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APPEAL FROM ORIGINAL CIVIL.

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rule of sale, or whether relief cannot be more properly and more easily granted by a resale. This was apparently the opinion held by Mr. Justice Sale. Ordinarily it would be easy in a case within this condition of sale to ascertain the amount of compensation due to an auction-purchaser by reason of any error or misstatement in the particulars or description of the property sold. In the present case the compensation will be determined not only by a deduction of the value of the land which he has not obtained, but in addition to that it must be ascertained what is the depreciation in the value of the premises actually purchased by the loss of this land, and the out-houses standing thereon. This cannot be readily ascertained. The inquiry will involve some expense and delay, whereas a resale would give the same result to the parties without such inconvenience. The amount is no doubt, however, capable of compensation, and on this ground I agree with the order which it is proposed to give.

HILL, J. I also agree with the learned Chief Justice, and for the reasons stated by him, in thinking that this appeal should be allowed, as well as with respect to the enquiry directed regarding the amount of compensation to which the applicant is entitled.

No question has been raised as to the authority of the Court in a proceeding such as the present to go into that question. And what we have to determine is whether, upon the proper interpretation of the 12th condition of sale, the error which has admittedly arisen in regard to the property sold comes within the condition and may be made the subject of compensation.

It appears to me that it would be difficult, in view of the form in which the applicant sought the assistance of the Court, to say that this question ought to be answered otherwise than affirmatively. What he asked for was that the western boundary of the premises sold might be rectified, or that such compensation should be allowed him in respect of the cook-room as to the Court might seem proper, or "otherwise," that is, failing redress in either of these forms, that the sale might be rescinded. He asked for **[428]** compensation as an alternative to a rectification of boundaries, which latter it was not in the power of the Court to grant. It is difficult to see how he can now say that the case was not a fitting one for compensation.

Attorneys for the appellant: *Carruthers and Co.*

Attorney for Aghore Nath Mookerjee, respondent: *Bepin Behari Bonnerjee.*

Attorneys for Koomeer Kadir, purchaser of lot No. 4, respondent: *Rutter and Co.*

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29 C. 428.

FULL BENCH.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Prinsep, Mr. Justice Ghose, Mr. Justice Hill and Mr. Justice Henderson.

FREDERICK PEACOCK *v.* MADAN GOPAL AND OTHERS.* [2nd May, 1902.]

Insolvency—Vesting order—Attachment by creditor previous to vesting order—Priority of Official Assignee over attaching creditor.

* **Reference to the Full Bench in reference from the Presidency Small Cause Court, No. 1 of 1901.**

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A judgment-creditor has no priority over the Official Assignee in respect of property attached by him previous to the vesting order.

Soobul Chunder Law v. *Russick Lall Mitter* (1) followed; *A. B. Miller* v. *Lukhimani Debi* (2) overruled.

REFERENCE by the Chief Judge of the Small Cause Court, Calcutta, for the opinion of the High Court under s. 69 of the Presidency Small Cause Court Act (XV of 1882) and s. 617 of the Code of Civil Procedure (Act XIV of 1882).

The facts of the case appear fully from the letter of reference, the material portion of which is as follows:—

"In this case the plaintiff, the Official Assignee, claimed property to the value of Rs. 600 attached by the first defendant on the 9th July 1901 under an order of this Court of the same date, and by the second and third defendants on the 15th July 1901 by prohibitory orders of the same date. The facts of the case are as follows:—Madan Gopal, the first defendant, obtained a decree in this Court against Nobin Chunder Dutt and Motilal Burdhon, and on the 9th of July 1901 he attached the property claimed by the plaintiff, the Official Assignee. On the [429] 13th July 1901, Nobin Chunder Dutt and Motilal Burdhon filed their petition of insolvency in the High Court, and an order vesting all their real and personal estate and effects in the plaintiff as Official Assignee was made on the same date. On the 15th of July 1901 the second and third defendants attached before judgment the property already attached by the first defendant on the 9th of July. On the 19th of July 1901 the plaintiff, the Official Assignee, instituted this suit against the three defendants claiming the property attached by them. On the 23rd of July 1901 the second and third defendants obtained decrees against the insolvents Nobin Chandra Dutt and Moti Lall Burdhon.

