APPELLATE CIVIL

Before H. R. Sodhi, J.

NIHAL CHAND,—*Appellant.*

versus

MADAN LAL AND OTHERS,—*Respondents.*

Execution First Appeal No. 161 of 1969.

April 10, 1969

Civil Procedure Code (V of 1908)—Order 41 rule 6(2)—Immovable property attached in execution of decree—Application by Judgment Debtor for stay of sale under Order 41 rule 6(2)—Executing Court—Whether can call upon the Judgment Debtor to deposit the whole of decretal amount—Probable value of the property—Whether to be determined by the Court before ordering such deposit.

Held, that there is nothing in the language of order 41 rule 6(2) of the Code of Civil Procedure, which can warrant an inference that in no case the executing Court can call upon the judgment-debtor to deposit the whole of the decretal amount or furnish security for the said amount before the sale of any attached immovable property is stayed simply on the ground that some immovable property has been got attached. In the exercise of sound judicial discretion, it is incumbent on the executing Court to find out the probable value of the property attached and it will then be a good guide in determining as to what amount out of the decretal sum the judgment-debtor should be required to deposit. A Court is not expected to act in an arbitrary manner and just choose to mention any particular sum to be paid in cash or security furnished for the same before the sale is stayed. It must, acting judicially, give reasons as to why a particular amount has been chosen for cash deposit or for security. When a controversy arises as to the value of the property attached, the executing Court must apply its mind and tentatively determine the same before it orders any amount to be deposited as security before the sale is stayed. (Para 6).

Execution First Appeal from the order of Shri M. S. Labana, Sub-Judge 1st Class, Ludhiana, dated 4th December, 1968 ordering that sale of attached property be stayed subject to sum of Rs. 6,000 being deposited in Court by 20th December, 1968 failing which proceedings for sale will continue.

D. N. AGGARWAL, AND AMAR DUTT, ADVOCATES, for the Appellant.
PURAN CHAND, ADVOCATE, for the Respondents.

JUDGMENT

SODHI, J.—In this appeal the sole question for determination is as to whether it was open to the executing Court to have imposed terms by way of directing the judgment-debtor to deposit Rs. 6,000

out of the decretal amount of Rs. 9,050 before sale of the attached property under Order XLI rule 6(2) of the Code of Civil Procedure, was stayed.

(2) The facts of the case are very simple and may be stated briefly. Madan Lal, obtained a decree for the recovery of Rs. 9,050, including interest, against Nihal Chand and others, judgment-debtors, on 24th December, 1962. Nihal Chand, judgment-debtor preferred an appeal against the decree which is pending in this Court. No stay of execution of the decree was allowed by this Court under Order XLI rule 5 of the Code of Civil Procedure during the pendency of the appeal. The judgment-debtor had one-third share in house No. BV-317, Division No. 3, situate in the city of Ludhiana, half of which, that is, one-sixth share, was got attached by the decree-holder in execution proceedings for the recovery of the decretal amount which practically comes to about Rs. 10,000. In the application under Order XXI rule 66 of the Code of Civil Procedure, which had been made in order to get the proclamation of the intended sale prepared, the decree-holder assessed the value of one-sixth share got attached by him at Rs. 10,000. Nihal Chand Judgment-debtor then made an application on 29th November, 1968, purporting to be under Order XLI rule 6 of the Code of Civil Procedure, praying that the sale of the attached property be stayed. It was asserted by him that the value of the attached property was not less than Rs. 20,000. Rule 6 of Order XLI may be quoted hereunder for facility of reference :—

"6. (1) Where an order is made for the execution of a decree from which an appeal is pending, the Court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be taken for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the Appellate Court, or the Appellate Court may for like cause direct the Court which passed the decree to take such security.

(2) Where an order has been made for the sale of immovable property in execution of a decree, and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of."

