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and consistently with their position and responsibility as an authority representing the public interest they would immediately have returned the amount of Rs.151-3-6 which they wrongfully extorted from the plaintiff when his property was freed from attachment. Even if the defence preferred by the Board were technically sound from a legal standpoint it is not one on which any responsible public authority should have insisted. The conduct of the Board in the matter in our view has been highly discreditable.

*Before Mr. Justice Bennet and Mr. Justice Verma*

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December, 14

BANSRAJ PANDEY (PLAINTIFF) v. RAM LAL PANDEY AND ANOTHER (DEFENDANTS)\*

*Civil Procedure Code, order XXI, rule 58—Attachment in execution—Private sale before attachment but after order for attachment—Time from which order for attachment takes effect—Civil Procedure Code, order XXI, rule 54(3)—Objection by the purchaser to the attachment—Purchase alleged to be in good faith—Whether section 47 or order XXI, rule 58 applies to the objection—Whether appeal lies, or a regular suit, against decision of objection.*

In execution of a simple money decree an order for attachment of certain property belonging to the judgment-debtor was passed on the 20th of June, 1931. The property was attached on the 22nd of June, but, a few hours before the attachment was made, a sale deed of the property was executed by the judgment-debtor in favour of a certain person. The purchaser filed an objection under order XXI, rule 58 of the Civil Procedure Code, claiming that he was a purchaser in good faith for value and had become the owner of the property at the time when it was attached. The decree-holder contested the claim and alleged that the purchase was not in good faith but was collusive. The execution court decided in favour of the purchaser, allowed his objection and ordered the property to be released. The decree-holder filed a suit under order XXI, rule 63, for a declaration that the property was liable to attachment and sale in execution of his decree. In this suit it was

\*Second Appeal No. 1756 of 1935, from a decree of Niyaz Ahmad, Second Additional Civil Judge of Gorakhpur, dated the 7th of March, 1935, reversing a decree of Kailash Prasad Mathur, City Munsif of Gorakhpur, dated the 8th of May, 1933.

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found by the lower appellate court, upholding the trial court, that the purchase was for an inadequate consideration and was not in good faith but was collusive. In view of this finding and of order XXI, rule 54(3), that court held that the order of attachment must take effect from the date on which it was passed and therefore the purchaser must be deemed to have purchased after the attachment was effected; he was therefore a representative in interest of the judgment-debtor, and the question between the parties fell within the purview of section 47 of the Code and a separate suit was thereby barred:

*Held* that the suit was not barred under section 47 of the Civil Procedure Code. The purchaser's objection, based upon the allegation that he had purchased in good faith before the attachment and had thereby acquired an independent title, was one distinctly under order XXI, rule 58, and was dealt with as such; and so the decree-holder's remedy against the decision was not by an appeal but by a regular suit under order XXI, rule 63, which he brought. In these circumstances it would amount to a denial of justice to refuse to entertain the decree-holder's suit on the ground that he ought to have appealed against the order of the execution court, treating it as one under section 47 of the Code.

The purchase was made before the attachment in point of fact took place, and such a purchaser cannot be regarded to be a representative of the judgment-debtor for the purpose of section 47. What sub-rule (3) of order XXI, rule 54 lays down is that the order made under sub-rule (1) shall take effect, as against all transferees other than those for value in good faith, from the date when such order is made, and not that the purchase though actually made before the attachment shall become subsequent to the actual attachment.

Mr. *Shiva Prasad Sinha*, for the appellant.

Mr. *N. Upadhiya*, for the respondents.

BENNET and VERMA, JJ.:—The suit out of which this appeal arises was brought by the appellant for a declaration that the property specified at the foot of the plaint was liable to attachment and sale in execution of decree No. 1385 of 1929 passed in his favour against the defendant No. 2, Balraj Pande, on the 30th of July, 1929. The court of first instance decreed the suit. The lower appellate court agreed with the

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findings of fact of the court of first instance, but holding in favour of the defendant No. 1, respondent, Ram Lal Pande, on a question of law, reversed the decree and dismissed the suit.

