CIVIL REVISION.

1936

May 6, 8, 22.

Before R. C. Mitter J.

BULANDA BASHINEE DASEE

v.

PRAN GOBINDA DHAR.*

Bengal Tenancy—Sale of holding in execution of rent decree—Prior attaching creditor, under money decree, if interested in setting aside the sale—Bengal Tenancy Act (VIII of 1885), s. 174(1).

A creditor obtaining an order for attachment of a holding belonging to a judgment-debtor in execution of a money-decree is a "person whose interests are affected by the sale" of that holding in execution of the landlord's rent decree under s. 174(*1*) of the Bengal Tenancy Act for the purpose of setting aside the sale although effected before the actual attachment.

Sankaralinga Reddi v. *Kandasami Tevan* (1); *Venkatesha Kamathi* v. *Vitla Bhakta* (2) and *Dhirendra Nath Roy* v. *Kamini Kumar Pal* (3) referred to.

Lakhan Choudhry v. *Bacha Lal Singh* (4); *Jogendra Nath Chatterjee* v. *Monmotha Nath Ghosh* (5); *Sullamanji Ibrahimji* v. *Pragji Kala* (6) and *Rustamji* v. *Perozshaw* (7) considered.

Muthiah Chetti v. *Palaniappa Chetti* (8); *Sinnappan* v. *Arunachalam Pillai* (9) and *Nabadweepchandra Das* v. *Lokenath Ray* (10) distinguished.

CIVIL RULE obtained by the purchaser in execution sale.

A holding was sold in execution of a rent decree, and was purchased by the petitioner. Prior thereto a creditor of the tenant of the holding obtained an order for attachment of the holding but the actual attachment was effected after the sale. The application of the attaching creditor to set aside the sale was refused by the first Court. The lower appellate Court set aside the sale. Hence the purchaser appealed.

*Civil Revision, No. 1653 of 1935, against the order of G. B. Synge, District Judge of Murshidabad, dated Sep. 16, 1935, reversing the order of Panch Karhi Sarkar, Second Munsif of Kandi, dated June 29, 1935.

(1) (1907) I. L. R. 30 Mad. 413.
(2) [1933] A. I. R. (Mad.) 455.
(3) (1924) I. L. R. 51 Cal. 495.
(4) [1930] A. I. R. (Pat.) 451.
(5) (1912) 17 C. W. N. 80.
(6) (1916) 39 Ind. Cas. 392.
(7) [1925] A. I. R. (Sind) 101.
(8) (1928) I. L. R. 51 Mad. 349; L. R. 55 I. A. 256.
(9) (1919) I. L. R. 42 Mad. 844.
(10) (1932) I. L. R. 59 Cal. 1176.

Jateendra Nath Sanyal and *Bijali Bhooshan Sanyal* for the petitioner.

Bijan Kumar Mukherjea and *Sanat Kumar Chatterji* for the opposite parties.

Cur. adv. vult.

R. C. MITTER J. The Secretary of State for India in Council, who is opposite party No. 2 in this Rule, obtained a decree for rent against opposite parties Nos. 3 and 4, Hatu Datta and Sudhangsu Bhooshan Datta. In execution of his decree the defaulting holding was sold and purchased by the petitioner, Bulanda Bashini Dasee, on May 27, 1935. It is this sale that the opposite party No. 1, Pran Gobinda Dhar, wanted to set aside by making a deposit under the provisions of sub-s. (*1*) of s. 174 of the Bengal Tenancy Act. His application for setting aside the said sale was refused by the first Court, but has been allowed by the lower appellate Court and the said sale has been set aside. The question raised in this rule is whether the Court had jurisdiction to entertain the said application of opposite party No. 1. This question depends upon the question as to whether he is a person whose interest has been affected by the rent sale.

The answer to this question depends upon the following facts which are not disputed by any of the parties to this Rule.

Opposite party No. 1 had obtained a money-decree against opposite parties Nos. 3 and 4. He applied for execution of his decree. An order for attachment of the holding in question was passed in the proceedings for execution of his decree on May 23, 1935, that is four days before the rent sale, but the property was actually attached after it, that is on June 21, 1935. He made the application under s. 174(*1*) and made the deposit as required by that section on June 22, 1935.

