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would have found that on the 29th December 1876 Kasturchand's warrant had been sent back by the Subordinate Judge for execution. It may well be that the karkun was very remiss in not informing the nazir that the warrant had again reached the office, but this does not exonerate the nazir either from his original mistake in parting with that warrant or in not making inquiry as to it before ceasing to detain Sheti in custody.

The fact that Kasturchand's warrant has not been executed against Sheti, is primarily due to this mistake and negligence on the part of the nazir. The negligence of the karkun subsequent to the original mistake of the nazir does not relieve the latter of his responsibility.

It is unnecessary for us to consider, and we do not give any opinion upon the question, whether, if the warrant had in the first instance been lodged with the karkun, and that fact had never been communicated to the nazir and he never knew of the existence of the warrant, he could have been made responsible for the negligence of the karkun, who is not his servant, but the servant of and paid by Government and appointed by the District Judge, or whether to such a case the reasoning which prevailed in the case of *Kalee Coomar Chatterjee v. Siddhessur Mundul* (1) might be applicable in favour of the non-liability of the nazir. That is not the case here, where there has been actual, not merely constructive, negligence of the nazir himself.

We reverse the decree of the District Judge, and make a decree for the plaintiff against the nazir only for Rs. 82-10-3 and costs of this suit and appeal. The defendant Ganesh (the karkun) must bear his own costs throughout.

We should observe that there was not only an absence of any necessity for the issue of a second warrant in Kasturchand's suit until the period named in his first warrant had expired, but the *batta* required for the maintenance of Sheti could not, under the law as it stood at the end of 1876 and until October 1877, (*viz.*, [70] Act VIII of 1859, s. 282), have become payable until he had been arrested and brought up before the Subordinate Judge, and the latter had made the order for Sheti's committal in execution of Kasturchand's decree. The reference by the District Judge to the new Civil Procedure Code upon this point is quite irrelevant.

*Decree reversed.*

4 B. 70—4 Ind. Jur. 520.

APPELLATE CIVIL.

*Before Sir Michael Roberts Westropp, Kt., Chief Justice and Mr. Justice F. D. Melville.*

RAJAN HARJI, KHOJA, DECEASED, BY HIS SON AND HEIR, FAZALBHAI RAJAN (*Original Defendant*), *Appellant v. ARDESHIR HORMUSJI WADIA (Original Plaintiff), Respondent.*\* [23rd July, 1879.]

*Alienation made to defeat intended execution of decree—Consideration—Fraud—Contract Act (IX of 1872), ss. 23, 24.*

On the 3rd October 1865 the plaintiff filed a suit against D to recover certain lands and money. While the suit was pending, *viz.*, on 13th October 1866, D mortgaged part of his immovable property to defendant R,

\* Second Appeal, No. 170 of 1879.

(1) 11 B. L. R. 256.

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and on 21st August 1871 executed a deed of sale to defendant R of all the immoveable property of which he (D) was then possessed, for the price of Rs. 4,000. On 30th April 1872 the plaintiff obtained a decree against D, and in execution thereof attached certain immoveable property other than the land mentioned in the decree. The defendant R applied under s 246 of the Civil Procedure Code (Act VIII of 1859), and on the 21st August 1873 procured the removal of the attachment, whereupon the plaintiff brought the present suit to set aside the order of 21st August 1873, and to obtain a declaration that the attached property belonged to D, and was liable in execution.

*Held*, that inasmuch as neither the decree of the 30th April 1872, nor the plaint on which it was founded, established or sought to establish any claim against a specific lien upon the immoveable property, the subject of the present suit, it was perfectly competent for D, at any time previously to an attachment of the property, to alienate it, and the question for decision as to that property was whether D had alienated it or not. If the deed of sale by which D conveyed the property on the 21st August 1871 were merely colourable, and the change of ownership ostensible only and not real—*i.e.*, if it was the intention of the parties that the alienee should be merely a trustee for D, to shield the property from execution, and that D should continue to be the beneficial owner of it—there would not be any alienation and the deed of sale would be void as against an attaching creditor of D. If, on the other hand, the sale were a real transaction, *i.e.*, if it was [71] the intention of the parties that the full ownership should pass from the vendor to the vendee—then the sale would be valid, even though it might have been in the contemplation of the parties that future attempts to attach the property by a creditor of the vendor (not having any specific lien on property) should be defeated by the sale. Until attachment the creditor has no right to interfere with the power of his debtor to deal with his property.

