appellant purchased the property in auction sale, was not adequate. High Court, on the ground of non-**
H **compliance of procedure laid down in Section 136 C.P.C., set aside the auction**

sale and allowed the Revision Petition. A

Hence this appeal.

Disposing of the appeal, the Court

HELD : 1.1. The failure on the part of the Court which issued the B attachment order in sending the order and the connected papers to the District Court will not invalidate the attachment order as such though in view of Order XXXVIII Rules 5 and 7 and Section 136 of Civil Procedure Code, 1908, it is clear that for effecting attachment of property outside the local limits of a Civil Court, the mode prescribed is that the order of attachment shall be sent to the District Court within the local limits of whose jurisdiction the property C is situated and the District Court thereafter shall send the order of attachments to the Subordinate Court within whose jurisdiction the property is situated for effecting the attachment. Section 136 only lays down the procedure in case the property is situated outside the territorial jurisdiction of the Court. The District Court to which such order of attachment is sent is D only effecting the attachment and the power under Order XXXVIII Rule 5 is not as such exercised by that Court. By the Amending Act of 1976 a new sub-rule was added to Rule 5 of Order XXXVIII to the effect that if an order of attachment is made without complying with the provisions of sub-rule (1) of the said rule, such attachment shall be void. Therefore, importance is given to the mandatory conditions under Rule 5(1) of Order XXXVIII and there is E no such similar insertion in Section 136. [744-C-D; 745-C]

Mariamma Mathew v. *Ittoop Poulo,* AIR (1952) Travancore-Cochin 159; *Mookan Ouseph Thomakutty* v. *Puramundekat Padinjare Madathil Nanu,* AIR (1963) Kerala 193; *Bansropan Singh and Ors.* v. *Emperor,* AIR (1937) Patna 603 and *Haji Rahim Bux and Sons and Ors.* v. *Firm Smlullah and Sons,* AIR F (1963) Allahabad 320, referred to.

1.2. The order of attachment is sent to the District Court when the property is situated outside the jurisdiction of the issuing authority. It is only to maintain the comity of Courts as, in some cases, the attachment order might G be issued by the Munsif/Civil Judge (Junior Division) and the property to attached might be within the jurisdiction of the Civil Judge (Senior Division)/ Subordinate Judge and in the fitness of things, Section 136 lays down the procedure that under such circumstances, the order of attachment should be sent to the District Court which is having supervisory jurisdiction over all subordinate Courts within that district. It is only a procedure and if the owner H

of the property raised an objection to the effect that the procedure was not complied with, court can issue appropriate direction to cure the defect in the procedure. If such an objection was not raised within a reasonable time, the attachment order itself cannot be treated as invalid. [744-G-H; 745-A-B]

M.G. Brothers **v.** *Shah Tolchand Parswachand and Co.,* **AIR (1963) Mys. 147, referred to.**

2. Mere inadequacy of the price is not a ground for setting aside the Court sale.

3. In view of the fact that failure in sending the order under Section 136 C.P.C. The matter is remanded back to the High Court to consider the plea raised by the respondents regarding the two agreements allegedly executed by them prior to the date of attachment. [745-H]

Vannarakkal Kallalathil Sreedharan **v.** *Chandramaath Balakrishnan and Anr.,* **[1990] 3 SCC 291, referred to.**

Paparaju Veerraghavayya **v.** *Killaru Kamala Devi,* **AIR (1935) Mad. 193;** *Veerappa Thevar* **v.** *C.S. Venkatarama Aiyar,* **AIR (1935) Mad 872;** *Angu Pillai* **v.** *M.S.M. Kasiviswanathan Chettier,* **AIR (1974) Mad 16;** *Rango Ramachandra Kulkarni* **v.** *Gurlingappa Chinnappa Muthal,* **AIR (1941) Bom. 198;** *Yeshvant Shankar Dunakhe* **v.** *Pyarji Nurji Tambol,* **AIR (1943) Bom. 145 and** *Kochuponchi Varughese* **v.** *Quseph Lonan,* **AIR (1952) TC 467, referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4394 of 1991.

From the Judgment of Order dated 15.2.91 of the Patna High Court in C.R. No. 1208 of 1987.

