PRIVY COUNCIL.

P.C.*
1914

April 24, 27;
May 18.

RAGHUNATH DAS
v.
SUNDAR DAS KHETRI.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Insolvency—Attachment under mortgage decree and order for sale of mortgaged property—Vesting order under s. 7 of Insolvency Act (11 & 12 Vict., c. 21), effect of—Sale after vesting order—Sale by Official Assignee to plaintiff—Title of purchaser from Official Assignee as against judgment-creditor purchasing at sale in execution of his own decree—Notice.

An attachment in execution of a money-decree on a mortgage of land, followed by an order for sale of the interest of the judgment-debtor does not create any charge on the land.

Sarkies v. *Bundhoo Bee* (1) referred to.

An attachment prevents and avoids any private alienation, but does not invalidate an alienation by operation of law such as is effected by a vesting order under the Indian Insolvency Act (11 & 12 Vict., c. 21); and an order for sale though it finds the parties does not confer title.

Previous to the 8th September 1904 a colliery leased to the judgment-debtors was attached under a mortgage decree by the respondents (judgment-creditors), and an order for sale on 5th September was made, but at the request of the judgment-debtors the sale was postponed until the 10th. On 8th September the judgment-debtors filed their petition in the Insolvency Court in Calcutta and the usual vesting order was made on the same day. On 12th September the execution proceedings were stayed. After issue of notice, on the application of the respondents, to the Official Assignee to show cause why he should not be substituted in the place of the judgment-debtors, the Subordinate Judge on 10th January 1905, finding that the notice had been duly served, made the order for substitution and fixed the sale for 6th March 1905, on which day the property was sold, and purchased

* *Present*: LORD MOULTON, LORD PARKER, SIR JOHN EDGE AND MR. AMEER ALI.

(1) (1866) 1 N.-W. P. 172.

by the respondents who in June were put into possession. Meanwhile on 23rd May 1905 the Official Assignee with leave from the Insolvency Court in March 1908 sold the property to a purchaser, who on 24th June 1908 sold it to the plaintiffs by whom on 16th July 1908 the present suit was brought for possession of the colliery.

Held (reversing the decision of the High Court), that the notice calling on the Official Assignee to show cause why he should not be substituted for the judgment-debtors was not a proper notice under section 248 of the Civil Procedure Code, 1882. A notice under that section should have called on him to show cause why the decree should not be executed against him. But assuming the notice to have been duly served (which was denied) the sale was altogether irregular and inoperative The property having vested in the Official Assignee it was wrong to allow the sale to proceed at all. The judgment-creditors had no charge on the land, and the Court could not properly give them such a charge at the expense of the other creditors of the insolvents. In the second place, no proper steps had been taken to bring the Official Assignee before the Court and obtain an order binding on him, and accordingly he was not bound by anything which had been done. In the third place, the judgment-debtors had, at the time of the sale, no right, title or interest which could be sold to or vested in a purchaser, and consequently the respondents acquired no title to the property.

Malkarjun v. *Narhari* (1) distinguished.

No proper notice was served under section 248 of the Civil Procedure Code, and the respondents had full notice, and were responsible for the irregularities of the procedure adopted.

APPEAL 98 of 1913 from a judgment and decree (4th June 1912) of the High Court at Calcutta, which reversed a judgment and decree (8th September 1909) of the Court of the Subordinate Judge of Burdwan.

The plaintiffs were the appellants to His Majesty in Council.

The main question for determination in this appeal was as to whether the title to certain lease-hold interests in a colliery, together with its equipment, engines, boilers, offices, etc., is in the appellants who were purchasers from the Official Assignee of Bengal, or in the respondents (defendants) who were

(1) (1900) I. L. R. 25 Bom. 337 ; L. R 27 I. A. 216.

1914

RAGHUNATH DAS v. SUNDAR DAS KHETRI.

purchasers in execution of a decree. The Subordinate Judge gave a decree for the plaintiffs.