*Tillakchand Hindumal v. Jitmal Sadaram* (1), *Sakharam v. Dawud* (2), *Balwantrav v. Jiwanji* (3) followed.

There is nothing in ss. 23 and 24 of the Indian Contract Act (IX of 1872) to support the opinion that a sale, made with the view of defeating a probable execution, is a sale with a fraudulent and unlawful object, and, therefore, void and within the meaning of those sections.

A creditor without a specific lien (*e. g.*, a mortgage or other direct charge or incumbrance) has not any *a priori* right to debar his debtor from parting with his immoveable property until it is attached in due course of law.

[R., 12 B. 270; 15 B. 1 (6); 16 B. 414 (423); 22 B. 176 (181); 25 B. 202; 34 C. 999 = 6 C.L.J. 410 = 11 C.W.N. 889; 3 Bom. L. R. 832; 12 Bom. L. R. 822 = 7 Ind. Cas. 957; 16 C.P.L.R. 164 (166); U.B.R. Civ. (1892—1896) 315; U.B.R. (1897—1901) 270; D., 10 B. 395; 22 B. 255 (258).]

THIS was a second appeal from the decision of J. Manteath, Acting Assistant Judge of Thana, reversing the decree of W. S. Howell, Subordinate Judge (Second Class) at the same place.

The plaintiff Ardeshir filed a suit against one Dhanji Karim on the 3rd October 1865. In that suit Ardeshir sought to recover from Dhanji certain money and land. On the 13th October 1866, Dhanji Karim executed a mortgage of part of his immoveable property to Rajan Harji. On the 21st August 1871, while the suit was pending, Dhanji executed a deed of sale by which he purported to sell to Rajan Harji for Rs. 4,000 all the immoveable property he (Dhanji) then possessed. Ardeshir obtained a decree against Dhanji on the 30th April 1872, and in execution thereof attached certain immoveable property (other than the land mentioned in the decree) as belonging to his judgment-debtor. Rajan Harji thereon applied for the removal of the attachment under s 246 of Act VIII of 1859. The application was decided in his favour on the 21st August 1873. Ardeshir thereupon brought the present suit against Rajan Harji to set aside the order of the 21st August 1873, and to obtain a

(1) 10 B. H. C. R. 206; (2) Sp. Ap. No. 456 of 1874. See note (1), p. 76.

(3) Second Appeal No. 44 of 1878. See note (2), p. 77.

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declaration that the property belonged to his judgment-debtor Dhanji Karim, and was liable to be sold in execution on his (Ardeshir's) decree against Dhanji.

[72] The Subordinate Judge raised the issue, whether the property belonged to Dhanji and was liable to be sold under the plaintiff's decree against him. He decided this issue in the negative. He held the deed of sale by Dhanji to Rajan Harji to be genuine, and that it had been executed in good faith, and was not collusive or fraudulent. He accordingly dismissed the plaintiff's suit with costs.

In appeal, which was preferred by Ardeshir, the Assistant Judge reversed the decree of the first Court on the ground that the deed was collusive. He imposed upon the defendant Rajan Harji the burden of proving that the sale was a *bona-fide* transaction, and held on the evidence that he (Rajan) failed to prove it so.

*Latham* (with him *Manekshah Jehangirshah*), for the appellant.—The Assistant Judge was wrong in throwing the burden of proving the *bona-fides* of the deed of sale on the defendant who was in possession of the property in dispute under that deed. The plaintiff impugns the deed, and must prove his case. Defendant has, besides, an order made in his favour under s. 246 of the Civil Procedure Code, and the plaintiff must bring evidence to show that order to be erroneous. We have proved the items which made up the consideration of the deed of sale by our books and the books of others. Section 23 of the Contract Act does not apply, as it is not illegal to sell property with a view to defeat a probable execution. The Lower Court, having found that the account between the appellant and Dhanji were intricate and not easily to be understood, was wrong in not appointing a commission to investigate and report on such accounts, and in not admitting in evidence the report of the Commissioner who had investigated the accounts in the miscellaneous proceedings between the parties under s. 246 of the Civil Procedure Code.

