

## APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

GANGA DIN AND OTHERS (DEFENDANTS) v. KHUSHALI (PLAINTIFF)\*.

*Execution of decree—Imperfect attachment of immovable property—Private alienation after such attachment not void—Civil Procedure Code, ss. 274, 276, 295, sch. IV., No. 141.*

A judgment-debtor whose property had been attached in execution of a money decree, sold the property, and out of the price paid into Court the amount of the decree, and prayed that the attachment might be removed. While the attachment was subsisting, and prior to the sale, the holders of other money decrees against the same judgment-debtor preferred applications, purporting to be made under s. 295 of the Civil Procedure Code, and praying that the proceeds of the sale of the property might be rateably divided between themselves and the attaching creditor. The Court refused to remove the attachment until these creditors had been paid. It was found that the sale by the judgment-debtor was a *bona fide* transaction, entered into for valuable consideration.

*Held* that, inasmuch as no order for attachment of the property was passed in favour of the decree-holders in manner provided by s. 274 of the Civil Procedure Code, their claims were not entitled to the protection conferred by s. 276 against private alienations of property under attachment; that these claims were not enforceable under the attachment which was made; that the sale by the judgment-debtor was valid; and that execution of the decrees could not take place.

*Per* MAHMOOD, J.—That s. 276 of the Civil Procedure Code, being a restriction of private rights of alienation, should be strictly construed; that before property can be subjected to such restriction, there must be a perfected attachment; that the orders passed under s. 295 did not amount to such attachment; and that, even assuming them to amount to such attachment, they, not having been duly intimated and notified, could not make the prohibition of s. 276 applicable to the case. *Mahadeo Dubey v. Bholu Nath Dicit* (1), *Anand Lall Dass v. Jullodhur Shaw* (2), *Rameswar Singh v. Ramtanu Ghose* (3), *Indro Chunder Baboo v. Dunlop* (4), *Gobind Singh v. Zalim Singh* (5), and *Gumani v. Hardwar Pandey* (6), referred to.

Also *per* MAHMOOD, J.—While s. 295 of the Code gives a special right to judgment creditors as distinguished from simple creditors, it is an essential condition precedent to the exercise of that right that there should be a sale in execution, and that its result should appear in assets realized by the sale, and therefore, until the sale takes place, no such right can be enforced. *Bishen Chunder Surma Chowdhry v. Mun Moninee Dabee* (7), referred to.

\* Second Appeal, No. 329 of 1884, from a decree of A. Sells, Esq., District Judge of Cawnpore, dated the 20th December, 1883, affirming a decree of Maulvi Farid-ud-din, Subordinate Judge of Cawnpore, dated the 26th June, 1883.

(1) I. L. R., 5 All. 86.

(2) 14 Moo. I. A. 543.

(3) 4 B. L. R., A. C., 24.

(4) 10 W. R. 264.

(5) I. L. R., 6 All. 33.

(6) I. L. R., 3 All. 698.

(7) 8 W. R. 501.

1885

---

 GANGA DIN  
 v.  
 KHUSHALI.

ONE Manni Ram, the holder of a decree for money against one Chhubba, dated the 17th May, 1881, applied on the 19th August, 1881, for the attachment and sale in execution of the decree of certain immoveable property belonging to his judgment-debtor, and an order for the attachment of the property was made in September following. On the 3rd January, 1882, Chhubba executed a deed of sale of the property in favour of Khushali, the plaintiff in this suit, and, out of the price paid for the property, paid into Court the amount of Manni Ram's decree, and prayed that the attachment might be removed. The Court executing the decree refused to remove the attachment until the holders of certain other money-decrees against Chhubba had been paid. One of these decree-holders, Ganga Din, had, on the 31st August, 1881, after Manni Ram had applied for the attachment and sale of the property in execution of his decree, preferred an application, purporting to be made under s. 295 of the Civil Procedure Code, and praying that the proceeds of the sale of the property might be rateably divided between him and Manni Ram, the attaching creditor. The other decree-holders had subsequently made similar applications. In consequence of the Court's refusal to release the property from attachment, Khushali brought this suit against the decree-holders in question to have it declared that the sale to him was valid, and that the property was not liable to be sold in execution of their decrees.

