

PRIVY COUNCIL.

DINENDRONATH SANNIAL AND ANOTHER (DEFENDANTS) v. RAM-
KUMAR GHOSE AND OTHERS (PLAINTIFFS).

TARAKCHANDRA BHUTTACHARJIA v. BAIKANTNATH
SANNIAL AND OTHERS.

P.C.*
1880
Nov. 30 §
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[On appeal from the High Court of Judicature at Fort William in Bengal.]

*Private Sale of Property attached in Execution—Incumbrance created after
Attachment—Civil Procedure Code (Act VIII of 1859), s. 240.*

The title obtained by the purchaser on a private sale of property in satisfaction of a decree, differs from that acquired upon a sale in execution. Under a private sale, the purchaser derives title through the vendor, and cannot acquire a title better than his. Under an execution-sale, the purchaser, notwithstanding that he acquires merely the right, title, and interest of the judgment-debtor, acquires that title, by operation of law, adversely to the judgment-debtor, and freed from all alienations and incumbrances effected by him after the attachment of the property sold.

In 1858, the respondent obtained a decree against *B*. In 1863, in satisfaction thereof, he caused to be attached a decree for mesne profits made in favor of *B* against the appellants in 1860. In May 1865, the respondent obtained an order for the sale thereof; but instead of proceeding to execution-sale, he purchased, in 1866, the whole of the mesne profits due under the decree of 1860, by private sale from *B*. Meanwhile, in September 1865, an order of Court had been made, between *B* and the appellants, on their consent (but without the respondent being a party to it), whereby the decree for mesne profits was set off, *pro tanto*, against a prior decree for a larger amount, which the appellants had obtained against *B*.

Held, that the sale of 1866 having been a private one, and not in process of execution, the respondent only obtained such title as *B* had in the decree of 1860—*viz.*, a title subject to the effect of the order of September 1865.

APPEAL from a decree of the High Court (16th March 1877), reversing a decree of the Subordinate Judge of Rajshahye (10th July 1875).

The principal question on this appeal was as to the effect of an order made on consent by a Divisional Bench of the High

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1881 Court, on the 14th of September 1865, in reference to the execution of two cross-decrees. In 1828, persons called in these proceedings the Sannials had obtained a decree for more than Rs. 82,000, on which interest accrued, against others called the Bhuttacharjias. In 1860, the Bhuttacharjias obtained a decree against the Sannials, setting aside a sale of lands which had taken place in execution of the decree of 1828, and awarding mesne profits. On the 14th September 1865, an order of Court was made, on consent of the parties, that the decree of 1860 should be set off in part satisfaction of the decree of 1828. Meanwhile, in 1858, the father of the respondent Ramkumar Ghose had obtained a decree against the Bhuttacharjias for money; and in May 1863, in consequence thereof, the decree of 1860 was attached. In 1866, Ramkumar Ghose, not proceeding to execution by sale of the attached decree, purchased from the Bhuttacharjias the whole of the mesne profits due to them under their decree of 1860.

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This appeal rose out of proceedings afterwards taken by Ramkumar Ghose, jointly with the Bhuttacharjias, in execution of the decree of 1860. The Sannials opposed this execution, on the ground both of limitation and of the right of set-off established in 1865.

In the Court of first instance, a stay of proceedings was ordered on the latter only, of the above grounds of defence. The High Court concurred in holding that limitation did not bar the proceeding to execution, but declined to give effect to the order for the set-off, and reversed the decree of the first Court.