Babu Priya Nath Sen, the Attorney for the Official Assignee, contends that the property attached should be released and handed over to the Official Assignee for the benefit of all the creditors of the insolvents. Mr. Mendes, the pleader for the first defendant, contends that as his client obtained a decree on the 8th of July and attached the property on the 9th of July, he is entitled to priority over the Official Assignee and the second and third defendants, and that his decree should be satisfied in full and that the plaintiff's claim should be dismissed. Babu Aghore Nath Sil, the pleader for the second and third defendants, contends that as his clients attached on the 15th of July 1901 and obtained a decree on the 23rd of July, they are entitled under s. 295 of the Civil Procedure Code to have the proceeds of the property attached divided rateably amongst the three defendants, and that the claim of the Official Assignee should be dismissed. In my opinion this contention on behalf of the second and third defendants is not sound. The property of the insolvents vested in the Official Assignee on the 13th of July before the second and third defendants attached. Subject to the opinion of the High Court, I hold that the second and third defendants are only entitled to share rateably with the general body of creditors of the insolvents. Mr. Mendes for the first defendant relies on the case of *A. B. Miller* v. *Lukhimani Debi* (2) decided by their Lordships the Chief Justice and Mr. Justice Banerji on the 28th of March 1901. In that case their Lordships held *that* 'a vesting order made under the Insolvency Act (11 and 12 Vict., c. 21) has not the effect of giving the Official Assignee priority over the claim of a judgment-creditor in respect of property attached at his instance previous to the passing of such order.'

Their Lordships followed the case of *Anand Chandra Pal* v. *Panchilal Sarma* (3), but the case of *Soobul Chunder Law* v. *Russick Lall Mitter* (1) was not cited before their Lordships. This case was decided by Sir W. C. Petheram, then Chief Justice, Mr. Justice Wilson and Mr. Justice Tottenham, and their Lordships decided that the case of *Anand Chundra Pal* v. *Panchilal Sarma* (3) has no application under the present state of the law and they came to the conclusion that assets which have not been realised on behalf of a particular creditor are to be divided among the general body of the creditors. The case of *A. B. Miller* v. *Gour Churn Dutt* referred by me to the High Court was decided on the 6th of July 1894 by Sir W. C. Petheram, then Chief Justice, Mr. Justice Norris and Mr. Justice Macpherson: the case has not been reported, the facts of the case are similar to those of the present case, and their Lordships followed [430] the case of *Soobul Chunder Law* v.

(1) (1888) I. L. R. 15 Cal. 202.
(2) (1901) I. L. R. 28 Cal. 419.
(3) (1870) 5 B. L. R. 691.

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Russick Lall Mitter (1) and held that the Official Assignee was entitled to the attached property for the benefit of the whole body of creditors. This case was not cited before their Lordships the Chief Justice and Mr. Bannerji in the case of *A. B. Miller* v. *Lukhimani Debi* (2), so it cannot be said to be overruled, and it has always been followed in this Court. As cases similar to the present are constantly occurring, it is most desirable that the Judges of this Court should be informed whether the case of *A. B. Miller* v. *Gour Churn Dutt* is to be followed or whether it is overruled by the case of *A. B. Miller* v. *Lukhimani Debi* (2)."

The reference came on for hearing before the Chief Justice, Mr. Justice Prinsep and Mr. Justice Hill who referred it to a Full Bench, because there was a difference of opinion in the case of *A. B. Miller* v. *Lukhimani Debi* (2) on the one hand and of *Soobul Chunder Law* v. *Russick Lall Mitter* (1) on the other.

Mr. *Garth* and Mr. *J. G. Woodroffe* for the Official Assignee.

No one appeared for the creditors.