Both the lower Courts concurred in decreeing the claim, holding that the deed of sale executed by Chhubba was a valid transaction; that it conveyed all his rights in the property; that therefore the holders of the decrees against Chhubba could not treat the property as still his; and that consequently execution could not take place.

The defendants appealed to the High Court, contending (*inter alia*) that the sale-deed executed by Chhubba on the 3rd January, 1882, was invalid, with reference to the provisions of s. 276 of the Civil Procedure Code.

Pandit *Ajudhia Nath* and Munshi *Sukh Ram*, for the appellants.

Munshi *Hanuman Prasad* and Pandit *Bishamber Nath*, for the respondent.

1885

GANGA DIN  
v.  
KHUSHALI.

OLDFIELD, J. —The *bonâ fide* character of the sale to the plaintiff of the property in suit on the part of Chhubba, the judgment-debtor of the appellants, has been found by the lower appellate Court, and is not open to the objections taken in appeal.

The question that remains for determination is whether, at the time of the sale to the plaintiff, the property was under attachment in execution of the appellants' decrees, and, under the provisions of s. 276 of the Civil Procedure Code, the sale to the plaintiff is void as against the appellants' claims under their decrees.

It appears that the property had been attached on the application of one Manni Ram in execution of his decrees against Chhubba on the 17th May, 1881, and some of the appellants who held decrees against Chhubba applied to attach the property in execution of their decrees while the attachment under Manni Ram's decree was subsisting and prior to the auction-sale; and further asked that, under s. 295 of the Civil Procedure Code, the proceeds of the sale might be rateably divided among the decree-holders. No order, however, for attachment was made, as required by the provisions of s. 274, on their applications.

Now, s. 276 provides that when an attachment has been made by actual seizure or written order duly intimated and made known in the manner aforesaid (that is, as required by s. 274), any private alienation of the property attached, whether by sale, gift, mortgage or otherwise, during the continuance of the attachment, shall be void as against all claims enforceable under the attachment.

What is here contemplated is the protection of claims which are enforceable under an attachment made according to the provisions in s. 274,—that is, in the case of immoveable property, which is that in dispute here, by written order duly prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from receiving the same from him by purchase, gift or otherwise, the order being proclaimed by beat of drum, and in other manner as directed by the section; and, with reference to the form 141 in sch. iv. of the Act, the particulars of the claim of the attaching creditor must be set out in the proclamation.

It is the claim of the attaching creditor who has made the attachment set out in the order of attachment which is enforceable

1885

GANGA DIN  
v.  
KHUSHALI.

under the attachment, and which is protected ; and to enable creditors to have the advantage of an attachment there must be separate attachments in each case by written order duly intimated and made known as required by s. 274, giving the particulars of the claims of the attaching creditors.

The reason is obvious, to enable those dealing with the property to become acquainted with the claims which are protected by the attachment.

For instance, as in this case, a person buys property with the knowledge of the attaching creditor's claim, which he satisfies, but it would be inequitable to make him liable for claims which were not promulgated at the attachment, and of which he knew nothing.

The plaintiff has satisfied the claim of Manni Ram, and is in a position to resist the sale of the property to satisfy the claims of the appellants, which, for the reasons given, are not claims enforceable under the attachment which was made.

The appeal is dismissed with costs.

MAHMOOD, J.—Five pleas have been raised in appeal ; but when I first heard what these were, I was convinced,—and I adhere to the opinion—that the last four are not such as could properly be entertained at this stage, since they only raise questions as to the evidence and as to the merits of the case. Both the Courts have found that the sale-deed of the 3rd January, 1882, now in question, was entered into *bonâ fide* for valuable consideration, and conveyed the vendor's rights in the property, and that no fraud, collusion or *mala fides* of any kind had been established. So far as regards this part of the case, we cannot interfere with the decrees of the lower Courts. There is, however, one part of the appeal—that brought forward by the first plea—which raises a question of law, namely, whether, even assuming the deed to have been a *bonâ fide* document, it was not void with reference to the provisions of s. 276 of the Civil Procedure Code. Before entering upon this question, I wish to observe that all the decrees held by the present defendants are simple money-decrees.

