APPELLATE CIVIL.

Before Cuming and Pearson JJ.

1929.

Mar. 21.

TARAKNATH MUKHERJI

v.

SANATKUMAR MUKHERJI.*

Agreement to sell—Obligation, whether creates a charge or interest in property and if can prevail over subsequent attachment before or after judgment—Transfer of Property Act (IV of 1882), ss. 40, 54—Code of Civil Procedure (Act V of 1908), s. 64 ; O. XXI, r. 54 ; O. XXXVIII, r. 10.

An agreement to sell immoveable property creates an obligation which does not amount to a charge or interest in the property or an easement within the meaning of section 40 of the Transfer of Property Act, 1882, and cannot prevail over subsequent attachment whether before or after judgment.

The purchaser under the contract might go to the auction purchaser and ask that he should perform the contract for sale.

Madan Mohan Dey v. *Rebati Mohan Poddar* (1) discussed and distinguished.

Per PEARSON J. *Madan Mohan Dey* v. *Rebati Mohan Poddar* (1) is not decided merely on principles of natural justice, but on the principle of law, applied to the facts of the particular case.

The fair effect of section 64 and Order XXXVIII, rule 10 of the Civil Procedure Code, 1908, in the circumstances of the present case, is that the attaching creditors were entitled to have the balance receivable under the agreement by the debtor applied to the payment of their debts.

SECOND APPEALS by the plaintiff.

The appeals arose out of three suits by the plaintiff, which related to the same plot of land, against three defendants. One Himadri had a one-third share in a *taluk*, named *Patni* Darbashini, which was separated, on partition, in 1911-12 and possessed separately by him. He was involved in debt and there were some decrees against him, including a mortgage decree in favour of Raja

*Appeals from Appellate Decrees, Nos. 206, 207 and 208 of 1927, against the decrees of Mati Lal Roy, Additional District Judge of Hooghly, dated Sept. 28, 1926, reversing or affirming the decrees of Kunja Behari Ballav and Surjomoni Dey, Subordinate Judges of Hooghly, dated May 23, 1925 and Feb. 28, 1925, respectively.

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Sreenath Ray. The land allotted to Himadri was sold on the 14th June, 1921, in execution of one of the decrees. On the 14th July, 1921, Himadri applied for the sale to be set aside on deposit of the decretal amount, which was done on the 18th July, 1921. On the 8th July, 1921, Himadri had entered into an unregistered agreement in favour of the plaintiff, Taraknath Mukherji, to sell the lot to him and the money for deposit in court was supplied by the plaintiff. In the meantime, the defendants, Sanat and Niladri, filed two money suits against Himadri and the said properties were attached before judgment in those two suits, on the 10th August and 3rd September, 1921, and the orders were made absolute respectively on the 3rd and 17th September, following. Subsequently, a decree holder, Kalinath Basu, the defendant in one of the three suits, attached the *patni* on 25th September, 1921, the *patni* being thus under attachment by the three defendants in the three suits in September, 1921. The sale to the plaintiff, in pursuance of the agreement in his favour, was made on the 29th November, 1921. The balance of the purchase money, which was sufficient to cover the amount of both the money decrees, was paid to Himadri, after the attachment, but before the sale. The plaintiff then put in objections to the attachments and, they being disallowed, he deposited the decretal amount in Kalinath Basu's execution case, and instituted the first suit against Kalinath, and then the other two suits against Niladri and Sanat, for a declaration that the property, having been contracted to be sold to him before the attachments, was not liable to be sold in execution of those decrees. He prayed for refund of the money deposited by him in Kalinath's decree and for stay of sale in the other two suits. The first suit against Kalinath Basu was tried by a Subordinate Judge, who held that the property was liable for the decretal debts. The other two suits were heard by another Subordinate Judge, who held the same view with regard to the liability of the property to be sold, but that it could be sold subject

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to the mortgage charge under Raja Sreenath Ray's decree and to the right of the plaintiff to enforce specific performance of his contract against the auction purchasers. Appeals were filed by both the parties against the said decrees and were heard together by the Additional District Judge, who held that the purchase by the plaintiff was *bonâ fide* and was not meant to defraud and delay the creditors and that, though the purchase by the plaintiff was subsequent in date to the attachments, this was merely carrying out an obligation which was incurred prior thereto. He, therefore, found that, though the plaintiff, by his previous contract, acquired a right to have a conveyance in his favour, he did not acquire the right to pay the unpaid portion of the purchase money to the debtor and ignore the attachment of the debtor's interest. He declared and confirmed the plaintiff's title by purchase to the property subject to the payment of the dues of the attaching creditors which would be a charge on the property. He, accordingly, set aside the decrees of the Subordinate Judges and allowed the plaintiff's appeals in a modified form.