The material facts as found by the courts below are these. The plaintiff appellant obtained a decree No. 1385 of 1929 from a court of Honorary Munsifs against the defendant No. 2, Balraj Pande, on the 30th of July, 1929. He applied for its execution on the 19th of June, 1931, and prayed for the attachment and sale of the property specified at the foot of the plaint as belonging to his judgment-debtor. On the 20th of June, 1931, the execution court passed an order for the attachment of the property. On the 22nd of June, 1931, the judgment-debtor, Balraj Pande, executed a deed of sale in respect of that property in favour of the defendant No. 1, Ram Lal Pande, at 12 o'clock. The attachment of the property was made by the amin on the same day, i.e., the 22nd of June, 1931, at 5 p.m. Thus the sale deed in favour of the first respondent, Ram Lal Pande, was executed prior to the actual attachment of the property, but subsequent to the order for attachment passed by the execution court. Ram Lal Pande filed a petition of objections under order XXI, rule 58 of the Civil Procedure Code objecting to the attachment of the property on the ground that he had *bona fide* purchased it for consideration before the attachment had taken place and that at the time of the attachment the property belonged to him and not to the judgment-debtor. The decree-holder, Bansraj Pande, contested that application, but the execution court held that Ram Lal Pande had *bona fide* purchased the property for consideration at a time when the property had not been attached and allowing the petition of objections ordered that the property be released from attachment. This order was passed on the 8th of August, 1931. Thereupon the decree-holder, Bansraj

Pande, filed the suit out of which this appeal has arisen on the 8th of August, 1932, seeking the declaration mentioned above. The suit purported to be one under order XXI, rule 63 of the Code.

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The defence of the defendant No. 1, Ram Lal Pande, as put forward in his written statement, was that the property purchased by him had not been attached at the time when the sale deed was executed in his favour, that he had no knowledge that the plaintiff had executed his decree, that he had taken the sale in good faith in order to have his own debts discharged by the vendor, defendant No. 2, and that he had paid full consideration for the same before the sub-registrar.

The trial court, besides finding the facts as stated above, also held that the sale deed in favour of Ram Lal Pande was for consideration but that the consideration was inadequate in view of the market value of the property. It further held that Ram Lal Pande had not made the purchase in good faith but had colluded with the judgment-debtor in order to assist him to convert his property into cash so that the decree-holder may not be able to realise the amount due to him. No question as to the suit being barred by the provisions of section 47 of the Civil Procedure Code was raised or decided.

Ram Lal Pande appealed to the lower appellate court against the decree of the trial court. In the memorandum of appeal he repeated the pleas taken by him in the written statement and attacked the finding of the trial court that his purchase had not been made in good faith, but did not take any ground to the effect that the suit was barred by section 47 of the Civil Procedure Code.

The lower appellate court framed two questions for determination:—“(1) Was the appellant a purchaser in good faith?” and “(2) Did he purchase the property

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during the continuance of an attachment made on the application of respondent No.1? If so, how does this affect the suit?" On the first question it agreed with the trial court and held that although Ram Lal Pande had paid Rs.400 as consideration for the sale, the consideration was inadequate, that he had colluded with the judgment-debtor with the object of defrauding the decree-holder and that his purchase was consequently not in good faith. When it came to consider the second question framed by it, it held that in view of the third sub-rule added to order XXI, rule 54 of the Code by this Court, and in view of the fact that Ram Lal Pande was not a purchaser in good faith, the order of attachment must take effect as against Ram Lal Pande from the date on which the order was made, namely the 20th of June, 1931, and that therefore Ram Lal Pande must be held to have purchased the property after attachment had been effected. Having arrived at that conclusion, the lower appellate court went on to hold that Ram Lal by his purchase had become a representative of the judgment-debtor and that the question that had arisen between him and the decree-holder was therefore a question which could be decided by the execution court alone in accordance with the provisions of section 47 of the Code and that a separate suit was barred. It accordingly allowed the appeal of Ram Lal Pande and dismissed the suit of the decree-holder.

The position thus is this. Ram Lal Pande contested the case on the allegation that he was a purchaser for value in good faith and that the order prohibiting the judgment-debtor from transferring the property in any way and other persons from taking any benefit from such transfer having been proclaimed and affixed on the property five hours subsequent to the execution of the sale deed in his favour, the sale could not be void against the claim of the decree-holder under the