Now, in passing any judgment in connection with the construction to be placed on s. 276, it is important to refer to an earlier section in the Code—s. 274,—which provides for the attachment

1885

GANGA DIN  
v.  
KHUSHALI.

of immoveable property, when it is the first step in execution of a simple money-decree against the person owning the property. It is as follows:—"If the property be immoveable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from receiving the same from him by purchase, gift or otherwise." This section corresponds to s. 235 of the old Code of 1859, and to the last part of s. 239 of the same. I wish to refer to these sections because they are interpreted by several rulings, to some of which I shall presently refer. Then we have s. 276 of the present Code, which is the most important provision for the purposes of this case. It says:—"When an attachment has been made by actual seizure or by written order duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, mortgage or otherwise, and any payment of the debt, or dividend, or a delivery of the share, to the judgment-debtor during the continuance of the attachment, shall be void *as against all claims enforceable under the attachment.*" The language of this section is practically the same as that of s. 240 of the Code of 1859, the words which I have emphasized being added to the present section. But notwithstanding the change of language, I do not think, so far as the present point is concerned, the law has been altered by the present Code. And I say this because my view is supported by a ruling of the Privy Council which, as I understand it, is as much applicable in principle to s. 276 of the present Code as it was to s. 240 of the old Code to which it related. Indeed, the words which I have emphasized were most probably inserted in consequence of that ruling. But before considering the effect of that ruling, I wish to refer to a somewhat recent Full Bench decision of this Court in *Mahadeo Dubey v. Bholu Nath Dichit* (1). The judgment in that case was delivered by my brother Straight, and concurred in by the rest of the Court, including myself. It was there ruled that a regularly perfected attachment is an essential preliminary to sales in execution of simple decrees for money, and, where there has been no such attachment, any sale that may have taken place is not simply voidable, but *de facto* void. I understand this ruling to apply as well to the old as to the present

(1) I. L. R., 5 All. 86.

Code, because a simple money claim seems to me as, so to speak, "floating", until the attachment of some particular property belonging to the debtor fixes the debt to some specific part of the debtor's property—a fixation which can be effected only by making the attachment according to law; and that I take to have been the reasoning of the Full Bench. I now go back to s. 274 of the Code, in order to bring out the most important question in this case. What was the object of the Legislature in enacting s. 274 in these three separate paragraphs, and in these specific terms, and what bearing has this object upon the question now before us? S. 274 provides for the attachment of immoveable property. The attachment is to be made in certain particular ways, and one important direction is, that notice be given not only to the judgment-debtor not to alienate the property, but also to the *public* not to *accept* any alienation from him. The object of the provisions is two-fold; and this view of the matter is supported by the provisions of s. 644 when considered with the fact that No. 141 of the fourth schedule of the Civil Procedure Code correctly provides an exact form to be employed for the purpose of carrying out the requirements of s. 274. It says:—"Whereas you (the judgment-debtor) have failed to satisfy a decree passed against you ..... it is ordered that you be, and you are hereby, *prohibited and restrained*, until the further order of this Court, *from alienating the property* specified in the schedule hereunto annexed, by sale, gift or otherwise,"—so far the words are a repetition of s. 274,—“and that *all persons* be, and that they are hereby, prohibited from *receiving* the same by purchase, gift or otherwise.” I have emphasized the words bearing upon the present point. Now, it is clear to my mind that s. 276 is a distinct interference with private rights of alienating property, and I believe it is a fundamental principle relating to the interpretation of statutes, that where the Legislature interferes in this manner, the provisions enabling it to do so must be not only carefully but *strictly* construed. Their Lordships of the Privy Council in *Anand Lall Dass v. Jullodhur Shaw* (1) in construing the corresponding s. 240 of the Code of 1859 which I have already cited, made the following observations:—"The question is whether those words—'any private alienation of the property attached, whether by sale, gift or

(1) 14 Moo. 1. A. 543.

