1889

SETH JAIDAYAL v. RAM SAHAE.

on the 23rd of September 1877. It turned out that the estate had been seized into the hands of the Collector under a decree against the defendant, and it was impossible for him to put the plaintiffs into possession.

Then the question arises, What were the damages for their not being put into possession? The damages awarded were for the Rs. 16,000 which had been received, and interest upon that amount, from the date of the contract, at 12 per cent. If the defendant had given possession, as was intended by the terms of this contract, the plaintiffs would have had the property for a period to commence from the 23rd of September 1877 as a security for Rs. 16,000 and interest.

The plaintiffs not having been put into possession, and the defendant not being able to give them possession, the damages which they sustained by not having that security for the Rs. 16,000 and interest were the Rs. 16,000 and interest which the Judicial Commissioner has allowed.

Their Lordships will, therefore, humbly advise Her Majesty that the decree of the Judicial Commissioner ought to be affirmed, and the appellant must pay the costs of this appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Barrow & Rogers.*

C. B.

---

*P. C.** 1889 *July* 23 *and August* 1.

KISSORIMOHUN ROY AND OTHERS (DEFENDANTS) *v.* HARSUKH DAS (PLAINTIFF).

[On appeal from the High Court at Calcutta.]

Attachment—Wrongful attachment—Claim to attached property—Civil Procedure Code, ss. 278, 283, 483—*Attachment before judgment—Liability of creditor who caused attachment of goods not belonging to the debtor—Damages after sale—Difference between English and Indian law on the subject.*

Orders for attachment in security under s. 483 of the Civil Procedure Code being issued on the *ex parte* application of the creditor, who is bound to specify

* *Present:* LORD WATSON, LORD HOBHOUSE, SIR B. PEACOCK, and SIR R. COUCH.

the property which he desires to have attached and its estimated value, it follows that the attachment is the direct act of the creditor, for which he is immediately responsible. Should the goods be proved not to belong to the debtor, the litigation and delay, and also any depreciation of the goods by an intermediate fall in the market, between attachment and sale, are the natural and necessary consequences of the creditor's unlawful act.

The plaintiff having taken, without success, the summary proceeding under s. 278, to get the release of goods attached under s. 487, in a suit to which he was not a party, afterwards, in a suit brought by him in accordance with s. 283, established his right of property in the goods: *Held*, that (*a*), in order to entitle him to the full indemnity for the wrongful attachment he was not bound to allege and prove that the defendants had resisted his previous application under s. 278 maliciously, or without probable cause; and that (*b*), the goods having been sold under the Court's order, the difference in market value of the goods at the time of their attachment (November 1883) and their price when they were sold (June 1884), the selling prices having fallen *intermediately*, *must be added to the* damages.

Held, also that, without bringing under review the judgment under s. 278, the effect of the judgment in the suit brought in accordance with s. 283 was to supersede the order under s. 278, and to render it inconclusive. The procedure on attachment not being the same in India as in England, where a judgment-creditor is not responsible for the consequences of a sale, under a judicial order, of goods taken in execution in satisfaction of his debt, that proposition does not hold good under the Indian procedure; and *Walker* v. *Olding* (1) is inapplicable to the latter.

APPEAL from a decree (13th March 1886) of the High Court (2) affirming a decree (28th April 1884) of the High Court in its Original Civil Jurisdiction.

The suit out of which this appeal arose was brought on 28th April 1884 by the respondent, Harsukh Das, in accordance with s. 283 Civil Procedure Code, to establish his right of property in, or a lien upon, 922 bales of jute which had been attached on 28th November 1883, before judgment, under s. 483, by the present appellants, Kissorimohun Roy and his brothers, in a suit brought by them on 23rd November 1883, in the Court of the Subordinate Judge of the 24-Pergunnahs District, against Borodakant Dey and Umakant Dey, at that time dealers in jute. That suit was one to recover about Rs. 4,500 from the Deys in respect of transactions

(1) 1 H & C., 621; 9 Jur., N. S., 53; 32 L. J., Exch., 142; 7 L. J., N. S., 633.

(2) See *Kishori Mohun Rai* v. *Hursook Das*, I. L. R., 12 Calc., 696.

1889

KISSORI-MOHUN ROY v. HARSUKH DAS.

between them and the Roys, who caused to be attached the above bales of jute in the screwing-godowns of Harsukh Das at Chitpore as the property of the Deys. A claim was preferred, under s. 278, by Harsukh Das, who was to screw the jute into bales, having had transactions with the Deys in the autumn of 1883, and having made a contract on 7th November 1883 with them, under which he was to have a lien on their jute for advances made by him, and for interest and other charges. Harsukh Das's claim was disallowed on the 15th April 1884 by the Subordinate Judge, under whose order, afterwards made for the benefit of all concerned, the jute was sold on 30th June 1884, realizing Rs. 12,053. This was upon a decline in the market price.

On the dismissal of his claim, and before the sale, Harsukh Das brought this suit, claiming to have his right of property in the jute at the time of the attachment declared, and claiming that, if the Court should find that he was not in fact the proprietor as against the Roys, he should be declared to have a lien on the jute for his advances to the Deys, amounting to Rs. 42,025; also, if the jute should be sold, that he should have a decree for its value when attached, *viz.*, Rs. 23,355.

