Allahabad High Court
Haji Rahim Bux And Sons And Ors. vs Firm Samiullah And Sons on 18 December, 1962
Equivalent citations: AIR 1963 All 320
Author: S Singh
Bench: M Desai, S Singh
JUDGMENT S.D. Singh, J.

1. The appellants in both the appeals are judgment-debtors in decree No. 59 of 1958 of the Court of Civil Judge, Kanpur, which was passed ex parte on 19th May, 1958, and the respondents are the Firm Haji Sanaullah and sons, who are decree-holders in the aforesaid decree.

2. While the suit was still pending, the respondents moved an application for attachment before judgment under Order XXXVIII, Rule 5 of the Code of Civil Procedure, (to be referred to hereafter as the Code). The property sought to be attached was, however, situated at Lucknow aud he order for attachment of the property was, therefore, sent to Lucknow under Sub-section (1) of Section 136 of the Code. This Sub-section (1) of Section 136, however, requires that the order of attachment shall be sent to the District Court within the local limits of whose jurisdiction the property is situate and under Sub-section (2) of the same section it is open to the District Court to have the attachment made by its own officers or by a Court subordinate to itself. What the Civil Judge at Kanpur. however, did was that the order of attachment was sent direct to Civil Judge, Lucknow. who even ordered the attachment of the property without caring to see whether he could execute the order of attachment of the property under a precept received by him direct.

3. After the suit was decreed, the decree was transferred to the Lucknow Court for execution and as according to the decree-holders, the attachment had already been made before judgment, they applied for execution of the decree by sale of the property on 25th August, 1958. No objections were filed by the appellants at the stage of the settlement of terms of sale or drawing up of the sale proclamation. Dates were fixed for sale of property, but for one or two dates the appellants obtained adjournment of the same to enable them to negotiate a private sale or to arrange for money by mortgage of the property.

Ultimately 12th October, 1959, was fixed for sale and in the meantime an objection under Section 47 was filed by the appellants on 17th September, 1959, the main contention in this objection being that the attachment of the property, which was made before judgment, was invalid and that consequently, therefore, the property could not besold. 14th November, 1959, was fixed for the hearing of this application. The sale could not be held even on 12th October and was adjourned on that date to 26th October and as there was no application for stay of sale, the property was actually knocked down on that date. The objection filed by the appellants came up for hearing on the date fixed. By his order dated 17th November, 1959, the Civil Judge virtually dismissed the objection. Reliance was placed during the hearing of that objection on behalf of the appellants on Firm Surajbali Ram Harakh v. Mohar Ali, AIR 1941 All 212, in which it has been held that any order of attachment before judgment, if it has to be sent to a Court in another district, must be sent to the District Court and that if it is sent to a subordinate Court direct, any attachment made by that Court would be ineffective. The Civil Judge realised the force of the view taken in this case, but held that

since the sale had already taken place, any objection, which the judgment-debtors wanted to raise, must be in proceedings under Order XXI Rule 90 of the Code. He, therefore, directed :

"This application is, therefore, filed with direction that as the sale has already taken place, the judgment-debtor's remedy is to file an objection for setting aside the sale incorporating his present contention, about the invalidity of the attachment, and this Court will then consider the consequences of the attachment order having been sent to the Civil Judge, Lucknow direct instead of its having sent to the District Court. The objection is disposed of accordingly."

4. First Execution Appeal No. 3 of 1960 was filed by the appellants against this order. They also filed a petition on 24th November, 1959, under Order XXI, Rule 90 of the Code of Civil Procedure the objections taken, briefly stated, being:

(1) That the Court has no jurisdiction to sell the property on account of the invalidity of the attachment.

(2) That on account of the irregular or unauthorised sale of the property bona fide bidders did not turn up and the property was consequently knocked down at an inadequate price resulting in substantial loss to the judgment-debtors.

(3) That the publication of the sale was fraudulent inasmuch as the terms of the sale proclamation were settled behind the back of the judgment-debtors without service of notice on them.

(4) That the property was grossly undervalued in the sale proclamation designedly and deliberately with a view to prejudice the judgment-debtors the valuation given being only Rs. 50,000/- as against 1,25,000/-, which was the proper valuation of the property.

(5) That the monthly rent of the property which was Rs. 487/8/- was not shown in the sale proclamation and this information was fraudulently suppressed.

(6) That the sale proceedings were vitiated on account of the attention of the Court not having been invited to the illegality or invalidity of the attachment, (7) That the holding of the sale during the pendency of the objections as to the jurisdiction of the Court to sell the property dissuaded the purchasers from bidding, resulting in substantial injury to the judgment-debtors.

(8) That theie was irregularity in the assumed service of notice under Order XXI, Rule 66 at the Code on the judgment-debtors resulting in material irregularity.

4A. A proviso has been added to Rule 90 of Order XXI of the Code by this Court, which provides :

"Provided that no application to set aside a sale shall be entertained :--

(a) upon any ground which could have been taken by the applicant on or before the date on which the sale proclamation was drawn up; and

(b) unless the applicant deposits such amount not exceeding twelve and half per cent of the sum realised by the sale or furnishes such security as the Court may, in its discretion, fix except when the Court for reasons to be recorded dispenses with the requirements of this clause."

