

## **BOMBAY HIGH COURT**

Rango Ramchandra Kulkarni

Vs.

Gurlingappa Chinnappa Muthal

Second Appeal No. 773 of 1938

(Broomfield and Divatia, JJ.)

06.09.1940

### **JUDGMENT**

#### **Broomfield, J.**

1. The question for determination in this second appeal is whether the holder of a money decree, who has attached Immovable property of his judgment-debtor before judgment, can bring that property to sale in satisfaction of his decree when the judgment-debtor has, before the attachment, agreed to sell the property to a third party and the sale has been completed by a conveyance after the attachment. The other facts which may be material in the particular case are that ₹ 1,500 out of the total consideration of ₹ 7,000 were paid at the time of the agreement, that possession was handed over to the purchaser at the same time, and that on the date of the sale-deed, which was executed two days after the attachment, ₹ 1,766 were paid to the vendor, the balance being retained by the purchaser in accordance with the agreement to satisfy certain mortgages on the property. The decree-holder brought a suit for a declaration that the property was liable to be attached and sold in execution, of his decree, and both the lower Courts have held in his favor. The purchaser from the judgment-debtor has appealed.

2. The following provisions of law have to be considered in connection with the question:-- Section 64, Order 21, Rule 54, and Order 38, Rule 10, of the Civil Procedure Code, and Sub-section 40 and 54 of the Transfer of Property Act. Section 64 and Order 21, Rule 54, might seem at first sight to make the rights of the purchaser under the sale-deed subject to the rights of the attaching judgment-creditor, but these provisions must be read along with Order 38, Rule 10. That rule saves the right of the purchaser under the contract of sale. His right is a personal one, i.e. the right to a conveyance in his favor on payment of the balance of the purchase-money. But there is nothing in the rule to suggest that it applies only to rights in rem. By reason of Section 40 of the Transfer of Property Act the purchaser may enforce his vendor's obligation under the contract of sale against a transferee with notice. Section 54 of the Act states that a contract for the sale of Immovable property does not, in itself, create any interest in or charge on such property. But the attachment does not create any interest or charge either. In this respect the attaching creditor is in no better position than the purchaser, and simply on the construction of the statutory

provisions it is difficult to see how his attachment can confer upon him any higher right than the judgment-debtor had at the date of the attachment, namely, a right to the balance of the purchase-money, this right being subject to the obligation to convey the property to the purchaser. The claim by the attaching creditor to sell the property in execution of his decree would override both the obligation of the judgment-debtor and the right of the purchaser existing prior to the attachment.

3. We were referred only to one authority in support of the attaching creditor's claim, namely, *Buta Ram v. Sayyad Mohammad*<sup>1</sup> and that is really no authority at all) because it was not a case of an attachment before judgment, and Order 38, Rule 10, therefore, did not apply. The lower Courts have relied on *Toraknath Mukherji v. Sanatkumar Mukherji*<sup>2</sup> which case has sometimes been cited in the text books as an authority for the proposition that an attachment before judgment prevails over the rights arising from a prior contract of sale. But though it is by no means easy to follow the judgments delivered in that case, it is clear when the facts are looked at that the Court did not lay down any such proposition. The suit there had been brought by the purchaser from the judgment-debtor for a declaration that the property was not liable to be sold in execution of the decree against him, and the Court of first appeal had made a decree confirming the plaintiff's title, but directing him to pay certain sums to the defendants which were made a charge on the property. This decree was confirmed in second appeal. It seems probable, although the fact does not very clearly appear from the report of the case, that the direction for payment of certain sums to the defendants and the declaration of a charge effectively safeguarded the rights of the attaching creditor to the balance of the purchase-money. But, in any case, as the purchaser's title was confirmed, there was certainly no finding that the attaching judgment-creditor was entitled to sell the property in satisfaction of his decree.

4. It may be noted moreover that in an earlier case, *Madam Mohan Dey v. Rebat Mohan Poddar*<sup>3</sup> the Calcutta High Court decided against the claim of the attaching creditor in similar circumstances. The facts were the same as here except that the contract for sale had been enforced in execution of a decree for specific performance, and the attached property had likewise been sold in execution. The Court had to determine the respective rights of the two purchasers. It held that the rights of the purchaser under the contract must prevail. The reasons given were that Section 64 of the Code only protects the creditor against a transaction subsequent to the attachment, and it must be read subject to Order 38, Rule 10, which is not limited to rights in rem. In *Basappa v. Hanmappa*<sup>4</sup>, Beaumont C.J. followed this case in preference to *Taraknath Mukherji v. Sanatkumar Mukherji*.

