1868

BHAGAWANI KUNWAR v. LALA BIJJ-NATH PRASAD

from the amount awarded to the plaintiff; and the decree of the lower Court amended by giving a decree to the plaintiff for the balance.

The costs of this appeal and the costs in the lower Court will be borne by the parties in proportion to the amounts decreed and disallowed.

Before Sir Barnes Peacock, Kt., Chief Justice and Mr. Justice Mitter.

1868
Nov. 19

MUSST. ZAHURAN (PLAINTIFF) *v.* W. TAYLER AND ANOTHER (DEFENDANTS.)*

Sale after Attachment—Caveat Emptor—Fraud.

T sold a mauza, of which he was owner, to Z. At the time of sale, the mauza was under attachment in execution of a decree obtained against T. by R. Z. paid the amount of the decree to prevent the property, which she had purchased being sold in execution. Z. was under no obligation otherwise to pay the amount of the decree. *Held*, Z was entitled to recover against T the amount so paid.

THIS suit was brought in the Court of the Principal Sudder Ameen of Patna, under the following circumstances:

It appeared that the defendant, Mr. Tayler, through his agent H. Kelly, the other defendant, by a deed of sale, dated 11th October 1866, sold to the plaintiff his mauza Dergaun, for the sum of Rs. 55,000.

The plaintiff alleged that at the time of the sale, Mr. Tayler concealed, or did not make known to her, the fact that at that time the mauza was under attachment in execution of a decree against him, held by Rani Asmedh Koer; that in order to preserve her property, the plaintiff was obliged to pay the amount of the decree. She now sued for the amount so paid, *viz.*, Rupees 11,381-13-6 principal, and Rupees 1,024-9½ interest. It was contended, for the defendant, that the plaintiff was bound to inform herself of all the circumstances advantageous or disadvantageous connected with the property; and that if she voluntarily, and without consulting the defendant, chose to pay off the decree, she could not recover the money so paid by her; that the plaintiff had full knowledge of the attachment when she bought the pro-

* Regular Appeal, No. 67, from a decree of the Principal Sudder Ameen of Patna.

perty; and that the real value of the property being 88,000 rupees, she having bought it for Rupees 55,000, without having raised any objection to the purchase on the score of the attachment of which she was cognisant, she had no reason to complain even though she had to pay off the decreeholder.

The Principal Sudder Ameen considered that, on the principle of *caveat emptor*, she, plaintiff, had bought the property "with all faults," as she had not enquired whether there was any defect in the title or possession, or any lien on the property. That no concealment of the attachment, which was known through the village, had been attempted by the defendant, and citing the case of *Bhowanidin Sukul* v. *Aymanchand Bibi* (1) held, that as the plaintiff had paid off the attachment voluntarily, she had no right to sue for the amount so paid. He, therefore, dismissed the plaintiff's suit.

The plaintiff appealed to the High Court.

Mr. *R. E. Twidale* and Mr. *C. Gregory* for appellant.

Mr. *Paul* (with him Baboos *Ram Chandra Banerjee* and *Amarnath Bose*) for respondents, relied mainly on the evidence as showing that the plaintiff had notice of the attachment; and cited the following cases: *Jain Sing* v. *Tiluckdhari Pattah* (2) *Baboo Luchmipat* v. *Lekraj Roy* (3); *Khadem Hossein Khan* v. *Kali Prasad Sing* (4).

The judgment of the Court was delivered by

PEACOCK, C. J.—It appears to me that this is a very clear case. The plaintiff seeks to recover the sum of Rupees 12,406 and 7 annas, which she paid on account of Mr. William Tayler, in discharge of a decree which Rani Asmedh Koer had received against him. It is almost unnecessary to consider whether the plaintiff was a volunteer in paying this money, or whether she paid it under compulsion, because it has been admitted by Mr.

(1) S. D. R., 1859, 402.
(2) 1 W. R., 318.
(3) 8 W. R., 415.
(4) 8 W. R., 49.

1868

MUSST. ZAMURAN v. W. TAYLER.

Paul, the learned counsel for Mr. Tayler, that the payment was not a voluntary one.

It appears that the plaintiff purchased an estate from Mr. William Tayler, for the sum of Rupees 55,000; that before the sale to the plaintiff, that estate had been attached in execution of the decree; and that the plaintiff paid the amount of the decree and interest, in order to prevent the property which she had purchased from being sold in execution. It is said by Mr. Tayler, that although the property was sold for Rupees 55,000, it was worth a great deal more, and in proof of that assertion, he has called a witness, who, if he is to be believed, has shewn that Mr. Tayler's estimate of the value was very much under the mark, inasmuch as the estate was worth two lakhs. I do not believe the evidence of that witness. It is improbable that he, acting as the agent of Mr. Tayler, would have sold for Rupees 55,000 property which was worth two lakhs; but whether it was worth Rupees 55,000, 88,000, or 2,00,000, is wholly immaterial for the decision of this case.