5. There is a second proviso added to this rule, but we are not concerned with the same in these appeals. When the appellants filed their objection under Rule 90 aforesaid, they did not deposit any amount under Clause (b) of the aforesaid proviso, nor did they furnish security or obtain exemption from the Court under the concluding part of that proviso. On 13th February 1960, however, the appellants moved an application praying that they may be exempted under the proviso (b) of Order 21, Rule go of the Code from depositing any amount or furnishing security thereunder. The Civil Judge, under his order dated 29-2-1960, allowed the application and dispensed with the requirements of the proviso aforesaid. The objection under Rule 90 was thereafter contested by the decree-holders, who were also the purchasers of the property. A preliminary objection was taken by them to the effect that since the provisions of Clause (b) of the aforesaid proviso were not complied with by the judgment-debtors within the period of limitation prescribed for the filing of an objection under Rule 90, the same was. liable to be dismissed on that account and reliance for the purpose was placed upon Bawan Ram v. Kunj Behari Lal, 1960 All LJ 578: (AIR 1962 All 42).

6. The objection under Order 21, Rule 90 was heard by the Civil Judge on this preliminary point raised on behalf of the decree-holders and rejected on account of non-compliance with the provisions of Clause (b) of the aforesaid proviso within thirty days of the sale under his judgment, against which the appellants have filed the other appeal. No. 50 of 1960. The learned Civil Judge has held that the appellants should have complied with the provisions of Clause (b) of the first proviso to Rule 90 within the period of limitation prescribed for an objection under Rule 90 and that since exemption from compliance was applied for and obtained long after the expiry of the aforesaid period of limitation, the objection filed by. them would be barred by time and consequently liable to be dismissed.

7. Taking the two appeals together, the questions, which arise for decision and which were canvassed before us, are:

(1) Whether attachment of the property by Civil Judge, Lucknow, on the authority of a precept received by him direct from Kanpur was valid and effective in law?

(2) Whether sale of the property without any valid attachment was valid and effective under S. 51 (b) of the Code?

(3) Whether it was necessary for the appellants to comply with the provisions of Clause (b) of the first proviso to Rule 90 of Order 21 of the Code within the period of limitation prescribed for an objection under the aforesaid rule.

8. Provision for arrest or attachment of property before judgment, outside the jurisdiction of the Court ordering the same, is made in Section 136 of the Code. Sub-sections (1) and (2) of that section read:

"136. (1) Where an application is made that any person shall be arrested or that anv property shall be attached under any provision of this 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 the warrant or order, together with the probable amount of the costs of the arrest or attachment.

(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 such warrant or order of the arrest or attachment".

9. 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 tile 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 outsidp 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 by 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.

10. Reference was made to some decided cases and it was argued on the basis thereof that the attachment of property by a Court within whose local jurisdiction the property is situate, on the authority of an order of attachment received from another Court is a mere matter of procedure and does not involve a question of exercise of jurisdiction and these authorities may therefore, be examined.

11. Jang Bahadur v. Bank of Upper India, Ltd., Lucknow AIR 1928 P. C. 162 is a case which involves the interpretation of Section 50 of the Code. In that case a decree was transferred by one Court to another, but the judgment-debtor was found to have died before the certificate was issued. Section 50 of the Code provides that where a judgment debtor dies before the decree is fully satisfied, the decree holder may apply to the Court which passed it to execute the same against the legal representatives of the deceased. The decree-holder in that case, however moved the application before the transferee Court, which Court allowed the same and execution was allowed to proceed against the legal representatives. At a later stage the legal representatives objected to the execution of the decree against them on that account and it was held that Section 50 only lays down a procedure and that if the procedure was not followed, the defect might be waived and that the legal representatives of the deceased-judgment-debtor having acquiesced in the transferee Court

exercising its jurisdiction in a wrong way, cannot afterwards turn round and challenge the legality of the proceedings.

12. The decision in the case turned upon a reasoning which would not be applicable to the facts of the instant case. The judgment-debtor in that case had died before the decree was transferred, but it was held that the Court of transfer did not lose its jurisdiction over the execution proceedings which do not abate by reason of the death. In respect of the obtaining of an order bringing the legal representatives of the deceased judgment-debtor on record, their Lordships observed that this was a matter of procedure and not of jurisdiction, that the jurisdiction over the subject-matter continued as before and that if the procedure prescribed for bringing the legal representatives on record was not followed and the non-compliance of such procedure was waived by the aforesaid legal representatives, they could not afterwards turn round and challenge the legality of the proceedings.

13. In Maharaj Kishore Khanna v. Raja Ram Singh AIR 1954 Pat 164 the question was about compliance with the provisions of rules 5 and 8 of Order XXI of the Code. Both these rules provide for transfer of a decree for execution. If the Court to which the decree is to be transferred is situate in the same district, the decree may be sent to that Court for execution by the transferor Court direct, but if the transferee Court is situate in a different district, it has to be sent through the District Court of the.district in which the decree is to be executed. Rule 8 provides, for the execution of the decree so transferred. It may be executed by the District Court itself or transferred by it to any subordinate Court of competent jurisdiction.