5. It has been held in several cases in Madras, *Veeraraghavayya v. Kamala Devi*<sup>5</sup> *Veerappa Thevar v. Venkatarama Ayyar*<sup>6</sup> and *Diraviyam v. Veernan*<sup>7</sup> that the attachment before judgment of property subject to a contract of sale merely gives the attaching creditor a right to the balance of the purchase-money. With respect I agree with this view. It necessarily follows that he can never sell the property in satisfaction of his own decree. If the purchase-money or the balance thereof has not been paid, he can attach it in the hands of the purchaser. He would also in that case have the benefit of the vendor's lien under Section 55(4) (b) of the Transfer of Property Act (see *Veerappa Thevar v. Venkatarama Ayyar* I.L.R. (1905)

<sup>1</sup> I.L.R. (1934) Lah. 328

<sup>3</sup>(1915) 21 C.W.N. 158

<sup>5</sup>(1934) 68 M.L.J. 67

<sup>2</sup> I.L.R. (1929) Cal. 274

<sup>4</sup> AIR 1939 Bom 492 : (1939) 41 BOM LR 943

<sup>6</sup> I.L.R. (1935) Mad. 1

<sup>7</sup>[1939] Mad. 853

Mad. 1, and he could, if necessary, sue to enforce it. If the whole of the price has been paid to the vendor, the attaching creditor's only right would seem to be to attach the money in the hands of the vendor, if he can. In most cases he will not be able to do so, and the attachment will then be in fructuous, for although by reason of the attachment the attaching creditor will become entitled to whatever part of the purchase-money has been paid after the attachment, the attachment itself will not enable him to enforce that right. That is the position in the present case, for the balance of the purchase-money, which was payable to the vendor, was paid on the date of the sale-deed.

6. We are informed that the purchaser has not yet satisfied the mortgages on the property which he is bound to do under the contract of sale. But that part of the purchase-price has to be applied in that way under the terms of the agreement. The attaching judgment-creditor got no right to it by his attachment of the property. As things are, therefore, not only is he not entitled to sell the property in satisfaction of his own debt but he is not entitled to any relief which the Court could give him in this suit.

### **Divatia, J.**

7. This appeal arises in a suit by the plaintiff for a declaration: that certain property consisting of a field belonging to one deceased Virappa, father of defendants Nos. 2 and 3, was liable to be attached and sold in execution of a decree in suit No. 205 of 1932 obtained by the plaintiff against Virappa. In that suit the plaintiff had obtained an order of attachment before judgment of this property on June 9, 1932. Before that date Virappa had entered into a contract on April 27, 1932, with defendant No. 1 to sell the field to him for ₹ 7,000, and the latter had paid ₹ 1,500 as earnest money and was also put in possession of the property. On the same date Virappa passed to defendant No. 1 a receipt in which it was stated that ₹ 1,500 were received as earnest money, that a sale-deed was to be passed within a month, that out of the balance of ₹ 5,500 payable for the price defendant No. 1 was to pay off a pre-existing mortgage on the property and he was to pay the remaining amount in cash to Virappa. The sale-deed was executed on June 11, 1932, ₹ 1,766 were paid to Virappa, and the remaining amount from the balance of ₹ 5,500 was left with defendant No. 1 to pay off the mortgagee. Thereafter the plaintiff's suit against Virappa ended in a decree in his favour on September 1, 1932. He applied for execution and proceeded against this property which was attached before judgment. Defendant No. 1 filed an objection petition in the darkhast on the ground that the field had been sold to him under a contract of sale prior to the attachment before judgment and that the title having passed to him by his subsequent sale-deed, it was not liable to be sold in execution. Defendant No. 1 succeeded in his application and the attachment was raised on April 15, 1935. Hence the present suit by the plaintiff against defendant No. 1 for a declaration of his right to attach and sell the property.

8. The plaintiff's case in substance was that the sale-deed being subsequent to the attachment, it was subject to his rights under the attachment, and, therefore, inoperative. Defendant No. 1's case was that he had become the absolute owner of the property even before the attachment by reason of his contract under which he was put in possession, and that in any case the attachment was invalid as he had a charge on the property to the extent of his purchase-money.

