

ORIGINAL CIVIL.

Before Mr. Justice Taraporewala.

VED AND SOPHER v. R. P. WAGLE & Co.*.

1925.

January 19.

Solicitors' lien for costs—Attachment of decree by judgment-creditor—Subsequent charging order for costs in favour of solicitor—Priority of solicitors' lien on moneys within jurisdiction.

W. & Co. having obtained a decree in a suit filed against N. H., the decree was attacked by their own judgment-creditors, V. and S. A few days later the solicitors who had acted for W. & Co. in that suit and in certain partnership litigation obtained charging orders for their costs against the same decree.

On a question arising as to the rights of the parties claiming to be entitled to the sums paid to the Sheriff in execution,

Held, that the solicitors were entitled to enforce their lien in priority to the attaching creditors, so long as the moneys attached remained within the jurisdiction of the Court.

Nature and extent of the solicitor's lien discussed.

MESSRS. R. P. Wagle & Co. brought a suit (No. 3666 of 1921) against one Narottam Haridas and on July 8, 1924, obtained a consent decree therein. On July 10, 1924, the said decree was attached by Messrs. Ved and Sopher (judgment-creditors of R. P. Wagle & Co. in another suit) under Order XXI, Rule 53.

On July 15 and 16, 1924, Messrs. Hiralal & Co., who had acted as solicitors for R. P. Wagle & Co. in Suit No. 3666 of 1921 and also in a certain partnership suit, obtained charging orders for their costs in these suits against the said consent decree.

Two sums of Rs. 2,500 and Rs. 500, respectively, having been paid to the Sheriff in execution, Ved and Sopher applied for payment out to them. It was contended on their behalf that the solicitors' lien could only attach to property remaining in the hands of the judgment-debtor and once that property was attached

* O. C. J. Suit No. 2355 of 1922.

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by a decree-holder, no claim against it could be enforced by the solicitor. Messrs. Hiralal & Co., however, opposed, contending that their two charges gave them priority as solicitors, over the attaching creditors.

Setna of Merwanji Kola & Co., for the attaching creditors.

B. K. Desai, instructed by *Hiralal & Co.*, for the charge-holders.

TARAPOREWALA, J.:—In this matter the plaintiffs, Messrs. Ved and Sopher, ask for payment to them of the amount of a decree obtained by the defendants, R. P. Wagle & Co., against one Narottam Haridas attached in execution of the decree in favour of Ved and Sopher in the suit and realized by the Sheriff.

The application is opposed by Messrs. Hiralal & Co., who acted as solicitors for R. P. Wagle & Co., and who have got a charging order in their favour on the decrees in favour of R. P. Wagle & Co., one of which is the decree attached in the present execution proceedings. The said decree was passed on July 8, 1924, and was attached by Ved and Sopher on July 10, 1924. The solicitors, Messrs. Hiralal & Co., got the charging orders on July 15 and 16, 1924. Thereafter, Narottam Haridas, the judgment-debtor in the said decree, paid the moneys in the Sheriff's office on August 5, 1924. The Prothonotary has certified that the only claim in execution against the amount of the decree is that of the decree-holders, Messrs. Ved and Sopher. The amounts paid in execution are now two sums of Rs. 2,500 and Rs. 500. Messrs. Hiralal & Co. contend that they are entitled to receive the said amounts in priority to the attaching creditors.

I have taken time to consider this matter because I was told that there were orders of this Court wherein the right of the judgment-creditor was held to have

priority over the lien of the solicitor where a charging order had not been obtained prior to the attachment by the judgment-creditor. I am unable to find any judgment with grounds or reasons for the judgment, and as this is a matter of importance to solicitors, I have gone through all the authorities on the point and I have given very careful consideration to the matter.