It was, however, pointed out that the jurisdiction to transfer a decree arises not under Rule 5 or 8 of Order 21 which only prescribes the procedure by which the transfer is to be carried out, but under Section 39 of the Code which lays down that the Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court, and then follow Clauses (a) to (d) prescribing the circumstances under which the decree may be so transferred. The decision in the case, therefore, rests upon the interpretation of Section 39 which vests jurisdiction in a Court to transfer a decree for execution to any other Court and it is in the light of the provisions of this section that Rules 5 and 8 of Order 21 of the Code were held to lay down mere procedure for such transfer.

14. In Banaras Bank Ltd. v. Jyoti Bhushan, AIR 1951 All 362 the question under consideration was whether the Registrar of the High Court could transfer a decree for execution to another Court. The decision in the case turned upon the interpretation of Clause (e) of Rule 9 (xi) of Chapter I of the then Rules of this Court (1931) under which the Registrar had the power to send the decrees and other orders to other Courts for execution. It was contended that this provision was ultra vires and that the Court had no jurisdiction to delegate its judicial function to a ministerial official, but it was held that the rule was framed under Section 122 of the Code and that the transfer of decrees for execution to other Courts was merely an act of ministerial nature. The question, therefore, which received consideration in that case, was altogether different. The Registrar exercised his jurisdiction for transferring the decree under the provisions of the Rules of Court which provisions were themselves prescribed under Section 122 of the Code.

15. There are, however, some cases having a direct bearing on the interpretation of Section 136. They are a Full Bench decision of the Travancore-Cochin High Court reported in Mariamma Mathew v. Ittop Poulo, AIR 1952 Trav-Co. 159, a Division Bench decision of the Patna High Court reported in Bansropan Singh v. Emperor, AIR 1937 Pat 603 a single Judge decision reported in Ram eshwardayal Ramswaroop v. Bheemsen Dulichand, AIR 1951 Madh-B 82 (2) and a'single Judge decision of our own High Court reported in AIR 1941 All 212.

16. The case reported in AIR 1951 Madh-B 82 is slightly distinguishable inasmuch as the warrant for attachment was sent by the attaching Court to the nazir of the Court within the local limits of whose jurisdiction the property was situate, and it was held that the attachment was illegal. In the other three cases, however, the question considered was exactly the same. The Travancore-Cochin High Court has taken the view, in its Full Bench decision, that Section 136 of the Code prescribes mere procedure and does not touch jurisdiction and that even when the warrant is sent to a Court other than the district Court for attachment of property, non-compliance with the provision of Section 136 amounts, at best, only to an irregularity and does not vitiate the attachment, In the other two cases, however, it has been held that where the warrant is sent not to the district Court, but to a Court subordinate to it, for attachment of the property, the attachment would be Invalid.

17. It appears to us that the provisions of Section 136 are quite explicit, and even though it may, to some extent, be said that that section lays down procedure for attachment of property outside the jurisdiction of the Court ordering the same, it also prescribes jurisdiction for attachment of property in such cases. The very fact that the order of attachment has to be sent to some other Court, indicates that the Court ordering the attachment has no jurisdiction to cause the attachment being made outside its own territorial jurisdiction. In order, therefore, that attachment may be made, two conditions must be satisfied.

(1) The property must lie within the territorial jurisdiction of the Court causing the attachment to be made.

(2) The Court ordering the attachment must be seized of the matter.

17A. The Court ordering attachment before judgment is seized of the matter, but the property does not lie within its jurisdiction. If the order of attachment is sent to a Court other than, the District Court, the property required to be attached may He within the jurisdiction of that Court, but that Court cannot be seized of the matter unless the proceedings for attachment are properly before it. Sub-sections (1) and (2) of Section 136, therefore, prescribe not only the manner in which the attachment shall be made but also jurisdiction for making the attachment. On receipt of the order of attachment, the District Court is seized of the matter and the property is also within its jurisdiction and attachment can, therefore, be made by it. Sub-section (2), however, prescribes that the District Court may cause the attachment to be made by its own officers or by a Court subordinate to itself. If the District Court exercises the option to get the attachment made by a Court subordinate to itself, it will be only then that that Court will be seized of the matter and since the property also lies within its jurisdiction, it will be able to get it attached.

This was the view taken by Dar, J. in AIR 1941 All 212 and with respect, we agree with the same. Dar, J. relied upon a single Judge decision of the Rangoon High Court reported in Desraj Chananlal v. Ramjasrar AIR 1937 Rang 367 in which the same view has been taken by that Court.

The Patna case, AIR 1937 Pat 603 (supra) is also referred to in the Allahabad case, AIR 1941 All 212 (supra). The Patna High Court has also taken the view that when the Court exercises its extraordinary powers relating to the attachment of property before judgment, the property being situate in another district, the provisions of Section 136 of the Code must be strictly observed and that the warrant must be endorsed to the District Court of the district in which the warrant is to be executed. In that case the warrant was sent to the Munsif direct and it was held that the warrant was defective.

