

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

CHUNILAL DEVJI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS,¹
v. KARAMCHAND SHRICHAND (ORIGINAL DEFENDANT), RESPONDENT².

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January 19.

Civil Procedure Code (Act V of 1908), sections 64, 73—Attachment before judgment—Part of property mortgaged after attachment—Attachment valid as against the whole of the property—Mortgagee takes subject to all claims made against property attached—Rateable distribution between decree-holders.

In 1904 one A filed a suit against defendants Nos. 2 to 10 and obtained an order for attachment before judgment of properties A and B belonging to the defendants. In 1905 one K filed a suit against the same defendants and obtained a decree in 1906. Out of the attached properties A and B, the property A was mortgaged to the plaintiff in 1902 but the property B was mortgaged to him in 1905, that is, after A's attachment but before K's decree. In execution of A's decree a part of property B was sold free of the mortgage of 1905. As K had also applied for execution, it was ordered that sale proceeds of part of B property be rateably distributed between A and K under section 73 of the Civil Procedure Code, 1908. The plaintiff, thereupon, sued to recover the amount which was paid to K.

Held, dismissing the suit, that when an attachment had been levied on property in execution of a decree, then any attempt by the judgment-debtor to deal with the property must be considered as contrary to the attachment, and the transferee or mortgagee must be considered as taking the transfer or mortgage subject to all claims which could be made against the property attached, which by the law were not confined to claims of creditors attaching before the transfer, but would also include the claims of any other execution creditors who might apply for execution before the assets were realized.

Sorabji Edulji Warden v. Govind Ranji, F. N. Wadia and another⁽¹⁾, relied on.

¹ SECOND appeal against the decision of N. V. Desai, Joint Judge of Thana, varying the decree passed by Abraham Isaac, Subordinate Judge at Pen.

Suit to recover money.

² Second Appeal No. 237 of 1921.

⁽¹⁾ (1891) 16 Bom. 91.

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The family of defendants Nos. 2 to 10 owned certain properties. These properties were in two lots A and B. On the 18th December 1902, the properties in lot A were mortgaged to Chunilal Devji (plaintiff).

In 1904 one Amarchand filed a Suit No. 81 of 1904 against defendants Nos. 2 to 10, obtained attachment of the above properties before judgment and subsequently obtained a decree.

On the 28th March 1905 these defendants Nos. 2 to 10 mortgaged the properties B to Chunilal, plaintiff.

In 1905 Karamchand (defendant No. 1) filed a suit against the defendants Nos. 2 to 10 to recover a sum of money and obtained a decree in 1906.

In execution of Amarchand's decree properties A and B were put up for sale and it was ordered that properties A should be sold subject to plaintiff's mortgage of 1902, while properties B should be sold free of the mortgage of 1905. Accordingly four lands out of B were sold and Rs. 3,205 were realized and sent to Court. Thereupon Karamchand in execution of his decree applied for a rateable distribution of the assets realized and the Court ordered that Amarchand be paid Rs. 1,300 and odd for his share and Karamchand Rs. 1,900 and odd.

The plaintiff filed the present suit to recover Rs. 1,900 paid to Karamchand (defendant No. 1) contending that his mortgage claim had priority over defendant No. 1's decree which was subsequent to the mortgage.

The Subordinate Judge allowed a decree against defendant No. 1 for the amount of Rs. 1,074-3-7.

On appeal the Joint Judge reversed the decree observing as follows :—

Appellant answers that his is a claim enforceable under that attachment and so this mortgage is void as against his claim. I think sections 64 and 73, Civil Procedure Code, fully support the position of appellant.

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Under section 73, Civil Procedure Code, appellant had a right to claim rateable distribution as he had a money decree against the same judgment-debtors and had applied for rateable distribution before assets were received. It was not contended here that he was not entitled to claim any rateable distribution. Priority was claimed on the ground that before he came in with his decree, the properties were already mortgaged. But one has to turn to section 64 to see that respondents cannot be allowed the advantage they claim. After an attachment by a Court, any private transfer of that property is void as against all claims enforceable under the attachment.

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An explanation is now added to this section 64, Civil Procedure Code, which says that claims enforceable under an attachment include claims for the rateable distribution of assets (see I. L. R. 16 Bom. 91).

Thus appellant's decree being a claim for rateable distribution of assets is included in the claims enforceable under Amarchand's attachment and this mortgage is therefore void against it also. The claim for a refund as brought against defendant No. 1 deserves therefore to be rejected.

The plaintiffs appealed to the High Court.

