APPELLATE CIVIL.

Before Mr. Justice Krishnan and Mr. Justice Odgers.

1921, August 10.

ANTHAYA HEGADE AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

MANJAIYA SHETTY (PLAINTIFF), RESPONDENT.*

Civil Procedure Code (V of 1908), sec. 64—Attachment of debt—Raising of attachment after successful claim proceedings—Success of suit to contest order on claim—Payment of debt in the interval, validity of—Revival of attachment—Payment of debt to benamidar, validity of.

The raising of an attachment on the success of claim proceedings is only provisional and the attachment is revived on the success of the suit by the attaching decree holder—*Bonomali Rai* v. *Prosunno Narain Chowdhry*, (1896) I L.R., 23 Calc., 829, followed. Hence any payment made by a debtor to his creditor, though after the raising of the attachment of the debt, cannot prevail against the attaching decree-holder who eventually succeeds in his suit.

SECOND APPEAL against the decree of K. GOPALAN NAYAR, Acting Subordinate Judge of South Kanara, in Appeal Suit No. 117 of 1919 preferred against the decree of K. BALAJI RAO, District Munsif of Coondapoor, in Original Suit No. 465 of 1918.

The facts are set out in the Judgment:

B. Sitarama Rao for appellant.—The defendants were not parties to claim proceedings; *lis pendens* does not affect a person who is not a party: *Pethu Ayyar* v. *Sankaranarayana Pillai*(1). *Lis pendens* does not apply to *moveables*: *Govind Baba Gurjar* v. *Jijibai Saheb*(2), and *Puninthavelu Mudaliar* v. *Bhashyam Ayyangar*(3). A

* Second Appeal No. 700 of 1920.

(1) (1917) I.L.R., 40 Mad., 955. (2) (1912) I.L.R., 36 Bom., 189, 198.
(3) (1902) I.L.R., 25 Mad., 406, 422.

payment is not an alienation. Section 64, Civil Procedure Code, does not apply, as the attachment had been raised: *Patringa Koer* v. *Madhavan and Ram*(1). Even if attachment is subsequently revived, it does not matter, I am discharged by payment to the benamidar: *Singa Pillay* v. *Govinda Reddy*(2).

K. Yegnanarayana Adiga for respondent.—I am a third party. The payment cannot be said to have been bona fide. A payment to one having no authority to receive is no good. On success of suit, attachment revives and section 64, Civil Procedure Code, applies and one need not reattach: *Krishnappa Chetty* v. *Abdul Khader Sahib*(3), *Lalu Mulji Thakar* v. *Kashibai*(4), *Bonomali Rai* v. *Prosunno Narain Chowdhry*(5), *Ali Ahmad Khan* v. *Bansidhar*(6) and *Ram Chandra Marwari* v. *Mudeshwar Singh*(7).

The Court delivered the following JUDGMENT:

The question for our decision in this Second Appeal is whether the payment of the two instalments of the plaint bond made by the defendants to Rukmini Shettithi and Mahabala Hegade on 18th March 1914 and 17th February 1915, respectively, are valid against the plaintiff. The learned Subordinate Judge has found them to be not valid and has disallowed the plea of partial discharge based on them.

The bond sued on is a simple money bond payable by instalments and was executed by the defendants in the name of one Sinnappa Chetty. Now it has been found that Sinnappa Chetty was merely a name lender or benamidar for one Nagappa Hegade to whom the debt

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(1) (1911) 14 C.L.J., 476.
(2) (1918) I.L.R., 41 Mad., 435.
(3) (1915) I.L.R., 38 Mad., 535.
(4) (1886) I.L.R., 10 Bom., 400, 407.
(5) (1896) I.L.R., 23 Calc., 829, 834.
(6) (1909) I.L.R., 51 All., 367.
(7) (1906) I.L.R., 33 Calc., 1158.

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was really due. One Sankayya got a decree against Nagappa in Original Suit No. 496 of 1909 and attached the plaint debt in execution of his decree in 1913. Before that, the bond had been assigned by Sinnappa to Rukmini and Mahabala who are the persons to whom the payments in question here were made by the defendants and who are the children of Nagappa. On the attachment being effected they preferred a claim under Order XXI, rule 58 of the Civil Procedure Code to the whole debt. Their claim was allowed and the attachment was withdrawn on 17th February 1914. Sankayya, the defeated decree creditor, then brought a suit against Nagappa, his judgment-debtor, and against Sinnappa Chetty and his assignees, Rukmini and Mahabala, and against the present defendants, the debtors under the bond, for a declaration that Sinnappa was a benamidar for Nagappa and so were his assignees and that he was entitled to attach the debt in execution of his decree. This suit was filed in April 1914. The suit was decreed in Sankayya's favour and the Appeal and Second Appeal against him failed and the debt due under the bond was sold in Court auction in 1918; whether there was a fresh attachment or not does not appear. The plaintiff purchased the debt in that auction and now sues for the whole amount due as it stood on the date of the original attachment.

It will be observed that the payments pleaded by the defendants were made the first one just after the original attachment was raised and before Sankayya's declaratory suit was filed, and the second when that suit was pending; both were made after the instalments fell due under the bond but after the date of the original attachment. Prima facie plaintiff is not entitled to recover more than what was due under the bond on the date of his purchase. But it is urged that these two payments

do not amount to a valid discharge against him on two grounds.

