
(1870) 09 CAL CK 0002

Calcutta High Court

Case No: Regular Appeal No. 193 of 1869

Panchilal Sarma

APPELLANT

Vs

Anand Chandra Pal

RESPONDENT

Date of Decision: Sept. 13, 1870

Judgement

Sir Richard Couch, Kt, C.J.

The provision in the Indian Insolvent Act, 11 and 12 Vict, c. 21, as to the vesting of the estate and effects of the insolvent in the Assignee is similar to the provision in the English Insolvent Act, 1 and 2 Vict., c. 110, and there is nothing in the Indian Act which can give to the Assignee under it a greater right than the assignee in England has. The vesting order of the Insolvent Debtors' Court, u/s 37 of the English Act, has the same legal operation as the assignment to the provisional assignee had for which it was substituted. Now, Lord St. Leonards In re Atkinson 2 De G.M. & G., 140, in his judgment as Lord Chancellor says:--

Two questions arise on this appeal; first, whether the title of the Assignee in insolvency is so absolute that it cannot be disturbed, and, secondly, what, under the circumstances as they here appear, are the rights of the Assignee for value. It may be considered as decided that the Assignee in insolvency represents the insolvent; he stands in his place and takes only such interest as he can give and subject to all equities by which the insolvent is bound. It has, however, been contended that the effect of the Act is so to vest the property that the insolvent cannot afterwards divest it; but this is not so, for there are no words in the Act giving to the Assignee any higher interest than the insolvent himself has: the Assignee does not therefore take so as not to be subject to equities as administered in this Court.

And Lord Westbury in moving the judgment of the House of Lords in Fleeming v. Howden L.R., 1 Scotch App., 382 says:

The right of a trustee under a sequestration is very different from the right of a singular successor, for it is a rule common to both English and Scotch Bankrupt Law that the

trustee or assignee takes the property of the bankrupt subject to all the rights and equities that affected it at the time of the bankruptcy. "But the singular successor is not bound by a trust or duty of which he had no notice. The trustee under a sequestration is in the same position as a gratuitous alienee. He takes such estate or interest only as the bankrupt can lawfully convey. So in England the assignee takes such interest only as the bankrupt can lawfully depart withal. The force of the two expressions is the same, and the implied conveyance to the trustee or assignee ranks no higher than a gratuitous alienation.

2. No higher authorities could be quoted for the rule which is to be applied in any case where it is necessary to determine what is the right of an Official Assignee. No doubt, as it was argued, he represents the creditors and is a trustee for them; but that cannot give him a greater interest in the property than the insolvent had. It appears to me that in the decisions in the Indian Courts this rule has been lost sight of, and the question has been treated as if it were whether the property passed to the Official Assignee, and whether any charge or lien upon it was created by the attachment. I except the case of *Gamble v. Bholagir* 2 Bom. H.C. Rep., 150, where the point was not raised, and it was assumed that if the attachment after decree was complete without re-seizure by the nazir, the execution creditor was entitled to preference, as regarded the attached goods over the Official Assignee. I think the question before us must be decided by considering the rule laid down by Lord St. Leonards and Lord Westbury in connection with the provisions of the Code of Civil Procedure. At the most, the English cases upon a different form of Procedure in execution can only assist us as being analogous. It is a little remarkable that although the English law has been so much referred to in considering this question, the case in the English Courts which is most applicable to it appears to have been the least noticed. It is not mentioned in the elaborate judgment of the High Court of the North West Provinces,--*Sarkies v. Mussamut Bundho Bae* 1 Allahabad H.C., Rep. Pt. VI 81. I mean the case of *Woodland v. Fuller* 11 A & E., 859. There a writ of *fi. fa.* against a person was lodged with the deputy of the sheriff who immediately issued a warrant to an officer. Afterwards, on the same day, a vesting order was made by the Insolvent Debtors' Court transferring the person's estate, and the assignee took possession of his property under it. The Sheriff's officer afterwards seized it, and it was held by the Court of Queen's Bench, that the seizure was proper; that the vesting order only vested the property in the assignee subject to the right of the execution creditor. The Court entertained no doubt, and the case is an instance of the application of the rule, that the assignee takes the property subject to the rights and equities which affected it at the time of the bankruptcy or insolvency. But as I have said, the question must be answered by a reference to the Code of Civil Procedure.

