

*Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Ainslie.*

1872  
July. 17.

GURU PRASAD SAHU (ONE OF THE DEFENDANTS) v. MUSSAMAT  
BINDA BIBI AND OTHERS (PLAINTIFFS).\*

*Civil Procedure Code (Act VIII of 1859), s. 240—Execution—Attachment—Sale—Incumbrance pending Attachment—Right of Purchaser at Sale at instance of second attaching Creditor.*

The purchaser of the right, title, and interest of a judgment-debtor in certain immovable property at an action-sale, which took place at the instance of a second attaching creditor, was held to take the property subject to an incumbrance created by the judgment-debtor pending the first, but prior to the second, attachment, although the first attaching creditor was first paid out of the proceeds of the sale.

Whether the sale ought not to have been under the first attachment, as against which the incumbrance would have been void.—*Quære.*

ON the 4th September 1864, the right, title, and interest of Ajrawal Sing, in Mauza Mohanpur Pareo, was attached in execution of a decree of Gapinath and Raghubans. On the 16th March 1865, which date had been fixed for the adjudication of certain objections by the judgment-debtor, the decree-holder failing to appear, the execution case was struck off the file, but was restored on the 1st April 1865. There were various other proceedings in execution till May 1866, when the case was again struck off the file in consequence of an appeal to the Judge of Patna. The appeal was disposed of on the 24th November 1867, and a special appeal was decided by the High Court on the 24th April 1868. On the 31st December 1868, Gapinath again applied for execution of his decree, and prayed that the amount due to him might be recovered by the attachment and sale of the property already mentioned. On the 25th February 1869; the pleader for Gapinath was ordered to pay the talabana fees.

By a bond dated 13th July 1866, an eight-anna share of

\* Regular Appeal, No. 273 of 1871, from a decree of the Subordinate Judge of Patna, dated the 12th of September 1871.

Mauza Mohanpur Pareo was mortgaged by Ajrawal Sing to Binda Bibi. The bond was specially registered under Act XX of 1866. Binda Bibi presented a petition under the Act to recover the amount secured by the bond, and on the 21st May 1868, a decree was passed by the Subordinate Judge of Patna, whereby it was ordered that the defendants Ajrawal Sing and Ramsaran do pay to Binda Bibi the amount due to her from "his person and the property pledged, with interest at one per cent. per month on the principal from the date of suit to the date of payment."

1872  


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 GURU PRASAD  
 SAHU  
 v.  
 MUSSAMAT  
 BINDA BIBI.

On the 26th May 1868, Ajrawal Sing, in consideration of Rs. 13,000, executed a deed of by-bil-wafa of the whole 16 annas of Mauza Mohanpur Pareo in favor of Binda Bibi. On the 6th February 1869, Binda Bibi, in execution of her decree of the 21st May 1868, caused the 16 annas of Mauza Mohanpur Pareo to be attached. The writ of attachment was to the following effect:—

"Claim to recover decree-money with costs. Pursuant to this day's order you are directed to attach the right, title, and interest of the judgment-debtors in the undermentioned property. \* \* \* \*

"The right, title, and interest of Ajrawal Sing, judgment-debtor, in Mauza Mohanpur Pareo, Pergunna Monir, the property mortgaged by the bond."

On the 30th of March 1869, Binda Bibi presented a petition to the Court in the terms following:—

"Your petitioner prays that, when the auction-sale is held, the fact of Rs. 3,000 being due to your petitioner under the conditional sale, and Rs. 683-2-6 on account of the decree purchased by your petitioner, and the fact of your petitioner being in possession, and of the property being under attachment, be notified, so that there be no difficulty in recovering the money."

Upon that an order was made that—

"The auction-sale take place on the objections of the objectors being notified, and this case be struck off the file."

This was notified at the time of the sale as appeared from a proceeding of the Civil Court of Patna dated the 15th June 1869, in which it was stated that—

1872

GURU PRASAD  
SAHU  
v.  
MUSSAMAT  
BINDA BIBI.

“ On the date fixed, the abovementioned property was put up for sale for the recovery of Rs. 2,012-7-8, on the conditional sale consideration-money of Rs. 13,000, stated in the deed of the 26th May 1868 in favor of the decree-holder, being notified.”

On the 6th May 1869, the property was sold and purchased by Guru Prasad Sahu for Rs. 3,725, and the money was paid into Court.