18. The Travancore-Cochhi case relates to Section 101 of the Travancore Civil Procedure Code, VIII of 1100. But that section corresponds to Section 136 of the Code of Civil Procedure and makes the same provision. The Full Bench of the Travancore-Cochin High Court has taken the view that the aforesaid section prescribes a mere matter of procedure and does not affect jurisdiction at all and that if the warrant is sent not to the District Court, but to a subordinate Court, there is only an irregularity committed in the execution of the warrant, which does not affect the jurisdiction of the Court. It is pointed out that when an order of attachment is sent to the District Court, that Court has no discretion of its own in refusing to execute the warrant or direct attachment being made, but is bound to carry out the order itself or get it executed 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 to which the District Court might send it, is, it is pointed out, only to carry out the order and comply with the formalities of attachment. It is certainly true that the District Court, to which the order of attachment is sent, has no discretion in the matter and has to carry out the order of the Court issuing the order of attachment, but that does not necessarily mean that the provision made for the order of attachment being sent, to that Court is a mere matter of procedure. The very fact that the Court ordering the attachment cannot itself issue a warrant and send it direct to the nazir for execution, indicates that a question of jurisdiction is involved in it. With respect, therefore, we are unable to follow the view taken by the Full Bench in AIR 1952 Trav-Co. 159 (supra) and hold that the Civil Judge at Lucknow had no jurisdiction to attach the property and the attachment was consequently invalid. The effect would be as if attachment had not been made at all.

19. The attachment of the property by the Civil Judge being invalid, the next question for consideration is whether under the circumstances the sale thereof could be ordered by that Court. This involves the interpretation of Section 51 of the Code. Under this section the Court may, on the application of the decree-holder, order execution of the decree, among the other modes, "by attachment and sale or by sale without attachment" of any property.

The first impression which this provision gives is that the Court may sell the property not only after attachment, but even without attachment. While the contention of the appellants was that sale of the property without attachment is void, it was contended on behalf of the respondents that the Court had jurisdiction to sell the property even without attachment and that no illegality will be attached to the sale on that account.

20. Order XXI, Rule 64, of the Code of Civil Procedure does provide that a Court may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold. It was suggested, therefore, that attachment of property prior to sale was necessary. The power or authority to put the property to sale is not, however, derived by the Courts under Rule 64 aforesaid, which only prescribes the procedure which will ordinarily be followed in executing a decree. The provision of law which defines the powers of a court to enforce execution of a decree is to be found in Section 51 of the Code, which provides that subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree holder, order execution of the decree in any one of the ways specified in Clauses (a) to (e). It is Clause (b) which is relevant for purposes of this appeal. It reads "by attachment and sale or by sale without attachment of any property'.'. A court has, thus, power to first attach the property and then sell it. or to direct sale of the property without any attachment, and this is also the view which has been taken in several reported decisions of this Court and other Courts.

21. The earliest case available on the point is a Full Bench decision of this Court reported in Mahadeo Dubey v. Bhola Nath, ILR 5 All 86. It was held in that case that failure to make the attachment goes to the very root of the power to make an order .for its sale and that it is a fatal defect which invalidates the sale. The view taken in this decision is, however, based on the provision of the Code of Civil Procedure, 1882, which was then in force/

22. Reference is made by the learned Judges to the form of an application for execution in which a decree-holder is required to specify the mode in which the assistance of the Court is required by him, and where he needs attachment of the property, that mode of execution of the decree has to be mentioned by him along with other assistance which the nature of the relief sought by him may require. Section 254 of the Code of Civil Procedure, 1882, provided for execution of decrees for money by the imprisonment of the judgment debtor, or by the attachment and sale of his property in manner hereinafter provided". Section 266 declared what property of a judgment-debtor was liable to attachment and sale in execution of a decree. The power of sale, it was pointed out, was conferred by Section 284 of the then Code, which corresponds to Order XXI, Rule 64 of the present one, under which "Any Court ..... may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold". While Rule 64 of Order XXI of the present Code does provide that any property, which may have been attached by the Court earlier or any part thereof may be sold, now that there is specific provision to that effect, the power to sell the property cannot be said to be derived by the Courts under this rule but under Section 51(b), which clearly makes provision for the Court ordering execution of the decree by attachment and sale, "by sale without attachment" of any property. Although Rule 64 of Order XXI does say that the Court may order sale of property which may have been attached earlier, or any part thereof as may seem necessary, to satisfy the decree, it does not curtail the jurisdiction of the Court under Section 51(b) aforesaid under which the court may direct sale of the property even without attachment.

23. The same point came up for decision in Sheodhyan v. Bholanath, ILR 21 All 311. This was also a case arising under the Code of Civil Procedure, which was in force in 1891, but it was held that the absence of attachment prior to the sale of immovable property in execution of a decree amounts to no more than a material irregularity and is not sufficient, unless substantial injury is caused thereby,

to vitiate the sale. ILR 5 All 86 was referred to but distinguished.

A still later case is Mahabir Prasad v. Raghunath Saran, AIR 1934 All 430 and even in this case it was held that absence of attachment prior to the sale of immovable property in execution of a decree amounts to no more than a material irregularity and is not sufficient, unless substantial injury is caused thereby, to vitiate the sale.