The judgment of the Court (KEMP and AINSLIE, JJ.), after giving at length a history of the litigation, continued thus:—

The only question we have to deal with is, whether Ramkumar Ghose, by purchasing the Bhuttacharjias' claim to mesne profits on the 27th March 1866, after their agreement with the Sannials to have their decree adjusted by set-off, recorded in the order of this Court of 14th September 1865, is bound by that order, and, consequently, loses the advantage which he had gained by attaching the Bhuttacharjias' decree. It has been decided that, as against him as a rival decree-holder, no right

of set-off under the law (s. 209, Act VIII of 1859) existed; and it is admitted that, if he had proceeded on his attachment and caused the Bhuttacharjias' decree to be sold, and had himself become the purchaser, the Sannials could not have resisted his claim to put that decree into execution without reference to their cross-decree. But it is contended that his decree has been satisfied, and that the attachment thereby came to an end, and that he stands in precisely the same position in respect of the Sannials as any third party, wholly unconnected with this litigation, who might have acquired by private purchase the Bhuttacharjias' rights at a date subsequent to September 1865.

There are several reported decisions, of which it is only necessary to mention the judgment of the Privy Council in *Anund Loll Doss v. Jullodhur Shaw* (1), which point out that the object of s. 240 is to secure the rights of an attaching decree-holder. These, however, do not carry us very far; but there is the Madras case of *Annunavadan v. Iyasawmy Pillai* (2), which is in many respects analogous to this case. In that case, the plaintiff, having sued on a bond by which property was hypothecated, obtained a decree establishing his rights under the hypothecation, and attached the property in execution. Eventually, the judgment-debtors, in 1868, sold the property to the plaintiff while still under attachment for the amount decreed. The defendant set up various claims arising out of an alleged mortgage and sale to his vendor, and subsequent agreement in 1857; but these had already been rendered fruitless by the result of a suit instituted in 1862. He further relied on a agreement made in 1866 while the property was under attachment, but not made with him with the consent of the plaintiff for the satisfaction of his decree. The Court held the plaintiff entitled, by s. 240, to recover on his purchase unincumbered by the prior agreement between his vendor and the defendant.

If, then, a private sale of the attached property with the consent of the attaching creditor for the satisfaction of his decree, whether to the creditor himself or to a third person, is protect-

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(1) 14 Moore's I. A., 543.

(2) 6 Mad. H. C. Rep., 65.

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ed by s. 240 from any incumbrances imposed on the property subsequent to attachment as much as if it was a sale effected under the orders of the Court, Ramkumar Ghose, who purchased the property attached by him in satisfaction of his own decree, is entitled, so far as may be necessary to secure his own rights, to hold it clear of the incumbrance created by the consent-decree between the Sannials and the Bhuttacharjias recorded behind his back, while the property was subject to his attachment. It is evident, that that consent-decree was made with full knowledge that it might not be operative against Ghose; for, six days after it was recorded, the Sannials commenced their suit for the express purpose of preventing Ghose from interfering with this arrangement. Failing on the ground first taken, that they were by law entitled to take the amount of the Bhuttacharjias' decree in satisfaction *pro tanto* of their own by set-off, they then tried to secure their end by putting forward a right by prior attachment: this was more than a year after the purchase by Ghose. This having failed, they now contend that the benefit of the attachment was waived by the private purchase, but, as it seems to us, with equal ill-success. But while we hold that we are not at liberty to close our eyes to the result of the Sannials' suit of 1865, which was, that, as against Ghose, they had no right to touch the decree obtained by the Bhuttacharjias against themselves until Ghose's claim should be satisfied, we do not think we are bound to extend the protection claimed by Ghose under s. 240, Act VIII of 1859 further than is necessary for the purpose of satisfying his decree. What would be the consequence? That the Sannials having a decree of 1828, which, with the accumulated interest, was calculated by the Judge to have amounted to Rs. 4,97,612 on the 3rd August 1872, and (assuming the correctness of that calculation) is now nearly 5½ lakhs, would have nothing to recover from except such interests of the Bhuttacharjias as may exist other than the decree in dispute; while Ramkumar Ghose, with a decree obtained in 1858 for Rs. 67,000 and odd, which may be roughly estimated as now amounting with accumulated interest to Rs. 2,30,000, would be enabled to execute against them the decree of the Bhuttacharjias, whose claim,

assessed in 1862 as something over Rs. 2,11,000, must now, with interest, come to about Rs. 5,91,000.