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It is now settled law, so far this Court is concerned, that an attaching creditor, who has attached in execution of his decree, has the right to apply to set aside a sale under O. XXI, r. 90 of the Code, which contains the same words—namely "whose interests "are affected by the sale" as occur in s. 174(*1*) of the Bengal Tenancy Act. But it is said by the learned advocate appearing for the petitioner that the fact of attachment alone in execution of a decree gives him the *locus standi* to apply for setting aside the sale under the provisions of O. XXI, r. 90 of the Code or s. 174 of the Tenancy Act, according as the sale is under the Code or the Tenancy Act. It is necessary to examine in this case the said contention and the precise principle.

In my judgment a person who has a proprietory or possessory interest existing at the date of challenged sale, which would be affected by it, has the right to apply to set aside the sale under O. XXI., r. 90 of the Code or s. 174 of the Tenancy Act. That is the simplest case. But a creditor who has attached the property in execution of his decree for money is a person who has got no proprietory or possessory interest therein. But he has a pecuniary interest therein, because it is the property to which he looked for the satisfaction of his decree. He has the right to its preservation in the same state and can sue if a third party by wrongful acts destroys it or diminishes its value [*Sankaralinga Reddi* v. *Kandasami Tevan* (1)], for such wrongful acts would ultimately affect the price that the property would fetch at the Court sale, the price which would have been the means of satisfaction of his decree. If it is sold in execution of another's decree, he having the right of rateable distribution is entitled to see that it has been sold not at an inadequate price by an irregular or fraudulent sale, for more the price fetched, the more would be his share in the rateable distribution. If he has not the

(1) (1907) I. L. R. 30 Mad. 413.

right to claim rateable distribution, the surplus sale-proceeds, after satisfying the claim of the decree-holder at whose instance the property was sold, would be available to him, and more the price fetched, the more would be the surplus. He has, therefore, a pecuniary interest affected by an irregular or fraudulent sale which had fetched an inadequate price by reason of the irregularity or fraud. It is on this principle and this principle only, namely, that his pecuniary interest are affected, that his right to apply for setting aside the sale is, in my judgment, based [*Venkatesha Kamathi* v. *Vitla Bhakta* (1)] and I consider that this is the only principle on which his right so to apply has been supported in the case of *Dhirendra Nath Roy* v. *Kamini Kumar Pal* (2). Page J. expressly puts the case on the said principle alone. Suhrawardy J. also states the principle in that way at p. 498 of the report. When he says that an attaching creditor has an interest in the sale of the property or in the property itself, he means that he has a pecuniary interest therein, because he looked to the property for the satisfaction of his money decree, which was sold at the instance of another creditor of the same judgment debtor. That is also the basic principle underlying the decision in *Sankaralinga's* case (3) as I have indicated above, on which Suhrawardy J. relies for his support.

Most of the cases where the question has come up are cases where the person who had applied for setting aside the sale had actually attached in execution the property before the sale and consequently in these cases the observations are to the effect that the attachment gave pecuniary interest in the property to the person seeking to set aside the sale. The question in this case is whether the fact of attachment in execution of a decree only gives him a pecuniary interest. In my judgment, the fact of attachment is one of the

(1) [1933] A. I. R. (Mad.) 455. (2) (1924) I. L. R. 51 Cal. 495.
(3) (1907) I. L. R. 30 Mad. 413.