MACLEAN, C. J. The question referred to us is whether a vesting order made under the Insolvency Act (11 and 12 Vict. c. 21) has or has not the effect of giving the Official Assignee priority over the claim of a judgment-creditor in respect of property attached at the latter's instance previous to the passing of such order.

I am not sure that the question would not have been better framed, if it had been "whether a judgment-creditor has priority over the Official Assignee in respect of property attached by him previous to the passing of the vesting order," but the distinction is not of much importance.

The reference has arisen from a difference of opinion in the case of *A. B. Miller* v. *Lukhimani Debi* (2) on the one hand, and of *Soobul Chunder Law* v. *Russick Lall Mitter* (1) on the other.

It is worthy of immediate notice that the latter case was not brought to the attention of the Court which decided the case of *A. B. Miller* v. *Lukhimani Debi* (2), to which decision I was a party.

[431] It seems to me that the first question we have to consider is whether the judgment-creditor, who had attached his debtor's property before the bankruptcy proceedings, has obtained by that attachment any charge or lien upon the attached property.

In the Full Bench case of *Anand Chandra Pal* v. *Panchilal Sarma* (3), it was considered that the judgment-creditor, who had obtained an attachment, had a charge or lien upon the attached property; and that view is also expressed, at any rate, by one of the Judges in the Full Bench case of *Shib Kristo Shaha Chowdhry* v. *A. B. Miller* (4). But in the case of *Soobul Chunder Law* v. *Russick Lall Mitter* (1) it is distinctly laid down that the attachment creates no charge upon the property, and that view is supported by a recent case before the Judicial Committee of the Privy Council, *Moti Lal* v. *Karrabuldin* (5), where it is distinctly held that attachment under Chapter XIX of the Code of Civil Procedure merely prevents alienation and does not give title. In advising Her late Majesty their Lordships say this:—"Attachment, however, only prevents alienation; it does not confer any title."

I think, therefore, it must be taken that the attaching creditor here did not obtain by his attachment any charge or lien upon the attached property, and if so, no question as to the Official Assignee only taking the

(1) (1888) I. L. R. 15 Cal. 202.
(2) (1901) I. L. R. 28 Cal. 419.
(3) (1870) 5 B. L. R. 691.
(4) (1883) I. L. R. 10 Cal. 150.
(5) (1897) I. L. R. 25 Cal. 179.

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property of the insolvent subject to any equities affecting it, can arise. But even if there was such a lien, the law as it stands now is different from what it was, when the Full Bench case of *Anand Chandra Pal* v. *Panchilal Sarma* (1) was decided. There is a marked distinction between the language of s. 270 of the Code of 1859 and s. 295 of the present Code, which governs the present case.

Under s. 270 of the Code of 1859 a creditor obtaining an attachment, was entitled to be first paid out of the proceeds of the sale, notwithstanding a subsequent attachment of the same property by any party in execution of his decree, but s. 295 of the present Code points to a rateable distribution of the proceeds of sale under a decree in certain events and under certain circumstances.

[432] If, then, the attaching creditor had obtained a charge or a lien upon the attached property, it would have been difficult, having regard to the change in the law, to hold that he was solely entitled as against the Official Assignee to the proceeds of sale under the decree. It is unfortunate that the case of *Soobul Chunder Law* v. *Russick Lall Mitter* (2) was not cited to us when Mr. Justice Bannerjee and I decided the case of *A. B. Miller* v. *Lukhimani Debi* (3) and that the arguments which have been addressed to us to-day, the arguments based upon the difference between s. 270 of the old Code and s. 295 of the present, were not called to our attention. Nor was the Privy Council case, to which I have referred, cited before us.

On these grounds I think that the question referred to us ought to be answered by saying that the judgment-creditor, under the circumstances, has no priority over the Official Assignee in respect of the property attached.