Now the whole argument of the judgment-creditor in claiming to exclude the solicitors' lien comes to this, that the solicitors' lien, as it existed in Common law, could only attach to the property remaining in the hands of the judgment-debtor and once that property was attached by a decree-holder the property went out of the hands of the client and the solicitor, therefore, could not claim a lien on the money which so went out of his client's hands, and that the decree-holder who by his diligence attached the property prior to the solicitor's asserting or realising his lien was entitled to exclude the solicitor even from participating in the distribution of the moneys. In England there has been statutory provision giving effect to the lien of the solicitor by 23 & 24 Vic., c. 127, section 28. It has been contended before me that prior to the enactment of the statute, the solicitor's lien only attached in cases where the moneys remained in the hands of his client, and that immediately the moneys were attached, the solicitor's lien came to an end. Unfortunately the English cases dealing with this point are mostly after the enactment of the statute 23 & 24 Vic., c. 127, and, therefore, there is some difficulty in getting at the real principle laid down in those decisions. The matter is treated by Cordery in his Law relating to Solicitors, 3rd Edition, at page 388, as follows :—

“ Where the lien is on a judgment recovered for the client the question of priority has often arisen between the solicitor and a judgment-creditor attaching the debt under Order XLV. (attachment of debts). ”

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"The result of the more recent cases seems to be, that so long as the money is within the jurisdiction of the Court a charging order will have priority over an attachment, unless there has been *malu fides*, or great neglect on the part of the solicitor, notwithstanding that execution has actually issued on behalf of the judgment-creditor at the time when the solicitor applies for a charging order."

These observations mix up the charging order under the statute with the lien under Common law. But looking into the cases I find it is distinctly laid down in *Shippey v. Grey*⁽¹⁾ that the solicitor's lien under Common law, independently of the charging order, has priority over any attachment by a judgment-creditor so long as the moneys attached remain within the jurisdiction of the Court, that is to say, are not realized and paid off to the judgment-creditor. In this case the learned Lord Justices of the Appeal Court have followed a previous decision of the Court in *Faithfull v. Ewen*⁽²⁾. The matter has been fully dealt with by Lord Justice Brett in his judgment, and he has, independently of the previous decision in *Faithfull v. Ewen*⁽²⁾, come to the conclusion that a solicitor was entitled to his lien in priority to an attaching creditor, and the principle on which the learned Lord Justice comes to the conclusion is this, that the money was earned by the act of the solicitor and that, unless something had occurred to take away his right, he had a right in law and in equity to an order in his favour so that the moneys so earned might not be paid away to any one without his costs being reserved. In that case the defendant obtained an *ex parte* garnishee order before the solicitors could tax their costs and before they could do anything or take any steps to preserve their right. The argument of the judgment-creditor, as put by Lord Justice Brett, came to this, that in that case the solicitor could in no event have got a priority over the judgment-creditor as his costs had

⁽¹⁾ (1880) 49 L. J. C. P. 524.

⁽²⁾ (1878) 7 Ch. D. 495.

not been taxed before the garnishee order was taken out. Lord Justice Brett characterises the proposition as extravagant and holds that the only principle on which the solicitor could be deprived of his lien would be that, if, before the solicitor took any steps, the money had been disposed of in some way beyond the power of the Court so that the Court had no longer any jurisdiction over it, then in that case the right of the solicitor would be at an end and the Court would be powerless to interfere. He gives an instance:—an execution had issued and been carried out so that the execution-creditor had received the money; in such a case an application by the solicitor would be too late. Or again, if the client had received the money and paid it over to some creditor of his, in such a case the right of the solicitor would be at an end. He held that the garnishee order was not effective without a subsequent order, for cause might be shown against it, that a Court of Equity considers that that which the solicitor had a right to have done was done and that the garnishee order obtained by the defendant did not take priority over the solicitor's lien. This judgment is not based on the statutory lien in respect of which a charging order could be obtained by the solicitor under 23 & 24 Vic., c. 127, but entirely on the solicitor's lien at common law. If one considers the object for which that statute was enacted, it is quite clear that the provision in the statute was made with a view to give a further right to the solicitors which they had not, prior to the enactment of the statute. They had no lien over the real property of their client and that was sought to be remedied by the statute 23 & 24 Vic., c. 127. But in making the said provision by statute, the Legislature made it as wide as possible and the solicitor was empowered under the statute to obtain a charging order in respect of all the property of his client recovered