Lakshmi Raman Singh and Amitesh Kumar for the Appellant.

Ajit Kumar Sinha for the Respondents.

The Judgment of the Court was delivered by

BALAKRISHNAN, J. This appeal is directed against the order passed in Civil Revision No. 1208/87 by the High Court of Judicature at Patna. The plaintiff-appellant herein filed Money Suit no. 13 of 1974 before the Sub-ordinate Judge's Court, Biharsharif. On 26.3.1974, the plaintiff obtained an

order of attachment before judgment in respect of certain properties of defendant situated within the local jurisdiction of Sub-ordinate Judge, Jehanabad. The attachment order was sent directly to Sub-ordinate Judge, Jehanabad on 27.3.1974 and it was served on the defendant in the suit on 31.3.1974. The defendant remained *ex-parte* and the suit was decreed on 11.10.1974. The plaintiff-decree hold sent the decree for execution to the Court of Sub-ordinate Judge, Jehanabad. On 25.8.1976, a fresh order of attachment of the properties was made by the executing court and the properties were sold through court auction on 19.11.1977. The decree holder himself purchased the attached property for a sum of Rs. 5996.38. The properties were having an extent of about 5 acres. The respondents herein filed a Miscellaneous Case on 19.11.1977 contending that they had purchased the disputed properties from the judgment debtor on 27.4.1974. According to the respondents, they had purchased these disputed properties under three registered sale deeds dated 27.4.1974 & 7.9.1974 for a total sum of Rs. 47,000. They had also alleged that prior to the sale deeds, there were two deeds of Baibeyana (Agreement to sell) dated 9.2.1974 and 16.2.1974 respectively. The respondents contended that there was no proper attachment of these properties and the auction of the properties was held illegally and they prayed that the lands be released from attachment. The Miscellaneous case no. 28 of 1977 filed by them was rejected by the Execution Court and aggrieved by the same, they filed Revision Petition No. 1208 of 1987 before the High Court.

The respondents contended that the attachment before judgment obtained by the decree holder-appellant was not in accordance with Section 136 of Civil Procedure Code. They also contended that the decree holder had purchased the property without obtaining previous sanction of the Court and therefore, the sale in his favour was illegal. They had further contended that the two agreements for sale were prior to the attachment obtained by the plaintiff and, therefore, the subsequent attachment will not prevail over the sale deeds executed pursuant to the agreements for sale. This plea was not considered on merits by the High Court. The High Court accepted the plea of the respondents regarding non-compliance of Section 136 of the Civil Procedure Code. The High Court held that the attachment order was not sent through the District Judge, Gaya within worse territorial jurisdiction, the Sub-ordinate Judge's Court, Jehanabad, and the attached properties were situate. The High Court accepted this plea and held that as the attachment before judgment was not sent through the District Judge, Gaya, within whose territorial Jurisdiction the attached property was situate, the same was ineffective and that warrant of attachment being ineffective, subsequent alienations by

A the judgment-debtor were valid transactions and the purchasers obtained valid title. In that view of the matter, the auction sale was set aside and the revision application filed by the respondents was allowed. Aggrieved by the same, the present appeal is filed.

The question that arises for consideration is whether the Court, which B passes an order of attachment in respect of properties situated within the jurisdiction of another Court, can directly send the order of attachment to that Court or it should always endorse the order of attachment to the District Court within the local limits of whose jurisdiction the attached property is situate. Attachment before Judgment is effected under Order XXXVIII Rule 5 of the Code of Civil Procedure. Rule 7 of Order XXXVIII provides the mode C of making attachment. It says as under :

> "Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree."

D Section 136 prescribes the procedure to be followed where a person to be arrested or property to be attached is outside the district. The relevant portion of the Section reads as follows :-

> "(1) Where an application is made that any person shall be arrested or that any property shall be attached under any provision of this E Code not relating to the execution of decrees, and such person resides or such property is situate outside the local limits of the jurisdiction of the Court to which the application is made, the Court may, in its discretion, issue a warrant of arrest or make an order of attachment, and/ send to *the District Court within the local limits of whose jurisdiction such person or property resides* or is situate a copy of F the warrant or order, together with the probable amount of the costs of the arrest or attachment.
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> 2. The District Court shall, on receipt of such copy and amount, cause the arrest or attachment to be made by its own officers, or by a Court subordinate to itself, and shall inform the Court which issued or made G such warrant or order of the arrest or attachment.
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> 3. XXXX
>
> 4. XXXX"
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> (Emphasis added)

H From the above provision, it is clear that for effecting attachment of

property situated outside the local limits of a Civil Court, the mode prescribed is that the order of attachment shall be sent to the District Court within the local limits of whose jurisdiction the property is situate and the District Court thereafter shall send the order of attachment to the subordinate Court within whose jurisdiction the property is situated for effecting the attachment.