It is first urged that the payments were made to two persons who had no right whatever to the money and so they could not amount to a valid discharge against Nagappa, whose rights plaintiff purchased, nor against the plaintiff. No doubt it has been found in Sankayya's declaratory suit that Rukmini and Mahabala had no rights in the suit bond, but that evidently means that they had no beneficial interest in it, for Sankayya's own case was that they took the assignment as benamidar for Nagappa and that in fact the assignment was made merely to change the benamidars. By the assignment Sinnappa transferred the bond debt to Nagappa's wife and child for Nagappa apparently at his own instance. The argument that a benamidar is a trustee and cannot transfer his trust to a third party does not apply to the facts here and is untenable. Taking Rukmini and Mahabala as benamidars for Nagappa, a payment to them will be good against him unless it was made after notice and objection by him. It has been laid down that a benamidar is entitled to sue in his own name both as regards simple bonds and as regards mortgage debts —see *Singa Pillay* v. *Govinda Reddy*(1), and the cases cited therein—and that the real owner need not be made a party. That being so, it follows that a payment made to the benamidar in discharge of the bond will bind the real owner if made without notice and objection by him. The learned Subordinate Judge says the payments in this case were not made *bona fide*, because the defendants knew the benami character of the assignment to Rukmini and Mahabala, but that fact will not interfere with the payment being good against Nagappa. Their

(1) (1918) I.L.R., 41 Mad., 435.

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knowledge by itself has no bearing on the validity of their payments as against him. There is no evidence that Nagappa required the defendants not to pay to them nor has he objected to such payments. It is more likely that the payments were made with his knowledge and connivance. The first objection therefore fails and must be overruled.

The next objection is that the payments were made after the debt had been already attached and were therefore void against all claims enforceable under the attachment under section 64 of the Civil Procedure Code, and as plaintiff's purchase was one in execution they are not valid against him. It is true that the payments were made only after the original attachment was raised by the order of Court when the claim of the assignees was allowed; but it is argued for the plaintiff that when Sankayya brought his suit under Order XXI, rule 63 of the Civil Procedure Code and got a declaration that the debt was attachable in execution of his decree and that his first attachment was a valid one, the original attachment was revived and any payment made after it to the judgment-debtor is invalidated by section 64 of the Civil Procedure Code; a payment to the judgment-debtor's benamidar being a payment for the former's benefit will no doubt stand on the same footing. In support of the contention that the attchment should be taken as revived and continuing in force all the time reliance is placed on *Ali Ahmad Khan* v. *Bansidhar*(1), *Bonomali Rai* v. *Prosunno Narain Chowdhry*(2), *Ram Chandra Marwari* v. *Mudeshwar Singh*(3), and *Lalu Mulji Thakar* v. *Kashibai*(4). These authorities do lay down that the release from attachment on the claim

(1) (1909) I.L.R., 31 All., 367.
(2) (1896) I.L.R., 23 Calc., 829.
(3) (1906) I.L.R., 33 Calc., 1158.
(4) (1886) I.L.R., 10 Bom., 400, 407.

being allowed is only provisional in character and is subject to the result of the suit which is allowed to be brought by the Code to contest the order and if the suit succeeds the attachment is revived from the beginning. As observed in *Bonomali Rai* v. *Prosunno Narain Chowdhry*(1), to hold otherwise would in very many cases defeat the object of the suit and render the decree infructuous—see page 834. We respectfully accept this view and are prepared to follow it. It is suggested that the principle should not be applied against persons like these defendants who were not parties to the claim and *Patringa Koer* v. *Madhavanand Ram*(2) is cited as supporting this contention. That was a case where owing to the decree-holder's default the attachment was removed and it had nothing to do with any claim proceedings; thus, it has no direct bearing on the present case. It is not therefore necessary to consider whether we should follow it or not.

We also think the fact that the defendants were not made parties to the claim makes no difference in this case. They were parties to the subsequent suit and, as we are inclined to think, the effect of the decree in that suit was to restore the attachment which had been provisionally removed, it must be taken to have been restored as against all parties affected by it or at any rate against all persons who were parties to the suit. It was also argued that there was a difference between debts and other properties on this point, because the mode of attachment of debts prescribed by Order XXI, rule 46, restricts the effect of the prohibition till the further orders of the Court are passed, whereas in the case of immoveables or other properties there is no such limitation. This difference is merely due to the nature

(1) (1896) I.L.R., 23 Calc., 829. (2) (1911) 14 C.L.J., 476.

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of the property attached and it makes no difference in our opinion as to the effect of the attachment. When the attachment is taken as revived by the decree in the subsequent suit we must take it the order of release, which is as much a provisional order in the case of debt as in other cases is cancelled and any payment made under that order of release becomes void as section 64 comes into play. We must therefore allow plaintiff's second objection and hold that the two payments made in this case are not valid against him on that ground.

The decree of the Subordinate Judge is therefore right. The Second Appeal fails and is dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Ramesam.

1921, September 1.

A. T. K. P. L. M. MUTHIAH CHETTY (PLAINTIFF), APPELLANT,

v.

PALANIAPPA CHETTY AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. XXI, rr. 62 and 63—Limitation Act (IX of 1908), art. 11—Attachment before judgment—Order for attachment passed, no actual attachment made—Claim petition by mortgagee from judgment-debtor—Petition dismissed on merits—Subsequent suit by mortgagee to establish his right withdrawn after obtaining leave of Court to file another suit—Later suit for sale on mortgage more than one year after order on claim petition—Suit, whether barred by limitation—Claim petition in the absence of attachment, whether competent—Acquiescence of parties—Jurisdiction of Court—Effect of order.

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* Appeal Suit No. 145 of 1917.