This is a result so disastrous to the Sannials and the Bhuttacharjias, and so unduly favorable to Ghose, that we think we are bound in equity to see whether some relief cannot be given against it. We think this case may be distinguished from the Madras case cited above, in which the Court refused to allow the first purchaser to retain his claim to the land subject to payment of the sum due to the plaintiff under his decree. The subject of sale in that case was land valued and sold for a certain sum, which may be taken to have been a fair, though probably not a maximum, value: at any rate, the thing sold was certain, and capable of immediate valuation. In the present case, the subject of sale was a claim to money, and the actual value of it was, and still is, uncertain. The purchase was effected at a time when a settlement had been arranged between the Sannials and the Bhuttacharjias, and while the former were prosecuting a suit against the purchaser for the purpose of giving effect to that settlement. It may be that, under these circumstances, the price was as much as there was any prospect of the vendors then realizing; but, unquestionably, the transaction was a speculative one so far as the purchaser was concerned: to the vendors [who apparently were insolvent], it seems to have been of no great consequence whether the money due under their decree went to Ghose or was retained by the Sannials.

If, instead of attempting to sell the Bhuttacharjias' decree, the Court had, under s. 243, done what we think it ought to have done, namely, appointed a manager to put the decree into execution so far as was necessary to satisfy the claim of the attaching creditor, Ghose's interest would have been duly protected without any avoidable sacrifice of the interest of the Sannials.

We should now, we think, deal with this case as if this course had been adopted. The result will be, that while Ghose is enabled to recover that which he might claim under his decree against the Bhuttacharjias unfettered by any agreement between them and the Sannials, the balance of the decree will be subject to that agreement.

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The decree of the Sannials must be calculated with simple interest from the date of the decree to the 14th September 1865; and that of the Bhattacharjias, from the date of the ascertainment of mesne profits to the same date. The amount of Ghose's decree with interest as therein awarded, must also be calculated to the same date. After deducting Ghose's decree from the Bhattacharjias' decree, the balance of the latter must then be set off against the Sannials' decree; the Bhattacharjias' decree, so far as they are concerned therewith, must be declared finally satisfied. Satisfaction will be entered on the Sannials' decree, taking effect from 14th September 1865, to the extent of this balance; and for the remainder, with the subsequently accruing simple interest, they will be at liberty to proceed in execution against the Bhattacharjias, while Ramkumar Ghose is declared entitled to proceed against them (the Sannials) upon the unsatisfied portion of the Bhattacharjias' decree with interest on the principal sum of his own decree. The order of the Subordinate Judge in execution suit No. 69 is set aside, and the case remanded to him with instructions to proceed at once upon these orders and wind up the accounts with as little delay as may be.

We make no order for costs.

Mr. Leith, Q. C., and Mr. C. W. Arathoon for the appellants.

Mr. R. V. Doyme and Mr. T. D. Mayne for the respondent.

For the appellants it was contended that the respondent, Ramkumar Ghose, was not protected against the consequences of an alienation by the Bhattacharjias effected in 1865, before his purchase from them. The consent given in September 1865 to the order of Court, declaring the set-off, established a prior charge on the decree of 1860. The respondent having bought the decree by a private sale, the result was, that his attachment in no way interfered with the right of set-off established by the order of September 1865. Even if the sale had taken place in due process of execution, the attachment of May 1865 would not prevail over the order of September 1865; for, at the time of the attachment, the litigation was pending, which resulted

in the order of set-off, and the respondent must be deemed to have had notice that the decree of 1860 was subject to a claim prior to his own.

For the respondent, Ramkumar Ghose, it was argued, that the order of the 14th September 1865 was not a complete judicial order disposing of the right of execution set-off. Nothing less than a complete order of a Court would prevent the respondent's right to execute from arising, and an execution set-off, as distinguishable from equitable set-off, depended upon distinct directions given to the Court under the legal obligation to execute. The order of the 14th of September 1865 was insufficient in this respect. Again, at the time when the order of September 1865 was issued, the property was subject to this attachment at the suit of the respondent already placed upon the decree of 1860.