The judgment appealed from (CHITTY and TEUNON JJ.), where the facts of the case are sufficiently stated, was as follows :—

"On 1st December 1899, the defendants granted a pottah of coal lands to Atul Nath Chatterji and Rajendra Nath Chatterji at an annual jama of Rs. 3,626-11-10 and a salami of Rs. 4,001. The lessees were two of four brothers, the others being Aghore Nath Chatterji and Chandra Nath Chatterji. The four brothers, who were members of a joint family, became heavily indebted to several creditors. On 6th December 1903, the present defendants filed a suit against their lessees for rent under the pottah and, on 23rd June 1904, obtained a decree against them for Rs. 3,090-10-6 and costs Rs. 350-7 annas. The other two brothers were also parties to that suit as *pro forma* defendants. On 13th July 1904, the defendants applied for execution of their decree by attachment of the immovable properties belonging to the judgment-debtors The lease-hold property was accordingly attached and 5th September 1904 was fixed for the sale. On that day, the judgment-debtors Nos. 1 and 2 applied for time to enable them to raise money by sale of the attached property, and the sale was accordingly adjourned until 10th September. On the 8th September, all four brothers filed their petition in the Court for the Relief of Insolvent Debtors at Calcutta and, on the same day the Court made the usual vesting order under section 7 of the Indian Insolvent Act. On 30th September 1904, the defendants applied to the Subordinate Judge of Burdwan to substitute the Official Assignee in the place of the judgment-debtors in the execution proceedings under their decree. On 23rd November, notice was ordered to issue to the Official Assignee to show cause why he should not be substituted in the place of the judgment-debtors, and it was made returnable on 22nd December 1904. On 10th January 1905 the Subordinate Judge, finding that Mr. Miller had been duly served with the notice, ordered that he be substituted in the place of the judgment-debtors, and 6th March 1905 was fixed for the sale of the attached property. On that day the property was sold and purchased by the defendants, the decree-holders. On 18th April 1905, the sale was confirmed and on the 14th June 1905, an order was made for delivery of possession to the defendants as purchasers and they accordingly took possession under it. Meanwhile, on the 23rd May 1905, the Official Assignee applied to the Insolvency Court and obtained an order that he should be at liberty to sell either by public auction or private contract to the best purchaser the properties of the insolvents including the lease-hold premises in question. He did not, as a matter of fact, sell at

that time ; but, on the 24th March, 1908, he sold the premises now in question to Hormusji Pestonji Banker *alias* Billimoria, a Parsi gentleman of Asansole. On the 24th June 1908, three months later, Banker sold the property to the present plaintiffs. On 16th July 1908, this suit was instituted to recover possession of the property.

"The learned Subordinate Judge has decreed the plaintiffs' suit and the defendants have appealed

"The first question is one of fact—whether the notice for substitution was duly served on the Official Assignee in the execution case. The Judge says that it is shown to have been served on a clerk of the Official Assignee and, in the absence of evidence to show that this amounted to service on the Official Assignee or that the clerk had authority to receive it, he finds that it was not properly served. This finding appears to us to be entirely against the evidence on the record. The clerk of the Official Assignee, Lakhinarayan Dhar, states that he has been an Assistant in the Official Assignee's office for 29 years. He admits that the notice was served in that office and that he signed acknowledging the receipt. He states that he received the notice on behalf of the Official Assignee, and made over the copy to Mr. Langer, the Head Assistant. The Small Cause Court bailiff (who has been a bailiff for 30 years and who served the notice) says that he has known Lakhinarayan Babu as the head-clerk or Bara Babu for 20 years and that he served notices for the Official Assignee upon him 20 or 30 times. He states that he always served notices for Mr. A. P. Miller on Lakhinarayan Dhar in this manner. There can be no question on this evidence that the notice was served in the Official Assignee's office in the usual way, and, in the absence of any evidence to the contrary, we must presume that Lakhinarayan Dhar was a person authorised to receive such notices within the meaning of section 75 of the Code of the Civil Procedure of 1882. It would have been simple for the opposite party to have called evidence from the Official Assignee's office to disprove this, had it been incorrect. We therefore hold that the notice for the substitution was duly served on the Official Assignee.

"The next question is what was the effect of the sale in execution as against the Official Assignee. It was argued for the defendants (i) that the Official Assignee was bound by the execution proceedings and by the sale which took place as we have stated ; (ii) that the lease-hold interest did not vest in the Official Assignee because he did not take possession ; and (iii) that the decree being one for rent, the decree holders were entitled to sell the lease-hold interest of the insolvents and to give a good title.

"(i). With regard to the first question, it must be conceded that the order for substituting the Official Assignee in place of the judgment-debtors in the execution proceedings was incorrect : see the case of *Miller v.*

1914

RAGHUNATH DAS v. SUNDAR DAS KHETRI.

Budhsingh Dudhuria (1). But the Official Assignee having been added and having taken no exception to the procedure, the sale must be regarded as having taken place in his presence and as binding upon him. The fact that a person who was not the representative of the judgment-debtors was brought upon the record as such representative, would not affect the validity of the sale: see *Malkarjun v. Narhari* (2). The Official Assignee having taken no steps to have that sale set aside in the manner provided by law, the sale must be taken to be good as against him.