The decree-holder, in reply to this application, had asserted that the value of the attached property was much less than Rs. 10,000 and there was thus not sufficient security. The executing Court relying on a judgment of this Court reported as *M/s. Angad Ram-Ram Singh* v. *Gainda Mal Charanji Lal and others* (1), and distinguishing another Single Bench judgment of the Lahore High Court, *Pokhar Dass* v. *Ghanaya Lal,* (2), held that all those authorities had to be read in the context of the circumstances of each case and that, even if the value of the property was as given by the judgment-debtor, there was no reason to stay the execution of the decree and deprive the decree-holder of the fruits of his decree without imposing further conditions. It was in this view of the matter that it directed the sale to be stayed subject to a sum of Rs. 6,000 being deposited in Court by a specified date failing which the proceedings of sale were to continue. Hence the present execution first appeal which was first preferred in the Court of District Judge, Ludhiana, but later returned for presentation to the proper Court.

(3) The main contention of Mr. D. N. Aggarwal, learned counsel for the appellant, is that the executing Court by imposing the onerous condition of requiring the judgment-debtor to deposit Rs. 6,000 in cash to secure stay of the sale when the attached property itself was of the value of more than Rs. 10,000 virtually denied the relief intended to be given to a judgment-debtor under Order XLI rule 6(2). The submission is that the executing Court should exercise sound judicial discretion and try to ascertain the value of the attached property before directing the deposit of any cash amount towards the satisfaction of the decretal amount. He has strenuously urged that the only correct interpretation of rule 6(2) is that no such order should be passed without proper enquiry. Reliance in this connection has been placed by him on the judgment of the Lahore High Court in *Pokhar Das's case* (2). There, one of the properties attached was a residential house in the city of Multan, which the judgment-debtor valued at about Rs. 40,000 whereas, according to the contention of the decree-holder, it was worth only Rs. 14,000 and that it was already under mortgage for about Rs. 10,000. The contention of the decree-holder was that it was only the equity of redemption left which had to be sold and it was not worth more than Rs. 4,000. The Senior Subordinate Judge, who was executing the decree ordered the sale

(1) A.I.R. 1961 Pb. 165.

(2) A.I.R. 1925 Lah. 256.

of the house to be stayed pending disposal of the appeal in the High Court, but on the condition that the judgment-debtor deposited in Court a sum of Rs. 1,000 in cash and also furnished security to the extent of Rs. 2,000. It may be mentioned here that the decree was for a sum of Rs. 6,941-2-9 as principal and Rs. 664-13-0 as costs. The judgment-debtor did not comply with the order of the executing Court and instead preferred a revision petition in the High Court. The learned Judge was of the view that the executing Court should have considered the representation made by the judgment-debtor and afforded him an opportunity to prove that the value of the house attached was really Rs. 40,000 and not Rs. 14,000 as alleged by the decree-holder. The revision petition was accordingly accepted and the case remanded to the Senior Subordinate Judge for a fresh decision after giving full opportunity to both the parties to be heard in support of their respective contentions as to the price of the property attached before an order under Order XLI rule 6(2) was passed.

(4) Mr. Aggarwal also contends that true meaning and spirit of rule 6(2) of Order XLI is that the judgment-debtor should not be called upon to deposit the full decretal amount, and may be, in some cases, not even a substantial portion thereof. Reliance in this regard is placed on a case reported as *Shankar Das and another* v. *Kasturi Lal and others*, (3), where Martineau, J., had held that an order of the executing Court requiring deposit of the whole of the decretal amount before staying the sale of the attached property was against the spirit of the rule, as it would be tentamount to refusing the relief intended to be given to a judgment-debtor under Order XLI rule 6(2). Mr. Aggarwal also relied on some observations made by a single Judge of Bombay High Court in *Ganesh Laxman* v. *Raosaheb Premchand Ichharam* (4). The facts of that case are distinguishable. It was a revision petition moved by the decree-holder against the order of the Subordinate Judge, who had dispensed with the imposition of any terms on the judgment-debtor while staying the execution of the decree without ascertaining as to whether the property under attachment which was sought to be sold was of a value sufficient enough to cover the decretal amount. In this context Gajendragadkar J., held that it was open to the decree-holder to invoke the revisional jurisdiction of the High Court. In refusing to require the judgment-debtor to furnish security or to submit to

(3) A.I.R. 1925 Lah. 69.