24. The same view has been taken even by the other High Courts. In Sakar Lal Jamnadas v. Jerbai Sorabji AIR 1934 Bom 348 and Sakharlal Jamnadas v. Pirojsha Sorabji AIR 1936 Bom 315 the Bombay High Court has held that absence of attachment prior to sale is only an irregularity, but no more than a material irregularity, and that it is not sufficient for vitiating the sale unless substantial injury is caused to the judgment-debtor.

Referring to the provisions of Rules 30 and 64 of Order XXI of the Code it was held by the same Court in Namdev Krishna v. Govardhan Nanabhai AIR 1939 Bom 277 that those rules do not limit the power given to the Court under Section 51 to sell the property without attachment, and that the absence of attachment does not vitiate such a sale.

25. The Lahore High Court pointed out in Muhammad Abdulla v. Jamiat Rai, AIR 1930 Lah 685 that in cases in which attachment is necessary, the absence of attachment prior to the sale of immovable property in execution of a decree amounts to no more than an irregularity and is not sufficient to vitiate the sale in the absence of any substantial loss resulting from such want of attachment. Mul Raj v. Official Receiver Jhelum, AIR 1937 Lah 297, Firm Tirkha Ram Chuni Lal v. Fakhir Ahmed, AIR 1939 Lah 36 and Daulat Ram v. Sardar Pritam Singh, AIR 1940 Lah 78 also support the view that a sale without attachment is not void.

26. The Calcutta High Court has also held in Nareshchandra Mitra v. Molla Ataul Huq, AIR 1931 Cal 35 and Rajani Kanto Pal v. Mohim Chandra Roy, AIR 1927 Cal 847 that absence of attachment does not vitiate the sale.

27. The Madras High Court pointed out in K. Swaminatha Iyer v. Krishnaswami Iyer, AIR 1947 Mad 213 that although attachment of property is a necessary preliminary to a judicial sale of immovable property, a sale without attachment is not a nullity, and that omission to attach the property is only a material irregularity which would not render the same liable to be set aside unless substantial injury is proved; and the same view was taken in two earlier decisions, Vengu Chetti v. Valjee Kanjee and Co. AIR 1936 Mad 99 and Shivakolundu Pillai v. Ganapathi Iyer, AIR 1918 Mad 1262.

28. This question came up for consideration before a Full Bench of the Travancore-Cochin High Court in Eravi Pillai v. Maluk Mohammad Shaul, AIR 1953 Trav-Co. 494 but in proceedings under the Travancore Revenue Recovery Act, I of 1068, and it was held that Section 24 of the Act relating to the attachment of property was mandatory and that sale of property without attachment was null and void, but the decision in the case turned upon the wordings of Section 24 which provided for attachment of property and then its sale. The provisions of Section 51(b) of the Code of Civil Procedure were also considered and it was pointed out that while sale of property without

attachment was possible under that section, it was not under Section 24 of the aforesaid Revenue Recovery Act, indicating thereby that according to the view taken even by that Court, sale of property without attachment would be possible under Section 51(b) of the Code.

29. The Nagpur view as expressed in Shanker Rao v. Manik Rao, AIR 1923 Nag 18, Jodhan v. Kapilnath, AIR 1923 Nag 78, Sitaram Shamrao v. Ganpati Maroti, AIR 1937 Nag 149 and an earlier case, Har Lal v. Narayan, AIR 1922 Nag 267 is to the same effect. Attachment, it has been pointed out, is merely for the protection of the decree-holder and to take the property out of the disposition of the judgment-debtor, and that its absence does not make the sale a nullity.

30. A Division Bench of the Patna High Court pointed out in Wazir Narain Singh v. Bhikari Ram, AIR 1923 Pat 45 that the object of the attachment is to bring the property under the control of the Court with a view to preventing the judgment-debtor from alienating it, and the requirement that the order of attachment should be publicly proclaimed is merely one of the requirements of law for perfecting the attachment. It was held that under Section 51 of the Code, the general powers of a Court executing the decrees enable it to order execution by attachment and sale or by sale without attachment and that a sale, which takes place without attachment, is not liable to be set aside without proof of substantial injury which might have been caused to the judgment-debtor. The Rangoon High Court also took the view in Ma Pwa v. Md. Tambi, AIR 1924 Rang 124 that absence of an attachment, though an irregularity, does not render the sale absolutely void.

31. This brings us to the next point involved in the case, namely, the one relating to the interpretation of the proviso to Rule 90 of Order XXI of the Code, which has already been extracted in the earlier part of this judgment. An application to set aside a sale is not to be entertained unless.

(1) the objector puts forward a ground, which could not have been taken by him on or before the date on which the sale proclamation was drawn up, and (2) he deposits such amount not exceeding twelve and a half per cent of the sum realised by the sale or furnishes such security as the Court may demand but the Court may, for reasons to be recorded, dispense with this requirement,

32. It is not in dispute that no deposit was made by the objectors, nor any security furnished by them. An application was moved for exemption being granted for the operation of Clause (b) of the proviso to Rule 90 aforesaid on 13th February, 1960, and was allowed on 29th February, 1960. The sale, it may be recalled, took place on 26th October, 1959, and the objection under Rule 90 was filed on 24th November, 1959. The question is whether the objector should have made the deposit or furnished security under Clause (b) of the proviso or applied for exemption thereunder within the period of limitation prescribed for filing an objection under Rule 90, and if, in the absence of compliance with the provisions of Clause (b) within the aforesaid period of limitation the objection could be 'entertained' or if it was liable to be thrown out.

