

(1916) 03 CAL CK 0001**Calcutta High Court****Case No:** None

Madan Mohan De Sarkar and
Others

APPELLANT**Vs**

Rebati Mohan Poddar and
Others

RESPONDENT**Date of Decision:** March 12, 1916**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 38 Rule 10, 64

Citation: 34 Ind. Cas. 953**Hon'ble Judges:** Woodroffe, J; Richardson, J**Bench:** Division Bench

Judgement

Woodroffe, J.

The facts of this case, so far as they are relevant to the findings in the judgment, are these. The plaintiffs attached the disputed property before judgment on November 6th, 1895, purchased it at an execution sale on August 19th, 1897, and obtained symbolical possession on August 20th, 1898. But on the 25th May 1897, before the execution sale, the defendants had purchased the disputed property by a kobala executed by the Court in pursuance of a contract dated before the attachment. This contract was evidenced by the bayna patra, referred to in the judgment, dated the 19th August 1895. It was followed by a suit for specific performance, the decree in which was passed on the 30th January 1897. The kobala, which was executed by the Court in the suit for specific performance, was executed in pursuance of the aforesaid contract dated before the attachment. The defendants obtained possession before the execution sale at which the plaintiffs purchased.

2. A number of questions have been argued in the lower Courts and before us. Though it is unnecessary, in the view that we take of this case, to go into all these questions I note them here. In the first place, it was objected on behalf of the respondents that the appeal could not proceed in the absence of the heirs of the

first respondent Rebati Mohan Poddar, the appeal having been, according to the previous judgment, declared to have abated as regards that respondent. It was next contended that the attachment was invalid for the two reasons stated in the judgment of the lower Court, namely, first, by reason of the want of proof that the proceedings were formally in order; and secondly, because Section 483 of the CPC had, it was contended, no application to an attachment of the present character by a mortgagee to realize his security. It was, however, argued and has in fact been held by the lower Court that even if there were a valid attachment the plaintiffs' suit was barred. It was contended on one hand before us by the appellants that the period of 12 years is to be reckoned from the date upon which the symbolical possession was awarded to the plaintiffs. And it is urged on behalf of the respondent that the limitation must run from at least the date when the defendants obtained possession in 1897 under the decree in the suit for specific performance, and that such possession must not be taken to have been, as is contended, possession on behalf of the judgment-debtor but a possession obtained on their own behalf by suit in *invitum*.

3. The appeal must, in my opinion, be determined on one of the grounds on which the learned Judge has proceeded in the Court below and with which I now deal. It is true that u/s 64 of the Code alienations after attachment are void as against all claims enforceable under the attachment. On the other, hand under the provisions of Order XXXVIII, Rule 10, an attachment before judgment does not affect the rights existing prior to the attachment. Now, it appears to me that a creditor can only attach the right, title and interest of his debtor at the date of the attachment and that he has no ground for complaining if prior to his attachment the debtor has created an obligation against him touching the property. The object of the provisions in Section 64 of the Code appears to me to secure to the creditor protection of his rights obtained by the attachment against all subsequent acts of his debtor, which may imperil his obtaining the fruits of his decree through the attachment which has been effected. I do not think that we are called upon to extend the provisions of Section 64 to cases which, it seems to me, were never contemplated by the section. After an agreement for sale the rights and duties of the seller were to receive the purchase-money and to execute the conveyance.

4. It has been argued by Dr. Ghose that creditors' right in this matter is paramount. This is so as regards all transactions subsequent to the attachment. But it does not seem to me that their right is paramount in the sense that the creditors are able to brush aside every obligation which may have been binding on the debtor prior to the date when the attachment was made. This would place them in a better position than the debtor whose property was attached. It is true that in this case the actual conveyance was executed after the attachment. But this was merely carrying out an obligation which was incurred prior thereto. It seems to me that if we are to hold that the plaintiff as a creditor can ignore the obligations incurred by the debtor, we should use the provision of Section 64 for a purpose which was not intended, that

provision being for the protection of a creditor against transactions subsequent to the attachment.

5. It may be noted here that before the plaintiff purchased the property at the execution sale he had had notice of the agreement to sell, having been previously impleaded in the specific performance suit to which I have referred. And some portion of the purchase-money was paid at the date of the agreement.

6. It is said that the agreement created no interest in the land itself. This may be so. But neither did the attachment create any interest in the land and the purchase subsequently made at the auction sale was later than the defendant's purchase and subject, as I have said, to the notice of the agreement under which the defendant's purchase was made.

7. Therefore, it seems to me that the natural justice of the case demands that the defendants' purchase should prevail. I do not see any ground for holding that the provision in Order XXXVIII, Rule 10, is limited to rights in rem. The section does not say so, and the Judge has not so held. I agree with his conclusion that the defendants had a right to have the contract to sell specifically performed and that u/s 489, now corresponding to Order XXXVIII, Rule 10, that right was not affected by the attachment. As he points out, the decree for specific performance was obtained and the sale completed before the attached property was sold to the plaintiff. Accordingly he held, and we think rightly, that in the circumstances of this case the defendants' purchase must prevail.

8. In this view of the case it is not necessary to enter into the other questions raised in the case.

9. I would, therefore, dismiss the appeal with coats.

Richardson, J.

10. I agree, upon the point which has been discussed, with the conclusion arrived at in the Court of Appeal below.