The Courts below concurred in conclusions opposed to those of the Subordinate Judge, and held that the plaintiff, at the time of the attachment in November 1883, was the actual owner, by purchase from the Deys, of 848 of the bales, and was therefore entitled to recover the full market value of those bales at the date of the attachment; and as to the residue of the bales, that the plaintiff had, under an agreement in writing with the Deys, the lien claimed by him. The result to these appellants was that the market value of the 848 bales having fallen largely between the 25th November 1883, when they were attached, and the 30th of June 1884, when they were sold by order of the Court of the Subordinate Judge, these appellants were declared liable to make good to the plaintiff that depreciation, amounting to Rs. 12,703-12. And they were also declared liable to pay the plaintiff the sum of Rs. 1,690-10 in respect of his lien. The total damages decreed were Rs. 25,584.

An appeal from the decree of Wilson, J., in the Original Jurisdiction, was heard by a Divisional Bench (Garth, C.J.,

and Cunningham, J.) The hearing of the case and the judgments on appeal are fully reported in I. L. R., 12 Calc., 697. The result was that the appeal was dismissed.

The Roys appealed to Her Majesty in Council, and on the 12th February 1889, before their appeal came on for hearing, an application was made on their behalf by Mr. *R. V. Doyne*, on affidavits setting forth that there had been a judgment in their favour by the Subordinate Judge on the claim made by Hursukh Das under s. 278, to their Lordships, Lord Watson, Lord Hobhouse, and Sir R. Couch, then present. The petition was to have that judgment, not then contained in the record of the appeal, added thereto. It was argued that the appellants were entitled to have this judgment made part of the record, and to refer to it, as showing that they had, in the opinion of the Subordinate Judge, acted in good faith throughout. The application was refused, on the ground that this judgment should not have affected the question raised in the subsequent independent suit permitted by s. 283.

Afterwards, on the hearing of this appeal (July 23rd),

Mr. *R. B. Finlay, Q.C.*, and Mr. *R. V. Doyne*, for the appellants, argued that the Courts below had taken an incorrect view of the plaintiff's right to damages. It was not disputed that, as the Courts found, the property was not that of the Deys, but of Harsukh Das. But it was insisted for the appellants that, as they had acted *bonâ fide* in attaching the jute in 1883, believing it to be that of the defendants, as it had remained in custody of the Court, and as it had been sold by order of the Court, they were not liable for the amount of damages decreed by the Courts below. The attachment could not be regarded as having been made without reasonable cause, and the respondent was an assenting party to the order made by the Court for the subsequent sale, which took place to prevent loss by injury to the goods *in specie*. The respondent could not claim as damages the reduction in price, the result of the fall in the market. In a case like the present, the party attaching goods for security, even although he might have caused the attachment of goods not the property of his debtor, could only be held liable for such damages as had been occasioned by his acting without reasonable and probable cause; or by his having wilfully misled the Court into action, whereby the oppo-

1889

KISSORI-MOHUN ROY v. HARSUKH DAS.

site party had been injured; or by reason of his with malice. The attachment was the act of the Court, and it would be contrary to the principle dec. judgment in *Walker* v. *Olding* (1) that a person wh conducted litigation in Court should be held liable for wh had done in good faith. Reference was made to *Walker* v. *Oldin* (1), *The Quartz Hill Consolidated Gold-mining Company* v. *Eyre* (2), *Mitchell* v. *Mathura Das* (3).

Mr. *T. H. Cowie, Q.C.*, and Mr. *J. H. A. Branson*, for the respondent, contended that the appeal must be determined on the fact, found by both the Courts below, that the goods at the time of the attachment were the plaintiff's, rendering the attachment illegal. It was no part of their case that it was malicious, nor was it necessary for them to assert that there was an absence of probable cause, although no admission was made as to the latter, of which the Committee were not in a position to judge. The finding of the Courts below must be taken as to all the matters of fact, in which they had concurred, no ground having been shown by the appellants for impeaching that finding. The attachment was illegal, as depriving the plaintiff of his right; and the illegality was sufficiently brought home to the defendants by their having set the Alipore Court in motion. At their own risk they had caused the attachment, and the order of the Court in directing the sale of the goods to save further loss, was an executive act, not a judicial proceeding; which act was the direct consequence of the defendant's mistake. The Civil Procedure enacted the law, which was not identical with English law on the subject, though, if, in *Walker* v. *Olding* (1), the defendants had pointed out the particular goods to the sheriff's officer, the decision would probably have been different. Here the wrongful attachment was directly occasioned by the appellants, who were therefore responsible for all the direct consequences.

Mr. *R. B. Finlay, Q.C.*, replied.

On a subsequent day (1st August) their Lordships' judgment was delivered by

(1) 1 H. & C., 621; 9 Jur., N. S., 53; 32 L.J., Exch., 142.
(2) L. R., 11 Q. B. D., 674.
(3) L. R., 12 I.A., 150; I. L. R., 8 All., 6.