Gapinath applied to be paid out of the proceeds of sale in the hands of the Court, and was opposed by Binda Bibi. The parties to the proceedings were Raghubans and Gapinath, Binda Bibi, Ramsaran, and others, heirs of Ajrawal Sing. On the 16th August 1870, the Subordinate Judge held that the mere striking the execution case off the file by the Court of its own motion, without notice to or consent of the parties, did not invalidate an attachment; and that, consequently, the attachment, in execution of the decree of Gapinath, in 1864, was in full force when the property was sold. He accordingly ordered payment of the proceeds of sale to Gapinath in satisfaction of his decree; and if any balance remained after satisfaction of Gapinath's decree, the same to be paid to Binda Bibi.

Guru Prasad Sahu was put in possession of the mauza.

Binda Bibi took proceedings under Regulation XVII of 1806 for foreclosure of her mortgage dated 26th May 1868, and caused a notice to be served on Ajrawal Sing and Guru Prasad. No money was paid by Ajrawal Sing or by Guru Prasad in satisfaction of the mortgage.

Hence the present suit by Binda Bibi for possession of Mauza Mohanpur Pareo, and for registry of her name.

The defendant Guru Prasad, in his written statement, set up (*inter alia*) that the mortgage of 26th May 1868 was void, as it had been executed pending the attachment of the property by Gapinath; that the property had been mortgaged to the plaintiff under the bond dated 13th July 1866, and was sold under a decree whereby the mortgaged property was declared to be sold in satisfaction of the debt, and as the property was sold under the attachment of the plaintiff, the whole property was passed by the sale, and not merely the right, title, and interest

of Ajrawal as it stood at the time of the attachment; and that the mortgage was collusive.

1872

GURU PRASAD  
SAHU  
v.  
MUSSAMAT  
BINDA BIBI.

The Subordinate Judge held that Gapinath's application for a second attachment was a clear abandonment of the first, and that no attachment had been taken out by him till March 1869; there was, therefore, no attachment in existence at the time of the execution of the mortgage of 1868. Guru Prasad had not purchased in execution of the decree of Gapinath, but in execution of the decree of Binda Bibi, consequently he could derive no title from Gapinath, nor any benefit from the attachment which had been taken out by him; the mere payment of the proceeds of sale under the provisions of s. 270, Act VIII of 1859, to Gapinath, did not convey any right to Guru Prasad under Gapinath's attachment. The mortgage was not collusive. The sale was not of the mortgaged property under the bond of 13th July 1866, the decree which declared that the debt might be realized from the mortgaged premises having been passed without jurisdiction. Besides, as the mortgage-deed of 13th July 1866 purported to convey only an eight-anna share of the property, and as the sale was of the whole property, the mortgaged premises could not have been sold, but merely the right and interest of the judgment-debtor, and consequently Guru Prasad did not acquire a higher right than that of an ordinary purchaser. He accordingly passed a decree in favor of the plaintiff.

The defendant Guru Prasad appealed to the High Court.

Baboos *Srinath Das*, *Mahes Chandra Chowdhry* and *Gopal Chandra Mookerjee* for the appellant.

Mr. *C. Gregory* and *Munshi Mahomad Yusaff* for the respondent.

Baboo *Srinath Das*, for the appellant, contended that the mortgage of 1868, executed by Ajrawal Sing to Binda Bibi, was void, as it had been executed at a time when the property was under

1872 attachment.—S. 240, Act VIII of 1859. *Amandal Das v. Radamohan Shaw* (1) was applicable, as the amount raised by the mortgage did not go towards satisfaction of the decree of the attaching creditor. The sale took place under the attachment of both the decree-holders, although it was held at the instance of one only. The mere striking off of the execution proceedings did not operate as a cessation of attachment—*Rajah Muhesh Narain Sing v. Kishnanund Misr* (2). The money paid by Guru Prasad went towards satisfaction of Gopinath's decree. Supposing the sale took place under the attachment of Binda Bibi alone, she can have no right to possession, as the attachment was under a decree whereby the property was declared to be sold for payment of the debt. The purchaser took free from all subsequent incumbrances—*Pralad Misser v. Udit Narayan Sing* (3).

GURU PRASAD  
SAHU  
v.  
MUSSAMAT  
BINDA BIBI.