*K. T. Telang* (with him *Shantaram Narayan*), for respondent.—The Lower Court has found that the deed of sale was colourable and the finding is conclusive.

#### JUDGMENT.

The following judgment of the Court was delivered by

WESTROFF, C.J.—Although the decree, obtained upon the 30th April 1872, by the present plaintiff, Ardeshir, against Dhanji Karim [73] in the suit commenced on the 3rd October 1865, did mention and specially affect land at Mauje Kolve at Kalyan, neither that decree, nor the plaint on which it was founded, established, or sought to establish, any claim against or specific lien upon the immovable property, the subject of the present suit. So far, therefore, as the suit and decree against Dhanji Karim are concerned, it was perfectly competent for him, at any time previously to an attachment of the property, the subject of the present suit, to alienate that property. The question, therefore, as to that property would be whether he has alienated it or not. If the deed of sale of the 21st August 1871 be merely colourable, and the change of ownership ostensible only, and not real—*i.e.*, if the intention of the parties were that the alleged alienee, Rajan Harji, should be merely a trustee for Dhanji Karim to shield the property from execution, and that Dhanji Karim should continue to be the beneficial owner of the property—there would not be any alienation, and the deed of sale of the 21st August 1871 would, as against an attaching creditor of Dhanji Karim, be void. If, on the other hand, the sale

were a real transaction—*i.e.*, if the intention of the parties to it were that the full ownership should pass from the vendor to the vendee—then, even though it may have been in the contemplation of those parties that future attempts to attach the property by creditors of the vendor (not having any specific lien on the property) should be defeated by the sale, that sale would be valid, the reason being that until attachment those creditors have no right to interfere with the power of their debtor to deal with his property. Such is the established doctrine of this Court as laid down in *Tillakchand Hindumal v. Jitamal Sudaram* (1), *Sakharam v. Dawud* (2), *Balwantrav v. Jivanji* (3) and other cases.

The learned Assistant Judge has, in his carefully written judgment, expressed an opinion, that a sale, made with the view to defeat a probable execution, would be a sale with a fraudulent and unlawful object, and, therefore, void within ss. 23 and 24 of the Indian Contract Act (IX of 1872), but we find nothing in those sections to support that opinion. Section 23 enacts that [74] "the consideration or object of an agreement is lawful, unless it is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent," &c. "In each of these cases the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful, is void." Irrespectively of certain provisions in the Insolvent Debtors' Act (11 and 12 Vic., c. 21, s. 24), which have no application in the present case, the alienation by a debtor of his property before attachment is not forbidden by law. In this remark we, of course, do not include persons under special disability, *e.g.*, Hindu widows, minors, &c. In fact, the enactments contained in s. 240 of Act VIII of 1859 and s. 276 of Act X of 1877, directly imply that until attachment a debtor may alienate. The creditor without a specific lien (*e.g.*, a mortgage or other direct charge or incumbrance) has not any *a priori* right to debar his debtor from parting with his immoveable property until it be attached in due course of law.

The learned Assistant Judge seems throughout to have placed upon the defendant (Rajan Harji's heir Fazalbai) the burden of proving that the deed of sale was not colourable. This course he deemed himself justified in adopting by the case of *Tillakchand Hindumal v. Jitamal Sudaram* already mentioned, the reason for placing the burden of proof in that case upon the party claiming under the *razinama* was not because he so claimed, but that he was the plaintiff. Here the party claiming under the deed of sale is the defendant, and has already obtained a decision in favour of that deed when he applied to raise the attachment, and the judgment-creditor, the present plaintiff, failed in his resistance to that application. The order then made, raising the attachment, is what the plaintiff in his present suit impugns, and the burden lies on him to prove the order of the 21st August 1873 to be wrong, and the deed of sale (Ex. 29) of the 21st August 1871 to have been merely a colourable transaction. The Assistant Judge appears to us, on this question of burden of proof, to have approached the case from an erroneous point of view, and we, therefore, think that on this ground, if there were no other, [75] there must be a new trial. We leave for the re-trial, and do not express any opinion whatever upon the question whether or not the deed of sale (Ex. 22) was a genuine, and not merely a colourable, transaction.