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through his exertions whether it was real or personal property. It does not, therefore, follow that before the enactment of the statute the lien so far as personal property was concerned was anything different from the lien given by statute. To my mind the effect of making a charging order under the statute is nothing more than to provide for enforcing the solicitor's lien which existed in respect of personal property prior to the statute and which was for the first time given in respect of the real property of the client by the statute. The solicitor's lien at Common law has been the lien which has been given effect to and enforced by the High Court of Bombay and Calcutta. There is no statutory provision in India as regards the solicitor's lien. The solicitor's lien as it prevailed in England before the statutory enactment is clearly defined by Lord Justice Brett in *Shippey v. Grey*⁽¹⁾. If effect was given to the solicitor's lien at Common law in the sense in which the judgment-creditor asks the Court to give it, it would be frustrating the whole object of the protection which the Court seeks to give to the solicitor by enforcing the lien, because as happened in this case the decree having been passed on July 8, and the attachment having been levied on July 10, there was no time for the solicitor to have his costs taxed so as to assert his lien in respect of these costs. And simply because the judgment-creditor obtains an order for attachment within two days of the passing of the decree he cannot be heard to say that the moneys by reason of such attachment go out of the jurisdiction of the Court so as to prevent the Court from interfering on behalf of the solicitor.

After all the lien is enforced for the protection of the solicitor who is an officer of the Court by the

⁽¹⁾ (1880) 49 L. J. C. P. 524.

Court interfering so long as the moneys are within the jurisdiction of the Court. By a mere attachment the moneys do not go out of the jurisdiction. I can well understand that if moneys had been realised in the course of the attachment and distributed and paid to the creditor and the solicitor had not obtained his charging order or had not come forward to claim his lien until that was done, he could not have claimed it as against the judgment-creditor who had got those moneys. Until the moneys are paid to the judgment-creditor they are still in the hands of the Court and within its jurisdiction and I do not see how a solicitor, who is entitled to his lien on the moneys obtained by his exertions which are in the hands of the Court, could be deprived of the fruits of his exertion by the mere fact of an attachment being levied on the moneys. Until the moneys are disposed of they remain within the jurisdiction of the Court and the solicitor is entitled to come to the Court and ask for its interference so as to protect his rights as regards his costs.

It has been pointed out to me that in Calcutta the solicitor's lien has been given effect to in a very wide manner. The question before the Calcutta High Court in *Harnandroy Foolchand v. Gootiram Bhuttar*⁽¹⁾ is not the question before me to-day but the judgment supports my view that the solicitor is entitled to the protection of the Court as far as possible, and that the solicitor's lien should be enforced and given effect to by the Court in all possible cases where the Court can effectively do so.

My attention was drawn to *North v. Stewart*⁽²⁾, in support of the proposition that the statutory enactment made a difference in the rights enjoyed by the solicitors prior to the enactment and thereafter in respect of lien for their costs on the moneys of their clients. Now that

⁽¹⁾ (1919) 46 Cal. 1070.

⁽²⁾ (1890) 15 App. Cas. 452.

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case decides entirely a different point and the question of the effect of the statute 23 & 24 Vic., c. 127, is merely incidentally brought in. There is no doubt that there are some words in the judgment of Lord Watson at page 463 which lend colour to the argument of the judgment-creditor here. But considering the facts of the case on which the decision was given, I do not see that they are capable of the wide construction which the judgment-creditor wants to put upon them. The question in that case was of jurisdiction and it was contended that jurisdiction was ousted by reason of the attachment being invalid as the moneys attached did not belong to the judgment-debtor but to the solicitor who had a lien on the moneys, and their Lordships merely considered this point, whether prior to the obtaining of the charging order it could be said that the moneys belonged to the solicitor and were not capable of being attached by the creditor of the client. Lord Watson observes at page 463 as follows :—

"Assuming that their lien, when charged by the order of the 13th of June might operate in the same way as an intimated assignation by the original judgment-creditor, and terminate his interest in the debt ; so long as the debt remains his property, the mere existence of a lien does not exclude the diligence of others having claims against him. The opinions expressed by the English Bench in *Hough v. Edwards*⁽¹⁾ and *Mercer v. Graves*⁽²⁾ appear to me clearly to show that, in the Courts of Common Law, a solicitor's lien upon costs decreed does not, until it is converted into a charge by virtue of the statute, prevent their attachment by other persons having claims against the judgment-creditor."

