

(1868) 06 CAL CK 0008

Calcutta High Court

Case No: None

Winter

APPELLANT

Vs

Gartner

RESPONDENT

Date of Decision: June 25, 1868

Judgement

Norman, J.

The question is, whether under these circumstances, the plaintiff is entitled to have the monies in the hands of Mr. Cochrane paid to the credit of this cause. In cases which have come before this Court, it has been repeatedly determined, that property of a judgment-debtor seized in execution of a decree, remains, notwithstanding the seizure, the property of such judgment-debtor, and, consequently, if he becomes insolvent before sale, the specific property passes to the Official Assignee under the provisions of the 7th Section of the Indian Insolvent Act. But the monies realized by a sale in execution do not belong to the judgment-debtor. They are realized by the sale of his property under the process of the Court, and we must look to the provisions of Act VIII of 1859, under which the sale takes place, to see to whom the proceeds are appropriated by that Act. Now the 270th Section provides, that " when property is Bold in execution of a decree, the person on whose application such property was attached, shall be entitled to be first paid " out of the proceeds thereof." Therefore, until the execution-creditor has been paid, no other person has any right to the money. It follows that the Official Assignee acquires no title to the monies except a right to the surplus after satisfaction of the decree. In the present case, the monies did not come into the hands of the Sheriff, and Messrs. Mackenzie, Lyall & Co. did, in point of fact, sell under the orders of the Official Assignee, and paid over the money to him. But I think, it must be taken that Messrs. Mackenzie, Lyall & Co. having been authorized to sell by the Sheriff, as well as by the Official Assignee, must be deemed to have sold under all the authorities which they possessed. Indeed it is pretty clear from the form of the headings of the catalogue, that they intended to exercise all such authorities, if that were material. Now the authority of the Sheriff was perfectly

good, legal, and valid, and it subsisted at the time of the sale. The Official Assignee was acting under an adjudication made by a Court having no jurisdiction, and which was afterwards annulled. Although, for many purposes, a sale under a petition which is afterwards dismissed, is valid u/s 7 of the Indian Insolvent Act, for instance, so as to give a title to the property sold, or to protect the Official Assignee or the broker or auctioneer, who has acted under his instructions, it cannot, in my opinion, operate so as to affect the rights of the execution-creditor. The sale gives to the Official Assignee no title to the proceeds; nor can it alter the rights of the debtor. The directions given by the Official Assignee, acting under a void adjudication, to the auctioneer, must, as against the Sheriff, under whose authority the sale was being legally conducted, be treated as a mere unauthorized attempt by a stranger to interfere with the execution of the order for sale. That being so, the sale must be deemed to have taken place in execution of the decree.

2. u/s 270 of Act VIII of 1859, the right of the execution-creditor to the proceeds of a Sale attaches immediately upon the sale. It is, then wholly immaterial whether the auctioneers who, as I have said, must be taken to have been the mere agents of the Sheriff for the purpose of conducting the sale, did, in fact, pay over the money to the Sheriff, or not. We have seen that neither the interference of the Official Assignee, nor the receipt of the money by him, can give to the judgment-debtor any right to the proceeds of the sale. On the dismissal of the petition, the Official Assignee became liable to pay over the proceeds of the sale, either to Messrs. Mackenzie, Lyall & Co., or to the Sheriff. The proceeds of sale in his hands were not monies belonging to the defendant, Gartner, and therefore the subsequent attachment by Mr. John is wholly inoperative, and for the same reason these monies did not pass under the subsequent insolvency of Gartner.

3. On these grounds, I am of opinion, that the plaintiff is entitled to the order prayed for, viz., that the money remaining in the hands of Mr. Cochrane be paid to the Comptroller-General of Accounts to the credit of this cause. The plaintiff is entitled to the costs of this application against the defendant, as part of the costs of the execution.