Reference was made to *Jhatu Sahu v. Baboo Ramacharn Lal* (1), *Sheikh Golam Yabeya v. Mussamut Shamasundari Kuari* (2), *Puddomonee Dossee v. Roy Muthooranath Chowdhry* (3), *Maharaja Dhiraj Mahatab Ohand v. Surnomoyee Dossee* (4).

Mr. *Leith*, Q. C., replied.

At the end of the arguments, on the 4th December 1880, their Lordships having stated that the decree of the High Court must be reversed, reserved the statement of their reasons till after the hearing of the appeal—*Tarakchandra Bhuttacharjia v. Baikantnath Sannial*.

This latter case was finally disposed of on the 26th January 1881, when *W. A. Raihes* (*Cowie*, Q. C., with him) argued the case for the appellants.

Mr. *Leith*, Q. C., and Mr. *C. W. Arathoon* for the respondents.

Mr. *W. A. Raihes* replied.

Sir B. PRACOCK, on the 26th January 1881, after the death of Sir J. W. Colville, stated their Lordships' reasons.

(1) 3 B. L. R., App., 68.

(2) *Ibid*, 134.

(3) 12 B. L. R., 411.

(4) *Ibid*, 414, note

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SIR B. PEACOCK.—This is an appeal from a judgment and decree of the High Court at Calcutta, dated the 16th of March 1877, which reversed an order of the Subordinate Judge of Rajshahye, dated the 10th July 1875, by which he ordered, amongst other things, that an execution case, No. 69 of 1875, instituted by the respondents against the appellants should be postponed until further orders.

At the close of the arguments on the hearing of the appeal their Lordships, after deliberation, stated that they would humbly advise Her Majesty by their report to reverse the decree of the High Court and to affirm that of the Subordinate Judge of Rajshahye so far as it related to the execution case, No. 69 of 1875, and that the respondents must pay the costs of the appeal. They, however, reserved the statement of their reasons for this report until after the argument of another appeal in some respects connected with this case, in which Tarakohandra Bhuttacharjia is the appellaut and Baikantnath Sannial and others are the respondents.

Their Lordships will now proceed to give their reasons for the report in the first appeal, which will be submitted to Her Majesty at the next Council.

The history of the case is stated by the learned Judges in the judgment under appeal. It appears that, in the year 1828, certain persons who are now represented in estate by the appellants, and whom, as well as the appellants, it will be convenient to speak of as the Sannials, obtained a decree against certain other persons who, as well as the Bhuttacharjia, respondents, may be called the Bhuttacharjias, for a sum exceeding Rs. 82,000. It was subsequently held, that the judgment carried interest at 12 per cent. from the date of the decree until the realization thereof. In execution of the decree the Sannials attached, sold, and became the purchasers of certain immoveable properties of the Bhuttacharjias, and obtained possession thereof, which they retained for many years. After considerable delay the Bhuttacharjias instituted proceedings to set aside the sale in execution, and on the 10th of November 1857 obtained a decree of the Principal Sadr Amin of Rajshahye, setting aside the sale and declaring the right of the

Bhuttacharjias to be restored to possession of their property with mesne profits. That decree was affirmed on appeal by the late Sadr Court on the 23rd May 1860.

In the interval, between the date of the decree of the Principal Sadr Amin and the affirmance thereof by the Sadr Court, *viz.*, on the 17th of May 1858, Anund Mohun Ghose, the father of the respondent Ramkumar Ghose, and who is now represented by him, obtained a decree against the Bhuttacharjias for a sum exceeding 67,000 rupees. In execution of that decree Anund Mohun Ghose attached, in May 1863, the Bhuttacharjias' right to mesne profits under their decree against the Sannials of the 10th of November 1857, and on the 26th May 1865, an order was issued by the District Court for sale of the decree for mesne profits.

