

Privy Council Appeal No. 27 of 1915.

Bengal Appeal No. 26 of 1912.

Mina Kumari Bibi - - - - - *Appellant,*

v.

Raja Bijoy Singh Dudhuria - - - - - *Respondent,*

FROM

**THE HIGH COURT OF JUDICATURE AT FORT WILLIAM
IN BENGAL.**

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 11TH DECEMBER, 1916.

Present at the Hearing :

LORD PARKER OF WADDINGTON.

LORD SUMNER.

SIR JOHN EDGE.

SIR LAWRENCE JENKINS.

Delivered by SIR LAWRENCE JENKINS.]

This is a suit for the possession of immoveable property brought by a purchaser under a private alienation against a purchaser at an execution sale, who was also the decree-holder, and against the judgment-debtor. There was also originally another defendant, but he has since died and is now represented by the decree-holder.

The suit was decided in the plaintiff's favour in the Court of the Subordinate Judge at Berhampur, but on appeal it was dismissed with costs by the High Court of Calcutta. From the High Court's decree the present appeal has been preferred to His Majesty in Council.

The judgment-debtor is Chhatrapat Singh Dugar, who is not inexperienced in litigation. Two decrees were passed against him in the High Court of Calcutta on its original side, one on the 24th August, 1896, in suit 449 of 1896, the other on the 3rd January, 1901, in suit No. 302 of 1900. The defendant, Raja Bijoy Singh Dudhuria, the purchaser at the execution sale, was a transferee of both decrees, and so became the decree-holder under each.

It will be convenient to trace briefly the history of these decrees, both of which were sent for execution to the Court of the District Judge of Murshidabad.

On the 13th June, 1902, an application was made at Murshidabad by the decree-holder, for execution of the decree of 1896, and the proceedings became execution case No. 8 of 1902.

On the 12th July, 1902, an order of attachment was made under section 274, C.P.C., prohibiting the judgment-debtor from alienating the property there specified until any other order should be passed by that Court.

The proceedings were protracted by adverse claims, but ultimately on the 29th March, 1905, the following order was recorded: "Nothing further can be done in this case at present. The application for execution is accordingly dismissed with the consent of the decree-holder. Certify result to the High Court, Original Side."

Though this does not appear on the record, it may be assumed that the Murshidabad Court certified the result to the High Court, in accordance with the provisions of the Code (Section 223).

On the 26th July, 1907, another application, No. 19 of 1907, was made to the Murshidabad Court for execution of the decree of 1896, and here, too, it may be assumed that an order was made by the High Court for the transmission of the decree. The order made on the application was, "Now issue warrant of attachment. Returnable on 16th August."

On the 29th July, 1907, at the decree-holder's instance, the issue of the warrant of attachment was stayed, and a direction given for the issue of notice to the judgment-debtor to show cause, on the 16th August, why the properties should not be advertised for sale.

On the 16th August the decree-holder applied for the issue of a sale proclamation, "the attachment being taken to have subsisted since the order passed on the 27th March, 1905, on his previous application for sale of the same properties. . . . Previous to that order there had been an order passed on the 20th March, 1905, directing that the 'sale of the [other] property now for sale here is postponed indefinitely.'"

Notwithstanding Chhatrapat's opposition, the District Judge held that the application 19 of 1907 must be received as one in continuation of the former proceedings, that the properties were still under attachment, and that a sale proclamation might issue without the property again being attached. Though on the face of things it seemed no real concern of his, still Chhatrapat appealed, but the order was affirmed by the High Court. So much, then, for the proceedings under the decree of 1896.

Under the other decree, that of 1901, an application for execution, No. 16 of 1907, was made by the decree-holder on the 16th July, 1907, in the Murshidabad Court. Notice was

issued, and on the 29th July, 1907, an order was made for the issue of a warrant of attachment. On the 23rd August, 1907, attachment was effected. A claim was preferred by the present plaintiff, but the property was sold in execution, notwithstanding her opposition, the purchaser being the decree-holder, in whose favour an order had been made allowing the purchase money to be set off against the decretal amount, which was considerably in excess of the price.

The private alienation under which the plaintiff derives title was effected by two sale deeds expressed to be executed in her favour on the 15th July, 1907, by the judgment-debtor. The question in this litigation is which of the two titles is to be preferred, the plaintiff's or the decree-holder's.

The plaintiff alleges that hers is the earlier, and that the judgment-debtor had no right, title, or interest in the property in suit at the date of the attachment in execution case No. 16 of 1907, under which the decree-holder bought. The plaintiff also questions, with certain exceptions, the identity of the property in the two sales, but in the view their Lordships take, this topic need not be pursued. The decree-holder denies the plaintiff's priority of title, and contends that the assurances to her were collusive and fictitious; that the sale deeds, though purporting to be of a date prior to the attachment in execution case No. 16 of 1907, were in truth executed later; and that in any case the private alienation to the plaintiff was during the continuance of an attachment, and therefore void.

