

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

WEDNESDAY, THE 5TH DAY OF AUGUST 2015/14TH SRAVANA, 1937

OP(C).No. 3205 of 2013 (O)

AGAINST THE ORDER IN EA NO.139/2008 IN EP NO.111/2006 IN OS NO.36/1997 OF
SUBORDINATE JUDGE'S COURT, HOSDURG DATED 20.07.2013

PETITIONER(S)/1ST RESPONDENT/DECREE HOLDER :

V.GOPI, AGED 42 YEARS
S/O. KOTTAN, ADVOCATE
RESIDING AT PUTHIYA PURAYIL HOUSE, KOTTACHERY
BELLA VILLAGE, HOSDURG TALUK.

BY ADVS.SRI.SUNIL NAIR PALAKKAT
SRI.K.N.ABHILASH
SMT.R.LEELA
SRI.K.K.ANIL KUMAR
SMT.N.K.SHEEBA

RESPONDENT(S):

1. DR. BHASKARAN,
S/O. K.P.V.KANNAN, MUCHILOT, AJANOR
HOSDURG TALUK, BY POWER OF ATTORNEY HOLDER
NARAYANAN. N., S/O. N.V.KUNHIRAMAN, 45 YEARS, AGRICULTURE
NALEPADATH HOUSE, AJANOR, HOSDURG TALUK.
2. K.V.BABU , AGED 42 YEARS
S/O. K.V. KOTTAN, AUTO WORKS, HINDU,
NORTH KOTTACHERY, HOSDURG TALUK.

R1 BY ADV. SRI. GRASHIOUS KURIAKOSE (SENIOR ADVOCATE)
R1 BY ADV. SRI. M.M. ANTO
R1 BY ADV. SRI. GEORGE MATHEWS
R2 BY ADV. SRI. SURESH KUMAR KODOTH

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 13.07.2015, THE COURT
ON 05-08-2015 DELIVERED THE FOLLOWING:

OP(C).No. 3205 of 2013 (O)

APPENDIX

PETITIONER(S)' EXHIBITS

EXHIBIT P1 : THE TRUE COPY OF THE JUDGMENT OF THIS HON'BLE COURT IN WP(C)
NO.22300/09 DATED 15.3.2011.

EXHIBIT P2 : CERTIFIED COPY OF THE ORDER DATED 20.7.2013 IN EA NO.139/2008 IN EP
NO.111/2006 IN OS NO.36/1997 ON THE FILE OF THE SUBORDINATE JUDGE OF HOSDURG.

RESPONDENT(S)' EXHIBITS: NIL

//TRUE COPY//

“C.R.”

A.HARIPRASAD, J.

O.P.(C) No.3205 of 2013

Dated this the 5th day of August, 2015

JUDGMENT

Undermentioned legal questions arise in this original petition:

(i) Whether an order of attachment before judgment under Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 (“the Code”, for short) made in a suit for recovery of money will survive the dismissal of the suit on merits?

(ii) If the appellate court reverses the decree of the trial court and allows the suit claim, will it result in an automatic revival of the order of attachment before judgment?

(iii) Whether the ratio in the decision by Full Bench in **Thampi Muhammad Abdul Kadir v. Padmanabha Pillai Parameswaran Pillai (1952 KLT 264)** holds good in view of the change in the precedential law and insertion of Order XXXVIII Rule 11A to the Code?

2. Conspectus of the facts: Petitioner is the plaintiff in O.S.No.36 of 1997 filed before the Court of Subordinate Judge, Hosdurg. The suit was one for recovery of a sum of ₹1,50,000/- from the second respondent