The validity of the attachment order issued not in accordance with the procedure prescribed under Section 136 Civil Procedure Code was considered by different High Courts and different views have been taken on this matter.

In *Mariamma Mathew* v. *Ittoop Poulo*, AIR (1952) Travancore-Cochin 159, the full Bench of the Travancore-Cochin High Court held that the procedure prescribed under Section 136 Civil Procedure Code is not mandatory so long as the Court effecting the attachment has jurisdiction over the subject-matter of attachment. In that case, one Munsif Court issued an order of attachment in respect of 12 items of immovable properties out of which 11 items were situated within the jurisdiction of another Munsif Court. The attachment order and the connected papers were sent directly to the Munsif Court within whose jurisdiction the property was situated. When the plaintiff took steps to execute the decree by the sale of the attached properties, the alienees who had purchased the properties from the judgment debtor raised an objection to the effect that the attachment effected was not valid, inasmuch as the order of attachment was not sent through the District Court as enjoined by Section 101 of Travancore Civil Procedure Code. Section 101 of the Travancore Civil Procedure Code is in *pari materia* with Section 136 of Civil Procedure Code, 1908. The Court after elaboratedly considering the question held as under :

> "The question is, when an order of attachment before judgment of properties situated within the jurisdiction of one Court is made by another Court, the provision in Section 101 to send the order of attachment to the District Court within the local limits of whose jurisdiction the properties sought to be attached are situated is only a mode of procedure prescribed or whether the jurisdiction of the Court effecting the attachment will depend upon the District Court's order in that behalf. Our considered view is that the provision is only a procedural one and that so long as the Court effecting the attachment has jurisdiction over the subject-matter or attachment non-compliance with the provision in Section 101 can only amount to an irregularity.
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> Sub-section 2 of Section 101 shows that when an order for attachment before judgment passed by a Court is sent to the District

A Court, the latter Court is bound to carry out the order itself or through a Court subordinate to it. The only function of the District Court to which the order of attachment is sent or of a Court subordinate to it which the District Court might sent it is only to carry out the order and complete the formalities of attachment. It other words, Section 101 prescribes the procedure, it does not touch the jurisdiction."

B

In *Mookan Ouseph Thomakutty* v. *Puramundekat Padinjare Madathil Nanu*, AIR (1963) Kerala 193, a Single Judge of the High Court followed *Mariamma Mathew* v. *Ittoop Poulo*, AIR (1952) Travancore Cochin 159 and held that Section 136 Civil Procedure Code prescribes only a procedure and C does not confer jurisdiction on the Court, which effects the attachment. The non-compliance of that procedure being only a procedural defect, may be waived if no objection is taken and it does not invalidate the attachment itself.

In *Bansropan Singh and Others* v. *Emperor*, AIR (1937) Patna 603, the warrant of arrest was issued by Munsif of Kohima for arresting a judgment D debtor for recovery of money. As the judgment debtor was evading arrest, the Civil Court peon alongwith three police constables approached the house of the judgment debtor and the peon informed that he had a warrant of arrest against the judgment debtor. The person who was found in the house of the judgment debtor tried to run away but the peon caught him. He cried for help E and the judgment debtor came out of the house and wounded the police constable with a dagger. The question arose whether the warrant issued by the Munsif Court, Kohima was valid. The judgment debtor was residing within the jurisdiction of Munsif Court, Buxar. It was contended that as the warrant was not endorsed to the District Court and as the warrant had to be executed outside the jurisdiction of the issuing court, it was not validily F issued. Under that circumstances, the Court held that when a Court exercises the extraordinary powers conferred on it by Section 136, Civil P.C., the provisions of that section must be strictly observed; and the warrant must be endorsed to the District Court outside the jurisdiction of the issuing Court, in which the warrant is to be executed. The warrant against judgment debtor G was therefore held to be defective.