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modes by which pecuniary interest is acquired in the property, but only one of many modes in which such an interest can be acquired. A mortgagee of a non-transferable occupancy holding who has recovered a decree, or even one who has not recovered a decree, can apply to set aside a rent sale held under Chap. XIV of the Tenancy Act. It may be said that the holding being non-transferable, he had not acquired any proprietory interest in the same against the landlord who has obtained the rent decree, but surely his pecuniary interest is affected by the rent sale. It is on this principle that the Patna High Court has supported his right to apply for setting aside a rent sale [*Lakhan Choudhry* v. *Bacha Lal Singh* (1)]. In such cases there is no attachment at all. In my judgment the correct principle for determining whether the applicant for setting aside the sale had acquired before the challenged sale a pecuniary interest in the property is to be gathered from the following passage in italics in the judgment of Mookerjee J. in the case of *Jogendra Nath Chatterjee* v. *Monmotha Nath Ghosh* (2) where he was considering the difference between an attachment before judgment and attachment in execution of a decree :—

> An attachment after decree, on the other hand, is an attachment made for *immediate purpose of carrying the decree in execution*, and it presupposes an application on the part of the decree-holder to have his decree executed.

In that case the question was whether a person who had attached the property before judgment but had not got a decree could apply to set aside a sale and it was answered in the negative. For drawing a *contrast*, the case of an attachment in execution of a decree was spoken of, but in my judgment a decree-holder acquires a pecuniary interest in the property, the sale of which at the instance of another decree-holder he challenges as soon as he has done a formal act, an act in Court, which indicates unequivocably that he wants that property for the satisfaction of his

(1) [1930] A. I. R. (Pat.) 451. (2) (1912) 17 C. W. N. 80, 81.

decree. The act must be specific, in relation to that particular property, must not remotely but proximately or immediately connect his intention to realise his dues out of that particular property. On this principle a person who has attached before judgment but who has at the date of the challenged sale got no decree would not be entitled to apply for setting aside the sale. A person who has obtained a decree for money, but has not applied for execution would also have not the right to apply on this principle, as he has not taken any action in Court to indicate that he looked to that particular property sold for satisfaction. The cases cited by the petitioner, namely, *Sullamanji Ibrahimji* v. *Pragji Kala* (1) and *Rustamji* v. *Perozshaw* (2), fall within this type. A person who has obtained a decree for money and has only applied for execution but has not applied for and obtained an order for attachment of the particular property may possibly be excluded, but when a person has gone further and has taken effective and definite steps for proceeding against the particular property, which steps in normal course would lead to the sale of the property in question for satisfaction of his decree, I think he would have the right to apply for setting aside the sale. Here such a definite step had been taken by the opposite party No. 1. He had asked for and had obtained an order for attachment of the holding sold at the rent sale brought about at the instance of the landlord, the Secretary of State for India in Council, before the rent sale. He had unequivocably manifested his intention to look to the said holding as a means of satisfying his decree and had done an act which cannot be said to connect remotely his intention to realise his decretal dues with the said holding. He had obtained an order from the Court which in its normal course, in the course of ministerial acts and proceedings only and without a further judicial order, would have placed the said property in *custodia legis* as a preliminary, necessary and immediate step for

(1) (1916) 39 Ind. Cas. 932. (2) [1925] A. I. R. (Sind) 101.

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enabling the satisfaction of his decree out of the same. It on this principle I hold that the opposite party No. 1 had *locus standi* to apply under s. 174(*1*) of the Bengal Tenancy Act, though the actual attachment was effected after the rent sale. I do not consider that the case of *Muthiah Chetti* v. *Palaniappa Chetti* (1) or the cases of *Sinnappan* v. *Arunachalam Pillai* (2) and *Nabadweepchandra Das* v. *Lokenath Ray* (3) to have any bearing upon the point that I have to decide. Those cases lay down that there is a distinction between an order for attachment and the actual attachment, and where the legislature has used the word attachment, as for instance in Art. 11 of Sch. I of the Limitation Act and s. 64 of the Code, it means attachment and not the order in consequence of which the attachment is afterwards made, with the necessary corollary that the result of attachment indicated by the legislature would follow only when there is the attachment and not before. I, accordingly, hold that the right order has been passed by the Court of appeal below and this Rule must be discharged with costs to opposite party No. 1, hearing fee 1 gold mohur.

Rule discharged.

A.K.D.

(1) (1928) I. L. R. 51 Mad. 349; L. R. 55 I. A. 256.

(2) (1919) I. L. R. 42 Mad. 844.

(3) (1932) I. L. R. 59 Cal. 1176.