By section 235 of the Code of Civil Procedure, when property is to be attached in execution of a decree, the attachment is to be made by a written order, prohibiting the defendant from alienating the property by sale, gift, or in any other way, and all persons from receiving the same by purchase, gift, or otherwise; and by section 240 of the same Act, it is enacted that when any attachment shall have been made by actual seizure, or by written order as aforesaid, and in the case of an attachment by written order after it shall have been duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift or otherwise, and any payment of the debt or debts or dividends or shares to the defendant during the continuance of the attachment, shall be null and void.

Mr. Tayler, therefore, must, before he sold the property, have been served with an order from the Court prohibiting him from alienating it. He must have been fully aware at the time of the sale, that any sale by him would be liable to be defeated by the decree-holder.

Several witnesses have been called on the part of the defendant,

and have proved that the plaintiff, at the time that she purchased the estate, was aware of the attachment. Enayet Hossein swore that he informed the husband of the plaintiff of the attachment at the time of the execution of the deed of sale. Sheikh Eusuf Hossein swore that Enayet Hossein told the husband of the plaintiff in his presence in the house of Velayet Ali Khan, where the consideration-money was paid; and yet Enayet Hossein, who was acting for Mr. Tayler in selling the property, upon cross-examination stated that he did not remember at what place he told Ahmedulla about the lien. Ahmedulla, on the other hand, swears that he never knew of the attachment, and if it were necessary to decide upon the conflicting testimony of the witnesses in the cause, I should have little hesitation in deciding that the plaintiff, at the time of the payment of the purchase-money, was not aware of the attachment. It is hardly, likely that if she had been aware of the attachment, something would not have been said upon the subject. Enayet Hossein, who, according to his own evidence, took the precaution of telling Ahmedulla about the attachment, swears that he was acting for both parties; and yet, according to his evidence, nothing appears to have been said at the time of the sale as to whether the plaintiff in consequence of her being allowed to purchase the estate for what Mr. Tayler calls the trifling sum of Rupees 55,000, was to take upon herself to discharge the debt which Mr. Tayler owed to the Rani. Even, supposing the plaintiff made a good bargain in buying this estate for Rupees 55,000, there was no obligation on her part, because she got the estate cheap, to pay Mr. Tayler's debt.

If it had been intended that she was not only to pay the 55,000 rupees to Mr. Tayler, but was also to pay off the debt which Mr. Tayler owed to the Rani, the purchase-money would have been stated, as suggested by Mr. Twidale, to be the 55,000 rupees, and the amount of the debt added, and part of the purchase-money would have been paid to the decree-holder in satisfaction of her decree. It is clear beyond all doubt that the plaintiff has paid Mr. Tayler's debt; that she was under no legal obligation to pay that debt as between her and Mr. Tayler; that she did not pay the debt voluntarily, but under compulsion, to save the estate

1868

MUSST. ZAHURAN v. W. TAYLER.

which he had purchased, and for which she had paid, from sale in execution of the decree; and under the ordinary rules of law, of justice, and of equity, Mr. Tayler, who has had the benefit of having his debt discharged by the plaintiff, would be bound to repay the amount. Even if the plaintiff, knew that Mr. Tayler owed the money, and that the estate had been attached, that fact would make no difference unless she came under an obligation to Mr. Tayler to pay off that debt in consideration of his allowing her to have the estate for 55,000 rupees; yet Mr. Tayler contends that, because she got the estate cheap, she was bound to satisfy the decree against him. I see no reason to believe that Mr. Tayler would have sold the estate to the plaintiff or to any one else for 55,000 rupees, if he could have got 2,00,000 or even 88,000 rupees from any other person. This lady was no more bound without a contract to pay Mr. Tayler's debt, because she got the estate for 55,000 rupees, than she was to pay Mr. Tayler the difference between 55,000 rupees, and 88,000 rupees, the amount at which he now values it, or the 2,00,000 rupees at which it was valued by his agent.

In the case of *Exall* and *Partridge* (1), which was decided on the principles of justice applicable as much in the mofussil as they were in England, it was held that where the goods of a stranger were on the premises of another person, and were distrained by the landlord for rent in arrear, and the stranger was obliged to pay the rent in order to redeem his goods, he might recover the money paid from those who owed the rent.

It was said by one (2) of the Judges that "the plaintiff could not have relieved himself from the distress without paying the rent. It was not, therefore, a voluntary, but a compulsory, payment. Under these circumstances, the law implies a promise by the three defendants to repay the plaintiff." It was said by another Judge (3): "one of the propositions stated by the plaintiff's counsel certainly cannot be supported; that whoever is benefited by a payment made by another is liable to an action of *assumpsit* by that other, for one person cannot, by a voluntary payment, raise

(1) 8 T. R., 308.
(2) Grose, J.
(3) Lawrence, J.

an *assumpsit* against another; but there was a distress for rent due from the three defendants; the notice of distress expressed the rent to be due from them all; the money was paid by the plaintiff in satisfaction of a demand on all, and it was paid by compulsion. Therefore, I am of opinion that this action may be maintained against all the three defendants."

Here, then, was a debt of Mr. Tayler, paid under compulsion by a person who was under no obligation to pay it, and the plaintiff is entitled to recover the amount. It is unnecessary, therefore, to consider or to decide whether there was any fraudulent concealment on the part of Mr. Tayler of the fact that the estate had been attached, or to enter into the question whether the recital in the deed amounted to a covenant that Mr. Tayler had power to sell.