(sole defendant). The plaint shows that what was claimed is only a personal decree against the defendant. Pending the suit, the petitioner filed I.A.No.633 of 1997 under Order XXXVIII Rule 5 of the Code for attachment of defendant's property before judgment. The court passed an order on the application and the property was kept under attachment till the disposal of the suit. The trial court dismissed the suit after trial on 19.12.1998. Petitioner preferred an appeal against the judgment and decree of the trial court. The appeal was filed within time. In other words, there was no delay in filing the appeal. Along with the appeal, an application for attachment of property of the second respondent was also filed. Nevertheless, no order was passed by the appellate court on the application till the disposal of the appeal. After hearing both sides, the appellate court allowed the appeal and decreed the suit. Thereafter, the petitioner filed an execution petition praying for attachment and sale of the property, which was attached by the trial court pending suit. Although the second respondent filed a counter statement in the execution petition raising some objections, the executing court did not consider those objections and proceeded with the execution of decree upto the stage of settlement of proclamation. Then the first respondent filed an application under Section 151 of the Code seeking exemption of the property from sale as he claimed title over the property sought to be attached and sold. According to the first respondent, he is a bonafide purchaser of the property for value by a registered document

dated 24.12.1999. Admittedly, the first respondent purchased the property from second respondent during pendency of the appeal. On the date when the first respondent purchased the property, there was no encumbrance or charge thereon. Although the petitioner had obtained an order of attachment before judgment in the suit, consequent to dismissal of the suit on 19.12.1998, the attachment order ceased to exist. As the petitioner was aware of this fact, he filed an application in the appeal for attachment. Fact that no order of attachment was passed by the appellate court is undisputed. Therefore, the first respondent, thinking that the second respondent was having a marketable title, purchased the property bonafide for value. These are the contentions raised by the first respondent.

3. Petitioner stiffly resisted the claims of the first respondent. Petitioner even challenged the maintainability of the petition. A stranger to the suit cannot invoke Section 151 of the Code, that too in execution proceedings. First respondent is not a bonafide purchaser of the property. As he claims through the judgment debtor, his contentions are barred. The claim raised by the first respondent is legally unsustainable and the court below should not have entertained the petition as it did not conform to the legal standards.

4. Heard Smt.Leela R., learned counsel for the petitioner and Shri Grashious Kuriakose, learned Senior counsel for the first respondent.

5. Learned counsel for the petitioner vehemently argued that the

impugned order is legally incorrect for many reasons. According to her, the order cannot be sustained primarily for the reason that an application under Section 151 of the Code should not have been entertained as the remedy of the first respondent, if any, was to file a petition under Order XXI Rule 58 of the Code. This argument is based on the premise that the order of attachment under Order XXXVIII Rule 5 of the Code will automatically revive in the event the appellate court reversed the trial court's decree. It is also contended that dismissal of the suit will not efface the order of attachment under Order XXXVIII Rule 5 of the Code. Unless and until the court has vacated the order, it will be in force.

6. In this case admittedly an order of attachment before judgment was passed. The requirements of Order XXXVIII Rule 5 of the Code are that the court must be satisfied at any stage of a suit, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of the whole or any part of his property or is about to remove the whole or any part of the property from the local limits of jurisdiction of the court. If so established, the court may direct the defendant, within a time to be fixed by it, either to furnish security for the suit claim or to appear and show cause why he should not furnish security. Sub-rule (3) of Order XXXVIII Rule 5 of the Code empowers the court to direct conditional attachment of the whole or any portion of the property specified in the petition.

7. The trial court at the first instance invoked this power and an order of attachment continued till the disposal of the suit. Undisputedly the suit was dismissed after an elaborate trial. Although an appeal was filed by the plaintiff against the decree, concededly there was no order of attachment, despite filing a petition for attachment before the appellate court. Ultimately the appeal was allowed. Learned counsel for the petitioner, based on a Full Bench decision of the Travancore-Cochin High Court reported in **Thampi Muhammad Abdul Kadir's** case (supra) contended that an order of attachment before judgment, which ceased to be in force with the dismissal of the suit will revive when the decree dismissing the suit is subsequently reversed. In paragraph 12, the following proposition of law is laid down by the Full Bench:

“An attachment before judgment which ceased to be in force with the dismissal of the suit will revive when the decree dismissing the suit is subsequently reversed and a decree in the plaintiff's favour is passed, even by the same court or by a superior court and this revival will be in force from the date on which the attachment before judgment is effected as provided for in the Civil Procedure Code.”