G. N. Thakor, for the appellants :—The mortgage executed in favour of the appellants was not necessarily void as against the claims of Karamchand. It was Amarchand who had obtained the attachment on property and after the mortgage in favour of the appellant, what Karamchand could have brought to sale in execution of his own decree would have been the right; title and interest of the original mortgagors in the property. If the view taken by the lower appellate Court is correct, great injustice will follow to a *bona fide* purchaser or mortgagee of the property under attachment. Hence section 64, Civil Procedure Code, 1908, must be so construed as to protect *bona fide* dealings.

G. S. Rao for *P. B. Shingne* and *B. R. Damle*, for the respondent were not called upon.

MACLEOD, C. J. :—The facts of this suit are somewhat complicated, and have been rendered more complicated by the fact that in the course of the proceeding an

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order was passed allowing the plaintiffs to amend their plaint. But in this second appeal the only respondent is the 1st defendant, and we are not concerned with any order passed by the lower appellate Court against the remaining defendants. The lower appellate Court dismissed the suit as against the first defendant, reversing the decree of the trial Court, which directed that the plaintiffs should recover from the first defendant Rs. 1,074-3-7 with interest. It is against the order of the lower appellate Court dismissing the suit as against the first defendant that the plaintiffs appeal, and for the purposes of the appeal it will only be necessary to refer to certain main facts.

In 1904 one Amarchand Keshavji filed a suit against certain persons, who are represented now in this suit by defendants Nos. 2 to 10. He attached certain properties before judgment which may be referred to as properties A and properties B.

In 1905 the present defendant No. 1, Karamchand, filed a suit against the same parties and obtained a decree in 1906.

Now properties A had been mortgaged to plaintiffs in 1902 before the attachment levied by Amarchand, but properties B were mortgaged to the plaintiffs in 1905, after Amarchand's attachment, but before Karamchand obtained his decree.

Amarchand sought to execute his decree by sale of the properties A and B, and it was ordered that properties A should be sold subject to plaintiffs' mortgage of 1902, while properties B were to be sold free of the mortgage of 1905. Fourlands out of B were sold. Meanwhile Karamchand had applied for execution of his decree, with the result that the sale proceeds of the four lands out of B, namely, Rs. 3,265, were distributed rateably under section 73 of the Civil Procedure Code between Amarchand

and the first defendant Karamchand. It is that sum of Rs. 1,900 which was paid to Karamchand under section 73 which the plaintiffs now seek to recover.

A very similar question arose in *Sorabji Edulji Warden v. Govind Ramji, F. N. Wadia and another*⁽¹⁾, which was decided by Mr. Justice Telang. That was a case under the Civil Procedure Code of 1882. The plaintiff Warden had filed a suit against Govind Ramji for Rs. 2,237 on the 8th July 1890, and obtained an attachment before judgment of certain money belonging to Govind Ramji in the hands of the B. B. & C. I. Railway Company. On the 5th August 1890, Warden got a decree, and on the 13th August he applied for execution. On the 24th September Govind Ramji made an assignment in favour of his Attorneys Messrs. Wadia and Ghandy, of the fund belonging to him (expressed to be Rs. 7,818) in the hands of the Railway Company, subject to the attachment levied by Warden. In February 1891, the Bank of Bengal attached the sum of Rs. 7, 818 in the hands of the Railway Company, in execution of a decree obtained by the Bank against Govind Ramji in Suit No. 190 of 1890, and subsequently other creditors of Govind Ramji, who had obtained judgment against him, applied for execution, and obtained attachments.

On the 26th May 1891, under a consent order in Suit No. 382 of 1890 (that was Warden's suit) the Railway Company paid over to the Sheriff of Bombay, the sum of Rs. 8,084-1-0, which was the amount admitted by the Company to be due to Govind Ramji after making all just deductions.

It was contended by Messrs. Wadia and Ghandy that, under the above assignment of the 24th September 1890, they were entitled to the fund assigned to them,

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subject only to the claim of Warden, who had, at the date of assignment, already attached the said fund, and that subsequent attaching creditors had no claim to the said fund.

It was held that the fund in question should be regarded as assets realized by sale, or otherwise, in execution of a decree, within the meaning of section 295 of the Code of Civil Procedure of 1882.

It was also held that under the provisions of section 295 the claims of the subsequent execution creditors were "claims enforceable under the attachment" of Warden within the meaning of section 276 of the Civil Procedure Code, and that the assignment to Messrs. Wadia and Ghandy was void, as well against the claims of the creditors of Govind Ramji, who applied for execution, before the 26th May 1891, as against the claim of Warden, to the funds in the hands of the Sheriff of Bombay.

It was also held that the attachment was not limited merely to such portion of the fund as covered the amount of Warden's decree, but was a valid attachment in the form in which it was made, namely, on the whole fund in the hands of the Railway Company.