"(ii). We cannot accept the second contention raised by the learned pleader for the defendants that the property had not vested in the Official Assignee. It is true that, in cases of lease-hold property, the Official Assignee has the right to elect whether or not he will accept the property under the vesting order. If he does so, there is no question that his acceptance relates back to the date of the vesting order: see *Abdul Razak v. Kernan* (3) That was the converse case and the question there was whether the Official Assignee could be made liable for the rent of the lease-hold property. It was held that inasmuch as he had taken possession, he must be regarded as having elected to take over the property. Here, he paid no rent, nor did he take actual possession; but the property did vest in him by the vesting order, and, that he regarded it as having vested in him is made plain by the application which he made to the Insolvency Court, on the 23rd May 1905, for leave to sell the property. He could not sell it unless it were vested in him. That being so, we must hold that the sale was effective as against the Official Assignee and also against the plaintiffs who claim through him. The plaintiffs are, in fact, in a dilemma. If the property had not then vested in the Official Assignee, it was sold away before the Official Assignee acquired any title to it; if it had vested in him—and we think that it had—it was sold in his presence and the sale was binding on him."

The High Court held that it was unnecessary to decide the 3rd point, and the appeal was allowed and the suit dismissed with costs.

On this appeal,

De Gruyther K. C. and *A. M. Dunne*, for the appellants, contended that they had established a good title

(1) (1890) I. L. R. 18 Calc. 43.
(2) (1900) I. L. R. 25 Bom. 337; L. R. 27 I. A. 216.
(3) (1898) I. L. R. 22 Bom. 617.

to the property in suit. The proceedings in execution subsequent to the insolvency of the judgment-debtors, and the sale of 6th March 1905 were without jurisdiction, *ultra vires*, and invalid, and passed no title to the respondents. The Insolvency Act (11 & 12 Vict., c. 21) section 7 under which the vesting order was made, was referred to. In India an attachment of property and an order to sell it did not affect the title of the Official Assignee. Was it different where he had been made a party? It was submitted not. A judgment-creditor had no priority over the Official Assignee in respect of property attached by him prior to the vesting order: *Peacock* v. *Madan Gopal*(1). The proper proceedings to make the Official Assignee a party were not taken. He was served with a notice to show cause why he should not be substituted for the judgment-debtors in the suit. The procedure for substituting one person for another on the record was contained in chapter XXI, sections 370, 372 of the Civil Procedure Code 1882; that section (372) applied where the substituted party represented the other, but there was no provision for making the Official Assignee a defendant in place of the judgment-debtors whom he did not represent: see *Miller* v. *Budh Singh Dhudhuria* (2). The Official Assignee represented rather the interests of the creditors, for the benefit of whom the insolvent's estate was vested in him. Those sections were not applicable in execution of decree: *Goodall* v. *Mussoorie Bank* (3). The substitution of the Official Assignee would have no effect on the sale; what was ordered to be sold was the right, title and interest of the judgment-debtors, and that was not altered by the substitution; the purchaser took nothing as after the making of the vesting order the

(1) (1902) I. L. R. 29 Calc. 428. (2) (1890) I. L. R. 18 Calc. 43.
(3) (1887) I. L. R. 10 All. 97.

1914

RAGHUNATH DAS v. SUNDAR DAS KHETRI.

judgment-debtors had no interest that could be sold. The position of the Official Assignee was shown by the case of *In re Hunt Monnet & Co: Ex parte Gamble* v. *Bholagir Mangir*(1); and section 49 of the Insolvency Act was referred to. He could apply for stay of execution and the word "may" in that section meant "shall." A notice might have been served on him under section 248 of the Code of Civil Procedure to show cause why the decree should not be executed, but he received no notice except for the substitution of his name in place of the judgment-debtors which was wrong. *Jitmand Ramanand* v. *Ramchand Nandram*(2) and *Kristnaswamy Mudaliar* v. *Official Assignee of Madras* (3) which both followed the case of *Peacock* v. *Madan Gopal*(4); and also Civil Procedure Code, 1882, sections 284, 287, 291 and 316 were referred to. The proclamation of sale only referred to the right, title and interest of the judgment-debtors; there was no power in the Court to make a fresh order for sale of the Official Assignee's interest, and even if there was power to do it such an order was not made.