LORD WATSON.—The present appellants, in a suit brought by them before the Subordinate Judge of the 24-Pergunnahs, obtained a decree for a debt of Rs. 4,523 against two persons, who, in these proceedings, are called the Deys, on the 7th January 1884. During its dependence, the appellants made application, in terms of s. 483 of the Civil Procedure Code, for attachment in security of 1,900 bales of jute, more or less, then lying in the present respondent's premises at Chitpore, which they alleged to be the property of one of the Deys, the defendants in the suit. On the 28th November 1883 a perwana was issued, directing the Nazir of the Court "to proceed to the spot and make an inventory of the bales of jute actually attached, *the same will be identified by Hari Churn Sircar on plaintiff's behalf.*"

The Nazir, in execution of the warrant, proceeded to the respondent's premises on the 28th November, and there attached a quantity of jute which was pointed out to him by the appellants as the property of Borodakant Dey, consisting of 848 bales, which the respondent alleged had been purchased by him from the Deys, and 74 bales over which he alleged that they had given him a lien for advances. The respondent then preferred a claim to the goods attached under s. 278 of the Code, which was disallowed, after inquiry, by the Subordinate Judge, on the 15th April 1884.

On the 28th April 1884 the respondent, as authorized by s. 283 of the Code, instituted the suit in which this appeal is taken before the High Court at Calcutta, in order to establish the rights which he claimed in the goods, and for damages in respect of their wrongful attachment. By decree dated the 28th December 1884, Wilson, J., declared that the respondent was sole and absolute proprietor of the 848 bales, and had a valid and effectual lien upon the remainder for advances exceeding their value, and assessed damages at Rs. 24,584, being the market value of the jute at the time of the attachment. The Court of Appeal, on the 13th March 1886, affirmed the judgment of Wilson, J., with costs.

The decree of the Subordinate Judge, dismissing the respondent's claim, was not brought under review in these proceedings

1889

KISSORI-MOHUN ROY v. HARSUKH DAS.

before the High Court; but the effect of the judgment of the High Court has been to supersede his decree and render it altogether inconclusive. The goods in question were sold in June or July 1884 by order of the Subordinate Judge, when, owing to the intermediate fall in the market, the price obtained for them was about half of what they were worth at the date of the attachment.

The validity of the respondent's claim to these 922 bales of jute depends upon the authenticity of the documents of title produced and founded on by him, which has been affirmed in this action by the concurrent findings of both Courts below. In the argument addressed to their Lordships the appellants did not impeach these findings; but they maintained that damages were assessed on an erroneous principle, and that the respondent was not entitled to recover more than the price which the jute realized when sold by order of the Subordinate Judge in the year 1884.

The appellants argued that to condemn them in payment of the market value of the jute on the 28th November 1883 was, in reality, to make them responsible for delay occasioned by litigation, and that the respondent could not recover the difference between that value and the depreciated price arising from such delay, unless he alleged and proved that they had litigated maliciously and without probable cause. That is a rule which obtains between the parties to a suit when the defendant suffers loss through its institution and dependence. It does not apply to proceedings taken by the injured party, after the wrong is done, in order to obtain redress. But, in this case, there has been no action and no proceeding instituted by the appellants against the respondent Harsukh Das. The summary proceeding under s. 278 was taken by the respondent for the purpose of getting the release of an attachment issued in a suit to which he was not a party; and it does not appear to their Lordships that, in order to entitle him to recover full indemnity for the wrongful attachment of his goods, the respondent is bound to allege and prove that the appellants resisted his application maliciously, and without probable cause.

The appellants mainly relied upon the English case of *Walker*

v. *Olding* (1) which was cited as an authority for the proposition that a judgment-creditor is not responsible for the consequences of a sale, under a judicial order, of goods illegally taken in execution in satisfaction of his debt. *Walker* v. *Olding* (1) would have been an authority of importance had the law of execution been the same in India as in England, but there is in that respect no analogy between the two systems. In England the execution of a decree for money is entrusted to the Sheriff, an officer who is bound to use his own discretion, and is directly responsible to those interested for the illegal seizure of goods which do not belong to the judgment-debtor. In India warrants for attachment in security are issued on the *ex parte* application of the creditor, who is bound to specify the property which he desires to attach, and its estimated value. In the present case, by the terms of the perwana, no discretion was allowed to the officer of Court in regard to the selection of the goods which he attached; his only function was to secure under legal fence all bales of jute in the respondent's premises which were pointed out by the appellants. The illegal attachment of the respondent's jute on the 28th November 1883 was thus the direct act of the appellants, for which they became immediately responsible in law; and the litigation and delay, and consequent depreciation of the jute, being the natural and necessary consequences of their unlawful act, their Lordships are of opinion that the liability which they incurred has been rightly estimated at the value of the goods upon the day of the attachment.

Their Lordships will, therefore, humbly advise Her Majesty that the judgment appealed from ought to be affirmed. The appellants must pay the costs of this appeal.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Barrow & Rogers.*

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

C. B.

(1) 1 H. and C., 621.; 9 Jur., N. S., 53; 32. L. J., Exch., 142.