(1) 10 B. H. C. R. 206.

(2) Sp. Ap. 456 of 1874. See note, *infra*, p. 76.(3) Second Appeal, 44 of 1878. See note, *infra*, p. 77.

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We cannot discover in the case of *Muthuroollah v. Torabooddeen and others*(1) referred to by the Assistant Judge, anything which is in conflict with, or in qualification of, the ruling in *Tillakchand Hindumal v. Jitamal Sudaram* (2).

Should the re-trying Court be of opinion that the deed of sale is colourable, it will be open to the defendant to stand upon his mortgage of the 13th October 1866 (*Hirachand v. Bhaskar*(3)), unless it, too, be a colourable transaction; and although the existence of the mortgage, even if genuine, does not preclude the right of the judgment-creditor to sell the right, title, and interest of the judgment-debtor (which, if the mortgage be valid, could be merely his equity of redemption), yet regard must be had to s. 287 of Act X of 1877, clause (c), which requires the Court, in its proclamation of the intended sale, to specify any incumbrance to which the property is liable,—a provision beneficial as well to mortgagees as to purchasers.

Mr. Monteath having left Thana, we consider it desirable that the re-trial should be conducted by the District Judge. He should be at liberty to take fresh evidence as to the existence of an attachment in the suit of Edalji Hormusji on a house belonging to Dhanji Karim, in respect of a decree for Rs. 784-14-0 and as to the payment by the defendant, Rajan Harji, or his heir, of a Rs. 900 or any other sum to Edalji Hormusji to raise that attachment. Evidence as to such an attachment and the raising of it ought to be forthcoming amongst the records of the proper Civil Court, if Edalji Hormusji's karkun spoke truly. The Assistant Judge says, with regard to the deed of sale, Ex. 22, "no money was paid," by which he probably means paid to Dhanji Karim directly; but if it were paid to another person (*e. g.*, Edalji Hormusji) to raise an attachment on Dhanji Karim's house or other property, it would form an efficacious consideration for the [76] sale as much as if it were paid to him. We think it also desirable that the Report of the Commissioner, mentioned in cl. 5 of the memorandum of second appeal and in Mr. Monteath's order of the 10th December 1878, (Ex. 14,) should be admitted in evidence, and also the evidence as to non-possession (by defendant or his father) of the lands tendered by the plaintiff to the Subordinate Judge, but rejected by him.

We reverse the decree of the Assistant Judge, and remand this cause for re-trial by the District Judge. Costs of the suit and appeals should be disposed of by him on the re-trial in such manner as may be just.

*Decree reversed and cause remanded.*

4 B. 76N. = 4 Ind. Jur. 523N.

NOTE. (1)—The following is a report of Special Appeal No. 456 of 1874, referred to in the above judgment. The case was heard on the 29th July 1875 by WESTROPP, C.J., and DE LARPEM, J. :—

SAKHARAM MAHIPAT v. DAWUD VALAD JAWABHAI.

Sakharam sued for a declaration that he was the owner of certain fields which had been attached and sold in execution of a money decree obtained by the defendant Dawud against Shivram on the 4th April 1867 (suit filed on the 16th January 1867), and which had been purchased by Dawud himself. The plaintiff alleged that the fields in dispute had been purchased by his father Mahipat from Shivram for Rs. 300 on the 3rd June 1867, and that they had been duly transferred to his father's name in the Collector's books on Shivram's *razinama*. The defendant answered, among other things, that the sale set up by the plaintiff was colourable. The Court of first instance made a decree in the plaintiff's favour. But it was reversed in appeal by the District Judge, who held that, even assuming the sale by Shivram to Mahipat to be *bona fide* and for

(1) 15 W. R. 305.