B. Dubé, for the respondents, contended that the appellants had tried to make out an entirely new case. The notice of the execution proceedings, the evidence showed, was duly served on the Official Assignee under sections 75, 91 and 92 of the Civil Procedure Code; and the sale took place in his presence: he represented the judgment-debtors under section 244 of the Civil Procedure Code. It was settled law that where a person has been made a party to execution proceedings his only remedy in such a case as this was under section 244; that was a suit to set aside the sale under section 311, but that had to be done within a year

(1) (1864) 1 Bom. H. C. 251.
(2) (1905) I. L. R. 29 Bom. 405.
(3) (1903) I. L. R. 26 Mad. 673.
(4) (1902) I. L. R. 29 Calc. 428.

1914

RAGHUNATH DAS v. SUNDAR DAS KHETRI.

after the sale. As to the notice to the Official Assignee even if it were wrongly served, such an irregularity was a matter which could be dealt with in execution of decree under section 244 of the Code. Reference was made to *Malkarjun* v. *Narhari*(1), *Prosunno Kumar Sanyal* v. *Kali Das Sanyal*(2) and *Punchanun Bundopadhya* v. *Rabia Bibi*(3). It must be presumed that the notice was duly served. As to notice under section 248 of the Civil Procedure Code, reference was made to *Bimola Sundaree Dassee* v. *Kalee Kishen Mojoomdar* (4). It was now too late to set aside the sale. An application to do so was barred by limitation under Article 12 of Schedule II of the Limitation Act, 1877.

De Gruyther K. C. replied.

The judgment of their Lordships was delivered by

May 18

LORD PARKER. The action in which this appeal arises is an action for the recovery of a leasehold colliery. The plaintiffs (the present appellants) claimed title to the property under the Official Assignee in the insolvency of the lessees. The order vesting the property in such Official Assignee was made under the Insolvent Debtors (India) Act, 1848, on the 8th September 1904. At the date of this order, the colliery had been attached in execution case No. 303 of 1904, in which the lessees were the judgment-debtors and the defendants (the present respondents) were the judgment-creditors, and an order had been obtained for the sale of the interest therein of the judgment-debtors. Counsel for the respondents admitted that attachment in execution of

(1) (1900) I.L.R. 25 Bom. 337, 346: L. R. 27 I. A. 216, 224.
(2) (1892) I. L.R. 19 Calc. 683: L. R. 19 I.A. 166.
(3) (1890) I.L.R. 17 Calc. 711.
(4) (1874) 22 W. R. 6.

1914

RAGHUNATH DAS v. SUNDAR DAS KHETRI.

a money-decree followed by such an order for sale does not confer on the judgment creditor any charge on the land: see *Sarkies* v. *Bandho Baee* (1). An attachment prevents and avoids any private alienation, but does not invalidate an alienation by operation of law such as is effected by a vesting order under the Act of 1848, and an order for sale, though it binds the parties, does not confer title.

It follows that under the order of the 8th September 1904, the property vested in the Official Assignee free from any charge in favour of the judgment-creditors. The Official Assignee in due course, by order of the Court having jurisdiction in the insolvency, sold the property, and the appellants derive title through the purchaser. Their title is thus *primâ facie* a good and valid title, but it is disputed by the respondents under the following circumstances.

On the 12th September 1904, the Judge in the execution proceedings stayed the sale therein directed until further order. This was the proper and indeed the only thing he could do, for the judgment-debtors had no longer any interest which could be sold. Further, if, as was no doubt the case, the judgment debt was included in the schedule filed by the insolvents under the Act, their Lordships are of opinion that he was bound to stay the sale under section 49 of the Act. At any rate the execution could not proceed until the Official Assignee had been properly brought before the Court, and an order binding on him had been obtained. In their Lordships' opinion this could only be done by obtaining an order for the issue of, and by serving him with, a notice under section 248 of the Civil Code of 1882, which was the Code then in force. It was suggested

(1) (1866) 1 N.-W. P. 172.

in argument that he might have been made a party to the proceedings either under section 32 or under section 372 of the Code, but even if these sections are applicable after final decree, as to which there is considerable doubt [see *Goodall* v. *Mussoorie Bank*, (1)], no proceedings seem to have been taken thereunder. What the judgment-creditors did was this: they applied to the Judge in the execution case for an order, and on the 30th September 1904, and again on the 3rd November, obtained an order for the issue and service on the Official Assignee of a notice calling upon him to show cause why he should not be substituted in the suit for the judgment-debtors. This was not a proper notice under the 248th section. A notice under that section should have called upon the Official Assignee to show cause why the decree should not be executed against him. Had the Official Assignee been served with such a notice, it is at least probable that he would, as in their Lordships' opinion he certainly could, have shewn good cause why the decree should not be executed, the property having under the Act and vesting order been transferred to him for the benefit of the creditors of the insolvent generally. It is possible that the notice might be upheld as a proper notice preliminary to adding the Official Assignee as a party under the 32nd section, if that section were applicable. but in order to bind a party added under the 32nd section, he has, after being added, to be served with a summons to appear and answer, and it is not suggested that any such summons was served. Similarly, it is not suggested that any order to carry on proceedings was obtained under the 372nd section.

