

APPELLATE CIVIL.

Before Mr. Justice Madgavkar.

GALABHAI LALLUBHAI (ORIGINAL PLAINTIFF), APPELLANT v. KIKI JIVAN
(ORIGINAL DEFENDANT), RESPONDENT.*

1929
July, 4.

Civil Procedure Code (Act V of 1908), section 64, Order XXI, rule 54—Decree—Execution—Immovable property—Order of attachment—Sale of property after order of attachment but before levy of attachment by proclamation of order—Sale not voidable even though transferee was aware of the order—Transferee in good faith—Transfer of Property Act (IV of 1882), section 53.

On the mere order of attachment, an immovable property is not said to be attached until that order is followed up in the manner laid down in Order XXI, rule 54, of the Civil Procedure Code, 1908. A sale of the property, therefore, by a judgment-debtor after he is aware of the order of attachment, but before the actual prohibition and proclamation under Order XXI, rule 54, is not voidable at the option of the decree-holder under section 64 of the Civil Procedure Code, 1908, even though the purchaser may have been told of the order.

Sinnappan v. Arunachalam Pillai⁽¹⁾; *Mula Ram v. Jivanda Ram*⁽²⁾ and *Muthiah Chetti v. Palaniappa Chetti*⁽³⁾ relied on.

Parashram v. Balmukund⁽⁴⁾ and *Gopal Chunder Chatterjee v. Gunamoni Dasi*⁽⁵⁾ referred to.

In view of the fact that the purchaser had been negotiating for the purchase of the land for some considerable time before the order of attachment and that he paid an adequate price, he must be taken to be a transferee in good faith and the sale could not be set aside as fraudulent under section 53 of the Transfer of Property Act.

SECOND appeal against the decision of K. B. Wassoodev, District Judge of Surat, confirming the decree passed by D. L. Mehta, Subordinate Judge at Olpad.

Suit for declaration.

On September 21, 1920, the plaintiff obtained a decree against one Pema Parbhu. On June 4, 1923, the plaintiff applied for execution of the decree and notice was ordered to issue under Order XXI, rule 22, returnable on June 29, 1923. Pending the above on the application of the plaintiff an order for attachment of the property in question was made on June 16, 1923. On June 17, 1923, the plaintiff posted a letter to the

*Second Appeal No. 197 of 1927.

⁽¹⁾ (1919) 42 Mad. 844.

⁽²⁾ (1928) 51 Mad. 849 at p. 355.

⁽³⁾ (1923) 4 Lah. 211.

⁽⁴⁾ (1908) 32 Bom. 572.

⁽⁵⁾ (1892) 20 Cal. 370.

1929

GALABHAI
LALLUBHAI
v.
KIKI
JIVAN

defendant informing him of the order made which was received by him the next day. On June 19, 1923, the judgment-debtor sold the attached property to the defendant. The order of attachment was promulgated under Order XXI, rule 54, on June 22, 1923. The defendant then applied to have the attachment removed and on March 17, 1924, the Court ordered the property to be released from attachment. The plaintiff, therefore, sued for a declaration that the sale deed executed on June 19, 1923, by the defendant was void as against him and for a declaration that the said sale deed was without consideration and got up in order to defeat his claim against the defendant.

The defendant contended that there were negotiations between him and Pema for the purchase of the land before June 16, 1923, and that he purchased it in good faith, and for an adequate consideration before its attachment.

The Subordinate Judge relying on the decision in *Sinnappan v. Arunachalam Pillai*⁽¹⁾ held that attachment operated as a valid prohibition against alienation under section 64 of the Civil Procedure Code from June 22, 1923, when the order was proclaimed as required by Order XXI, rule 54, and not from June 16, 1923, when the Court ordered the attachment; that the alienation under the sale deed of June 19, 1923, could not therefore be declared as void under section 64 of the Civil Procedure Code. The learned Judge also held that the defendant took the sale deed on June 19, 1923, with notice of the Court's order of attachment of June 16, but that circumstance by itself did not show any *mala fides* on the defendant's part as in fact there were negotiations going on between the defendant and Pema for the purchase of the land before June 16, 1923, and

⁽¹⁾ (1919) 42 Mad. 844.

he had paid the full price. The suit was, therefore, dismissed.

On appeal, the District Judge, agreeing with the reasons of the Subordinate Judge, confirmed the decree.

The plaintiff appealed to the High Court.

H. V. Divatia, for the appellant.

G. N. Thakor, with *R. J. Thakor*, for the respondent.

MADGAVKAR, J. :—The plaintiff-appellant obtained a decree against one Pema Parbhu on September 21, 1920. The plaintiff applied in execution on January 16, 1923, and obtained an order of attachment with notice under Order XXI, rule 54, returnable on June 29. On June 19, 1923, the judgment-debtor sold the property to the defendant-respondent Kika, and the actual prohibition upon the judgment-debtor and proclamation were effected on June 22, 1923. The question in this appeal is whether the sale to the respondent by the judgment-debtor on June 19, 1923, after the order of attachment but before the actual prohibition and proclamation under Order XXI, rule 54, is voidable at the option of the appellant under section 64 of the Code of Civil Procedure; secondly, if not, whether it can be set aside under section 53 of the Transfer of Property Act.