Reliance was placed by the learned Counsel for the respondents on 1960 All LJ 578, (AIR 1962 All 42) in which V. Bhargava, J. has held that under such circumstances the proviso bars the entertainment of an objection altogether and that consequently if the requirements of the proviso are not complied with within the time within which the objection could be filed, it cannot there after

be entertained, nor can the deposit or security therefor accepted after the expiry of such time. It was, therefore, urged that the objection filed by the appellants was liable to be dismissed on that ground.

A Full Bench decision of the Patna High Court Brij Behari Lal v. Srinivas Ram, AIR 1939 Pat 248 was cited in Bawan Ram's case 1960 All LJ 578: (AIR 1962 All 42) and was distinguished on the ground that the corresponding proviso (a) added by the Patna High Court to Rule 90 aforesaid laid a bar to the 'admission' of a petition and it was pointed out that under that Rule if there was compliance with the proviso before admission, it had to be held that there was sufficient compliance. The words used in the Patna Rule are:

"(i) Provided that no application to set aside a sale shall be admitted unless

(a) .....

(b) the applicant deposits with his application such amount not exceeding 12 1/2 per cent of the sum realized by the sale or such other security as the Court may in its discretion fix, unless that Court, for reasons to be recorded, dispenses with the deposit".

33. This proviso differs from the one added by this Court in two important respects:

(1) The words "shall be admitted" have been used for the words "shall be entertained".

(2) The words "deposits with his application" have been used in Clause (b) as against the simple word "deposits" used in the Allahabad amendment.

34. The use of the words "deposits with his application" seems to make it obligatory that the deposit must be made or other requirements of the clause satisfied simultaneously with the moving of the application, but the word ''admitted'' in the opening clause indicates that even if the provisions of Clause (b) of the proviso are complied with by the time the application is admitted, the objector will be deemed to have complied with the provisions of the clause. It is this latter aspect of the Patna amendment which was referred to by V. Bhargava, J. and the Patna view distinguished.

35. Since then, however, there has been another decision of this Court in Kundan Lal v. Jagan Nath, 1962 All WR 500: (AIR 1962 All 547) in which 1960 All LJ 578: (AIR 1962 All 42) (supra) has been overruled, and it has been held that the expression "entertain" does not mean the same thing as the filing of the application or the admission of the application by the Court and that the true intention of the proviso is to allow the judgment debtor to prosecute his application for the setting aside of the sale, if he complies with the conditions contained in the proviso to Rule 90 before the application is finally heard and disposed of by the Court.

36. The meaning of the word "entertain" was also understood in the same sense in another recent decision, Dhoom Chand Jain v. Chaman Lal, 1962 All LJ 729: (AIR 1962 All 543) to which one of us was a party, and it was pointed out:

"The dictionary meaning of the word 'entertain' is: to deal with; to admit to consideration. In its application to Clause (a) the word bears the meaning, of admitting to consideration. That clause enjoins the Court from considering the application on any ground which could have been taken on or before the drawing up of the sale proclamation. In its application to Clause (b) the word should bear the same sense. Accordingly while the court cannot refuse to take an application which is not backed by deposit or security, it cannot judicially consider it. It is expected that the Court would ordinarily give an opportunity to the applicant to comply with Clause (b), and would reject the application if Clause (b) were still not complied with".

37. The word "entertain" was also explained by their Lordships of the Supreme Court in Samarth Transport Co. (P) Ltd. v. Regional Transport Authority, Nagpur, AIR 1961 SC 93 though in another connection. Interpreting Section 68-F of the Motor Vehicles Act, 1939, their Lordships observed at page 97:

"The word 'entertain' may mean 'to receive on file or keep on file', and in that sense the Authority may refuse to keep an application on its file by rejecting it either at the time it is filed or thereafter. It does not connote any time but only describes the scope of the duty under that clause. It can only mean that the Authority cannot dispose of the application on merits but can reject it as not maintainable".

38. According to this view the word 'entertain' may mean that an objection may not be received by the Court without the provisions of the Proviso being complied with at the time of the filing of the objection, or that the objection may not be heard on merits unless compliance with it is duly made. It is in this latter sense that the word 'entertain' was understood in 1962 All LJ 729: (AIR 1962 All 543) as well as in 1962 All WR 500: (AIR 1962 All 547) and the reason for the same is obvious.