9. Both the lower Courts held that the attachment was valid and binding on defendant No. 1, that he took no title under the sale-deed, and the property was, therefore, liable to be sold in execution of the plaintiff's decree. The reasons given by the lower Courts are shortly these: A contract to sell does not create a charge on the property, and is not, therefore, a pre-existing right under Order 38, Rule 10, of the Civil Procedure Code, that the subsequent sale-deed of the property attached was void as against all claims enforceable under the attachment under Section 64 of the Civil Procedure Code, and that as decided in *Taraknath Mukherji v. Sanatkumar Mukherji*<sup>8</sup> the contract to sell cannot prevail over the subsequent attachment, whether before or after judgment. A decree was, therefore, granted in the plaintiff's favor, and this appeal is now preferred by defendant No. 1 against that decree.

10. The point arising for decision in this appeal depends on the application of Section 64 read with Order 38, Rule 10, of the Civil Procedure Code. Under Section 64 a private transfer of property after its attachment is void as against all claims enforceable under the attachment. Order 38, Rule 10, provides that attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit. If, therefore, a person has a right over a property before its attachment and he is not impleaded in the suit, that right could not be affected by the attachment. The question then is whether a transfer of property in pursuance of such a right would be affected by the attachment. It is true that under Section 54 of the Transfer of Property Act a contract for sale of Immovable property does not, of itself, create any interest in, or charge on, such property, but it is also true that an attachment, whether before or after judgment, does not confer any title in, or create a charge over, the property. It merely keeps it in custodia legis and prevents its alienation in certain cases. Moreover, the attachment is not necessarily of the property itself but of the right, title and interest of the debtor in the property at the date of the attachment. So also under Order 38, Rule 10, it is subject to pre-existing rights over the property. If, therefore, a person, having a contract of sale in his favour, has such pre-existing right, the attachment could not be binding on him. The right of a promisee under such contract is to enforce its specific performance by the sale of the property to him. If the promisor sells or gifts the property and hands over its possession to another with notice of the contract, the promisee can enforce it against that other person also under Section 27 of the Specific Relief Act as well as Section 40 of the Transfer of Property Act. True, it is a right in personam and not in rem, but it is an obligation annexed to the ownership of immovable property and is in the nature of a trust under Section 91 of the Indian Trusts Act. It is, therefore, clearly "a right within the meaning of that term in Order 38, Rule 10, and the attachment under Section 64 is subject to that right. If the promisee gets a conveyance, after the attachment, in pursuance of his contract, he takes a good title in spite of the attachment. Even if the property is sold in execution, he can enforce specific performance of his contract against the auction-purchaser as the latter acquires only the interest of the judgment-debtor, and that interest is burdened with the contract.

11. The lower Court has relied on the decision in *Taraknath Mukherji v. Sanatkumar Mukherji* in holding that the attachment is binding on defendant No. 1 and that the

<sup>8</sup>(1929) I.L.R. 57 Cal. 274

property is liable to be sold in execution of the plaintiff's decree, but it has misunderstood the actual decision in that case. There the contract to sell took place on July 8, 1921, in favor of the plaintiff under which he paid the greater part of the price as earnest money. The property was attached by three creditors in their suits in August and September, 1921; in November, 1921, it was sold to the plaintiff who paid the balance of the purchase-money. In execution of the

attaching creditors' decrees, the plaintiff objected unsuccessfully, and he, therefore, filed suits for declarations that the property was not liable to be sold. The lower Court had held that the title of the plaintiff to the property would be confirmed but he should pay certain sums to the defendants which would be a charge on the property. That order was confirmed by the High Court, but the two learned Judges based their decisions on different grounds. Cuming J. observed that as the contract did not create a charge on the property, the attaching creditor had the right to bring it to sale in execution in spite of the previous sale to the purchaser who may enforce his right of specific performance against the auction-purchaser under Section 40 of the Transfer of Property Act. He discussed a previous decision of the Calcutta High Court in *Madan Mohan Dey v. Rebat Mohan Poddar*<sup>9</sup> in which it was held that the attachment was not effective against a sale in pursuance of a contract before attachment, but it was distinguished on the ground that it did not proceed on any principle of law but on natural justice. In the end, however, he did not hold the sale to the plaintiff as invalid but made it subject to a charge for the payment of sums due to the attaching creditors on the property in his hands. But he did so on the ground that as the attachment prevailed over the subsequent sale, the property remained liable for the attaching creditors' claims. The other Judge, Pearson J., was of the opinion that the previous decision in *Madan Mohan Dey v. Rebat Mohan Poddar* was not based merely on the principle of natural justice but on Section 64 coupled with Order 38, Rule 10, of the Civil Procedure Code. He was, however, of opinion that the attachment affected the right of the vendor in the property, at any rate, to the extent of any balance then receivable under the agreement, and the attaching creditor was entitled to have it applied, in the events which had happened, towards the payment of his debt. On that ground he agreed with the order that the plaintiff was liable to pay to the defendants the balance recoverable at the date of the attachment.