3. By Section 15 of Act XXIII of 1861, substituted for Section 215 of Act VIII of 1859, it is enacted that, "if the application for execution of a decree be admitted, the Court shall order execution of the decree according to the nature of the application." Section 221 of Act VIII of 1859, says: "When all necessary preliminary measures have been taken, where any such are required, the Court, unless it see cause to the contrary, shall issue

the proper warrants for the execution of the decree."

4. Section 232 is "If the decree be for money and the amount thereof is to be levied from the property of the person against whom the same may have been pronounced, the Court shall cause the property to be attached in the manner following," and thereafter the different modes of attachment are given. Section 242 says: "In all cases of attachment under the preceding sections, it shall be competent to the Court at any time during the attachment to direct that any part of the property so attached as shall consist of money or bank notes or a sufficient part thereof shall be paid over to the party applying for execution of the decree, or that any part of the property so attached as may not consist of money or bank notes so far as may be necessary for the satisfaction of the decree, shall be sold, and that the money which may be realized by such sale or a sufficient part thereof shall be paid to such party."

5. Now, it is a rule, that when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority when the case arises and its exercise is duly applied for by a party interested and having the right to make the application. This has been often decided, and it is sufficient to quote the cases of *Macdougall v. Paterson* 11 C.B., 755, *Crake v. Powell* 2 E. & B. 210, and *Bowes v. Hope Life Insurance Company* 11 H.L.C., 389. In those cases the word used in the Statute was "may." According to this rule, the words "it shall be competent to the Court" in Section 242 must not be construed as giving to the Court a power which it may exercise or not as it thinks fit, but as obligatory and conferring on the attaching creditor a right to have the attached property sold and the money realized by the sale paid to him.

6. Section 116, which provides for the non-appearance of one or more of several plaintiffs, is an instance of the same words "it shall be competent to the Court" being obligatory, and so is section 97, where, if the plaintiff satisfies "the Court that there are sufficient grounds for permitting him to withdraw from the suit with liberty to bring a fresh suit for the same matter," the Court is bound to grant the permission.

7. In several sections the word "may" is clearly obligatory, for instance--84, 90, 101, 143, and the first part of 102, In the latter part of this Section the words "if it think proper" are introduced after "may" apparently to show that it is not obligatory. Section 351 is another instance of this, the words there being "if it think right."

8. In Section 92, as to injunctions, the words "it shall be lawful for the Court" are clearly obligatory when a proper case arises. It would be contrary to the whole scope of the Act to hold that by an attachment after decree the creditor does not acquire a right to have the property sold, and that the Court may arbitrarily refuse to issue the order for sale.

9. Section 240 appears to me to furnish a strong argument against the Official Assignee. By that section the right or equity created by the attachment is such that it cannot be affected by even a bona fide alienation for value without notice of it. The vesting order

ranks no higher than a gratuitous alienation, and it cannot be consistently held that it is to defeat the attachment when an alienation for value is not allowed to do so. It was argued that after the vesting order, the property cannot be sold as that of the judgment-debtor, as it has passed to the Official Assignee, but the answer to that is that it has so passed subject to being divested by a sale in execution of the decree, and it may still be sold as the property of the judgment-debtor. In this case, I think, the sale on the 17th of April by order of the Zillah Judge was legal notwithstanding the vesting order, and the defendant Anand Chandra Pal acquired a good title to the property under it, and that the plaintiff has no right to recover it from him.

Bayley, Kemp, and Jackson, JJ., concurred.

Phear, J.

10. During the argument in this case, both sides seemingly considered that decisions given by me in two former cases--*Petumber Mundle v. Cochrane* 1 Ind. Jur., N.S., 11, *Roy Chunder Roy v. Bampton* 2 Ind. Jur., N.S., 188 afford material support to the position which the present plaintiff endeavours to maintain.

11. Judging from the mode in which those decisions have been used both here and elsewhere, I cannot help thinking that their effect has been in some degree misunderstood, and that an explanation of them will not be out of place now. In each of the cases it happened that the contest turned solely on the immediate proprietary rights of the parties, whatever those were, in the subject attached at a time when a vesting order had been made by the Insolvent Court after attachment (under different circumstances in the two cases) and when a sale had not taken place nor even an order for sale passed.