In another case reported in AIR (1963) Allahabad 320, *Haji Pahim Bux and Sons and Others* v. *Firm Samiullah and Sons* a decree holder had obtained order of attachment before judgment. After the decree, he applied for execution thereof by sale of the property attached. The sale was notified H and in the meantime, an objection was raised that the attachment of the

property made before judgment was invalid and that the property could not be sold. The sale was adjourned and as there was no stay, the property was actually sold and the objection filed by the appellants came up for consideration later. The objection was dismissed and in the appeal, the High Court held that as the attachment was not in accordance with Section 136 of the Code of Civil Procedure, it was invalid. The Court held in paragraph 9 at page 323 as under:

> "A plain reading of these two sub-sections will show that where the property to be attached is situate outside the local limits of the jurisdiction of the Court to which an application for the purpose is made, an order of attachment has to be sent to the District Court within the local limits of whose jurisdiction the property is situate together with the probable amount of the costs of the attachment. On receipt of the order of attachment, the District Court may cause the attachment to be made by its own officers or by a Court subordinate to it. Primarily, therefore, jurisdiction to make an attachment on the authority of a precept received from an outside Court vests in the District Court. A Court subordinate to the District Court may attach the property in compliance with the order of attachment received but that would be possible only if the District Court requires it to do so. It is the District Court, which has jurisdiction to cause the attachment to be made by its own officers or by a Court subordinate to itself. In the absence of a direction of the District Court to that effect, therefore, any attachment, which may be made by a subordinate Court in pursuance of a precept received from a Court in another district would be without jurisdiction and consequently void."

The Counsel for the appellant contended that the views taken by the Allahabad High Court and Patna High Court are not correct. In the above two decisions, the Court had held that when the property to be attached is situate outside the local jurisdiction of the Court to which an application for the purpose is made, an order of attachment has to be sent to the District Court within the local limits of whose jurisdiction, the property is situate, and it is the District Court which may cause the attachment of the property and, therefore, the attachment order passed by the issuing Court without sending the papers to the District Court is invalid and defective. Though, in Section 136 of the Civil Procedure Code, it is stated that the District Court shall, on receipt of the order of attachment or order of arrest, as the case may be, cause the attachment or arrest to be made by its own officers or by a Court subordinate to itself, in effect, the order is as such not passed by the District

A Court. The Court which passes the attachment before judgment passes the same under Order XXXVIII Rule 5 of the Code. The said rule gives authority to the Court to pass attachment before judgment after being satisfied by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him may try to dispose of the property. Before issuing such order of attachment, the Court must B satisfy itself that the defendant is about to dispose of the whole or any part of his property, or is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court.

It is only on the satisfaction of these conditions, the Court can pass C an order of attachment under Order XXXVIII Rule 5. Rule 7 of Order XXXVIII says that such attachment shall be made in the manner provided for the attachment of the property in execution of a decree.

Section 136 of the Code of Civil Procedure lays down the procedure to be followed where the person to be arrested or property to be attached is D outside the District Court which passes the order of arrest or attachment. Section 136 only lays down the procedure in case the property is situate outside the territorial jurisdiction of the Court. The District Court to which such order of attachment is sent is only effecting the attachment and the power under Order XXXVIII Rule 5 is not as such exercised by that Court.

E

In *M.G. Brothers* v. *Shah Tolchand Parswachand & Co.,* AIR (1963) Mys. 147, it was held that the Court passing the order of attachment has got the power to raise the attachment. In that case, a warrant was issued under Section 136 of the Code by the Subordinate Judge, Kunoor to the District Court, Bellary in which a lorry was attached, and a claim was preferred before F the District Judge and he made an order raising the attachment on the claimant furnishing security. The High Court held that the Court which could hear the claim was the Court which made the order of attachment and not the Court which actually effected the attachment.