Both the lower Courts held that the respondent had been negotiating for the purchase of the land some time prior to the application for execution, and had paid a proper purchase price in good faith; although the appellant-decree-holder informed him by letter on June 17 of the order for attachment. They upheld the sale and dismissed the application for execution chiefly on the strength of *Sinnappan v. Arunachalam Pillai*.⁽¹⁾

⁽¹⁾ (1919) 42 Mad. 844.

1929

GALABHAI
LALLUBHAI
v.
KIKI
JIVAN

1929

GALABHAI
LALLUBHAI
v.
KIKKA
JIVAN

Madgawkar J.

It is argued for the appellant that in the Madras case knowledge of the order for attachment on the part of the purchaser was not proved as it has been held proved in the present case, and the object of prohibition and promulgation under Order XXI, rule 54, being notice, and that object being served in the present case by the letter of the appellant, the latter is entitled to set aside the sale under section 64 of the Code of Civil Procedure, or at least under section 53 of the Transfer of Property Act. It is contended for the respondent that an order for attachment is only the beginning and not the end of the attachment and the attachment is not complete until prohibition and proclamation under Order XXI, rule 54. Section 64, therefore, has no application: on the facts as held by the lower Courts, the plaintiff-respondent is a *bonâ fide* purchaser for value, and the sale cannot be set aside under section 53 of the Transfer of Property Act. In any case as the notice under Order XXI, rule 22, on the judgment-debtor was not returnable till June 29, 1923, no attachment should have issued until he appeared on this date and showed cause and as in the case of a sale without notice, such attachment is held to be invalid by *Parashram v. Balmukund*⁽¹⁾ and *Gopal Chunder Chatterjee v. Gunamoni Dasi*.⁽²⁾

Attachment, in my opinion, is not complete until prohibition and proclamation under Order XXI, rule 54. It can hardly be said that immovable property is attached on the mere order of attachment until that order is followed up in the manner laid down in Order XXI, rule 54. The view of the Full Bench of the Madras High Court in *Sinnappan v. Arunachalam Pillai*⁽³⁾ is followed in *Mula Ram v. Jiwanda Ram*,⁽⁴⁾

⁽¹⁾ (1908) 32 Bom. 572.
⁽²⁾ (1892) 20 Cal. 370.

⁽³⁾ (1919) 42 Mad. 844.
⁽⁴⁾ (1923) 4 Lah. 211.

and derives support from the observations of their Lordships of the Privy Council in *Muthiah Chetti v. Palaniappa Chetti*.⁽¹⁾ Their Lordships observe (p. 355) :—

“ . . . under the Civil Procedure Code in India the most anxious provisions are enacted in order to prevent a mere order of a Court from effecting attachment, and plainly indicating that the attachment itself is something separate from the mere order, and is something which is to be done and effected before attachment can be declared to have been accomplished. . . . No property can be declared to be attached unless first the order for attachment has been issued, and secondly in execution of that order the other things prescribed by the rules in the Code have been done.”

Though the question before their Lordships was in regard to the application of section 11 of the Indian Limitation Act, their observations apply in the present case.

In regard to the contention for the appellant that he informed the respondent by letter before the date of the sale after order, that fact does not suffice to complete and convert the order for attachment into a legal attachment. In the absence of a legal attachment section 64 has no application. It is not, therefore, necessary to consider the *argumentum ab inconvenienti*. But if the Courts have to go into the knowledge, actual or probable, of the parties instead of the prohibition and the proclamation by themselves laid down by Order XXI, rule 54, the proceedings in execution, sufficiently protracted and difficult under the law, would become almost impossible. In my opinion, the appellant, therefore, is not entitled to the benefit of section 64 merely by reason of his letter to the respondent prior to the sale being taken by the latter from the judgment-debtor. In this view, it is not necessary to consider the alternative argument for the respondent attacking the validity of the attachment before the date fixed for the return of the notice under Order XXI, rule 22. The authorities cited by him are

1929

GALABHAI
LALLUBHAI

v.

KIKKA
JIVAN

Madgaokar J.

⁽¹⁾ (1928) 51 Mad. 849.

1929

GALABHAI
LALLUBHAI
v.KIKI
JIVAN*Madgankar J.*

both cases of sale in the absence of notice, and it does not follow that an order for attachment is equally voidable.

With regard to section 53, on the finding of the lower Courts that the respondent had been negotiating for the purchase of the land for some considerable time before, and that he paid an adequate price, he must be taken to be a transferee in good faith. There is no sufficient reason to differ from the view of the lower Courts that the appellant has failed to prove the necessary ingredients under section 53 to avoid the sale in favour of the respondent.

The appeal fails, and is dismissed with costs.

Decree confirmed.

J. G. R.