12. I have dwelt upon this case at some length because it has been mainly relied on by the lower Court in support of its decision, and it is therefore necessary to see whether it can be regarded as an authority laying down any general rule. One thing is, at any rate, quite clear that even if that decision is correct, it does not support the decree which the lower Court, relying upon it, has made in the present case. The lower Courts have held that in spite of the sale in favor of defendant No. 1 in pursuance of the contract prior to the attachment, the property is liable to be sold in execution of the plaintiff's decree. But that was not the order in Taraknath's case. On the other hand, the title of the purchaser to the property was confirmed. The only result of the attachment was held to be the creation of a charge on it for payment of the sums due to the creditors even though the whole of the price had already been paid by the purchaser to his vendor. There is no authority for the proposition that in such a case the sale in pursuance of the contract is to be treated as absolutely void and that the property should be sold at the instance of the attaching creditors either free from or subject to the right under the pre-existing contract. On the other hand, it has been held in *Veerappa Thevar v. Venkatarama Ayyar*<sup>10</sup> and *Diraviyam v. Veeranan*<sup>11</sup> that title to the property passes to

<sup>9</sup>(1915) 21 C.W.N. 158

<sup>10</sup>I.L.R. (1935) Mad. 1

<sup>11</sup>[1939] Mad. 853

the purchaser, and it cannot be sold in execution of the decree. The same view is taken by Beaumont C.J. in *Basappa v. Hanmappa*<sup>12</sup>, although the observations were in the nature of obiter dicta. The decree of the lower Court cannot, therefore, be justified in any case, but the question would still remain whether defendant No. 1 gets absolute title under the sale or he gets it subject to a charge for the balance of the price payable at the date of the attachment. In Taraknath's case, discussed above, a charge was no doubt created on the property in favour of the attaching creditors, but it is difficult to extract any general principle from either of the two judgments in

that case. The plaintiff appears to have been satisfied with the confirmation of the sale to him and willing to pay off the decree-holder. Taraknath's case, therefore, cannot be regarded as an authority for the proposition that the attachment prevails over the contract in the sense that the purchaser under the contract takes the property burdened with the obligation to pay off the attaching creditors to the extent of the balance of the price unpaid at the time of the attachment, even though he had subsequently paid the balance to his vendor at the time of the completion of the sale. It is indeed true that the attachment holds good in respect of such right as the vendor had in the property at the time of the attachment, i.e. the right to receive the whole or a part of the price on completion of the sale. It is held in *Veerappa Thevar v. Venkatarama Ayyar* that where there is an unpaid balance of the purchase-money, the attachment fastens to the vendor's right to recover the money, i.e. the unpaid vendor's lien over the property under Section 55(4) (b) of the Transfer of Property Act. To the same effect is the decision in *Diraviyam v. Veernan*. Those decisions are, in my opinion, correct. If, therefore, there is an unpaid balance of price in the hands of the purchaser, the attaching creditor can hold the purchased property in his possession liable for that amount because by virtue of the attachment he gets the benefit of the lien. If, however, the purchaser has paid the whole price to the vendor, the vendor's lien has ceased to exist and the property is free from liability. The attaching creditor can proceed against the price in the hands of his judgment-debtor, but he cannot hold the purchaser responsible for paying it over again to him.

13. We have not got sufficient materials in the present case to hold that the order of attachment before judgment operated as a notice or an injunction to the purchaser not to pay the balance of the purchase-money to the vendor. It seems to be clear in any case that he had no specific notice of the order of attachment. That being so, he was not bound to pay it in Court or to the attaching creditor, and if he did pay it to his vendor at the time of the completion of the sale, he cannot be ordered to pay it over again to the attaching creditor. In my opinion, therefore, the purchaser in the present case gets an absolute title to the property he has purchased under his contract, and the decision of the lower Court is, therefore, wrong and must be set aside.

14. Appeal allowed, decrees of the lower Courts reversed and suit dismissed with costs throughout.  
Appeal allowed.