

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

BHUPAL (PLAINTIFF) v. KUNDAN LAL (DEFENDANT).*

Civil Procedure Code, 1908, section 64, Explanation—Attachment—Claim for rateable distribution—Private alienation not impeachable by applicant for rateable distribution unless he has himself attached the property claimed.

Held on a construction of the Explanation to section 64 of the Code of Civil Procedure, 1908, that a person claiming rateable distribution of assets cannot get the benefit of it unless he has himself got an attachment on the assets from which he seeks to benefit. The mere fact that he has filed a petition asking to share in the distribution is not sufficient. *Annamalai Chettiar v. Palamalai Pillai* (1) followed. *Mina Kumari Bibi v. Bijoy Singh Dudhuria* (2) referred to.

The facts of this case are fully set forth in the judgment of the Court.

Babu Piari Lal Banerji, for the appellant.

Babu Sital Prasad Ghosh, for the respondent.

TUDBALL and MUHAMMAD RAFIQ, JJ. :—This is a plaintiff's appeal arising out of a suit for sale based upon two mortgage deeds of the 26th of May, 1913, and the 6th of December, 1913, executed by the defendants Gauri Shankar and Beni Prasad for Rs. 600 and Rs. 300, respectively. The property mortgaged consisted of two houses. The court of first instance dismissed the claim on the basis of the mortgage of the 6th of December, 1913, and decreed the claim on the basis of the mortgage of the 26th of May, 1913. The defendant *alone* appealed and on appeal the lower appellate court dismissed the claim also on the basis of the deed of the 26th of May, 1913. The plaintiff has come here in second appeal, and the contention is that the decision on the point of law raised in the court below by that court is incorrect and that, on a true interpretation of the law, the claim under the bond of 26th of May, 1913, should have been decreed and the lower appellate court ought to have dismissed the appeal in respect thereto. We are concerned only with the mortgage of the 26th of May, 1913. Gauri Shankar and Beni Prasad were judgment-debtors under two decrees. One was obtained against

* Second Appeal No. 488 of 1918 from a decree of D. R. Lyle, District Judge of Agra, dated the 23rd of January, 1918, modifying a decree of Kaulshar Nath Rai, Subordinate Judge of Agra, dated the 24th of August, 1917.

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them by Koka Mal, who applied for execution and in execution attached the two houses on the 9th of June, 1912. Lala Mal was another decree-holder against them, who apparently also applied for execution of his decree, and the property having been already attached in Koka Mal's decree, he applied for a rateable distribution on the 12th of February, 1913. Koka Mal proceeded with his execution and the property was put up for sale and sold on the 25th of March, 1913. On the 2nd of April, 1913, the judgment-debtors and Koka Mal made an application to the court stating that the decree of Koka Mal had been satisfied out of court and asking that the sale be set aside as the decree had been satisfied. On the 26th of April, 1913, the court refused to set aside the sale on this ground, being apparently of opinion that these two persons were combining to defeat the claim of Lala Mal. However, it appears that the auction purchaser having deposited his one-fourth at the date of sale failed to deposit the remaining three-fourths of the purchase money, and on the 24th of May, 1913, the court set aside the sale for this reason. Then came the mortgage of the 26th of May, 1913, which is the basis of the present claim. On the 20th of June, 1913, Lala Mal applied for and obtained attachment of the property in execution of his own decree. On the 24th of June, 1913, he applied to the court which was executing the decree of Koka Mal and asked that rateable distribution should be allowed to him in this way that Koka Mal be directed to bring into court the money that he had received from the judgment-debtors in satisfaction of his decree and that out of it he (Lala Mal) should receive his fair share. This application of his was disallowed on the 6th of July, 1913. The execution of Lala Mal's decree proceeded. The property was put up to auction and was purchased by one Piari Lal, who in his turn sold it to Kundan on the 12th of December, 1914. Kundan is the present respondent before us. On behalf of the defendant it was urged in the court below that the private transfer of the 26th of May, 1913, was void as against him because Lala Mal had applied for a rateable distribution prior to the 26th of May, 1913, and the plea is based upon the wording of the Explanation to section 64 of the Code of

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Civil Procedure. The learned District Judge has expressed his opinion in the following language:—"The property in my opinion remained under attachment until the order of the 5th of July, 1913, and in view of the Explanation attached to section 64 of the Code of Civil Procedure, Lala Mal's claim for rateable distribution was undoubtedly enforceable under that attachment, and the sale deed of the 26th of May, 1913, is, therefore, void as against the defendant appellant."

We are referred on behalf of the plaintiff respondent to the Privy Council ruling in *Mina Kumari Bibi v Bijoy Singh Dudhuria* (1), but that ruling is under the old Code of Civil Procedure and it is argued that it is not applicable to the present case. The question is one which was considered by a Full Bench of the Madras High Court in *Annamalai Chettiar v. Palamalai Pillai* (2), and in that case the decision of their Lordships of the Privy Council was considered and it was clearly held that the Explanation attached to section 64 had not materially advanced the benefits of execution creditors who had applied for rateable distribution. The decision of their Lordships of the Privy Council is also quite clear on the point. If we apply the *ratio decidendi* of that judgment to the facts of the present case, it is quite clear that the right of Kundan is a right which is enforceable not under the attachment of the 9th of June, 1912, but under the attachment by Lala Mal of the 20th of June, 1913. His rights cannot be referred in any way to the prior attachment but only to the subsequent attachment, which was also subsequent to the mortgage of the 26th of May, 1913. We do not think it necessary to add anything to the very cogent reasons to be found in the Full Bench decision of the Madras High Court. We fully agree with that decision, and in our opinion the decision of the court below was incorrect. The result is that we allow this appeal, set aside the decree of the court below and restore that of the court of first instance. The plaintiff will have his costs in this Court and in the lower appellate court as against the defendant respondent.

Appeal decreed.

(1) (1916) I. L. R., 44 Cal., 662. (2) (1917) I. L. R., 41 Mad., 265.