attachment. The finding of fact of the trial court was that he was not a purchaser in good faith and for adequate consideration. In his appeal to the lower appellate court he attacked that finding of fact and insisted that he was a *bona fide* purchaser for full value and that the finding of the trial court that his purchase was tainted by fraud and collusion was incorrect, and that therefore the order passed by the execution court for attachment of the property in accordance with the provisions of order XXI, rule 54(1) did not take effect as against him from the date on which it was passed. The contention which is now pressed upon us on his behalf seems to have been raised before the lower appellate court at the time of argument and it was evidently urged that if his purchase was held to be not in good faith, then the attachment having become effective from the date on which the order under order XXI, rule 54 (1) was passed, i.e., the 20th of June, 1931, his purchase had been made during the continuance of a valid attachment and that therefore he had become by such purchase a representative of the judgment-debtor within the meaning of section 47 of the Civil Procedure Code. His contention was, and is, that section 47 having thus become applicable, the party against whom the execution court passed an order had a remedy by way of appeal and not by a separate suit. It is this contention that has been accepted by the lower appellate court.

Sub-rule (3) which has been added to order XXI, rule 54 runs as follows: "The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property, and against all other transferees from the judgment-debtor from the date on which such order is made." The order is one "prohibiting the judgment-debtor from transferring or charging the property." What this newly added sub-rule lays down is that the order made under order XXI, rule 54(1) shall take effect as against all transferees other than those for value in good faith from

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the date when such order is made, and not that the purchase, though actually made before the attachment, shall become subsequent to the actual attachment. The distinction is somewhat fine, but is permissible. Apart from that, however, the basis of the contention, and of the decision of the lower appellate court, is that when the order of the 8th of August, 1931, was made by the execution court the proper remedy of the decree-holder against whom the order was made was to appeal, treating the order as one under section 47 of the Code and therefore having the status of a decree under section 2(2), and not to bring a suit. The question that arises for our consideration is whether, on the facts found in this case, this contention is well founded and the decision accepting it is correct. The case is almost on all fours with the case of *Mathura Das v. Ramraj Singh* (1) decided by a Bench of this Court. Ramraj Singh's objection to the attachment of the property in the execution court was under order XXI, rule 58 of the Civil Procedure Code. The allegation on which it was founded was that he had made his purchase in good faith and prior to the attachment made on the decree-holder's application for execution, and was holding under an independent title. This contention was upheld by the execution court. The objection purported to be under order XXI, rule 58 and was throughout treated as such, and the order passed by the execution court was, in so many words, on such an objection; in other words, it was an order passed under order XXI, rule 60 of the Code. If the decree-holder had attempted to appeal against that order, his appeal would indubitably have been rejected on the ground that no appeal lay because the order was one passed on an objection under order XXI, rule 58 and also that the execution court had held that the purchaser was a third party and was not a person who had purchased during the continuance of the attachment. We entirely agree with the

learned Judges who decided *Mathura Das's* case in holding that in these circumstances it would amount to a denial of justice to refuse to entertain the decree-holder's suit on the ground that he ought to have appealed against the order of the execution court releasing the property.

A number of cases have been cited by the learned counsel appearing for the defendant respondent. But in the circumstances of this case, as stated above, and in the view that we have taken, none of those cases is really applicable. We do not propose therefore to deal with them at any length, but shall refer to them only briefly.

The earliest case cited is that of *Basti Ram v. Fattu* (1). The objection to the attachment in that case had been preferred by the judgment-debtor himself. The objection having been dismissed by the execution court, the property was put up to sale and was purchased by the decree-holder himself. The judgment-debtor thereupon brought a suit in accordance with the section of the Code which corresponded to order XXI, rule 63 of the present Code against the decree-holder who had also become the auction purchaser. The question which was referred to the Full Bench is thus stated: "Is a suit brought by a *quondam* judgment-debtor against the purchaser of his occupancy tenure, who was also his decree-holder, barred by the rule in section 244(c) of the Civil Procedure Code? (Section 47 of the present Code corresponds to section 244 of the old Code.) That was a very different question from the one which arises before us. The basis of the decision is thus expressed at page 148 of the report: "This question is one which arose between the plaintiff judgment-debtor and the decree-holder, who is also the purchaser, and was determined against the former by the court which executed the decree prior to the sale; and it is

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(1) (1886) I.L.R. 8 All. 146.



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a question which must be considered to relate to the execution, discharge, or satisfaction of the decree. It is, in effect, whether certain property was liable to attachment and sale to satisfy the decree."

In the case before us the question has arisen not between the decree-holder and the judgment-debtor, but between the decree-holder and a purchaser by private treaty from the judgment-debtor whose purchase had been effected before the attachment had actually been made. That case therefore is not applicable to the facts of the present case.

