

BOMBAY HIGH COURT

Yeshvant Shankar Dunakhe

Vs.

Pyaraji Nurji Tamboli

Second Appeal No. 310 of 1941

(Divatia, J.)

05.08.1942

JUDGMENT

Divatia, J.

1. This is an appeal by defendant No. 1 against a decree passed in the plaintiff's favour declaring that the suit property was not liable to attachment and sale in the execution proceedings started by defendant No. 1. The facts are shortly these :-Defendant No. 2 agreed to sell the suit property to the plaintiff on November 26, 1934. The plaintiff then sued for specific performance of the agreement and obtained a decree, in pursuance of which a sale-deed was executed in his favour through the Court on March 28, 1939, In the meanwhile defendant No. 1, in execution of a decree obtained by him against defendant No. 2, had attached the suit property on September 13, 1936. The question was whether the plaintiff got a good title by virtue of his sale-deed in spite of the property being attached before the sale-deed was passed through Court. The lower appellate Court has held, relying on the decisions in *Basappa v. Hanmappa*¹, and *Madan v. Rebat*², that the plaintiff acquired a good title notwithstanding the attachment, because the agreement to sell took place before the attachment, which was not therefore effective against the agreement, and, secondly, because the sale through Court was not a private transfer but a transfer through Court, and therefore it did not come within the prohibition of Section 64 of the Civil Procedure Code.

2. In my opinion, that view is correct. It has been held very recently by this Court in *Rango Ramchandra v. Gurlingappa Chinnappa*³, that an attachment before judgment of property subject to a contract of sale merely gives the attaching creditor a right to the balance of the unpaid purchase money and he is not entitled to bring that property to sale in satisfaction of a decree subsequently obtained by him. The learned advocate on behalf of the appellant seeks to distinguish that case as well as the cases relied upon by the lower appellate Court on the ground that they were all cases of attachment before judgment and were, therefore, governed by the provisions of O. XXXVIII, Rule 10, while in the present case there was no attachment before

judgment and hence that principle would not apply here. In my opinion, however, there is no substance in that argument. It is true that in those cases the attachment was before judgment, but although it is expressly provided in

¹ AIR 1939 Bom 492 : (1939), 41 BOM LR 943 ³(1940) 43 Bom. L.R. 206

²(1915) 23 C.L.J. 115

Order 38, Rule 10, that an attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, the same principle would apply to an attachment in execution. In *Veeraraghavayya v. Kamala Devi*⁴, the attachment was not before judgment but was in execution, and it was held that where the purchase was subsequent to the attachment but the agreement in pursuance of which the purchase was made was prior to the attachment, the purchase prevailed against the attachment. The learned Judge observes (p. 70) :-

O. XXXVIII, Rule 10, saves expressly in the case of an attachment before judgment, rights existing prior to the attachment of persons not parties to the suit. Though there is no similar provision dealing in terms with attachments in due course of execution, it can hardly be suggested that a different principle applies. Indeed, O. XXXVIII, rule 8, specifically provides that claims preferred to property attached before judgment shall be investigated in the same manner as claims to property attached in execution of decrees.

3. The learned Judge came to that conclusion on the provisions of Section 64 of the Civil Procedure Code as well as Section 40 of the Transfer of Property Act. The principle laid down in O. XXXVIII, Rule 10, is not thus limited to attachments before judgment. It would apply to all attachments, whether before judgment or in course of execution. Moreover, as held by our High Court in *Lakshman v. Ramchandra* if after the attachment the vendee filed a suit for specific performance of the contract and the Court enforced the execution of a conveyance, such conveyance would not be a private transfer subject to the provisions of Section 64 of the Civil Procedure Code. That being so, the right obtained by the plaintiff under the sale-deed would not be void under the attachment.

4. The decree of the lower appellate Court is, therefore, correct and must be confirmed. The appeal is dismissed with costs.

Appeal dismissed.

⁴(1934) 68 M.L.J. 67