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KING-EMPEROR v. LACHMAN SINGH.

It was argued that the prosecution did not prove that Lachman knew that the person to whom he gave false information was a public servant. The answer to this argument has been given by Wort, J.

ALLANSON, J.

I allow this appeal, set aside the acquittal and convict Lachman Singh of an offence under section 182 of the Indian Penal Code and sentence him to pay a fine of Rs. 25 or, in default, three days' rigorous imprisonment.

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, JJ.

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April, 19.

HAZARIRAM

v.

KEDAR NATH MARWARI.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 64, *Order* XXI, *rules* 16, 53—*Decree for mesne profits, attachment of—subsequent transfer, effect of—Transferee, whether entitled to execute the decree.*

The attachment of a decree for mesne profits has not the effect of preventing a valid transfer of the decree. Therefore a transfer of the decree during the subsistence of the attachment is not invalid and the transferee is entitled to be substituted in place of the assignor and to apply under Order XXI, rule 16 for execution.

The effect of an attachment of a decree for the payment of money being specially provided for in Order XXI, rule 16, of the Code of Civil Procedure, the general provisions of section 64 do not apply.

Appeal by the assignee.

The facts of the case material to this report are stated in the judgment of Kulwant Sahay, J.

*Appeal from Original Order no. 28 of 1927, from an order of Babu Surendra Nath Sen, Subordinate Judge of Godda, dated the 17th January, 1927.

Hasan Imam (with him *L. K. Jha* and *K. P. Sukul*), for the appellants.

C. C. Das (with him *Jagannath Prasad* and *G. N. Mukherjee*), for the respondents.

KULWANT SAHAY, J.—On the 15th January, 1924, a decree for mesne profits was passed by the High Court in favour of Jai Kisen Baram and Parmanand Baram for self and as guardian of Pratap Baram against Teja Bibi, Nope Chand Marwari and Kedarnath. On the 12th November, 1925, the appellants before us, Hazariram and Bilas Ram, took a transfer of the decree from the Barams and from one Sashi Bhusan, who was a trustee of the estate of the Barams. Before this transfer, however, the mesne profits decree had been attached in execution of two decrees against the Barams. The first attachment was on the 25th April, 1924, in Execution Case no. 13 of 1924 in which one Lakhi Prashad Dhandhania was the decree-holder and the Barams were the judgment-debtors. The second attachment was on the 6th August, 1924, in Execution Case no. 17 of 1924 in which one Shivadutt Ram Marwari was the decree-holder and the Barams were the judgment-debtors. The transferees of the decree made an application before the Subordinate Judge under the provisions of Order XXI, rule 16, of the Code for execution of the decree. The transferors who were the original decree-holders, namely, the Barams, as well as the judgment-debtors were made parties and notice of the application was given to all of them. The Barams appeared and admitted the validity of the transfer. The judgment-debtors objected on various grounds. They challenged the validity of the transfer on the ground that the transfer was a sham transaction intended to defraud creditors; that there was no legal necessity for the transfer and that the minor transferor was not benefited thereby; that the permission of the Subordinate Judge of Godda where originally the suit in which the decree was made was instituted was not taken: and that on this account

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the transfer was invalid; that the decree having been attached in money execution cases nos. 13 and 17 of 1924, the subsequent transfer was invalid; that one of the transferors, namely, Sasi Bhusan was not validly appointed as trustee; that it was a sham appointment and that he had no interest to transfer the decree; that the Barams had before the transfer to the appellants transferred certain interest in the decree to one Kamaruddin Mandal and others and they could not again transfer the same interest to the appellants. Before the case was taken up for hearing the attaching creditors Sheodatt Marwari and Lakhi Prasad Dhandhania filed two petitions on the 18th September 1926 in which they referred to the fact of the attachment and prayed that the execution proceedings may be stayed until realisation of their money in full. The learned Subordinate Judge by his order, dated the 18th September 1926, directed that these two petitions will be disposed of along with the main contention of the judgment-debtors. The learned Subordinate Judge considered the objections raised by the judgment-debtors and disallowed all of them except the objection as regards the validity of the transfer on the ground of the prior attachment of the decree. He held that on account of the decree having been attached before the transfer, the transfer was invalid and the transferees could not be substituted in place of the transferors and he accordingly rejected their application under Order XXI, rule 16. The transferees have therefore come up in appeal to this Court.