8. Learned Senior Counsel for the first respondent contended that the above proposition is not good law in view of the amendment to the pertinent provisions in the Code.

9. Order XXXVIII Rule 11 of the Code specifically says that where a property is under attachment by virtue of the provisions of Order XXXVIII Rule 5 and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for re-attachment of the property. This provision is not affected by the amendment to the Code by Act 104 of 1976 which came into effect on 01.02.1977. By the aforementioned amendment, a new provision has been added as Order XXXVIII Rule 11A. It reads as follows:

“11A. Provisions applicable to attachment.-

(1)The provisions of this Code applicable to an attachment made in execution of a decree shall, so far as may be, apply to an attachment made before judgment which continues after the judgment by virtue of the provisions of rule 11.

(2) An attachment made before judgment in a suit which is dismissed for default shall not become revived merely by reason of the fact that the order for the dismissal of the suit for default has been set aside and the suit has been restored.”

I may also refer to Order XXI Rule 57 of the Code which is substituted by the same amendment. It now reads as follows:

“57. Determination of attachment.-(1)

Where any property has been attached in execution of a decree and the Court, for any reason, passes an order dismissing the application for the execution

of the decree, the Court shall direct whether the attachment shall continue or cease and shall also indicate the period up to which such attachment shall continue or the date on which such attachment shall cease.

(2) If the Court omits to give such direction, the attachment shall be deemed to have ceased.”

10. Now the controversy centres round the effect of addition of Rule 11A to Order XXXVIII and substitution of Rule 57 to Order XXI of the Code. It is argued by Smt.Leela that on a conjoint reading of Order XXXVIII Rule 11A and Order XXI Rule 57 of the Code, one may perceive an impression that an order of attachment passed before judgment will cease to have force if the court did not indicate when the suit was dismissed as to whether the order should continue or not. She strongly contended that the spirit of law is against that perception. According to her, the words in Sub-rule (2) to Rule 11A of Order XXXVIII of the Code, which show that an attachment made before judgment in a suit dismissed for default shall not become revived merely for the reason that the suit has been restored, are pointers to think that a suit dismissed on merit stands on a different footing. This, according to the learned counsel for the petitioner, excludes the possibility of a reasoning that the principle in Order XXI Rule 57 of the Code can be applied to an attachment under Order XXXVIII Rule 5 of the Code.

11. Decision of another Full Bench of this Court in **Arumuhom Ammal v. Nayanar Panicker (1962 KLT 264)** was cited at the Bar. The ratio in the decision reads as follows:

“O.21, R.57, speaks of property “attached in execution” and it is impossible to hold that an attachment before judgment comes within the ambit of the rule. O.38, R.11 does not mean that an attachment before judgment is transformed into an attachment in execution and should be deemed as such for the purposes of O.21,R.57. The rule no doubt dispenses with the necessity for an attachment in execution, but the rule does not make an attachment before judgment an attachment in execution. Therefore the dismissal of an execution application for default does not put an end to the attachment before judgment.”

It is to be remembered that the decisions in **Thampi Muhammad Abdul Kadir** and **Arumuhom Ammal** were rendered by Full Benches before 1976 amendment to the Code.

12. A learned Single Judge of this Court in **Sebastian Joseph v. Cherian Varghese (1994(1) KLT 445)** considered the question whether it was legal for the court to dismiss a claim petition merely because the execution petition was dismissed. The question whether the principles in Order XXI Rule 57 of the Code would apply to a case of attachment before

judgment was also considered by the learned Single Judge. Incidentally, the ratio in **Arumuhom Ammal's** case (supra) was also considered. Learned Single Judge opined that addition of Rule 11A to Order XXXVIII of the Code caused an impact on the Full Bench decision in **Arumuhom Ammal's** case.