(2) 10 B. H.C.R. 206.

(3) 2 B.H.C.R. 198.

valuable consideration, it was made by Shivram with a view to defeat the execution of Dawud's decree against him (Shivram), and that it was invalid, because the purchaser Mahipat was aware of the fraudulent intention on the part of his vendor. In special appeal it was contended for the plaintiff that the sale was not void, even supposing it to have been intended to defeat the execution of the defendant's decree.

WESTROPP, C.J.—The suit of Dawud, commenced on the 10th of January 1867, was founded on a simple money bond, unaccompanied by any mortgage of the land in dispute. That bond, therefore, did not create any specific lien on the land. The sale of the land to Mahipat is alleged to have taken place on the 3rd of June 1867. If that sale were a real transaction, made for a valuable consideration, and took place before the attachment of the land at Dawud's suit, under his money decree of the 4th April 1867, the sale to Mahipat would be valid, even if it were made by Shivram with the intention of defeating Dawud in the execution of his decree. If, however, the sale to Mahipat were only a colourable and nominal transaction, and not intended to pass the land to him beneficially, but merely in order that he [77] should be a trustee for Shivram, the sale, so far as regards Shivram's interest would be void. See *Tillakchand Hindumal v. Jitmal Sudaram* (1) and *Manmal v. Dashrath* (2) where *Wood v. Dixie* (3) was cited. Hence, if the sale to Mahipat were a real transaction for a valuable consideration, the decision of the District Judge in favour of the defendant was wrong. It is not, however, quite clear whether he merely assumed or actually found as a fact that the sale to Mahipat was a real transaction for a valuable consideration. It, therefore, becomes necessary that, while reversing his decree, we should remand the cause to the District Judge for a new trial on that question. If that question be determined in the affirmative, the District Judge should restore the decree of the Subordinate Judge. The costs of the suit and of both appeals are to be in the discretion of the District Judge. [F., 4 B. 70; R., 24 C. 825=1 C.W.N. 665.]

4 B. 77-N.=4 Ind. Jur. 523-N.

NOTE (2).—The following is a report of Second Appeal No. 44 of 1878 referred to in the above judgment. The case was heard by MELVILL and KEMBALL, JJ., on the 15th April 1878:—

BALVANTRAY v. JIVANJI HORMASJI.

Balvantray sued to establish his right to a certain house which was sold in execution of a money decree obtained by Mancharji against Narayan Sakharan, and which was purchased by Jivanji Hormasji on the 16th August 1873. The plaintiff alleged that the house in dispute was part of a very large immoveable property sold to him by Narayan Sakharan and Parvatibai for Rs. 11,999, under a deed of sale dated the 26th April 1872. The defendant Jivanji claimed the house as purchaser at a Court sale. The Subordinate Judge awarded the plaintiff's claim. In appeal, which was preferred by Jivanji, he contended, among other things, that the sale to the plaintiff was collusive. The Joint Judge held it to be colourable, on the ground, among others, that the sale to the plaintiff was made after Mancharji had applied for the execution of his money decree against Narayan Sakharan. In the High Court it was contended on behalf of the plaintiff that the onus of proving collusion ought to have been placed on the defendant who alleged it, and that the Joint Judge was wrong in holding the plaintiff's purchase to be fraudulent and collusive in the absence of any evidence.

MELVILL, J.—It appears to us that none of the grounds on which the Joint Judge has reversed the decree of the Subordinate Judge can be sustained and that it is, therefore, our duty to restore the latter decree. The Joint Judge has found that, in order to defeat a possible execution for Rs. 532, certain judgment-debtors made a fictitious and colourable sale of their whole property for Rs. 12,000. This is on the face of it improbable. The mere cost of stamping and registering the deed of sale would render such a transaction [78] a very unprofitable one. The principal reason given for the Joint Judge's conclusion is that the plaintiff has not proved to the Joint Judge's satisfaction that he paid the full purchase money. But the Joint Judge has held it proved that the plaintiff paid off a mortgage of more than Rs. 7,000; and he does not attempt to explain why the plaintiff should have paid so large a sum of money, if the sale were a colourable transaction. Another creditor of the judgment-debtors, Edalji Hirji, swears that the plaintiff paid off a debt of Rs. 1,560 due to him by the judgment-debtors. It is most improbable that such an admission against interest would have been made, if it were not true; and the Joint Judge's only reason for doubting it is that an extract from Edalji's accounts, filed in the case, appeared to him to show that Edalji's accounts were not regularly kept. There is evidence that the balance of the purchase money was paid to one of the judgment-debtors, and the defendant has given no evidence

(1) 10 B.H.C.R. 206.