Before the Subordinate Judge it was contended on behalf of the transferees that the two attachments of the decree were invalid. Mr. Hasan Imam has before us admitted that the attachments were valid and the only question argued by him was as to the effect of the attachment. The law on the subject is contained in Order XXI, rule 53, of the Code of Civil Procedure. The decree of the Barams which was attached was a decree for the payment of money

and Order XXI, rule 53, provides the mode of attachment of a decree for the payment of money. Clause (*b*) of sub-rule (*1*) of rule 53 prescribes the mode in which attachment should be made of a decree for payment of money passed by a Court other than the one which passed the decree which is sought to be executed. It says that the attachment should be made by a notice to the Court which passed the decree sought to be attached by the Court which passed the decree sought to be executed requesting the former Court to stay the execution of the decree unless and until (*i*) the Court which passed the decree sought to be executed cancels the notice, or (*ii*) the holder of the decree sought to be executed or his judgment-debtor applies to the Court receiving such notice to execute his own decree. Sub-rule (*2*) of rule 53 then prescribes what the Court which receives the application referred to in sub-head (*ii*) of clause (*b*) of sub-rule (*1*) is to do. It has to proceed to execute the attached decree on the application of the creditor who has attached the decree or his judgment-debtor and to apply the net proceeds in satisfaction of the decree sought to be executed. Sub-rule (*6*) of rule 53 then provides that on the application of a holder of a decree sought to be executed by the attachment of another decree, the Court making an order of attachment under this rule shall give notice of such order to the judgment-debtor bound by the decree attached; and no payment or adjustment of the attached decree made by the judgment-debtor in contravention of such order after receipt of notice thereof, either through the Court or otherwise, shall be recognized by any Court so long as the attachment remains in force.

It will be noticed that there is no provision in sub-rule (*1*) or (*2*) or (*6*) which prohibits the holder of a decree for payment of money from transferring the decree attached. It only provides that the execution of the attached decree shall be stayed unless and until the attachment is cancelled or the holder of

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the decree sought to be executed or the holder of the decree sought to be attached applies to the Court receiving the notice to execute his own decree and, further, the judgment-debtor, if a notice is served upon him, is prevented from making payment of the money under the decree to the decree-holder either through the Court or otherwise, and if such payment is made, it will not be recognized by any Court so long as the attachment remains in force. In contra-distinction to these terms we have got the provisions of sub-rule (4) of rule 53 which provides that where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in sub-rule (1), namely, a decree for the payment of money, then the attachment shall be made by a notice by the Court which passed the decree sought to be executed to the holder of the decree sought to be attached prohibiting him from transferring or charging the same in any way. Here there is a distinct provision for prohibiting a transfer of the decree other than a decree for the payment of money. There is no such prohibition in the case of a decree for the payment of money. It is thus clear that the fact of the attachment of the decree of the Barams did not in any way affect the right of the appellants and the transfer made to the appellants was in no way affected on account of the attachment of the decree. The learned Subordinate Judge seems to be of the opinion that the mere fact of the attachment of the decree had the effect of prohibiting the transfer of the decree and a transfer during the subsistence of the attachment was invalid. In this he is clearly wrong. I am of opinion that the transfer was a valid transfer and the appellants acquired a good title by the transfer. They are therefore entitled to have their names substituted in place of the assignors and to apply for execution under Order XXI, rule 16, of the Code.