Section 64 of the Code of 1908 is the section corresponding to section 276, and the explanation to that section, which is new, gives the sanction of the Legislature to the view of Mr. Justice Telang, which otherwise might have been open to correction by a higher Court.

Now it seems to me that, substituting "properties B" for "the funds" in that case in the hands of the Railway Company, which were due to the judgment-debtor, there can be no difference in the principle applicable to both cases. The mortgage by defendant No. 2 of properties B after Amarchand's attachment was

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undoubtedly contrary to the attachment, which could not be limited to only such portion of the properties as might be sufficient to cover the amount of the decree, but was an attachment against the whole of the property. Mr. Justice Telang held that the attachment in Warden's case was not limited to so much of the fund as would be sufficient to cover his decree, but was a valid attachment against the whole fund which was over Rs. 7,000. As long as the assets are not realized it is open to any other subsequent judgment-creditor to apply for execution of his decree against the property attached by the previous judgment-creditor before any private transfer or delivery of property to third parties had been made.

The argument in *Warden's case*⁽¹⁾ chiefly dealt with the question whether subsequent claims which might be made for rateable distribution could be considered as claims enforceable under the original attachment, and that point has now been made clear by the explanation to section 64, and it is difficult to see now what is left for the appellants to argue in the face of that decision, unless it could be said that the property attached by the judgment-creditor is property to which different principles must apply from those applicable to property which consisted of a fund claimable by the judgment-debtor in the hands of a third party. When an attachment has been levied on property in execution of a decree then any attempt by the judgment-debtor to deal thereafter with the property must be considered as contrary to the attachment, and the transferee or mortgagee must be considered as taking the transfer or mortgage, subject to all claims which could be made against the property attached, which by the law are not confined to claims of creditors attaching before the transfer, but will also include the claims of any other execution

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creditors who may apply for execution before the assets are realized. We think the decision of the Court below was right and the appeal should be dismissed with costs.

COYAJEE, J. :—I agree with the reasons given in the judgment now delivered by the learned Chief Justice. It is contended on behalf of the appellants in this second appeal that, although the mortgage executed in their favour in the year 1905 by the predecessors-in-interest of defendants Nos. 2 to 10 was void as against Amarchand's claims, it was not necessarily void as against the claims of Karamchand. In support of this contention it is urged that but for the attachment and sale effected on the application of Amarchand, what Karamchand could have brought to sale in execution of his own decree would have been the right, title and interest of the original mortgagors in the property, subject to the prior incumbrances created by them, and that the rights of the mortgagees would have remained unaffected by such sale. That no doubt is the true effect of a judicial sale. But here the property was brought to sale under an attachment made at the instance of Amarchand; and Karamchand was clearly entitled to the benefit of section 73, Civil Procedure Code, 1908, which—with certain alterations not here material—replaces section 295 of the Code of 1882, and which enabled him to claim a share by rateable division in the assets realized by such sale. As against Amarchand's claims the mortgage in favour of the plaintiffs was void, and the property secured by the mortgage was liable to be sold free from the mortgage (section 64, Civil Procedure Code, 1908, which corresponds to section 276 of the Code of 1882). If then it was void as against Amarchand's claims it was also void as against all claims enforceable under the attachment made at his instance. For, even under the provisions

of the Code of 1882 the claims of the subsequent execution-creditor Karamchand were "claims enforceable under the attachment" made in enforcement of Amarchand's decree: *Sorabji Edulji Warden v. Govind Ramji* ⁽¹⁾. The explanation to the 64th section of the Code of 1908 gives effect to that decision and expressly says that "claims enforceable under an attachment include claims for the rateable distribution of assets". It would thus appear that the mortgage in question is void against Karamchand's claims also. The plaintiffs entered into the transaction subsequent to and in defiance of Amarchand's attachment, and they presumably knew the legal consequences of that attachment.

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Decree confirmed.

J. G. R.

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Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

KESHAV RAGHUNATH JOSHI (ORIGINAL PLAINTIFF), APPELLANT v. GAFURKHAN DAIMKHAN BUBERE AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS².

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January 20.

Indian Limitation Act (IX of 1908), Article 134—Transfer from mortgagee as ostensible owner—Valuable consideration—Title of transferee unassailable after statutory period.

When a mortgagee sells the mortgaged property as an ostensible owner and there is valuable consideration for the sale, the right of the purchaser becomes unassailable by the mortgagor by the lapse of twelve years from the date of the purchase under Article 134 of the Limitation Act, 1908.

² Second Appeal No. 425 of 1921.

⁽¹⁾ (1894) 16 Bom. 91.