12. The material facts of the first case were as follows. A suit was pending before the High Court in which before decree certain property had, at the instance of the plaintiff, been attached as being the property of the defendant. After the date of this attachment, and also before decree, an order of the Insolvent Court was made by which all the property of the defendant vested in the Official Assignee. The Official Assignee thereupon claimed the attached property under the provisions of Section 86 of the Civil Procedure Code, and succeeded in getting the attachment removed and the property handed over to him. The plaintiff then proceeded to trial, and having obtained a decree without taking any proceedings in execution either by re-attaching the property or otherwise brought a regular suit against the Official Assignee for the purpose of asserting a right of some sort to the property solely upon the foundation of the original attachment. The Court in giving judgment remarked upon the peculiarly indefinite character of the right put forward by the plaintiff, and it dismissed the plaintiff's suit on the ground that an attachment effected before decree did not alone create in favor of the plaintiff any such definite lien or charge on the property in the hands of the Official Assignee as could be realized in a separate suit.

13. In the second case, namely, in *Roy Chunder Roy v. Bampton* 2 Ind. Jur., H.S., 188 money due to the judgment-debtor in the hands of the Administrator-General was attached by the High Court in execution of a decree passed by itself, and afterwards before any further steps were taken to obtain execution the judgment-debtor filed his petition in the Insolvent Court, and the usual vesting order was made thereon. In this state of things the judgment-creditor applied to the High Court for execution of his decree by the payment over to him of the monies attached, insisting that the attachment had given him a right to them in the shape of a lien or charge upon them for the amount of his decree. The only contested question before the Court was, as the Court itself stated it, whether the assets, at the time when by virtue of the vesting order they passed into the hands of the Official Assignee, carried with them an existing liability to be sold in execution of the decree for which they were attached, in priority to the rights of the Official Assignee as representing the general body of creditors. The Court answered this question in the negative, and after holding that the execution proceedings had not gone far enough to yield the judgment-creditor any such right as would bind the property in the hands of a bona fide alienee, it expressed the opinion on the particular facts of the case that there was no hardship in the judgment-creditor being placed on the same footing as all the other creditors. Accordingly it refused the judgment-creditor's application for an order for sale, or rather its equivalent, an order for transfer of the money, as it well might in exercise of the discretion reposed in it by section 49 of the Insolvent Act.

14. The footing upon which the decision of the Court in each of these cases rested, may be thus stated, namely, that the attachment, whether effected in the course of the suit before decree as in the first case, or in the execution proceedings after the decree as in the second case, did not of itself alone create in favor of the attacher any lien or other proprietary interest in the property attached, and, after the able discussion of all the authorities bearing upon the point which has taken place before us, I see no reason now for altering this statement of the law or for thinking that those cases were in any degree wrongly decided.

15. It appears to me, however, that the rights of the parties to the present suit lie entirely outside the scope of those decisions. The defendant founds his claim to be the owner of the land and house, for which the plaintiff sues, upon the title of a sale made to him by the Civil Court in the execution proceedings of a certain suit between other parties. The land and house, when attached in the course of those proceedings were the property of the judgment-debtor, but before the sale took place a vesting order of the Insolvent Court transferred the property to the Official Assignee. Under these circumstances we are not called upon to consider whether or not the factum of an attachment gives the judgment-creditor a right of lien which the Court executing the decree is bound to enforce without regard to the occurrence of insolvency: but the material question before us is substantially this, namely, did the Civil Court, at the time of making the sale on the facts of the case referred to us, possess the power of selling which it affected to exercise, notwithstanding the previous alienation of the property to the Official Assignee. I think a

little consideration will show that the answer to this question does not hinge upon the nature of the action, if any, which attachment may have upon the proprietary rights of any one on the subject which is attached.