Mr. C. C. Das on behalf of the judgment-debtors has, however, argued that the attaching creditors

namely, Sheodat Marwari and Lakhi Prasad Dhandhania are necessary parties to this appeal and the appeal cannot proceed in their absence. The answer to this objection is that they were not parties to the proceedings in the Court below. They merely put in two applications on the date of the hearing fixed by the Subordinate Judge and the Subordinate Judge directed that their objections would be considered along with the main contention of the judgment-debtors, but they were never made parties to the execution proceedings. The objection as regards the invalidity of the transfer to the appellants was not taken by the attaching creditors. They only stated the fact of the attachment and prayed that execution might be stayed so long as their money had not been paid in full. Mr. C. C. Das refers to section 64 of the Code of Civil Procedure. This section provides that where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment. Under the provisions of this section it is only the persons, who have claims enforceable under the attachment, who can take objection that the transfer was void. Mr. C. C. Das admits that the objection as regards the invalidity of the transfer on the ground of the prior attachment is not available to him. If that is so, then the objection taken by the judgment-debtors in the Court below was an objection which was not available to them and need not have been considered. The effect of the attachment of a decree for the payment of money is especially provided for in Order XXI, rule 53 and the general provisions of section 64 do not apply.

Mr. C. C. Das next contends that the transfer to the appellant was a fraudulent transfer without consideration. His argument comes to this that the present appellants are mere benamidars for the

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Barams. If that is so, then there can be no objection to the present application under Order XXI, rule 16, being entertained inasmuch as the assignors namely, the Barams were also parties and they expressed their assent to the application of the purchasers being entertained. A benamidar has a right to maintain an action on behalf of the beneficiaries. In this case if the transfer to the present appellants be considered to be a benami transaction, of which, however, there is very little evidence, then the Barams being parties to the present application, there can be no objection to the application being entertained.

The result is that the order of the Subordinate Judge, in so far as it declares the transfer in favour of the appellants to be an invalid transfer owing to the previous attachment, will be set aside and the Subordinate Judge will proceed to entertain the application under Order XXI, rule 16, of the Code.

It is stated that the attaching creditors namely, Sheodutta Ram Marwari and Lakhi Prasad Dhandhania have already taken out execution of this decree and a second execution at the instance of the transferees cannot proceed. Such an objection was not taken in the Court below and we are not in a position to express any opinion thereon. Mr. Hasan Imam expresses his willingness to pay off the decrees held by Sheodatta Marwari and Lakhi Prasad Dhandhania. If he does so, then the attachment will be withdrawn and there will be no objection whatsoever to the execution proceeding at the instance of the present transferees. However, it is not necessary for us to express any opinion on this point.

The result is that the order of the Subordinate Judge is set aside and it is directed that the assignees be substituted in place of the original decree-holders. The appellants are entitled to their costs of this appeal as well as in the Court below.

MACPHERSON, J.—I agree and I would add a few observations. The many headed objection of the respondents to the substitution of the appellants was in all respects groundless and nothing short of an abuse. Their object was to defer as long as possible execution of a decree on which no interest is payable. A Court should be astute to prevent such mala fide delaying tactics from attaining any measure of success. Then if the respondents, that is, the judgment-debtors and the attaching decree-holders are, as is suggested, in league, it is clearly open to the Court to allow appellants to execute the decree on terms; even terms will be unnecessary if the suggestion that the appellants pay off the decree of the attaching decree-holders is given effect to.

Order set aside.

APPELLATE CIVIL.

Before Das and Allanson, JJ.

HITNARAYAN SINGH

v.

RAMBARAI RAI.*

1928.

April, 20.

Rent Suit—real heir of deceased tenant not impleaded—sale in execution of decree, whether holding passes—Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *section* 167—*Notice, service of—onus probandi.*

Where the defendant, in a suit for the rent of a holding, is not in fact the heir of the deceased tenant, or does not completely represent the holding, the decree obtained in the suit is not a "rent" decree and, consequently, a sale of the holding in execution of the decree does not pass the holding to the auction-purchaser.

*Appeal from Original Decree no. 192 of 1924, from a decision of Babu Tulsi Das Mukherji, Subordinate Judge of Shahabad, dated the 14th August, 1924.