39. Clause (b) of the Proviso does not require the objector to deposit in Court, or to furnish security for, or particular amount (sic) or for an amount or for an amount which he may be able to determine. He has to deposit, or furnish security in the sum of, an amount not exceeding 12 per cent of the sum realized by sale. The amount thereof has, therefore, to be determined by the Court. Unless the amount is so determined the objector cannot decide, if he would be able to deposit the amount, or if it would be necessary for him to request the Court to accept security for the same, or if he should pray for being exempted from the operation of the rule. If he has to make an application for necessary direction of the Court witbin the period of limitation prescribed for filing an objection, it may in a way result in the period of limitation being indirectly curtailed, and the court is not, even then, bound to pass orders before the expiry of the last day of limitation. Compliance with Clause (b) of the Proviso simultaneously with the filing of an objection under Order 21, Rule 90 is thus impossible and could not be and was not intended. The Allahabad amendment does not even use the words "with his application" which are to be found in the Rule as added by the Patna High Court, and the grounds for accepting this interpretation of the Allahabad Rule are, therefore stronger.

40. In this particular case, the Civil Judge granted the 'objectors' exemption from the operation of the proviso before the objection came up for final hearing. There was, therefore, no difficulty in the Civil Judge 'entertaining' the objection, in the sense of 'proceeding to bear it on merits'.

41. The next question to be considered in this case is whether the Civil Judge should have heard the earlier objection filed by the appellants under Section 47 of the Code of Civil Procedure on merits, even though the property may have already been put to sale. On this point reference may be made to Kishan Lal v. Har Prasad, 1961 All LJ 951 : (AIR 1963 All 319) which was decided by a Division Bench to which also one of us was a party. It was held that if a judgment debtor seeks to set aside a sale on the ground of an irregularity, his application is covered by Order 21 Rule 90 but if he seeks a declaration that the sale was null and void, he could get relief under Section 47. It was further pointed out that a sale attended with an irregularity is quite distinct from a sale which is null and void, the former exists-and is in force so long as it is not set aside, whereas the latter does not exist in the eye of the law at all. A sale attended with an irregularity has-to be set aside; whereas in a null and void sale only a declaration to that effect may be necessary, if at all. We have already held that absence of attachment as a condition precedent to the sale of the property is only an irregularity, may be a material irregularity, which does not vitiate the sale unless substantial injury is caused to the judgment debtor. The objection, which was filed by the appellants under Section 47 of the Code of Civil Procedure, could not be disposed of before the property was put to sale either because no application for stay was moved by the appellants or the application, it moved, was not granted by the executing Court. The appellants themselves were responsible for the property being sold before their objection could be decided inasmuch as although they were appearing in the court and raising different objections, they did not file this particular objection in time, with the result that when the objection was raised it could not be heard and decided before the property was put to sale. The sale having already been held, there was no option left to the Civil Judge than to direct that the appellants should file an objection under Rule 90 of Order XXI and challenge the legality of the sale in accordance with the provisions of that rule. The appellants cannot, therefore, make any grievance of the same and their first appeal 3 of 1960, is liable to be dismissed on that account.

41A. So far as the second appeal, 50 of 1960 is concerned, it will have to be allowed in so far as the Civil Judge could not dismiss the objection filed by them under Rule 90 for non-compliance of Clause (b) of the first proviso within the prescribed period of limitation prescribed for the filing of the objection under Rule 90.

42. But there is another condition prescribed by the very same proviso to Rule 90, namely, that no objection will be entertained under Rule 90 upon any ground which could have been taken by the applicant on or before the date on which the sale proclamation was drawn up. Normally it should have been possible for the appellants to take the objection relating to non-attachment of the property before the date on which the sale proclamation was drawn up, but it may be that according to them they were not served or had no notice of the execution proceedings and that would, therefore, be a question to be considered by the execution Court. Some of the objections taken by the appellants under Rule 90 relate only to the holding of the sale and could not have, therefore, been taken before the sale proclamation was drawn up, while others are directly connected with the non-attachment of the property prior to sale arid these objections would, therefore, go along with the main contention of the appellants and will be considered by the execution Court along with the same.

43. In view of these findings, therefore, appeal No. 50 of 1960 succeeds and will have to be allowed.

44. First Execution Decree Appeal No. 3 of 1960, is dismissed with costs to the respondents. First Appeal From Order No. 50 of 1960, is allowed. The judgment 'and the decree of the trial Court, dated 19th November, 1960, are set aside. The objection filed by the appellants under Order XXI Rule 90 of the Code of Civil Procedure is remanded to the execution Court for hearing and disposal in accordance with law in the light of the observations made in the body of this judgment. The appellants will be entitled to costs of this appeal from the respondents.

Desai, C.J.

45. I agree with the orders proposed by my brother S. D. Singh.

46. The First Execution Decree Appeal No. 3. of 1960, fails on two grounds. The appellants' contention was that the attachment of the property by the Civil Judge, Lucknow, on a precept received direct from the Civil Judge, Kanpur, was without jurisdiction and, therefore, null and void. I agree with the interpretation, placed upon Section 136 by my learned brother. A Court has no jurisdiction to carry out attachment of property situated outside its territorial limits; the Civil Judge, Kanpur, therefore, could not attach the property in dispute situated in Lucknow district. His jurisdiction was confined to sending the order of attachment to the District Judge, Lucknow, for necessary action. The District Judge, Lucknow, could get the property attached by his own officers or could authorise the Civil Judge, Lucknow, to get it attached by his officers. Neither the District Judge nor the Civil Judge, Lucknow, could have any jurisdiction to get the property attached except on receipt of an order of attachment from the Civil Judge, Kanpur. As these were not the Courts passing the decree they could not attach the property even though it was situated within their territorial limits and it was only by virtue of the provisions of Section 136 that they could have the jurisdiction to get it attached by their own officers. It is, therefore, clear that Section 136 contains a jurisdiction-conferring provision and a jurisdiction-conferring provision must be construed strictly.