Having obtained leave in that behalf, the respondents proceeded to serve the notice in question, and

(1) (1887) I. L. R. 10 All. 97.

1914

RAGHUNATH DAS v. SUNDAR DAS KHETRI.

their Lordships will assume that the notice was duly served on the Official Assignee. The Official Assignee took no notice of it, possibly because he had no objection to being substituted as a party, and expected to be served with notice of any further application against him. There is no evidence that he knew that an order for sale had been already made. The time fixed by the notice for cause to be shown having expired, the respondents, without further notice to the Official Assignee, applied for and obtained an order not only substituting the Official Assignee as a party in the place of the judgment-debtors but directing the sale to proceed. The sale accordingly proceeded. There had to be a fresh sale proclamation by reason of the 291st section of the Code. Such proclamation is not in evidence, but their Lordships must presume in default of evidence to the contrary that the property offered for sale was the property ordered to be sold, that is to say, the right and interest of the judgment-debtors in the colliery. At the sale the respondents (the judgment-creditors) having obtained leave to bid, became the purchasers. The sale was confirmed by the Court on the 8th April 1905, and on the 25th April 1905 the appellants obtained the usual certificate which refers to the right, title, and interest of the judgment-debtors as the property sold. Their Lordships are of opinion that this sale was altogether irregular and inoperative. In the first place the property having passed to the Official Assignee it was wrong to allow the sale to proceed at all. The judgment-creditors had no charge on the land, and the Court could not properly give them such a charge at the expense of the other creditors of the insolvents. In the second place no proper steps had been taken to bring the Official Assignee before the Court and obtain an order binding on him, and accordingly he

was not bound by anything which was done. In the third place the judgment-debtors had at the time of the sale no right, title, or interest which could be sold to or vested in a purchaser, and consequently the respondents acquired no title to the property.

Their Lordships' attention was called in this connection to the case of *Malkarjun* v. *Narhari* (1), but in their opinion there is nothing in that case which has any bearing upon the present appeal. As laid down in *Gopal Chunder Chatterje* v. *Gunamoni Dasi* (2), a notice under section 248 of the Code is necessary in order that the Court should obtain jurisdiction to sell property by way of execution as against the legal representative of a deceased judgment-debtor. In the case of *Malkarjun* v. *Narhari*(1), such a notice had been served, and the Court had determined, as it had power to do for the purpose of the execution proceedings, that the party served with the notice was in fact the legal representative. It had therefore jurisdiction to sell, though the decision as to who was the legal representative was erroneous. There being jurisdiction to sell, and the purchasers having no notice of any irregularity, the sale held good unless or until it were set aside by appropriate proceedings for the purpose. The present case is of a wholly different character. No proper notice was served under the section, and the respondents had full notice of, and indeed were responsible for, the irregularities of the procedure adopted.

The respondents suggested that with regard to certain machinery, which was included in the sale of the colliery by the Official Assignee, and which was also sought to be recovered in this action, the statute of limitations was a good defence. This point

(1) (1900) I. L. R. 25 Bom. 337 ; L. R. 27 I. A. 216.

(2) (1892) I. L. R. 20 Calc. 370.

1914

RAGHUNATH DAS v. SUNDAR DAS KHETRI.

does not appear to have been taken at any time prior to the hearing before their Lordships' Board. It was not one of the issues settled by the Court on the action, nor did the respondents mention it among their grounds of appeal from the decision of the Subordinate Judge. Their Lordships consider that it involves an inquiry as to the nature of the machinery to which it is said to be applicable, and that it is therefore too late to raise it.

Their Lordships will humbly advise His Majesty that the appeal ought to be allowed and the decree of the High Court of the 4th June 1912 set aside with costs, here and below, and that the judgment of the Subordinate Judge of Burdwan of the 8th September 1909 ought to be restored.

Appeal allowed.

Solicitors for the appellants: *W. W. Box & Co.*

Solicitors for the respondents: *Barrow, Rogers & Nevill.*

J. V. W.