13. A Division Bench of this Court in **Tony v. Navodaya Enterprises (AIR 2004 Kerala 245)** overruled the decision of the learned Single Judge in **Sebastian Joseph's** case (supra) by holding that once an attachment under Order XXXVIII of the Code is made at the pre-decretal stage, it will continue in force until full satisfaction of the decree is attained or till the attachment is lifted. It is also observed that the provision in Order XXI Rule 57 of the Code has no application since it deals only with an attachment made in execution proceedings. It can be seen on a close scrutiny of **Arumuhom Ammal's** case and **Tony's** case that the questions whether an order of attachment in a suit would be in force after its dismissal on merit and/or whether the order would revive when an appeal therefrom was later allowed did not arise in those cases, nor they were decided. Those are cases in which the suits, wherein orders of attachment before judgment were passed, were decreed and later the execution petitions filed were dismissed. In that context the above observations were made. Hence those decisions are not relevant for deciding the questions

raised in this case.

14. Learned Senior Counsel for first respondent placed reliance on **Sardar Govindrao Mahadik and another v. Devi Sahai and others (AIR 1982 SC 989:(1982) 1 SCC 237)** to justify his contentions.

15. Facts in **Sardar Govindrao Mahadik's** case, in brief, are as follows: First plaintiff (subsequently deceased and represented through legal representatives) and the second plaintiff filed a suit for redemption of a mortgage in respect of a house described in the plaint. A loan of ₹10,000/- was secured by the mortgage. It was a possessory mortgage. First plaintiff was the mortgagor and the sole defendant was the mortgagee. Second plaintiff was a purchaser of the mortgaged property from the first plaintiff under a registered sale deed. It was also noticed that though it was a possessory mortgage, it was not a usufructuary mortgage, but an anomalous mortgage. The mortgagor served a notice calling upon the mortgagee to render true and full account of the mortgage transaction. The mortgagee failed to comply with the notice. In the meantime, the first plaintiff sold the house by a registered document to the second plaintiff. Thereafter the mortgagor and the subsequent purchaser as plaintiffs 1 and 2 respectively filed a suit against the mortgagee for taking account of the mortgage transaction and for a decree of redemption. The trial court after repelling the plea of the mortgagee raised under Section 53A of the Transfer of Property Act decreed the suit. When the mortgagee's appeal

was pending, one Motilal approached the Supreme Court claiming a right under Order XXII Rule 10 of the Code for being joined as a party to the appeal urging that under a sale certificate issued by another court in another proceeding, he had purchased the equity of redemption in respect of the mortgaged property and he had a subsisting interest in the property. He contested the rights of the plaintiffs as well as the mortgagee-defendant to claim any right, title or interest in the property. Motilal further alleged that he had filed a suit for recovering certain amounts against the first plaintiff-mortgagor and had secured an order of attachment before judgment of the mortgaged property much prior to the suit by the plaintiffs. The suit was decreed by the court and an execution application was filed. In that proceedings, the mortgaged property was sold subject to mortgage and he purchased the same for value. The auction was confirmed in his name. Subsequent to that, the mortgagor preferred an appeal against the decree of the trial court. And the appellate court allowed the appeal and dismissed the suit by Motilal in its entirety. Against that, Motilal filed a second appeal before the High Court and that Court set aside the lower appellate court's decree and passed a decree in favour of Motilal. The application filed by Motilal to get himself impleaded in the plaintiffs' case was resisted by the parties, but the High Court allowed the application and he was joined as a party to the appeal. In the above case, various questions including the question touching upon the doctrine of part

performance was raised before the Supreme Court.

16. The issues relevant for determination of the case on hand are dealt with in paragraphs 57 to 59 of the Supreme Court's judgment. After discussing the effect of an order of attachment before judgment, the Supreme Court held as follows:

“..... The sole object behind the order levying attachment before judgment is to give an assurance to the plaintiff that his decree, if made would be satisfied. It is a sort of a guarantee against decree becoming infructuous for want of property available from which the plaintiff can satisfy the decree. The provision in S. 64 of the Civil P. C. provides that where an attachment has been made, any private transfer or delivery of the property attached of 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. What is claimed enforceable is the claim for which the decree is made. Motilal's suit was for a money claim. It finally ended in a decree for Rs. 500/- by High Court and in between the 1st appellate Court had dismissed Motilal's suit in entirety. There is nothing to show that the attachment which would come to an end on the suit being dismissed would get revived if a second appeal is filed which ultimately succeeds.