PRINSEP, J.—I am of the same opinion. In my opinion the case should be decided in accordance with the judgment of the Court in the case of *Soobul Chunder Law* v. *Russick Lall Mitter* (2). There is no priority in a matter of this description. The expression, no doubt, is derived from the terms of s. 270 of the Code of 1859, which gave the first attaching creditor the right to be paid before other persons could participate in the money realised from the judgment-debtor, but s. 270 has been repealed and it has been re-enacted in an entirely different form in s. 295 of the present Code. Under s. 295 all decree-holders, who have applied for execution of their decrees for money against the same judgment-debtor before the realisation of assets from him, are entitled to rateable distribution. If the judgment-creditor in the present case be allowed to execute his decree in spite of the opposition of the Official Assignee, who represents him and all the other creditors, only those creditors, who may have obtained decrees, will be entitled to rateable participation with him in monies realised, and the object for which the Official assignee has been appointed will be frustrated.

I agree in the judgment delivered by my Lord the Chief Justice and the answer which he proposes to give to this reference.

[433] GHOSE, J.—I agree with my Lord. I am clearly of opinion that the attaching creditor did not acquire any title or charge upon the property by reason of the attachment in question; and it seems to me, having regard to the provisions of s. 295 of the Code, which has already

(1) (1870) 5 B. L. R. 691.
(2) (1888) I. L. R. 15 Cal. 202.
(3) (1901) I. L. R. 28 Cal. 419.

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been referred to by the learned Chief Justice, that he cannot claim any priority as against the Official Assignee, who represents not only the insolvent, but the whole body of the creditors.

HILL, J. I agree with my Lord and have nothing to add.

HENDERSON, J. I agree with my Lord the Chief Justice.

Attorney for the Official Assignee: *Priya Nath Sen.*

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PRIVY COUNCIL.

PRESENT:

Lord Macnaghten, Lord Robertson, and Lord Lindley.

PARBATI KUMARI DEBI *v.* JAGADIS CHUNDER DHABAL.

[12th, 13th and 14th November, 1901. 22nd February and 19th March, 1902.]

On appeal from the High Court at Fort William in Bengal.

Hindu Law—Inheritance—Migrating family—Presumption as to law governing family settling in province other than that of its origin—Mitakshara and Dayabhaga laws—Succession to ancestral estate—Impartible zemindar—Brother—Widow—Succession to self-acquired property by Mitakshara law.

If Hindu families migrate from one part of the country to another, the presumption is that they carry with them the laws and customs as to succession prevailing in the province from which they came.

Where a family migrated from the North-Western Provinces, where the Mitakshara law prevailed, and settled in the Jungle Mehals of Midnapore:—

Held, the presumption is that it continued to be governed by the Mitakshara law.

Held, also, this presumption is supported by—

(*a*) previous instances of succession in the family which had followed that law rather than the Dayabhaga law;

(*b*) testimony as to the observance of rites and ceremonies at marriages, births, and deaths which showed a strong body of affirmative evidence in favour of the continuance and against the relinquishment of Mitakshara law in the family; and

(*c*) documentary evidence pointing to the same conclusion.

[434] *Held*, further, that the succession being governed by the Mitakshara law, the brother and not the widow was entitled to succeed to the ancestral estate of the last male holder of an impartible zemindari, which by custom was held by one member of the family.

Held, also, that immoveable property which had been purchased by the Court of Wards during the minority of the last holder out of the savings from the ancestral estate were his self-acquired property, there being no sufficient evidence of any intention to incorporate it with the ancestral zemindari estate. Succession to such property follows the rule of the Mitakshara law as to self-acquired property.

APPEAL from a judgment and decree (17th May 1897) of the High Court at Calcutta, which reversed a decree (26th February 1895) of the Subordinate Judge of Midnapore.

The plaintiff Parbati Kumari Debi appealed to His Majesty in Council.

This appeal related to the right of succession to the Jungle Mehal estate and Raj of Jamboni. The last male holder, Raja Purna Chunder Dhal, died without male issue on 23rd August 1886. He left two widows—Radha Kumari and Parbati Kumari, of whom the latter was the second wife of the Raja, but older than Radha Kumari, the first wife.