The legal maxim, *caveat emptor*, has been misapplied. It is wholly inapplicable, and has no bearing whatever upon the present case.

The Principal Sudder Ameen says, that "the concealment, if it was one, was by no means fraudulent;" but I feel at a loss to understand what notions the Principal Sudder Ameen entertains of fraud when he holds that if a gentleman sells an estate which he knows has been attached under a decree against him, and conceals the fact from the purchaser, and receives the purchase-money, is a concealment which does not fall within the class of fraudulent.

Cases have been cited to show that if an execution case is struck off the file, any attachment which has been made under that execution necessarily falls to the ground.

Section 245 of the Code of Civil Procedure enacts that, "if the amount decreed, with costs and all charges and expenses which may be incurred by the attachment, be paid into Court, or if satisfaction of the decree be otherwise made, an order shall be issued for the withdrawal of the attachment, and if the defendant shall desire it, and shall deposit in Court a sum sufficient to cover the expense, the order shall be proclaimed or intimated in the same manner as hereinbefore prescribed for the proclamation or intimation of the attachment, and such steps shall be

1868

MUSST. ZAHURAN v. W. TAYLER.

taken as may be necessary for staying further proceedings in execution of the decree."

I find no authority in Act VIII. of 1859 for saying, that an attachment is at end if the execution case is struck off the file; and, therefore, if it became necessary to decide upon that point, I should refer the case to a Full Bench. No one, I presume, will contend that if a Judge finds that he has struck off an execution case improperly, he cannot restore it to the file, but that the case must proceed *de novo*. In this case, according to the statement which must be taken all together, "the execution decree case had been for a time struck off the register when the sale took place, and subsequently the case was revived, when a sale proclamation issued, on which the plaintiff preferred a claim, and on the claim being rejected, she paid the amount for which the property had been attached." There has been no case cited which goes to the extent of holding that if an execution case is struck off the file, and a proclamation issued upon the attachment which had issued before the case was struck off, the sale would be subject to all encumbrances created by the debtor between the time the attachment was made and the time the property was sold, on the ground that the effect of the attachment was destroyed for ever by the striking the case off the file. Though not expressly in point, the case of *Raja Mahesh Narayan Sing* v. *Kishanand Misr* (1) has a strong bearing upon the point.

For the above reasons, it appears to me that Mr. Tayler is bound to refund the money which the plaintiff was compelled to pay, and did pay, in order to save the estate, which she purchased and paid for, from being sold under the execution. Plaintiff is also entitled to interest at 12 per cent. upon that amount from the date of payment, *viz.*, the 25th February 1867, to this date. She will also recover from the defendant the costs incurred by her in the lower Court and in this appeal. This decree to carry interest at the rate of 12 per cent. to the time of realization.

The decree is given against Mr. Tayler alone, and the suit is dismissed against Mr. Kelly, without costs.

(1) 9 Moore's I. A., 324.

1868

MUSST. ZAHURAN v. W. TAYLER.

MITTER, J.—I entirely concur. I feel no hesitation in holding that the plaintiff is entitled to recover, both upon the ground that she paid a debt due from Mr. Tayler to Rani Asmedh Koer, when she was under no obligation to pay it, as also upon the ground that a fraud has been perpetrated against her by Mr. Tayler in concealing from her the fact that the estate sold by him to her was under attachment in execution of a decree of Court. I should have been extremely sorry if the state of the law were otherwise.

Before Mr. Justice Kemp and Mr. Justice E. Jackson.

KAILASH CHANDRA ROY AND OTHERS (PLAINTIFFS) *v.* HIRALAL SEAL AND OTHERS (DEFENDANTS.)*

1868
Nov. 25.

Enhancement of Rent—Mokurruri.

Land had been let under different pottas to a man for building and horticultural purposes, to be enjoyed by him, his sons, and his sons' sons for ever, at a rent mentioned in the pottas. *Held*, the rent was not liable to enhancement.

Baboos *Hem Chandra Banerjee* and *Ambika Charan Bhose* for appellants.

Mr. *Mackenzie* (with him Mr. *Allan* and Baboo *Ashutosh Dhur*) for respondent.

The facts of these cases (which were heard together) and the arguments raised in special appeal, sufficiently appear in the judgment, which was delivered by

KEMP, J.—These two cases were taken up together, and were very fully and ably argued on both sides. As very important points arise in the case, we have taken time to consider the judgment, which we now proceed to deliver.

The plaintiffs sue to obtain from the defendants a kabuliat at an enhanced rate. The defendants pleaded that the lands were protected from enhancement by their pottas. Both Courts have dismissed the plaintiffs' suits. The Judge's decision is entirely based upon two decisions passed in the years 1842 and 1844, which the Judge holds to have decided finally that these pottas protect the tenure of the defendants from further enhance-

* Special Appeals, Nos. 789 and 902 of 1868, from decrees of the Judge of Hooghly, affirming decrees of the Deputy Collector of that District.