If an authority acquires jurisdiction by virtue of a provision, it acquires it only if that provision is fully complied with. It was not within the power of the Civil Judge, Kanpur, to confer jurisdiction upon the Civil Judge, Lucknow, to attach the property; the latter could get jurisdiction only from the District Judge, Lucknow. Inthis case the Civil Judge, Lucknow, did not get any jurisdiction from the District Judge, Lucknow, and therefore, had no jurisdiction to attach the property and the attachment was null and void. But there is ample authority to show that a sale of property without attachment is not void; therefore the want of attachment did not invalidate the sale. This is one ground on which the appeal should fail.

The other ground is that the sale had taken; place before the appellants' objection under Section 47 against the property being put to sale without a valid attachment could be disposed of. It was their own fault if they did not apply for stay of sale during the pendency of their objection against the attachment. Once the sale took place the Civil Judge, Lucknow, could not go into the question of the validity of the attachment. He, therefore, rightly dismissed the objection of the appellants and I agree with my learned brother that this appeal should be dismissed with costs.

47. Coming to the connected appeal I agree with my learned brother that the appellants' objection under Order 21 Rule 90 was not barred by proviso (b) added to the Rule by this Court and might have been barred by the proviso (a). I agree that the word "entertain" in the proviso means not "receive" or "accept" but "proceed to consider on merits" or "adjudicate upon". An application under the Rule is not to be entertained unless the applicant deposits such amount or furnishes such security as the Court may in its discretion fix, unless it dispenses with the deposit or security. The duty is of the Court to fix the amount to be deposited or the security to be furnished and unless it does so no duty is cast upon the applicant to deposit any money or to furnish any security. The obligation cast upon him is to deposit the amount, or furnish the security, fixed by the Court; the obligation does not attach itself to him unless the Court has done this. It is not his duty to invite the Court to do it; certainly there is no provision casting this duty upon him. The question of the Court's fixing the amount or the security would arise only after an application under the rule has been presented to it; it has to fix the amount or the security not by a general order but by a special order on each application. So there must be an application under the rule before it can fix the amount or security. Without adequate words in the Rule it cannot be said that an intending applicant should approach the Court before making an application under the Rule and require it to fix the amount or security. The provision regarding 12 per cent in proviso (b) is a limitation on the Court's power of fixing the amount and not an obligation upon an intending applicant in the absence of the Court's order fixing the amount.

The proviso, certainly does not mean that if the Court has not fixed the amount an intending applicant must deposit 12 1/2 per cent. There is no time limit for the Court's fixing the amount or security but obviously it must do so before it entertains the application i. e., proceeds to consider it on merits or adjudicate upon it. It is open to the Court to dispense with the requirements of this proviso; evidently it can do this only after an application under the Rule has been presented before it. The question of dispensing with the requirements would not arise if the requirements had been complied with. What the proviso, therefore, means is that an applicant is not required to deposit any amount or furnish any security simultaneously with making an application under the rule, that after he has made an application it is for the Court to fix the amount or security and the time within which it must be deposited or furnished and that only after the period allowed has expired that it can dismiss the application on the ground that it could not proceed to consider it on merits because the amount or security fixed by it had not been deposited or furnished. It cannot dismiss an application under the Rule as soon as it is presented to it on the ground that it was not accompanied by a deposit or security. It would be consistent with this view that the only limitation, upon an applicant's right to deposit the amount or furnish the security fixed by the Court is the time allowed to him by the Court for the purpose and not the period of limitation prescribed for making an application under the rule. He is entitled to the full length of the period of limitation allowed for making an application under the rule and his liability to deposit an amount or furnish a security arises only under the Court's order fixing the amount or security and the time allowed to him by the Court is irrespective of the period of limitation prescribed for making the application. If the law is not that he must deposit the amount or furnish the security while presenting an application, it cannot be that he must deposit the amount or furnish the security within the period of limitation prescribed for the application. Within what period he should deposit the amount or furnish the security has no connection with the period of limitation prescribed for making an application and

depends not upon it but upon the time allowed by the Court in the order fixing the amount or security.

In this case the appellants applied for the requirements of the proviso being dispensed with and they were dispensed with by the Court; it is wholly irrelevant that they were dispensed with after the expiry of the period of limitation for an application under the rule. After the dispensation there could not arise any question of non-compliance with Clause (b) of the proviso and the application could not be dismissed on that ground. The question whether the application could be dismissed under Clause (a) of the proviso requires reconsideration as pointed out by my learned brother; the Civil Judge will have to go into the question whether the objection raised by the appellants in their application could not have been raised by them earlier. The appeal should, therefore, be remanded. I agree that the appellants should get their costs of this appeal from the respondents.