The next case cited is that of *Lalji Mal v. Nand Kishore* (1), and the learned counsel for the defendant respondent has laid considerable stress on it. The case is undoubtedly almost parallel to the one before us. There is this distinguishing feature, however, that the attachment in that case had in fact taken place before the purchase by Lalji Mal, whereas in the case before us the attachment was made after the purchase and it is only by the application of the newly added sub-rule (3) of order XXI, rule 54 of the Civil Procedure Code that it is sought to make it relate back to the date on which the order under order XXI, rule 54 (1) of the Civil Procedure Code was passed by the execution court. At page 333 of the report the learned Judges observe: "In our opinion, as the property in question was under attachment at the time the sale took place, the purchaser must be treated as a representative of the judgment-debtor; on the same principle as he would have been a representative of the judgment-debtor by reason of his purchase, if the decree had been one for sale of a particular property. The position of a purchaser of a property affected by a decree for sale was discussed by this Court in *Madho Das v. Ramji Pathak* (2)." The decision thus purports to be based on the case of *Madho Das v. Ramji Pathak* (2). In our

(1) (1897) I.L.R. 19 All. 332.

(2) (1894) I.L.R. 16 All. 286.

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judgment the position of a purchaser by private sale of immovable property from a person against whom a simple money decree, and not a decree for sale of hypothecated property, has been passed is not the same as that of a person who has purchased hypothecated property either before or after the decree for sale on the mortgage has been passed. The distinction has been very clearly explained in the case of *Madho Das v. Ramji Pathak* (1) itself, but that portion of the judgment does not seem to have been brought to the notice of the learned Judges who decided the case of *Lalji Mal v. Nand Kishore* (2). At pages 291-292 of the report of *Madho Das v. Ramji Pathak* the following passage occurs: "In this case, however, the decree against Mahabir Prasad was not a decree based upon any document hypothecating any property; it was not a decree for sale; it was a simple money decree, and the only connection between that decree and the defendant here is that the plaintiff sought in execution of that money decree to bring to sale property purchased by the defendant here from the legal representative of the judgment-debtor. In our opinion it would be stretching section 244 too far to hold that that section included in an application for execution of a simple money decree a person who had purchased from the judgment-debtor property against which the decree was sought to be executed, but which was not affected by the decree itself and would not be affected until an order for attachment or an order for sale in execution of the decree was made." We respectfully agree with the view expressed in this passage.

The next case cited by the learned counsel for the defendant respondent is that of *Gur Prasad v. Ram Lal* (3). In this case it was recognized that the cases of *Lalji Mal v. Nand Kishore* (2) and *Madho Das v. Ramji Pathak* (1) mentioned above were not reconcilable and

(1) (1894) I.L.R. 16 All. 286.

(2) (1897) I.L.R. 19 All. 332.

(3) (1898) I.L.R. 21 All. 20.

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that there was a conflict between the two. That conflict was ignored with the observation that in the case of *Madho Das v. Ramji Pathak* (1) one of the facts found was that there was a subsisting attachment at the time of purchase but that no mention of such attachment was made in the rest of the judgment, and the case of *Lalji Mal v. Nand Kishore* was followed. We find, however, that the judgment in *Madho Das v. Ramji Pathak* shows that the fact of there being a subsisting attachment at the time of the purchase was clearly present to the mind of the learned Judges, as the paragraph dealing with this question, beginning at the bottom of page 290 and ending at the top of page 292 of the report, clearly shows. It seems to us that the correct law on this point is laid down in the case of *Madho Das v. Ramji Pathak* (1).

The learned counsel for the defendant respondent has also referred to the Full Bench case of *Gulzari Lal v. Madho Ram* (2). But the question that arose for decision in that case was a very different one. It is thus stated by STANLEY, C. J., at page 451 of the report: ". . . Whether or not an auction purchase at a sale held in execution of a simple money decree against a judgment-debtor whose property has been ordered to be sold at the suit of mortgagees in a mortgage suit, is a representative of the judgment-debtor within the meaning of section 244 sub-section (c) of the Civil Procedure Code." The decision in that case therefore is no authority for the proposition contended for by the learned counsel for the respondent. In this connection reference may also be made to the judgments of the majority of the Judges, particularly those of BANERJI and AIKMAN, JJ., in the Full Bench case of *Bhagwati v. Banwari Lal* (3). AIKMAN, J., points out that it was not correct to give the wide meaning to the observations of their Lordships of the Privy Council in the

(1) (1894) I.L.R. 16 All. 286.