The question there was whether the debt could be attached and what Lord Watson holds is that the debt could be attached so long as there was no charging order but if there was a charging order to the fullest extent of the debt then no doubt, no interest of the judgment-creditor would remain and, therefore, there would be nothing which others could attach. But it

(1) (1855) 1 H. & N. 171.

(2) (1872) L. R. 7 Q. B. 499.

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does not follow from these observations that once the property is attached by others, the lien of the solicitor comes to an end. The judgments of the other Lords clearly show that their whole attention was given to the point whether the attachment in the first instance could be levied or not and not as to the effect of the attachment if the solicitor claimed to exercise his lien as against the moneys so attached. For that the decision in *Shippey v. Grey*⁽¹⁾ is quite clear. This decision is later in date than the decision in *Hough v. Edwards*⁽²⁾ and *Mercer v. Graves*⁽³⁾ referred to by Lord Watson in *North v. Stewart*⁽⁴⁾, and in my opinion *Shippey v. Grey*⁽¹⁾ lays down the correct principle and is in no way in conflict with the decision of the House of Lords in *North v. Stewart*⁽⁴⁾.

The decision of this High Court in *Devkabai v. Jefferson, Bhaishankar and Dinsha*⁽⁵⁾ was cited to me but it does not touch the point raised in this case. It merely says that the solicitor's lien in the High Courts of India is governed exclusively by the law as it existed in English Courts before the passing of 23 & 24 Vic., c. 127, by which that lien was very much extended. "Very much extended" means the extension to the real property which did not exist before the statutory enactment. The lien was confined to personal property before the statute. These passing remarks in the judgment in no way affect the question which is before me for decision. There is no judgment of this Court which is binding on me with which my present decision is in conflict. In my opinion the solicitor in the matter before me is entitled to the interference of the Court on his behalf, and he is entitled to enforce his lien as against the moneys in dispute in priority to the attaching creditor.

⁽¹⁾ (1880) 49 L. J. C. P. 524.⁽²⁾ (1872) L. R. 7 Q. B. 499.⁽³⁾ (1856) 1 H. & N. 171.⁽⁴⁾ (1890) 15 App. Cas. 452.⁽⁵⁾ (1886) 10 Bom. 248 at p. 253.

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I may mention a further point and that was a point taken by the attorneys for Ved and Sopher that the charging order was in respect of costs incurred by R. P. Wagle & Co., in other matters, i.e., partnership suits, which have been fought out by Hiralal & Co., and that, therefore, they could not claim a lien on the judgment-debt in this particular case excepting for the costs of that case and not for their costs in general in respect of which they have obtained the charging order. In my opinion the question is not open to me as Mr. Justice Mulla, after consideration of the point, has made the charging order in respect of the solicitors' costs in general on the ground that the property was recovered by the exertions of the solicitor including the judgment-debt in this matter and that they were entitled to a lien for all their costs on all property recovered by their exertions for the partnership. I do not express any opinion on the point as I hold that the learned Chamber Judge's order is clear on the point and he has given effect to the lien as claimed by the solicitors by giving the charging order. I, therefore, hold that Messrs. Hiralal & Co. are entitled to recover their costs under the charging order obtained by them in priority to the attaching creditor.

I am told that another sum of Rs. 500 has been paid into the Sheriff's office after this notice was taken out and as the solicitors' costs amount to a sum larger than Rs. 3,500, I direct that the solicitors are entitled to receive the said sum of Rs. 500 also.

All costs should come out of the moneys first. Counsel certified.

O. H. B.