1885

GANGA DIN  
v.  
KHUSHALI.

otherwise, shall be null and void'—are to be taken in the widest possible sense as null and void against all the world, including even the vendor, or to be taken in the comparatively limited sense attached to them by the Courts in India? Their Lordships adopt the language of the Chief Justice, who, in the judgment of the Court, expresses his opinion that the object was to make the sale null and void, so far as it might be necessary to secure the execution of the decree, relates *only* to alienation which would affect *the creditor who obtained the attachment*. That appears to their Lordships to be the true meaning of the section. It could scarcely be held—in fact, it was scarcely maintained in argument—that a sale made to a *bonâ fide* purchaser by the vendor could be set aside by the vendor himself; the words must therefore necessarily be read with some limitation. It appears to their Lordships that their construction must be limited in the manner indicated by the Chief Justice, on the ground that they were intended for the protection of *the creditor who had obtained an execution*, and not for the protection of all persons who at *any future time* might possibly obtain execution." I have emphasized the important words, and applying these observations to this case, I must now consider whether such conditions existed as could invalidate the deed of the 3rd January, 1882. I have already said that a perfected attachment is necessary to render these restrictions upon private rights effective so as to prevent the owner from dealing with his property as he might have done before attachment. In support of this view, I may refer to two cases—*Rameswar Singh v. Rintanu Ghose* (1) and *Indro Chunder Baboo v. Duntop* (2). I need not refer to them at length, but they are authorities for the view that before property can be made liable to these restrictions, there must be a perfected attachment. They amount practically to an enunciation of the same principle as was laid down by this Court in *Mahadeo Dubey v. Bhola Nath Dichit* (3), to which I have already referred.

Now, if a sale in execution of decree, without a previous attachment is *ab initio* void, it follows that a private sale, where there has been no such perfected attachment, is valid. Of course, as a matter of logic, the truth of a proposition does not involve the

(1) 4 B. L. R., A. C., 24. (2) 10 W. R. 264.

(3) I. L. R., 5 All. 86.

1885

---

 GANGA DIN  
 v.  
 KHUSHALI.

truth of what may be called its converse; but in a case of this description, I think that the two propositions depend upon the same principle, and that if one of them is true, the other must be true also. Indeed, the judgment of my brother Tyrrell in *Gobind Singh v. Zalim Singh* (1) goes almost a greater length to support my view; for there the private alienation by the judgment-debtor, though made during the subsistence of a valid attachment, was upheld, on the ground that although the interests of the auction-purchaser, who sought to avoid the private alienation, originated in an attachment made in execution of the same decree, yet as the former attachment had been infructuous, and the latter attachment, which resulted in the auction-sale, was made subsequent to the private alienation, such alienation could not be avoided by such auction-purchaser.

In connection with this part of the case, if it could be shown that the present defendants had by reason of their applications obtained a valid and perfected attachment in execution of their decrees *before* the sale of the 3rd January, 1882, there would be no difficulty. But I concur in the reasoning of my brother Oldfield in *Gumani v. Hardwar Pandey* (2), where he held that the prohibition provided by s. 276 could not have effect unless there had been a regular attachment, and that an alienation made after attachment not "*duly intimated and made known*" as required by s. 276, would not be vitiated. The rule seems to me to rest upon a foundation similar in principle to the equitable doctrine of "*notice*" when applied to *bonâ fide* transferees for value. And applying this rule to the present case, it has to be considered whether the application made by Ganga Din on the 31st August, 1881, and the order passed thereon, amounted to such an attachment as my brother Oldfield had in view in the case which I have just mentioned. There can be no doubt that neither the application nor the order amounted to such an attachment. The application was made under s. 295, and so were the other subsequent applications by the decree-holders—the defendants in the present litigation.

That section provides for the state of things which was formerly met by ss. 270 and 271 of the Code of 1859. The provisions of the former of these sections, which gave priority to the

(1) I. L. R., 6 All. 33. (2) I. L. R., 3 All. 698.