G The order of attachment is sent to the District Court when the property is situate outside the jurisdiction of the issuing authority. It is only to maintain the comity of Courts as, in some cases, the attachment order might be issued by the Munsif/Civil Judge (Junior Division) and the property to be attached might be within the jurisdiction of the Civil Judge (Senior Division)/ Subordinate Judge and in the fitness of things, Section 136 lays down the H procedure that under such circumstances, the order of attachment should be

sent to the District Court which is having supervisory jurisdiction over all the subordinate Courts within that district. It is only a procedure and if the owner of the property raised an objection to the effect that the procedure was not complied with, Court can issue appropriate direction to cure the defect in the procedure. If such an objection was not raised within a reasonable time, we do not think that the attachment order itself could be treated as invalid.

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It is also pertinent to note that by the Amending Act of 1976, a new sub rule was added to Rule 5 of Order XXXVIII to the effect that if an order of attachment is made without complying with the provisions of sub-rule (1) of the said rule, such attachment shall be void. Therefore, the importance is given to the mandatory conditions under Rule 5(1) of Order XXXVIII and we do not find any such similar insertion in Section 136. Therefore, the failure, if any, on the part of the Court which issued the attachment order in sending the attachment order and the connected papers to the District Court will not invalidate the attachment order as such. Therefore, the learned Single Judge of the High Court was not correct in holding that the attachment order passed by the Subordinate Judge, Biharsharif was invalid.

C

D

The other ground for setting aside the same is the inadequacy of the price. The respondents have not alleged any fraud or material irregularity in the conduct of the Court's auction sale, whereby they suffered injustice. Mere inadequacy of the price is not a ground for setting aside the Court sale. That finding of the learned Judge also is not sustainable in law.

E

The respondents had also urged another ground to set aside the same, namely, that there were two deeds of Baibeyana (Agreements to sell), one on 9.2.1974 and another on 16.2.1974 prior to the date of attachment, namely, 6.3.1974. The respondents had contended before the Execution Court that these agreements should prevail over the attachment but this plea was rejected by the Subordinate Judge on the ground that the attachment does prevail over the pre-existing contract to sell even though the attaching creditor has no notice of a contract to sell. The very same plea was advanced before the learned Single Judge of the High Court but the same was not considered as the decision was taken in the matter having regard to non-compliance of Section 136 of the Code of Civil Procedure and the learned Single Judge felt that it was not necessary for him, in this case, to consider that plea.

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As we have taken a contrary view regarding Section 136, the matter has to go back to the learned Single Judge to consider the plea raised by the respondents regarding the two agreements allegedly executed by them. It may

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A be noted that as regards the question whether the agreement entered into by the judgment debtor prior to the attachment of property in execution of a decree would prevail over the attachment itself, was considered by this Court in *Vannarakkal Kallalathil Sreedharan* v. *Chandramaath Balakrishnan and another*, [1990] 3 SCC 291 and this Court approved the views expressed in *Paparaju Veeraraghavayya* v. *Killaru Kamala Devi*, AIR (1935) Mad. 193; B *Veerappa Thevar* v. *C.S. Venkatarama Aiyar*, AIR (1935) Mad. 872 and *Angu Pillai* v. *M.S.M. Kasiviswanthan Chettiar*, AIR (1974) Mad. 16 followed by *Rango Ramachandra Kulkarni* v. *Gurlingappa Chinnappa Muthal*, AIR (1941) 198; *Yesvant Shankar Dunakhe* v. *Pyaraji Nurji Tambol*, AIR (1943) Bom 145 and *Kochuponchi Varughese* v. *Ouseph Lonan*, AIR (1952) TC 467 C and held that the agreement for sale creates an obligation attached to the ownership of property and since the attaching creditor is entitled to attach only the right, title and interest of the judgement debtor, the attachment cannot be free from the obligations incurred under the contract for sale.

It is for the learned Single Judge to consider these aspects having D regard to the nature of the agreements alleged to have been executed by the respondents on 9.2.1974 and 16.2.1974.

As the learned Single Judge has not considered the questions raised by the respondents regarding the two agreements and their effect on the attachment, the matter has to go back to High Court to be considered afresh E subject to the observation made by us above. It is ordered accordingly.

As this litigation has been protracted and delayed, the learned Single Judge before whom the matter comes up for decision is requested to dispose of the same at an early date.

F The appeal stands disposed of accordingly. Parties to bear their respective costs.

K.K.T. Appeal disposed of.