(2) 9 B.H.C.R. 147.

(3) L.R. 7 Q.B. 892.

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whatever to the contrary. The Joint Judge, however, has disbelieved the evidence of the payment, because the plaintiff's accounts do not, in his opinion, show that on the date of the sale the plaintiff had sufficient funds in hand to make so large a payment. On a reference to Exs. 78 and 79 it appears to us that the Joint Judge was mistaken; but, at any rate, after the plaintiff had proved that he had paid the greater part of the purchase-money, the circumstance that he failed to prove payment of every rupee was no ground for holding the sale fictitious. The Joint Judge lays stress upon the non-appearance of the plaintiff and the judgment-debtors in the Court of first instance. But the plaintiff could not be held responsible for the absence of the judgment-debtors: and it may be assumed that good reason was shown for his own non-appearance, for the Subordinate Judge took no notice of it, and made a decree in his favour.

The only other reason assigned by the Joint Judge for his conclusion is that it appears (as he says), from the decree of the Subordinate Judge that the house in dispute was not given into the possession of the plaintiff after the sale. If this were so, it might no doubt constitute evidence of collusion between the vendors and vendee. But we can find nothing of the kind in the Subordinate Judge's judgment, nor has it been shown to us that there is any evidence that the house in dispute was not transferred to the plaintiff. What the Subordinate Judge does say is that certain property mentioned in the deed of sale, other than the house in dispute, is proved to have been given into the possession of the plaintiff; and this circumstance he treats, and very properly, as evidence that the sale was a *bona fide* transaction.

For these reasons we are of opinion that the grounds stated by the Joint Judge for his reversal of the Subordinate Judge's decree do not constitute valid or legal grounds for such reversal; and we, therefore, reverse the Joint Judge's decree, and restore that of the Subordinate Judge, with costs on the defendant Jivanji throughout. [This case is also followed in 4 B. 70 (73).]

4 B. 79.

[79] APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

JESINGBHAI AND OTHERS (Original Plaintiffs), Appellants v.  
HATAJI AND OTHERS (Original Defendants), Respondents.\*  
[26th August, 1879.]

*Landlord and tenant—Suit for contribution—Voluntary payment by landlord.*

The plaintiffs were the registered holders of the village of Mankoli, in the Ahmedabad Collectorate, for which they obtained a *sanad* in 1864 under Bombay Act VII of 1863. The defendants were the descendants of the original owners of the village, who about 1768, finding themselves unable to meet the expenses attaching to the village, gave up their title to it to the ancestors of the plaintiffs on condition of retaining a third of the lands rent-free as their *vanta*, or share, subject to no other condition but a house-tax.

*Held*, that the circumstances did not constitute the relationship of landlord and tenant between the parties.

*Held*, also, that a settlement made by the plaintiffs without the defendants' consent was not binding on the latter, and any payment made by them to Government was a purely voluntary one, to which they could not ask the defendants to contribute.

Also, assuming that the relationship of landlord and tenant did exist between the parties, a suit by the plaintiffs against the defendants would not lie for contribution to any expenses to which the plaintiffs as landlords might have been put in defending or perfecting their title.

The fact that the defendants had for some years paid to the plaintiffs part of the amount of quit rent levied from the plaintiffs by Government, did not estop the defendants, when better informed of their rights, from contesting the title of the plaintiffs to any further payments.

[F., 6 B. 244 (250); R., 17 B. 407 (411); 2 Bom. L.R. 855.]

\* Second Appeal No. 209 of 1879.