First, then, as to the alienation in favour of the plaintiff being, as it is termed in the respondent's case, collusive and fictitious. It is there alleged that "the judgment-debtor, Babu Chhatrapat Singh, was, and always remained, the real owner of the properties in dispute." Strictly this means that the transaction was benami and not that it was a fraudulent transfer within the meaning of Section 53 of the Transfer of Property Act. The difference is distinct, though it is often slurred. To the suggestion that the transaction was benami, a complete answer is furnished by the admission that the judgment-debtor owed the plaintiff the amount stated to be the consideration for the sale deeds and more.

And even if the case for the decree-holder be treated as raising the further plea of a fraudulent transfer, this same admission operates strongly in the plaintiff's favour.

It may be that the judgment-debtor preferred the plaintiff, with whom he was connected by family ties, and that he did this of set purpose, yet this would not stamp the transaction as a fraudulent transfer. A debtor, for all that is contained in Section 53 of the Transfer of Property Act, may pay his debts in any order he pleases, and prefer any creditor he chooses. And whatever may be suspected, and however slender the confidence that Chhatrapat may inspire, there is no evidence on which any fraudulent intention can be imputed to the plaintiff.

Had it been made out that the sale deeds to the plaintiff were really executed after the attachment in execution case 16 of 1907, then there would have been justification for a finding of fraud; though in that case the finding would have been unnecessary, for the plaintiff's title would have been defeated, apart from fraud, under the express terms of Section 276 of the Civil Procedure Code.

But the contention that the sale deeds were antedated cannot be sustained. It is a general though not a conclusive presumption that a document was made on the day of the date it bears, so that for what it is worth the plaintiff starts with that in her favour; but her case does not rest there, for such oral evidence as there is on the point supports the presumption, and was not seriously challenged by cross-examination. It has been suggested that the plaintiff should have called other witnesses to the date of execution. But her advisers had no reason to apprehend that this contention would be advanced. It is not pleaded in the written statement, it is not raised in the issues, and the judgment of the First Court certainly does not suggest that it was given prominence even at the trial.

There may be ground for suspicion, and Chhatrapat's treatment of his creditors in the past may engender doubt, but the Court's decision must rest, not upon suspicion, but upon legal grounds established by legal testimony. Such as it is the legal proof here is all on the plaintiff's side, while if indirect signs are sought the keenness which marked the contest as to the continuation of the execution proceedings No. 8 of 1902 is hardly intelligible unless it be assumed that both parties realised the importance of the dates, and the dates could only have possessed importance if the sale deeds had been already executed.

But then it is urged for the decree-holder that the sales to the plaintiff, even if executed on the date the kobalas bear, are, nevertheless, void under Section 276 of the Civil Procedure Code. That section provides that when an attachment has been made as there described any private alienation of the property attached during the continuance of the attachment shall be void against all claims enforceable under the attachment. *Ex hypothesi*, the alienation to the plaintiff was not during the continuance of the attachment in execution case No. 16 of 1907, or, in other words, the attachment under which the execution sale to the decree-holder was made. Therefore it cannot be avoided by that attachment.

But the decree-holder argues that it was made during the continuance of the attachment in execution case No. 8 of 1902, and in support of this reliance is placed on the order of the District Judge of the 16th August, 1907, which was affirmed on appeal by the High Court.

The plaintiff is not bound by those decisions, and their correctness has been forcibly questioned before their Lordships. But it is unnecessary and inadvisable to deal further

with this point, and more especially as there is another and surer answer to the decree-holder's plea. He relies on Section 295 of the Code of Civil Procedure as entitling him to the benefit of Section 276, and for this purpose he calls in aid his application for attachment in execution case No. 8 of 1902. To bring Section 295 into play certain conditions are necessary, and one of them is that there should be assets held by the Court. It has not been shown that there were such assets, and the indications in the record point the other way. But apart from this, Section 295 cannot help the decree-holder. Though the word "attachment" occurs three times in Section 276, the reference is to one, and only one, attachment; that one in this case is the attachment in execution case No. 16 of 1907. All that can be done is to employ that attachment for the purpose of impugning the private alienation, for it is on that alone that the decree-holder's title to the property in suit at present rests. So that even if it be assumed, for the sake of argument, that the view which prevailed in *Sorabji v. Govind*, I.L.R. 16 Bom. 91, is correct, and that the conditions of Section 295 have been satisfied, it cannot advance the decree-holder's case.

It still is the attachment in execution case No. 16 of 1907, that is, the only weapon of attack, and it is not made more effective by the earlier attachment in execution case No. 8 of 1902. All that earlier attachment can do in the circumstances of this case is to entitle the decree-holder to the benefit of the later attachment. He can not claim to be in a better position than the decree-holder in execution case No. 16 of 1907, nor does it strengthen his position that it is the same person who is the decree-holder in both cases. To claim a higher right because the attachment in execution case No. 8 of 1902 is of an earlier date rests on an obvious confusion of thought.

The result then is that the appeal must be allowed, the decree of the High Court set aside, and the decree of the Subordinate Judge, so far as it directs that the plaintiff do get khas possession of the properties in suit, restored with costs in both Courts, and any costs paid under the decree of the High Court must be refunded and the costs of this appeal paid by the decree-holder.

And their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

MINA KUMARI BIBI

v.

RAJA BIJOY SINGH DUDHURIA.

DELIVERED BY

SIR LAWRENCE JENKINS.