In fact a dismissal of the suit may terminate the attachment and the same would not be revived even if the suit is restored and this becomes manifestly clear from the newly added provision in sub-rule (2) of R. 11-A of O. 38, C. P. C. which provides that attachment before judgment in a suit which is dismissed for default shall not be revived merely because by reason of the fact that the order for the dismissal of the suit for default has been set aside and the suit has been restored. As a corollary it would appear that if attachment before judgment is obtained in a suit which ends in a decree but if in appeal the decree is set aside the attachment of necessity must fail. There should be no difficulty in reaching this conclusion.” (sic)

(underline supplied)

The law on the point is succinctly stated by the Supreme Court without any room for ambiguity. Noticeable factual difference in our case is that the suit was dismissed by the trial court, but it was decreed in the first appeal. But that does not make the principle of law pronounced by the Supreme Court inapplicable to this case.

17. I have gone through the reasons for change made by C.P.C. Amendment Act 104 of 1976 while adding Rule 11A to Order XXXVIII of the Code. Clause (1) in Rule 11A specifically states that the provisions of this Code applicable to an attachment made in execution of a decree shall, so

far as may be, apply to an attachment made before judgment which continues after judgment by virtue of Rule 11. The Legislature expressed the following reasons for the change:

“Sub-rule (1) of new rule 11-A is intended to clarify the position as to whether the provisions of Order XXI, rule 57, apply to attachment made before judgment. The provision has been framed in general terms as it would not be appropriate to apply only the provisions of rule 57 of Order XXI.

Sub-rule (2) of new rule 11-A clarifies that an attachment before judgment made in a suit which was dismissed for default will not become revived on the restoration of the suit.”

(underline supplied)

From the above passage, it is clear that Rule 11A is added to Order XXXVIII of the Code with an intention to clarify that it is in general terms and not only the provision in Order XXI Rule 57 of the Code, but other provisions also, if found applicable, could be applied to an attachment made under Order XXXVIII of the Code. It is further clear that the statement of law in Order XXI Rule 57 of the Code also applies to an attachment before judgment as well. Viewing from this angle also, it can only be held that the order of attachment will not survive the dismissal of a suit on merit. Going by the principles in **Sardar Govindrao Mahadik's** case, it is definite that reversal of a decree in appeal will not revive the

order of attachment, which ceased to be in force on the dismissal of the suit.

18. There was a feeble attempt on the side of the petitioner to contend that the observations by the Supreme Court in **Sardar Govindrao Mahadik's** case are only *obiter dicta*. For definite reasons, I cannot agree with this contention. I have narrated the facts and the principles of law laid down therein. The pronouncement of law by the Supreme Court unequivocally show that a question in that regard arose for determination in that case and the law was declared after considering all the aspects involved in the case. It is well settled principle that a judgment of a court operates as a precedent only for what it decides, known as *ratio decidendi*, and not for its general or casual observations, called *obiter dicta*.

19. Rupert Cross and J.W.Harris in "Precedent in English Law"(4th Edition - page 41) say thus:

"There are undoubtedly good grounds for the importance attached to the distinction between ratio decidendi and obiter dictum. In this context an obiter dictum means a statement by the way, and the probabilities are that such a statement has received less serious consideration than that devoted to a proposition of law put forward as a reason for the decision. It is not even every proposition of this nature that forms part of the ratio decidendi."