(2) (1904) I.L.R. 26 All. 447.

(3) (1908) I.L.R. 31 All. 82.

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case of *Prosunno Kumar Sanyal v. Kali Das Sanyal* (1) that was sought to be given to those observations in *Gulzari Lal v. Madho Ram* (2). It would also appear that the majority of the learned Judges did not accept the view expressed in *Gulzari Lal v. Madho Ram* that the earlier Full Bench case of *Sabhajit v. Sri Gopal* (3) must be taken to have been erroneously decided in view of any observations of their Lordships of the Privy Council in the case of *Prosunno Kumar Sanyal v. Kali Das Sanyal*.

It would thus appear that of the cases cited, those that deal with the question which arises before us are those of *Madho Das v. Ramji Patak* (4) and *Mathura Das v. Ramraj Singh* (5) on the one hand, and those of *Lalji Mal v. Nand Kishore* (6) and *Gur Prasad v. Ram Lal* (7) on the other. For the reasons that we have given above we prefer to follow the cases of *Madho Das v. Ramji Pathak* and *Mathura Das v. Ramraj Singh*.

The learned counsel for the respondent has also cited the case of *Ishar Das v. Parma Nand* (8). The basis of the decision as expressed in the judgment at page 135 of the report is that "An assignee from a judgment-debtor of property belonging to him and affected by the decree is a representative of the judgment-debtor within the meaning of the section." Lower down in the judgment the learned Judges observe: "There can be no doubt that a purchaser from the judgment-debtor of his property which is neither under attachment nor otherwise affected by the terms of the decree cannot be held to be a representative of the judgment-debtor. . . ." In the case before us, as we have shown above, the purchase was before the attachment in point of fact took place.

Reference has also been made by learned counsel for the respondent to the case of *Lachhoo v. Munnii Lal*

(1) (1892) I.L.R. 19 Cal. 683.

(3) (1894) L.L.R. 17 All. 222.

(5) A.I.R. 1925 All. 240.

(7) (1898) I.L.R. 21 All. 20.

(2) (1904) I.L.R. 26 All. 447.

(4) (1894) I.L.R. 16 All. 286.

(6) (1897) I.L.R. 19 All. 332.

(8) A.I.R. 1926 Lah. 134.

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*Babu Lal* (1). In that case, however, the original judgment-debtor had died and the appellant Lachhoo had been brought on the record as his legal representative, and had thus become the judgment-debtor. The case is therefore distinguishable.

For the reasons given above we allow this second appeal and setting aside the decree of the lower appellate court restore that of the court of first instance. The appellant shall have his costs throughout.

### APPELLATE CIVIL

1938

December, 15

Before Mr. Justice Bennet and Mr. Justice Verma

SHYAM LAL (PLAINTIFF) v. LAKSHMI NARAIN AND OTHERS  
(DEFENDANTS)\*

*Evidence Act (I of 1872), section 68—Mortgage deed—Attesting witness called but due “attestation” not proved—Whether deed inadmissible in evidence for any purpose—Acknowledgment of earlier mortgage contained in the deed—Admissibility in evidence to prove the acknowledgment for saving limitation on the earlier mortgage—Mortgage of joint family property—Rate of interest.*

In a suit upon a mortgage, a recital of the mortgage in a deed of a subsequent mortgage by the same mortgagor was relied on as an acknowledgment saving limitation for the suit. The execution of this later deed was proved, and one of the “attesting” witnesses was called and examined but his evidence failed to establish that the deed had been duly “attested” as defined in section 3 of the Transfer of Property Act. The question was whether the deed could be used as evidence for the purpose of proving the acknowledgment:

*Held*, that although the document could not be used in evidence as a mortgage deed, which required attestation, yet it was not prevented by section 68 of the Evidence Act from being used in evidence for the purpose of proving the acknowledgment. The words, “it shall not be used as evidence”, in section 68 should not be held to imply the words “it shall not be used as evidence for any purpose”; the words are to be held merely as applying to a suit for enforcement of the document, leaving the ordinary provisions of law in section 67 to apply where the document is to be used for any other purpose. The

\*Second Appeal No. 145 of 1936, from a decree of S. B. Singh, Additional Civil Judge of Farrukhabad, dated the 19th of October, 1935, confirming a decree of G. D. Sahgal, Additional Munsif of Kanauj, dated the 30th of April, 1935.