1885

GANGA DIN  
v.  
KHUSHALI.

attaching creditor for satisfaction of his decree as against other decree-holders, have not re-appeared in s. 295 of the present Code; the material effect of the change, so far as this point is concerned, being that, whilst under the old Code the first attaching creditor was to be paid in full, and the others rateably, under the rule of distribution provided by the present Code, no such priority exists, and any decree-holder who applies to the Court is entitled to participate rateably, subject, of course, to the other rules provided by the section. The substantial provisions of s. 271 of the old Code have, however, re-appeared in an *amplified* form, in s. 295 of the present Code, and whatever the change of law may have been in other respects, the principle, so far as the matter now under consideration is concerned, has certainly undergone no change. I can explain this in the best manner by quoting another passage from the judgment of the Lords of the Privy Council in the case which I have already cited:—"Reference has been made to s. 271, which is to this effect—'If, after the claim of the person on whose application the property was attached has been satisfied in full from the proceeds of the sale, any surplus remain, such surplus shall be distributed rateably amongst any other persons who, prior to the order for such distribution, may have taken out execution of decrees against the same defendant, and not obtained satisfaction thereof.' This section only applies where there has been a judicial sale, and appears to their Lordships to have little or no bearing on the question in the present case, which is, whether or not, under the circumstances, a private sale was valid."

Now, reading s. 295 of the present Code in the light of these observations, there can be no doubt that whilst the section gives an especial right to judgment-creditors as distinguished from simple creditors, it is an essential condition precedent to the exercise of that right that there should be a sale in execution, that its result should appear in assets realized by the sale, and so, until the sale takes place, no such right can be enforced. Now the first Court, in dealing with the defendant's application, issued no proclamation under s. 274: no order was passed prohibiting the judgment-debtor from alienating the property. The public were not warned against accepting a conveyance from the judgment-debtor, and under these circumstances there was neither a perfected attachment nor

any such prohibition as could render s. 276 applicable to the case. In support of what I have just said, I may mention the case of *Bishen Chunder Surma Chowdhry v. Mun Mohinee Dabee* (1) in which it was held that s. 270 of the old Code, corresponding to a part of the present s. 295, did not apply to a case in which property had *not* been sold in execution of a decree.

I hold therefore that because the application of the 31st August, 1881 was not an application for execution by attachment of the property in suit, because it did not end in an order for attachment, because the order passed, even supposing it were an order for attachment, was never duly intimated and notified, there was no such attachment of the property as could render the prohibitions of s. 276 available to the present defendants for the purposes of executing their decrees against the property sold under the sale-deed of 3rd January, 1882.

There was Manni Ram's decree under which the property was attached; but that attachment could only invalidate such alienations as could be taken to be in derogation of his rights, so far as the decree, in execution whereof he attached the property, is concerned. But since the defendants never properly attached the property in execution of the decrees which they now seek to execute against that property, since that property has by a valid sale passed from the hands of their judgment-debtor and become the property of the plaintiff—a *bond fide* purchaser for value—they cannot either avoid the deed of sale or execute their decrees against the property. For these reasons, the appeal must be dismissed with costs.

*Appeal dismissed.*

*Before Mr. Justice Brodhurst and Mr. Justice Mahmood.*

RODH MAL (DEFENDANT) *v.* RAM HARAKH AND ANOTHER (PLAINTIFFS)\*

*Mortgage—Purchaser of part of mortgaged property without notice—Suit for sale of whole property in satisfaction of mortgage—Marshalling—Apportionment.*

The equities which apply to a puisne incumbrancer in the marshalling of securities apply also to a *bond fide* purchaser for value, without notice, of a portion of property the whole of which was subject to a prior incumbrance. *Tulsi*

\* Second Appeal No. 1590 of 1883, from a decree of G. E. Knox, Esq., District Judge Mirzapur, dated the 31st August, 1883, affirming a decree of Munshi Madhofal, Munsif of Mirzapur, dated the 23rd January, 1883.

(1) 8 W. R. 501.

1885

GANGA DIN  
*v.*  
KHUSHALI.

1885  
March 18.