The sale in execution of the Sannials' decree of 1828 having, as before stated, been set aside, they took fresh proceedings to have the decree again executed for the amount of principal and interest due thereon. Numerous conflicting judgments were, from time to time, given by different Courts as to the amounts due to the Sannials and to the Bhuttacharjias respectively, on their respective decrees, and as to the right to set off one judgment against the other. The amount due to the Sannials under their decree exceeded the amount due by them to the Bhuttacharjias under their decree for mesne profits. It is unnecessary, and it certainly would not be profitable, to point out in detail the effect of the several conflicting judgments which were delivered in the course of the litigation between the Sannials and the Bhuttacharjias. It is sufficient to say that, on the 14th of September 1865, upon an application for a review of a judgment which is not set out in the record, a judgment was given by Justices Kemp and Campbell, stating that it had been arranged, by consent of both parties, that the Sannials should have simple interest only on their original decree from the year 1828 to the date of payment, it being understood that the cross-decree of the Bhuttacharjias for mesne profits should also bear simple interest from the date of ascertainment only. The learned Judges, having then proceeded to modify an order which had been previously made, declared that simple interest

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only should be calculated on the Sannials' decree from 1828, and that then the decree of the Bhuttacharjias should be set off against the gross amount of the Sannials' decree once for all.

It is not clear that the operative part of the order was made by consent, but the fact has not been disputed, and it may be taken to have been so. The judgment was given in a proceeding in which the Sannials were petitioners, and the Bhuttacharjias were judgment-debtors. Ramkumar Ghose was not a party to the proceeding. He did not, however, proceed to a sale under the execution against the Bhuttacharjias of the decree for mesne profits which he had attached, but he entered into a private arrangement with them, by which they sold to him the whole of the mesne profits due to them under their decree against the Sannials, together with all interest due thereon, in lieu of the sum of Rs. 74,506 due to him upon the decree obtained against them by Anund Chundra Ghose, his father. The arrangement was carried into effect by a deed of sale, dated the 15th Chéyt 1272, corresponding with the 27th March 1866. It was correctly stated by the High Court that the only question they had to deal with was, whether Ramkumar Ghose, by purchasing the Bhuttacharjias' claim to mesne profits on the 27th of March 1866, after their agreement with the Sannials to have their decree adjusted by set-off, recorded in the order of the 14th September 1865, was bound by that order, and consequently lost the advantage which he had gained by attaching the Bhuttacharjias' decree.

The Subordinate Judge had held that Ramkumar Ghose, by privately purchasing the mesne profits from the Bhuttacharjias, had destroyed the right which he possessed under his attachment as a decree-holder, and stayed his execution against the Sannials. The High Court reversed that decision, and held that the benefit of the attachment was not affected by the private purchase, and that Ramkumar Ghose was entitled, so far as might be necessary to secure his own rights, to hold the decree clear of the incumbrance created by the consent-decree between the Sannials and the Bhuttacharjias which had been recorded behind his back while the property was subject to his attachment. They, however, limited the right of Ram-

kumar Ghose to avail himself of the mesue profits freed from the Saunnials' right of set-off to the extent of satisfying the amount of his decree against the Bhattacharjias with simple interest to the 14th September 1865, the date of the consent order.

Their Lordships are of opinion that the private sale to Ramkumar Ghose was not tantamount to, and had not the same effect as, a sale in execution of Ramkumar Ghose's decree, under which the mesue profits had been attached; and that Ramkumar Ghose, by virtue of his purchase, acquired no greater interest than the Bhattacharjias had in the decree for mesue profits, and consequently that he was bound by the order of the 14th September 1865.

By s. 201 of Act VIII of 1859, it is enacted that if the decree be for money (which Ramkumar Ghose's decree was), it shall be enforced by the imprisonment of the party against whom the decree is made, or by the attachment and sale of his property, or by both, if necessary. By s. 205 debts due to the judgment-debtor may be attached and sold as property in execution of a decree. By s. 236, where the property shall consist of debts not being negotiable instruments or shares in any railway, banking, or other public company or corporation, the attachment shall be made by a written order prohibiting the creditor from receiving the debts, and the debtor from making payment thereof to any person whomsoever until the further order of the Court; and then by s. 240, in the case of an attachment by written order, any payment of the debts to the judgment-debtor after the order shall have been made known in the manner in the said Act mentioned, and during the continuance of the attachment, shall be null and void.