The plaintiff, thereupon, appealed to the High Court and the defendants filed cross-objections.

Mr. Brajalal Chakravarti and *Dr. Bijankumar Mukherji*, for the appellant.

Mr. Rupendrakumar Mitra, for the respondent, in Appeal No. 206.

Mr. Saratchandra Basu and *Mr. Amarendranarayan Bagchi*, for the respondent, in Appeal No. 207.

Mr. Hiralal Chakravarti, for the respondent, in Appeal No. 208.

CUMING J. The facts of the case, out of which these appeals arise, are these. One Himadri had a certain share in a certain *taluk*. He was involved in debt and there were a number of decrees out against him. On the 14th June, 1921, in execution of a money

decree, his share in the *taluk* was sold. He then applied on the 14th July, 1921, to have the sale set aside, on depositing the decretal amounts and this was allowed on the 18th July, 1921. It will appear that the money to do this was supplied by the plaintiff in the present suit, Babu Taraknath Mukherji. On the 8th July, Himadri had entered into an agreement to sell to Mukherji his interest in the *taluk* and Mukherji paid him in advance some Rs. 26,000 odd of the purchase money, and it was this money which was used to satisfy the decretal amount of the decree I have already referred to.

One Kalinath Basu had meanwhile obtained another decree against Himadri and, in execution of the decree, attached the same property on 25th September, 1921.

On the 16th September, 1921, two persons, Niladri and Sanat, had instituted money suits against Himadri and attached the property before judgment in one suit on the 10th August, 1921, and, in the other, on 3rd September, 1921. On the 29th November, 1921, the agreement for sale, I have already referred to, was completed and the property sold to Mukherji. The balance of the purchase money, Rs. 5,386 odd, was paid sometime before this date. Mukherji then put in objection to the three attachments under Order XXI, rule 58, but was unsuccessful. Mukherji deposited the decretal amount in Kalinath Basu's case. He has brought three suits. One against Kalinath Basu, asking for a declaration that the property was not liable to be sold in execution of Kalinath's decree and asking for a refund of the purchase money.

In the other two suits, he asked for a declaration that the property was not liable to be sold in execution of the decrees.

In Kalinath Basu's case, the court held that the property was liable for the decretal debt. In the other two cases, it was held that the property was liable to be sold in execution of the decrees which had since been obtained, subject to a mortgage charge of

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one Raja Sreenath Ray and subject to the right of the plaintiff to have his claim for specific performance of contract enforced against the auction purchaser. There were appeals and cross-appeals to the District Court. That court passed the following decree " that " the title of the plaintiff to the property would be " confirmed, but that he would pay certain sums to the " defendants which would be charge on the property."

A like cross-appeal in Suit No. 71 was dismissed.

The plaintiff has appealed and there are also cross-objections by the defendants. The plaintiff's case briefly is that the property is not in any way liable for the payment of the defendant's decrees. The question, therefore, to be decided in these appeals is a simple one, *viz.*, whether the attachment, which took place before the sale, or the sale itself shall prevail. So far as this point is concerned, section 64 of the Civil Procedure Code supplies a complete answer, for any private transfer or delivery of the property attached subsequent to the attachment is void against all claims enforceable under the attachment. Admittedly, the sale was completed on the 29th November, after the attachment. The section makes no distinction between attachment before or after judgment. The plaintiff appellant, however, would rely on the agreement of sale of the 8th July, and would seem to contend, if I understand his argument rightly, that this agreement to sale would create some obligation on the property, which obligation, if I understand him rightly, would prevail over the attachment.

The obligation presumably referred to here must be such an obligation as is referred to in section 40, Transfer of Property Act, an obligation which does not amount to an interest in the property or an easement. Section 54, Transfer of Property Act, makes it quite clear that a contract for sale does not create any interest or charge on the property.

Therefore, at the time of the attachments, the appellant had no interest in or any charge on the property which was attached. He had at the most an obligation as contemplated under section 40, Transfer

of Property Act, which might allow him to go to the transferee and compel the transferee to sell to him the property.