Mr. Gregory contended that the decree of Binda Bibi, under which the property was sold, did not confer on the purchaser the right of the mortgagee; only the right, title, and interest of the decree-holder had been advertized for sale and not the mortgaged premises. The decree which had been obtained by Binda Bibi was, so far as it affected the mortgaged premises, passed without jurisdiction. As to the effect of such a decree, see *Ramgopal Law v. Blaquiere* (4). Notice of the existence of the mortgage was given. There was no attachment subsisting at the time of the mortgage; the case had been struck off—*Khadem Hossein Khan v. Kalee Pershad Singh* (5) and *Baboo Luchmeeput v. Baboo Lekraj Roy* (6). The purchaser, at a sale in execution of a decree, takes only the right, title, and interest of the judgment-debtor at the time of the attachment. Therefore the defendant took the property subject to the mortgage of 1868.

Baboo Srinath Das in reply.

Mr. Gregory, with the permission of the Court, referred to *Prosunno Moye Dossee v. Wooma Moye Dossee* (7). [COUCH,

(1) 2 B. L. R., F. B., 49.

(2) 9 Moo. I. A., 324: see p. 337

(3) 1 B. L. R., A. C., 197.

(4) *Id.*, O. C., 35.

(5) 8 W. R., 49.

(6) *Id.*, 415.

(7) 14 W. R., 409.

C.J.—A part of the head note ought not to have been there],

1872

GURU PRASAD  
SAHU  
v.  
MUSAMAT  
BINDA BIBI.

*Cur. adv. vult.*

The judgment of the Court was delivered by

COUCH, C.J. (after stating the facts, and observing in reference to the decree of 21st May 1868—"It was said that the Court, in a suit under s. 55 of this Act (XX of 1866), had not power to order, as was done here, that the money should be paid out of the property which was mortgaged: that the decree could only be for the payment of money. However, the decree was in this form, and no objection appears to have been made to it"—proceeded, referring to the order of 16th August 1870): The effect of this was, that although the sale was made under the attachment in the suit upon the mortgage to Binda Bibi and the mortgage for Rs. 13,000 was prior to that, and would not be void as against it, yet the application of the proceeds was ordered as if the sale had really been made under the attachment of Raghubans and Gapinath. The sale should have been under their attachment as against which the mortgage for Rs. 13,000 was void, and the sale would not have been subject to it. I doubt whether the proceeding was a proper one, but we have not to determine that. The present defendant's case is this:—he says, it is true I purchased under an attachment which was subsequent to the mortgage for Rs. 13,000 in respect of which the plaintiff brings this suit, but the money which was realized from my purchase was applied in satisfying the decree of Raghubans and Gapinath, and as their attachment was previous to the mortgage for Rs. 13,000, I claim to have the benefit of it, and to have the mortgage held void as against me. Now I think the defendant is not entitled to that. The decision of this Court, which has been confirmed by the Judicial Committee of the Privy Council, upon the construction of s. 240 of the Civil Procedure Code, are that "null and void" means not null and void as against every body, but null and void as against the attaching creditor. The decision does not go beyond this, that it shall be null and void as against the attaching creditor and persons who claim under or by virtue of

1872  
 GURU PRASAD  
 SAHU  
 v.  
 MUSSAMAT  
 BINDA BIBI.

his attachment, persons making title under it. Such a question, as the present, was not before the Judicial Committee or before this Court in that case, but the principle upon which they were decided would not entitle the present defendant to have the benefit of an attachment from which he does not derive his title. It is true that the Court has ordered that the proceeds of the sale should be paid to Gapinath, but that is a matter subsequent to the defendant's purchase. The mere application of the purchase-money does not make him a purchaser under that attachment. Therefore, as regards that part of the case I think the defendant is wrong.

Then there is another question in the case with regard to the eight-anna share which was mortgaged to Binda Bibi. Now as I have said, the decree under Act XX of 1866 authorized the sale of the mortgaged property to satisfy the debts, although wrongly, and the property was sold. Therefore Binda Bibi, the plaintiff, is in the position of a person who has, by the process of a Court, had sold, under the mortgage, the eight-anna share. I think it must be taken that she caused to be sold all which she had a power to sell, and to give to the purchaser all which she had title to. This would give to the defendant a priority over the subsequent mortgage for the 13,000 rupees; and it is just and equitable that he should have the benefit of that, and that the present plaintiff should not be allowed, as it were, to set aside her own act in getting the property sold under the mortgage, and set up a subsequent mortgage against the mortgage to her of the eight anna share.

The result is, that the defendant is entitled to retain an eight-anna share of the property, but that the plaintiff will have a decree as prayed for in respect of the other eight-anna share. The parties will bear their own costs in both Courts.

*Decree modified.*