(4) A.I.R. 1956 Bom. 249

some other suitable terms, the executing Court had clearly overlooked the material provisions in sub-rule (2).

(5) Mr. Puran Chand, learned counsel for the decree-holder respondent, has invited my attention to a Single Bench judgment of this Court decided by Shamsher Bahadur J., in *M/s. Angad Ram-Ram Singh's case* (1). The learned Judge made a reference to the cases reported as *Beni Singh* v. *Ram Saran Singh,* (5); *Rukmani Ammal* v. *Subramania Sastrigal and another,* (6), and *Ramnath Singh and others* v. *Raja Kamleshwar Prasad Singh* (7), in support of the conclusion that it is open to the executing Court to make it a condition of the order of stay of sale that the entire decretal amount be deposited in Court before the stay is granted. The learned Judge has stated in his judgment that the view taken by Martineau, J., in *Shankar Das's case* (3) was doubted in *P. C. Thirumalai Goundar* v. *Town Bank Ltd., Pollachi* (8), where it was held that the executing Court had jurisdiction to make it a condition precedent to the order staying sale of the attached property that the judgment-debtor should deposit the whole of the amount covered by the decree.

(6) After hearing the learned counsel for the parties, I am of the opinion that there is nothing in the language of Order XLI rule 6(2) which can warrant, an inference that in no case the executing Court can call upon the judgment-debtor to deposit the whole of the decretal amount or furnish security for the said amount before the sale of any attached immovable property is stayed simply on the ground that some immovable property has been got attached. In the exercise of sound judicial discretion, it is, however, incumbent on the executing Court to find out the probable value of the property attached and it will then be a good guide in determining as to what amount out of the decretal sum the judgment-debtor should be required to deposit. A Court is not expected to act in an arbitrary manner and just choose to mention any particular sum to be paid in cash or security furnished for the same before the sale is stayed. It must, acting judicially, give reasons as to why a particular amount has been chosen for cash deposit or for security. It must, therefore, be held that when a controversy arises as to the value of the property attached, the executing Court must apply its mind and

(5) A.I.R. 1936 Pat. 443.
(6) A.I.R. 1940 Mad. 82.
(7) 9 I.C. 323.
(8) A.I.R. 1934 Mad. 709.

tentatively determine the same before it orders any amount to be deposited as security before the sale is stayed. In the instant case, no such approach has been made by the executing Court which has just chosen a sum of Rs. 6,000, out of the decretal amount of Rs. 10,000, to be deposited as security, when there is a specific allegation that the value of the property is Rs. 10,000.

(7) For the foregoing reasons, I allow this appeal, set aside the order of the executing Court and remand the case for a fresh decision as to whether and to what extent the judgment-debtor should be called upon to furnish security before the sale of the attached property is stayed and this should be done after giving full opportunity to the parties to be heard and to lead any evidence, if so advised.

(8) There will be no order as to costs of the present appeal.

R. N. M.

APPELLATE CRIMINAL

Before Gurdev Singh and S. S. Sandhawalia, JJ.

STATE,—*Appellant.*

versus

SHAM SINGH AND OTHERS,—*Respondents.*

Criminal Appeal No. 763 of 1966

April 25, 1969

Opium Act (I of 1878)—Sections 9 and 10—Respective scope of—Presumption under section 10—When can be drawn—Joint incriminating possession—Liability for—Whether within the ambit of Criminal Law—Contraband articles recovered from a small vehicle like a car—Inference of joint possession—Whether can be raised against the occupants of such car.

Held, that on a close reading of the provisions of sections 9 and 10 of the Opium Act, 1878, together it is evident that the initial burden is on the prosecution to show the connection of the accused person with the incriminating opium but once this initial onus has been discharged by the prosecution, the presumption under section 10 is to be called in that the accused person is guilty of an offence under section 9. The onus is then shifted on to the accused person to show that his connection and dealing with the incriminating opium was justifiable or innocent. By the interplay of the presumption under section 10 it becomes no longer incumbent upon the prosecution to prove all the necessary ingredients of the offence under section 9 including the fact that the accused had conscious possession—that is presumed against him—and it is for him to show that there was want of