16. I will endeavour shortly to explain the mode in which the matter presents itself to my mind. When in any ordinary money suit, the property of the defendant is attached before decree, it seems clear to me that that property does not thereby become any element in the *lis pendens*. But when a decree or order has been passed in the suit, and the judgment-creditor, by way of proceeding to obtain execution thereof, asks the Court to attach specified property of the judgment-debtor, the case is wholly changed in this respect: the judgment-creditor by that step sets up a right to have his claim satisfied out of that particular property, and, if the attachment so sought be made, thenceforward the attached property, so far as the purposes of the execution are concerned, constitutes the substantial subject of suit between the parties. Now, if we suppose for the moment that the property, instead of having thus become the subject of litigation between the parties in the execution stage of a suit for money, had been the original subject of the suit, and if, during the pendency of such suit, before decree, the owner had aliened it, then no doubt, upon principles of public expediency which are acknowledged in all our Courts, the alienee would be held to take with express notice of the suit and would be bound by the decree therein, though not himself a party thereto: but I understand the operation of this doctrine to be limited to the actual subject of the suit itself; it does not extend to collateral proceedings, and, even as regards the subject of suit, loses its force when the alienation is involuntary. Thus, for instance, in the English Court of Chancery in the event of a defendant in a suit becoming bankrupt, the plaintiff can only effectively proceed with the suit by making the assignee a party. Going back then from this point to that subsidiary suit against the property of the judgment-debtor, which for convenience" sake I take the proceedings in execution of a money decree to constitute, I think the general principle, namely, the principle that ordinarily a decree of the Court only binds the parties to the suit is here unaffected by the doctrine which I have mentioned, and therefore would, apart from legislative enactment, prevent what I may term the execution suit from being infructuous in regard to so much of its subject as might be aliened during its pendency until at least the alienee should be brought within its scope by being made a party. In England where the execution proceeding is nothing more than the act of suing out the writ and placing it in the hand of the Sheriff, there is little risk of its being defeated by an alienation during its pendency. But in this country the case is different. Under the Code which governs procedure here the proceedings necessary to obtain execution of a decree of Court commonly rival, in length and complexity, the proceedings of the suit before decree, and not seldom greatly exceed them in these respects. The legislature has accordingly thought fit to provide against fraud or vexatious conduct on the part of the judgment-debtor towards his judgment-creditor pending the execution proceedings, by the enactment of Section 240 of Act VIII of 1859. At one time there was some difference of opinion relative to the exact operation of this section, but it is now settled by a decision of the Full Bench 2 B.L.R., F.B., 49, as I understand it, that the effect of the section is

precisely the same with regard to alienations effected pending the execution proceedings as that of the rule of law which I first referred to relative to alienations of the subject of suit made during the suit itself. The section does neither more nor less than bind the alienee in the cases to which it applies by the order of sale which may be made by the Court after alienation, notwithstanding that he, the alienee, be not a party to the proceedings.

17. In my view, then, a judgment-creditor, when he attaches specific property of his judgment-debtor in execution of a money decree, may, with convenience, be regarded as having instituted a suit or rather as having converted the original suit against his judgment-debtor into a suit in respect of that property, and this suit, if successful, will terminate in a decision in rent in the shape of an order for sale: if during this suit before the order for sale an alienation be effected which does not fall within the operation of section 240, the judgment-creditor can only pursue his claim against the property in the hands of the alienee by making the alienee a party to the suit. On the other hand, if the alienation be such that it is covered by section 240, it may be entirely disregarded. To use the words of the Master of the Rolls in the *Bishop of Winchester v. Paine* 11 Ves., 197 (and I quote these words because I think they precisely represent the effect of the Full Bench decision to which I have referred): "The litigating parties are exempted from the necessity of taking notice of a title so acquired. As to them, it is as if no such title existed."