20. The distinction between an *obiter dictum* and a *ratio decidendi* has been explained by the Supreme Court in **Director of Settlements, A. P. v. M. R. Apparao (AIR 2002 SC 1598)** in the following words:

*“So far as the first question is concerned. Article 141 of the Constitution unequivocally indicates that the law declared by the Supreme Court shall be binding on all Courts within the territory of India. The aforesaid Article empowers the Supreme Court to declare the law. It is, therefore, an essential function of the Court to interpret a legislation. The statements of the Court on matters other than law like facts may have no binding force as the facts of two cases may not be similar. But what is binding is the ratio of the decision and not any finding of facts. It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio and not any particular word or sentence. To determine whether a decision has 'declared law' it cannot be said to be a law when a point is disposed of on concession and what is binding is the principle underlying a decision. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. An 'obiter dictum' as distinguished from a *ratio decidendi* is an observation by Court on a legal question suggested in a case before it*

but not arising in such manner as to require a decision. Such an obiter may not have a binding precedent as the observation was unnecessary for the decision pronounced, but even though an obiter may not have a bind effect as a precedent, but it cannot be denied that it is of considerable weight. The law which will be binding under Article 141 would, therefore, extend to all observations of points raised and decided by the Court in a given case. So far as constitutional matters are concerned, it is a practice of the Court not to make any pronouncement on points not directly raised for its decision. The decision in a judgment of the Supreme Court cannot be assailed on the ground that certain aspects were not considered or the relevant provisions were not brought to the notice of the Court (See AIR 1970 SC 1002 and AIR 1973 SC 794). When Supreme Court decides a principle it would be the duty of the High Court or a subordinate Court to follow the decision of the Supreme Court.”

In **Sardar Govindrao Mahadik's** case, the supreme Court had considered various provisions in Order XXXVIII and Order XXI of the Code which directly arose in that case and lucidly laid down the law. Therefore, the observations therein can only be *ratio decidendi* and hence undoubtedly a binding precedent. A Constitution Bench of the Apex Court in **Sarwan Singh Lamba v. Union of India (AIR 1995 SC 1729)** has held that

normally even an *obiter dictum* of the Supreme Court is expected to be obeyed and followed. A Bench of the Supreme Court consisting of three Honourable Judges in **Commissioner of Income-tax, Hyderabad, Deccan v. M/s. Vazir Sultan and Sons (AIR 1959 SC 814)** has ruled that *obiter dicta* of the Supreme Court are entitled to considerable weight. For the said reasons, I have no doubt that the principles in **Sardar Govindrao Mahadik's** case were laid after considering the facts and the relevant law on the subject and therefore all the courts in the country are bound to follow the principles by virtue of Article 141 of the Constitution.

21. The petitioner raised a challenge against the maintainability of an application under Section 151 of the Code at the instance of a stranger to the suit. The challenge is unfounded. Reasons are many. First of all, the first respondent legally cannot approach the executing court with a petition under Order XXI Rule 97 of the Code as there was no attempt to dispossess him. Secondly, as there is no order of attachment passed by the court on the execution side and the order of attachment before judgment in the suit had ceased to operate for the reasons aforementioned, the first respondent could not have filed an application under Order XXI Rule 58 of the Code. There cannot be any dispute to the proposition that Section 151 of the Code could be invoked by the executing court in appropriate situations. Hence, the application filed by the first respondent is legally correct.

22. By way of answering the questions posed, I may sum up the discussion on the basis of relevant provisions and binding precedential principles. An order of attachment before judgment passed under Order XXXVIII Rule 5 of the Code will not survive the dismissal of a suit and it ends when the suit is dismissed after trial. Even if the appellate court later allows an appeal and reverses the decree of dismissal passed by the trial court, it will not result in an automatic revival of the order of attachment made by the trial court. On account of the changes made in Order XXXVIII and Order XXI of the Code by the C.P.C. Amendment Act 104 of 1976 and also by the declaration of law by the Supreme Court in **Sardar Govindrao Mahadik's** case, I hold that the ratio in **Thampi Muhammad Abdul Kadir's** case is no longer good law and hence inapplicable to this case.

Resultantly, the original petition is dismissed confirming the order passed by the executing court.

A. HARIPRASAD, JUDGE.

cks