It is not necessary to decide whether, if Ramkumar Ghose had purchased at a sale, under his execution, the attachment would have protected him from the effect of the order of the 14th September 1865, the attachment having been issued *pendente lite*,—that is to say, pending the proceedings between the Saunnials and the Bhattacharjias, in which the question was raised as to the right of set-off. It may be admitted for the sake of argument, but only for the sake of argument, that

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the order of the 14th September 1865, made by consent of the Sannials and of the Bhuttacharjias, directing the set-off, amount- ed to a payment of the mesne profits by the Sannials to the Bhuttacharjias, and a receipt thereof by the Bhuttacharjias with- in the meaning of s. 240. The effect of that section, however, is, not to render the payment of a debt which has been attached in execution absolutely void, under all circumstances and against every one, but merely to make it void, so far as may be necessary to secure the execution of the decree. The principle is clearly laid down in the case of *Anund Loll Doss v. Jullodhur Shaw* (1). The private sale, pending the attachment, was binding upon Ramkumar Ghose, and also upon the Bhuttacharjias. Ram- kumar's decree was satisfied by the sale to him of the mesne profits in lieu of the sum due to him under his decree. He never afterwards could have proceeded to execute that decree or to sell under the attachment. By privately purchasing the mesne profits which he had attached, he abandoned his execu- tion, and also the attachment, which was a part of the execution.

There is a great distinction between a private sale in satisfac- tion of a decree and a sale in execution of a decree. In the former, the price is fixed by the vendor and purchaser alone; in the latter, the sale must be made by public auction conducted by a public officer, of which notice must be given as directed by the Act, and at which the public are entitled to bid. Under the former, the purchaser derives title through the vendor, and cannot acquire a better title than that of the vendor. Under the latter, the purchaser, notwithstanding he acquires merely the right, title, and interest of the judgment-debtor, acquires that title by operation of law adversely to the judgment-debtor, and freed from all alienations or incumbrances effected by him subsequently to the attachment of the property sold in execution.

The High Court relied upon the case of *Annavunavadan v. Iyasawmy Pillai* (2), but there is a distinction between that case and the present, for there the property sold was hypothecated to the plaintiff by the bond for which the decree was obtained. The case, however, is of no greater authority than

(1) 14 Moore's I. A., 549, 5 0.

(2) 6 Mad. H. C. Rep., 65.

the decision under consideration, and their Lordships are not prepared to say that it would have been affirmed on appeal.

Their Lordships cannot but regard as lamentable, the long, harassing, and expensive litigation to which the Sannials have been subjected in endeavouring to obtain the fruits of their decree of 1828, an object which, although upwards of half a century has elapsed since the date of the decree, they have not as yet attained. It is indeed a subject of deep regret that in the course of that litigation so many contradictory and conflicting judgments have been delivered, sometimes on appeal from an inferior to a superior Court, and sometimes even by the same Judges in reviewing their own judgments.

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THE hearing of the appeal of Tarakchandra Bhuttacharjia v. Baikantnath Sannial and another, having been interrupted by the lamented death of Sir James Colvile, the case was re-argued this day before the Committee, and their Lordships' judgment, at the close of the argument, was delivered, in the following terms, by

SIR B. PEACOCK.—Their Lordships are of opinion that the decision of the High Court was correct as to the construction of the order of the 14th September 1865. That order runs as follows:—

“ At the hearing of this case this day by consent of both parties it (torn) arranged that the plaintiff (torn) have simple interest only (torn), original decree from the year (torn), date of payment, it being (torn) that the cross-decrees of (torn), for wasilat also bears simple interest from date of ascertainment only. The orders, therefore, for calculating interest on the one hand upon the sum ascertained to be due in 1250, and for setting off the wasilat due to defendants year by year is modified, and there will be no annual account to set the two accounts against one another. The simple interest only will be calou-

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