But it is equally clear that, as a result of the obligation, no charge or interest has been created by such obligation and, as far as I can understand, nothing can prevail against the attachment except some prior interest or charge. It might be that, as a result of the obligation or agreement, Mukherji might be able to go to the person who had purchased the property at an execution sale and ask that he should perform the contract for sale.

The appellant has relied in support of his contention on the case of *Madan Mohan Dey* v. *Rebati Mohan Poddar* (1).

If I understand that decision rightly, it did not decide or lay down any principle of law, but was decided on some principle of natural justice, for the learned Judge (Woodroffe J.) concludes his judgment by saying that the natural justice of the case demands that the defendants' purchase should prevail. The facts of that case were that the plaintiff had attached certain properties before judgment, on 6th November, 1895, and purchased them at an execution sale on 19th August, 1897. Before the sale, on 28th May, 1897, the defendant purchased the property by a *kabala*, in pursuance of a contract executed before the attachment. In deciding this case, Woodroffe J., no doubt discusses section 64, Civil Procedure Code, and also Order XXXVIII, rule 10, and remarks that the creditor can only attach the right, title and interest of his debtor, at the date of attachment and cannot complain, if his debtor has created an obligation against him prior to the attachment. Perhaps he cannot complain and, as far as I can see, he would have no grounds of complaint, for an obligation does not, as far as I can see, affect the right, title or interest of the judgment creditor at the time of the attachment. It creates no charge or interest and the very use of the expression 'obligation' shews that

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the learned Judge realised that it was not a right. Neither would it be a title or interest. Obviously, therefore, the creditor would have nothing to complain about, for, as far as I can see, it cannot affect his right to bring the property to sale in execution of his decree. The learned Judge, further on states that "It seems to me that if we are to hold that a "plaintiff as a creditor can ignore the obligation "incurred by the debtor we should use the provision "of section 64 for a purpose which was not intended, "that provision being for the protection of the "creditor against transactions subsequent to the "attachment."

The transactions referred to are transfers or delivery of the property and an agreement to sell is neither. But, as it creates no interest or charge in the property, there is nothing to protect the judgment creditor against. In my opinion, he is not affected by anything that creates no charge or interest in the property. But, after all, the decision of that case depends as far as I can see on no principle of law but on some principle of natural justice, and I find some difficulty in applying to the present case some principle of natural justice which was applicable obviously to the particular fact of that particular case.

I am, therefore, of opinion that the attachment must prevail over the subsequent sale to the plaintiff and that the property is liable for the satisfaction of the three decrees already referred, for the execution of which the property had been attached both before and after judgment. The plaintiff appellant states that if this be our decision, he does not quarrel with the form of the lower court's order and will not contest it.

The cross-appeals, in the event of the decision being against the plaintiff appellant, as it is, are not pressed and are dismissed. The result is that the appeals fail and are dismissed with costs.

PEARSON J. I only desire to add that I am unable to take the same view of the basis of the decision in

Madan Mohan Dey v. *Rebati Mohan Poddar* (1), as Cuming J. I think that decision was given on a consideration of the scope and effect of section 64, Civil Procedure Code, coupled with Order XXXVIII, rule 10, as affecting the circumstances of that case, and that it is not to be disposed of by saying that it was rested, not upon principles of law, but upon natural justice only. For the purpose of the present case, however, the only question is whether, in the circumstances, the attachment held good to the extent of the then unpaid balance of the purchase money under the prior agreement of July. At the time of the attachment, there is admittedly no question of any transfer of interest in the property, which, therefore, remained in the vendor. Neither the contract for sale nor the attachment created any such interest. Then, as regards the argument that the attachment cannot interfere with pre-existing rights under Order XXXVIII, rule 10, the question arises as to what those rights actually were. The vendor's right was to receive the balance of the purchase money, but only upon execution of the conveyance operating as a transfer, and from that he was prohibited in terms of the attachment order (see Order XXI, rule 54). In my view, when the attachment was made, it was an attachment affecting the right, title and interest of the debtor in the property, at any rate to the extent of any balance then receivable under the agreement: the debtor's existing interest in the property became thereby affected to that extent and the creditor became entitled to have it applied, in the events which happened towards payment of his debt. That, I think, is the fair effect of section 64, Civil Procedure Code, and Order XXXVIII, rule 10, in the circumstances of the present case. I would, therefore, agree with the order proposed to be made in this appeal.

Appeals dismissed.

A. A.

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