18. I come now to the enquiry, is the alienation which is effected by the force of the vesting order of the Insolvent Court within the words of section 240? Is it such a private alienation as is there spoken of? I think not. Clearly, the Legislature, by the use of the word "private," intended something in the way of a limiting or qualifying character. "Private alienation" must mean something short of all alienations whatever. In the repealed Regulation, from which section 240 is taken, private alienation is opposed to alienation by auction sale, and I apprehend that at the date of that Regulation the words "auction sale" referred to a sale effected under some power of selling paramount to the owner's will. In my opinion, private alienation means alienation voluntarily effected by the owner in exercise of his ordinary powers of ownership. This, the alienation which is brought about by the vesting order, is not it may no doubt be said to proceed from the will of the owner, when it is the consequence of a petition of insolvency presented by him. But in the same way a sale made by the Collector for default of payment of Government revenue in cases where the default is willful (and such cases certainly occur) would be voluntary on the part of the defaulter; and if the intention of the owner that the alienation should take place is enough to render the alienation private within the meaning of section 240, such a sale would be voided by that section as against a previous attaching creditor; but I think no one would be bold enough to argue that it is so. It seems to me that the alienation caused by the vesting order is an alienation affected by operation of law for the benefit of all the owner's creditors upon the happening of certain events, and that its character is in no wise altered by the circumstance that in one alternative the principal event is a voluntary act of the insolvent himself. It follows, according to the views which I have endeavoured to express, that when a vesting order is made relative to the property of a

judgment-debtor after attachment in execution of a decree and before order for sale, the judgment-creditor, in order to pursue his claim against the attached property, must make the Official Assignee party to the proceedings. If he does so, he has, I think, with a qualification which I will presently mention, the same right as against the Official Assignee to have the attached property sold as he had before the vesting order against his judgment-debtor. I have never doubted that, apart from the equitable considerations introduced by the Insolvent Act, the Official Assignee, by virtue of the vesting order, takes the property of the judgment-debtor simply as the judgment-debtor himself held it. Indeed I expressly stated in the case of *Petumber Mundle v. Cochrane* 1 Ind. Jur., N.S., 11 that he takes it subject to the same equities as those to which it was subject in the hands of the insolvent. And it is therefore much satisfaction to me to find that this doctrine has recently, since the case of *Petumber Mundle v. Cochrane* 1 Ind. Jur., N.S., 11, been forcibly enunciated by so eminent an authority as Lord Westbury in *Fleming v. Howden* L.R., 1 Scotch App., 382. The vesting order simply transfers the property from the one person to the other, and therefore does not deprive the attaching Court of jurisdiction in due course of proceeding and in proper exercise of its judicial discretion to order the sale of the attached property. But when the Court is asked to order the sale of the property after it has been thus transferred to the Official Assignee, and when it has the Official Assignee properly before it, then comes into play the qualification which I conceive to be effected by the insolvency in the right of the judgment-creditor to pursue the property,--namely, that this right of his against his debtor, however it may be designated, ought not to be allowed to defeat the policy of the Insolvent Act. It is not necessary for me now to discuss this particular topic further. I will only add that when sitting on the other side of this Court in the exercise of its original civil jurisdiction, I have invariably considered myself bound, on the application of the Official Assignee, to stay or set aside execution proceedings and to allow him to take the judgment-debtor's attached assets, unless special reason for a contrary course has been shown. I have always understood the policy of the Insolvent Act to be that all the creditors alike, irrespective of their individual priorities or diligence, should be paid ratably, the Act in this respect differing notably from the Winding-up-Acts; and it has appeared to me that the discretion vested in the Civil Courts by section 49 of the Insolvent Act was bestowed upon those Courts in order that it should be exercised in furtherance of the purposes of the Act. Of course the equities of the Insolvent Act rest upon the assumption that there is real insolvency, and that there are assets to administer. If, therefore, in any given case the Civil Court has reason to believe that the insolvency proceedings are fictitious and instituted by the judgment-debtor himself for the purpose of harassing or defrauding his creditor, that Court would be right in refusing to stay execution at the instance of the Official Assignee. On the case which is stated to us, in this reference, I must assume that the proceedings of the Zilla Judge were regular. I do not think that the vesting order made by the Insolvent Court affected his jurisdiction to continue the execution proceedings and to order the sale of the attached property, if in the due exercise of his judicial discretion he thought fit to do so. It is not expressly said that he had the Official Assignee before the Court after the transfer of property effected by the vesting order and before making the sale, but I cannot

suppose that he omitted this step, and indeed it seemed to be admitted in the argument that the Official Assignee had been heard in the Zilla Court. It is not our concern to enquire whether or not the Judge might with propriety have stayed the execution proceedings; we must take it that he did in fact order the sale in due course, and I think, consequently, that that sale operated to pass the property out of the hands of the Official Assignee into those of the purchaser-defendant, and that the Official Assignee was thus left without anything to sell to the plaintiff.